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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DALLEN TREALOFF,

Plaintiff, Cross-defendant and Appellant,

v.

FOREST RIVER, INC.,

Defendant, Cross-complainant, and Appellant;

PETER LIEGL,

Defendant and Appellant;

ECLIPSE RECREATIONAL VEHICLES, INC.,

Cross-defendant and Appellant.

E048818

(Super.Ct.No. SCVSS96372)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed in part, reversed in part.

Jones Day, George S. Howard, Jr., Brian M. Hoffstadt, and Erica L. Reilley; Taft Stettinius & Hollister and Michael C. Terrell, for Defendant, Cross-complainant and Appellant Forest River, Inc. and Defendant and Appellant Peter Liegl.

Irell & Manella, Brian J. Hennigan, Joseph M. Lipner, and Mark A. Kressel for Plaintiff, Cross-defendant and Appellant Dallen Trealoff and Cross-Defendant and Appellant Eclipse Recreational Vehicles, Inc.

Plaintiff Dallen Trealoff sold recreational vehicles for defendant Forest River, Inc. At some point, defendant Peter Liegl, owner of Forest River, decided to terminate the employment of Trealoff. Prior to termination, Liegl had a Forest River employee take Trealoff's personal laptop and delete or transfer certain files. Trealoff's employment was then terminated and he was later handed his laptop after its files had been altered. Trealoff initiated this action against Forest River and Liegl (sometimes referred to as Defendants). A jury found in favor of Trealoff, and against Forest River and Liegl, on Trealoff's breach of contract, tort and statutory claims. The jury rejected Forest River's cross-claims against Trealoff and his company, Eclipse Recreational Vehicles, Inc. The jury awarded compensatory and punitive damages, along with attorney fees, to Trealoff.

Defendants appeal, contending: (1) the evidence is insufficient to support the liability verdicts against Liegl; (2) the damages award against Forest River must be vacated and the cause remanded for a new trial on damages; (3) the punitive damages award must be vacated because there is insufficient evidence that Forest River and Liegl acted with oppression, fraud, or malice; and (4) the punitive damages award is constitutionally excessive. In a separate brief, Defendants also challenge the award of

attorney fees. Trealoff cross-appeals, challenging the trial court's decision to reduce the amount of punitive damages.

I. PROCEDURAL BACKGROUND AND FACTS

Since 1974, Trealoff had worked in the recreational vehicles (RV) industry and for much of that time acted as a sales manager. As an RV salesman, he was very successful. He built relationships with dealers by providing them the support and information they needed. He had worked with some dealers since 1976. He usually worked seven days a week and was on the road about six months a year. In the 1980's, he was the number one salesperson in California for Skyline Corporation. His total sales were approximately, $11.8 million, which were at least, if not more than, twice as much as any of his colleagues. Throughout his career, he had consistently been the number one salesperson. In the early 1990's Trealoff joined Cobra, where he began selling a product line with a small market share and the company did not have a developed dealer network. Nonetheless, within 30 months of joining Cobra, the line for which he was responsible had reached number two in California.

When Trealoff joined Cobra, Liegl personally owned part of the company and served as its president. Liegl and two others had purchased Cobra in 1985 for approximately $4.5 million. In 1993, they sold Cobra for $52 million. Liegl stayed on as president for a year after the sale, until he was terminated from the company. About a year or year and a half after Liegl's termination, Cobra declared bankruptcy. In January 1996, Liegl paid a total of approximately $10 million to purchase much of Cobra's assets out of bankruptcy. With these assets, Liegl created Forest River.

Meanwhile, Trealoff received an offer to become a salesman for California Thor, an RV manufacturer. Trealoff was offered a 2.5 percent commission and a larger territory. On December 19, 1995, Trealoff tendered his resignation to Cobra with the intent of working for California Thor on January 2, 1996. Around December 29, 1995, Tom DeRosa, general manager at Cobra, soon to become Forest River, asked Trealoff to stay. Trealoff understood that DeRosa had authority to set compensation. From the start, Trealoff told DeRosa that he would take the riskier step of staying with Cobra/Forest River on two conditions: (1) he receive a 3 percent commission with a 1 percent override (3%/1% commission); and (2) there was confirmation that someone was going to buy and finance the new company so it could actually build trailers. Trealoff also called Liegl, with DeRosa present, in DeRosa's office. Liegl confirmed that DeRosa would be the general manager of the new company, and Trealoff believed that both of his conditions would be met. Thus, Trealoff stayed.

Trealoff's first commission check in February 1996 from Forest River was calculated at 2.5 percent, not 3 percent. Trealoff pointed out the error to DeRosa. When Trealoff's second commission check was also calculated at 2.5 percent, he again went to DeRosa and provided a written calculation of the difference between the 2.5 percent commission he had received and the 3%/1% commission he had been promised.

Forest River did not pay Trealoff the shortfall. Instead, the company lowered Trealoff's commission rate to 2 percent. In April 1996, after receiving the latest round of incorrect commission checks, Trealoff called Liegl and set up a meeting to discuss the issue at Liegl's office in Indiana. The meeting was held on April 17 and into the early

morning hours of April 18. Liegl told Trealoff that he would be paid the 3%/1% commission; however, "[t]he company was just starting and it was going to take a while . . . ." Trealoff testified that Liegl promised: "We'll make it good to you. We are a company of our word." Trealoff stated that during the time he met with Liegl, Liegl never said that he would not pay the 3%/1% commission.

Neither Liegl nor anyone else at Forest River made an effort to pay Trealoff the 3%/1% commission as promised, even after the company became financially solvent. Instead, Liegl claimed that he never promised a 3%/1% commission.[1] Rather, he testified that a 3%/1% commission was "exorbitant and ridiculous." The commission that Trealoff received after the April 1996 meeting was 2.4 percent on his sales with a quarter percent override on the people he supervised. However, Liegl continued to assure Trealoff that he would receive the 3%/1% commission. At the time of these assurances, Forest River was still a growing company that was a relatively new entry in the market.

According to Trealoff, Liegl did not believe in wasting money. For example, he circulated a memo that forbade employees from using Federal Express because it was too expensive. Liegl also decided to disallow payment of car-mileage-equivalent reimbursement requests when Trealoff flew his own airplane to visit distant dealers (at a cost of fuel and upkeep that exceeded the requested car mileage). More importantly, Liegl did not allow Forest River to provide Trealoff and other salesmen with a computer.

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[1] In his declaration prepared in support of a defense motion for summary judgment, Liegl stated that he never discussed a 3%/1% commission with Trealoff or DeRosa at any time. Apparently, Liegl "didn't read [the declaration] properly . . . ."

Despite the fact that the company would not purchase a computer for its salesmen, Trealoff bought his own personal computer, which he used for work and personal information.[2] Trealoff also hired and personally paid for a computer programmer to build a software program called "Traxs," which is an "underlying database" that could hold and track information about RV sales. Trealoff was a successful RV salesman; in the six years that he worked for Forest River, he sold approximately $85 million to $100 million worth of RV's.

On August 5, 2002, when Trealoff went to lunch, he left his computer on his desk as usual. Forest River's Tyran Miller, acting on orders from Liegl, had another employee, Joe DeRosa (the 22-year old son of Tom DeRosa), retrieve Forest River information from Trealoff's computer, which involved seizing Trealoff's computer. Liegl made the decision to fire Trealoff. When Trealoff returned from lunch, Miller told him that he was fired, "[p]er Pete Liegl." Miller confirmed he was "going through Pete [Liegl] on all of this stuff." When Trealoff asked Miller for his computer, Miller refused to return it. When Trealoff asked specific questions about what had been done to his computer, Miller and others would only say, "[y]ou need to contact corporate." Trealoff was not asked for permission to seize or search his computer. Trealoff filed a police report.

Joe DeRosa went through the files on Trealoff's personal computer, deleting and copying onto a compact disc the files that he thought might contain Forest River

[2] Trealoff kept personal financial information on this computer, along with very private, personal information.

information. This was the first time anyone had asked Joe DeRosa to go through someone's personal laptop, including personal files, without permission, and he felt "a little bit" uncomfortable. For 20 percent of the files, he was unable to determine whether the file was company information or Trealoff's private information by looking only at the file's name. Thus, Joe DeRosa looked at the content of those files and saw some of Trealoff's personal information.

As a result of his three-hour review, Joe DeRosa deleted about 7,000 files from Trealoff's laptop. Sometimes he would delete/remove entire folders without looking at the contents of the folder at all. He was able to accomplish so much destruction in so little time because he was "able to delete huge categories of files en masse with the stroke of a single button . . . ." DeRosa deleted and copied Trealoff's personal information onto two compact discs, one of which was sent back to the Indiana office. DeRosa used his own judgment in deciding which files contained Forest River information.

Liegl admitted he understood that data had been taken off Trealoff's "personal computer." Liegl also admitted that he had instructed Miller "to make sure we retrieve our company property." Jason Poole, a former Forest River employee, testified that Miller admitted he (Miller) was acting on Liegl's orders.

When Poole left Forest River, Miller did not seize Poole's computer; rather, Miller sat with Poole and discussed which files contained Forest River information. Also, Forest River witnesses could not account for all the people who had accessed the files on Trealoff's laptop. When Trealoff got his laptop back, the files were in a state of devastation. His personal information was not there, had been deleted, or was missing.

The Traxs program he had created could not be opened. Trealoff suffered rage and anger, and could not sleep at night. Anger from the theft made it difficult for him to be intimate or to experience feelings such as joy and laughter.

On November 1, 2002, Trealoff initiated this action. The operative pleadings included causes of action for breach of contract against Forest River; violations of Labor Code section 201 et seq.; fraud; conversion; intentional infliction of emotional distress; negligent infliction of emotional distress; trespass to personal property; invasion of the constitutional right to privacy; and violations of Penal Code section 502 against Liegl and Forest River. Forest River cross-complained against Trealoff and his new company, Eclipse, for purported misappropriation of trade secrets and other related counterclaims.

The jury trial began on February 19, 2009. At the close of evidence on Trealoff's complaint, the trial court directed a verdict in favor of Trealoff and against Forest River on Trealoff's claims for conversion, trespass to personal property and violation of Penal Code section 502. Defendants do not challenge the directed verdict.

Regarding the remaining issues, the jury found in favor of Trealoff and against Forest River and Liegl on all claims except intentional infliction of emotional distress. Trealoff was awarded $1.7 million in damages against Forest River and $850,000 against Liegl. As for punitive damages, Trealoff was awarded $7 million, reduced to $3 million, against Forest River and $8 million, reduced to $4 million, against Liegl.

On April 17, 2009, Trealoff moved for his attorney fees, requesting $1,624,301. On April 28, Defendants opposed the motion, and Trealoff filed his reply on May 4.

Following oral argument, the trial court ordered Trealoff's trial counsel to submit redacted billing records limited to fees generated by two of the three primary attorneys who worked on the case. On July 8, 2009, the trial court denied approximately 40 percent of the requested fees and awarded the amount of $980,373.50 to Trealoff. Specifically, the trial court rejected the request for fees paid to the first lawyer on the grounds that the request was insufficiently documented, and the request for fees charged by a third trial lawyer on the grounds that Defendants had tried the case with only two lawyers.

The trial court rejected Defendants' argument that Trealoff's attorney fees should be limited to rates charged by attorneys located in San Bernardino, stating: "From a review of the aforementioned items, together with the fact that this [c]ourt heard the trial, the court finds that Plaintiff was reasonable in seeking Los Angeles based counsel to prosecute his case." The trial court observed that Los Angeles counsel often try cases in his court, that Trealoff "had suffered what . . . reasonably appeared to be setbacks" with his original attorneys, and that because Trealoff "had tried local counsel and was not satisfied with their performance it was reasonable for him to look outside the San Bernardino Riverside area for new counsel. The court also found that "fees need not be apportioned based upon common issues raised in [Trealoff's] case and the Defense all involving a common core of facts and related legal theories." Finally, the court found that Trealoff had submitted sufficient documentation of the work done by his prior counsel, Hodel, Briggs & Winter (Hodel Firm), to support an award of its fees.

II. SUFFICIENCY OF EVIDENCE

A. Standard of Review

"'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .' [Citation.]" (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

B. Claims against Liegl

Liegl contends that none of Trealoff's claims against him (Liegl) were supported by substantial evidence. Specifically, Liegl claims there is insufficient evidence to support the computer-related claims (conversion, trespass to personal property, invasion of privacy, and violation of Penal Code section 502), the promise of a 3%/1% commission (promissory fraud), and that Liegl was an "employer" under the Labor Code (Labor Code claims).

1. Computer-related claims

According to Defendants, the computer-related claims fail because the only evidence that Liegl directed or authorized the taking of Trealoff's personal computer came from the testimony of Jason Poole, who testified that Miller had admitted he was acting on Liegl's orders. They argue that Poole's testimony amounts to hearsay and does not constitute substantial evidence. We disagree.

Liegl owned Forest River, and according to Trealoff, had "total control of the company and possession of it." Miller was the acting general manager who took Trealoff's computer. Liegl was in direct communication with Miller immediately before and after Trealoff was terminated. Trealoff testified that when he questioned Miller's actions, Miller said, "Your services are no longer required per Pete Liegl." As for the computer, Miller said, "per Pete Liegl, we have your computer." Liegl admitted he understood the data had been taken off Trealoff's "personal computer." Liegl also admitted that he instructed Miller to "make sure we retrieve our company property." When Trealoff questioned Miller about what had been downloaded off the computer, Miller responded that Trealoff would "need to contact corporate."

In response to Defendants' charge that Poole's testimony was merely hearsay, Trealoff claims the testimony falls under more than one statutory exception to the hearsay rule. (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1244-1246 [uncorroborated hearsay does not constitute substantial evidence "[e]xcept in those instances recognized by statute where the reliability of hearsay is established"].) Trealoff argues that Poole's testimony is admissible as (1) an admission by a party opponent, and (2) a prior inconsistent statement. We agree. Both Liegl and Forest River are parties to this action, namely, defendants. Miller acted as the general manager of Forest River. Thus, anything they said constituted admissions by a party opponent. (Evid. Code, § 1220.) Also, to the extent Liegl denied authorizing or directing the taking of Trealoff's computer, his out-of-court statements to Miller were admissible as prior inconsistent statements. (Evid. Code, § 1235.) The same is true for Miller's out-of-court statements.

Moreover, both Miller and Liegl testified during the trial and the jury was provided with the opportunity to observe them, as well as Poole, and draw its own conclusions as to who was telling the truth. "It is well established that '"'[t]he testimony of a [single] witness . . . may be sufficient' [to support a judgment]."' [Citations.]" (*Dart Industries, Inc. v. Commercial Union Ins. Co*. (2002) 28 Cal.4th 1059, 1075.) "'[N]either conflicts in the evidence nor "'testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."' [Citations.] Testimony may be rejected only when it is inherently improbable or incredible, i.e., '"unbelievable *per se*,"' physically impossible or '"wholly unacceptable to reasonable minds."' [Citation.]" (*Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 1150, 1155.) Here, we see no reason to reject that which the jury chose to accept, i.e., the testimony of Poole identifying Liegl as the person who authorized the seizing of Trealoff's computer.

2. 3%/1% commission

Defendants contend that Trealoff "failed to present substantial evidence of a promise by Liegl to pay the alleged commissions or to present *any* evidence regarding Liegl's intent not to perform such promise." More specifically, they argue that "where the only evidence to establish a necessary element of a plaintiff's claim comes from testimony by the plaintiff that conflicts irreconcilably with his own prior testimony, and where the plaintiff is unable to explain the former testimony as a misreporting of his

answers, a mistake on his part, or the product of a misunderstanding, a verdict for the plaintiff on that claim must be reversed for lack of substantial evidence." We disagree.

Turning to the record before this court, we conclude that substantial evidence supports the jury's finding that Liegl promised to pay Trealoff a 3%/1% commission. As Trealoff notes, (1) DeRosa was the general manager of Forest River; (2) Trealoff was consistently the number one salesperson in the RV industry; (3) prior to being approached about working for Forest River, Trealoff had accepted a job with California Thor (2.5 percent commission and a larger territory) and intended to begin working on January 2, 1996; (4) Trealoff told DeRosa that as a condition of working for Forest River, Trealoff needed a 3%/1% commission; (5) Trealoff met with DeRosa and was satisfied that his conditions had been met; (6) when Trealoff's commission checks came in at less than 3%/1%, he complained to Liegl and met with him on April 17, 1996; (7) Liegl said, "'If that's what we hired you at, we will make it up. We'll make it good to you. We are a company of our word[]'"; and (8) Liegl continued to promise to make up the amounts that Forest River owed Trealoff, assuring him that as soon as the company matured, "[w]e will take care of it . . . ." Trealoff was specifically asked: "Now, when you flew back to Indiana in April of 1996, did Mr. Liegl tell you at any time that he would pay you a commission of 3 percent on direct sales with a 1 percent override?" In response, Trealoff answered, "Yes."

Nonetheless, Defendants point to Trealoff's interrogatory responses about a December 29, 1995, conference call with Liegl, DeRosa, and Trealoff, and argues that Trealoff's trial testimony contradicts those responses. At trial, Trealoff was asked, "Mr.

Trealoff, before you began your employment with Forest River in January of 1996, did Mr. Liegl personally tell you that if you came to work at Forest River, Forest River would pay you a 3 percent/1 percent commission?" In response, Trealoff said, "No." In his interrogatory responses, Trealoff stated, "in the original conversation with Mr. DeRosa and the telephone conversation between Mr. DeRosa, Mr. Liegl and the Plaintiff, it was agreed that the Plaintiff would be paid a 3% commission for all sales that the Plaintiff made directly, and 1% of any sales made by any of the other sales people working in the western region." We see no contradiction. Trealoff negotiated with DeRosa, the general manager, regarding the amount of commission. Thus, it was DeRosa, not Liegl, who told Trealoff that Trealoff would get what he was asking for. While Liegl may not have "personally" told Trealoff that he would get 3%/1% commission, Liegl did not have to. DeRosa was the general manager representing Forest River in negotiations with Trealoff for the purpose of getting Trealoff to work for Forest River.[3]

Likewise, regarding Trealoff's conversations with Liegl at trade shows, Trealoff's acknowledgement (on cross-examination) that Liegl had said 2.4 percent was the best Trealoff was going to get must be considered with the testimony that Liegl continued to assure Trealoff he would receive the 3%/1% commission; however, Forest River was still a growing company that was a relatively new entry in the market. The jury was tasked

[3] Liegl notes the trial court excluded evidence of DeRosa's supposed promise because Trealoff's deposition testimony showed he understood that DeRosa lacked authority to set salesmen's pay. Regardless of DeRosa's authority, it was clear that Liegl allowed Trealoff to believe whatever was necessary in order to get him to change his plan to begin working for California Thor and join Forest River.

with judging the credibility of the witnesses, weighing the evidence, and deciding what testimony to believe. (Judicial Council of Cal. Civ. Jury Instns. (2010) CACI No. 107.) To the extent there was conflicting evidence, it went to the weight the jury accorded Trealoff's testimony; it did not render his testimony without substance. Given the jury's verdict, the jury chose to believe Trealoff.

Regarding promissory fraud, Defendants contend Trealoff "failed to present *any* evidence regarding Liegl's intent not to perform the promise. At most, the record reflects a disconnect between Liegl and Trealoff over the amount of the commission . . . ." We disagree. "Promissory fraud . . . consists of making a promise *without the present intention to perform it*, i.e., misrepresenting the speaker's *then-present intentions*. [Citation.]" (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 575.) "'[S]omething more than nonperformance is required to prove the defendant's intent not to perform his promise.' [Citations.] To be sure, fraudulent intent must often be established by circumstantial evidence." (*Tenzer v. Superscope, Inc*. (1985) 39 Cal.3d 18, 30.) Here, the evidence shows that Defendants knew Trealoff was going to work for California Thor unless certain conditions could be met, namely the 3%/1% commission; that Liegl delayed performance, asking Trealoff to be patient until the company became more financially stable; that Defendants never attempted to pay the 3%/1% commission; that Trealoff continued to wait for Defendants' performance; that Liegl considered the 3%/1% commission to be "exorbitant and ridiculous"; and that Defendants fired Trealoff when DeRosa was sick with terminal cancer. The fact that Liegl was surprised that Trealoff had been paid a 2.5 percent commission further suggests he never intended to

pay Trealoff the 3%/1% commission. This circumstantial evidence was sufficient for the jury to find that Defendants falsely promised to pay Trealoff a commission of 3%/1%.

3. Labor Code violation

Liegl contends he was not an "employer" under Labor Code sections 201, 203 and 221, and thus, the evidence fails to support the jury's finding that Liegl violated Labor Code sections 201, 221, et seq. We agree.

As Liegl notes, each of the Labor Code sections of which the jury found Liegl to be in violation imposes requirements on the employee plaintiff's "employer." (Lab. Code, §§ 201, 203, 221.) However, none of those statutes provide a definition of "employer." Thus, "absent a clear and unequivocal expression of contrary legislative intent, we must assume the Legislature intended [the term employer] would be interpreted in accordance with the common law." (*Bradstreet v. Wong* (2008) 161 Cal.App.4th 1440, 1452; *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1086 (*Reynolds*) [looking to common-law definition of "employer" where Labor Code sections 510 and 1194 provided no definition].)

"Under the common law, corporate agents acting within the scope of their agency are not personally liable for the corporate employer's failure to pay its employees' wages. [Citations.] This is true regardless of whether a corporation's failure to pay such wages, in particular circumstances, breaches only its employment contract or also breaches a tort duty of care. It is 'well established that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract.' [Citation.] And '[d]irectors or officers of a corporation do not incur personal

liability for torts of the corporation merely by reason of their official position . . .' [Citation.]" (*Reynolds*, *supra*, 36 Cal.4th at p. 1087.)

Trealoff disagrees, contending *Reynolds* has been largely overruled by *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*). Acknowledging that *Reynolds* dealt with a different section of the Labor Code, Trealoff submits that "a similarly inclusive definition of 'employer' should be applied with the Labor Code sections at issue in this case." Thus, he argues Liegl "was exactly the person at whom these provisions of the Labor Code were meant to be directed. . . . [¶] As the sole owner of Forest River . . . Liegl's control of the company and the relevant wage decisions makes him a person who 'employs or exercises control over the wages, hours or working conditions of any person.'" We are not persuaded by Trealoff's argument.

The *Martinez* court's discussion was limited to actions brought under Labor Code section 1194. (*Martinez*, *supra*, 49 Cal.4th at p. 52.) For those cases, our state's highest court held that "the IWC's [Industrial Welfare Commission] wage orders do generally define the employment relationship, and thus who may be liable." (*Ibid*.) Recognizing that the *Reynolds* court had looked to the common law rather than the applicable wage order to define "employment" in an action under Labor Code section 1194 (*Reynolds*, *supra*, 36 Cal.4th at pp. 1086-1088), the *Martinez* court concluded that *Reynolds* did not govern, because "Wage Order No. 14 . . . properly defines the employment relationship in this action under [Labor Code] section 1194." (*Martinez*, *supra*, at p. 62.)

"The plaintiff in *Reynolds* . . .worked for a corporation that owned and operated automobile painting shops. He sued under [Labor Code] section 1194 to recover unpaid

overtime compensation allegedly due him under the IWC's applicable wage order. The plaintiff named as defendants, in addition to the corporation, eight of its officers and directors in their individual capacities. The question before us on demurrer was whether the plaintiff had stated a cause of action against the individual defendants. We held he had not. [Citation.]" (*Martinez, supra,* 49 Cal.4th at pp. 62-63.) In holding that the common law, not the applicable wage order, defined the employment relationship in a Labor Code section 1194 action, the *Reynolds* court (1) rejected the suggestion that the Legislature had intended "to incorporate" the IWC's definitions into Labor Code section 1194, and (2) applied the maxim of statutory interpretation, i.e., that a statute is interpreted in light of the common law unless the Legislature dictates otherwise. (*Reynolds, supra,* 36 Cal.4th at pp. 1086-1087.)

In discussing the *Reynolds* opinion, our high court noted the flaw in its prior analysis. Specifically, after examining Labor Code section 1194 in its historical and statutory context, our high court noted that "the Legislature intended to defer to the IWC's definition of the employment relationship in actions under the statute." (*Martinez, supra,* 49 Cal.4th at p. 64.) Thus, the *Martinez* court concluded, "While the common law definition of employment plays an important role in the wage orders' definition, and thus also in actions under [Labor Code] section 1194, to apply only the common law definition while ignoring the rest of the IWC's broad regulatory definition would substantially impair the commission's authority and the effectiveness of its wage orders." (*Id.* at p. 65.)

Here, Liegl points out that, unlike a plaintiff suing under Labor Code section 1194 to recover unpaid minimum wages set by an IWC wage order, Trealoff is not suing to enforce a wage order. Instead, Trealoff is suing under Labor Code sections 201, 221 et seq. Liegl argues there is "no logical reason to incorporate the IWC wage order's definition of 'employer' into [such claim]." Thus, Liegl maintains that as a corporate officer, or agent, he "was an agent, acting within the scope of his agency, [and] . . . cannot be deemed Trealoff's employer for purposes of his Labor Code claims." We agree. (*Jones v. Gregory* (2006) 137 Cal.App.4th 798, 807 ["a corporate officer or agent does not employ employees—the corporation does"]; *Reynolds*, *supra*, 36 Cal.4th at p. 1087.) Accordingly, Liegl cannot be personally liable for Trealoff's Labor Code claims. The jury's verdict on that claim, as to Liegl only, must be reversed.

III. COMPENSATORY DAMAGES AWARD

Defendants contend that remand for purposes of holding a new trial on compensatory damages is "warranted because three of the counts on which the jury's $1.7 million compensatory award against Forest River may have been based—promissory fraud, breach of contract, and Labor Code § 201—are not supported by substantial evidence." Because we have found otherwise, this issue is moot.

IV. SUFFICIENT EVIDENCE SUPPORTS PUNITIVE DAMAGES AWARD

Defendants challenge the punitive damages award, claiming "there was not clear and convincing evidence of oppression, fraud, or malice as to any of the claims on which the jury may have awarded those damages." We reject Defendants' argument.

A. Standard of Review

"In a civil case not arising from the breach of a contractual obligation, the jury may award punitive damages 'where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.' (Civ. Code, § 3294, subd. (a).)" (*Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 712 (*Roby*).) Generally, punitive damages awards are reviewed under the substantial evidence standard of review "in which all presumptions favor the trial court's findings and we view the record in the light most favorable to the judgment. [Citation.]" (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916.) We are also "guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. . . .' [Citation.]" (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927.)

B. Analysis

1. Malice

"[Civil Code section 3294] defines 'malice' as 'conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' (Civ. Code, § 3294, subd. (c)(1).) 'Oppression' means 'despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.' (Civ. Code, § 3294, subd. (c)(2).) And finally, 'fraud' means 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or

otherwise causing injury.' (Civ. Code, § 3294, subd. (c)(3).)" (*Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1559.)

2. Promissory fraud

Defendants argue the record lacks clear and convincing evidence of promissory fraud. Specifically, they claim the only evidence Trealoff presented to the court was his own testimony, which was contradictory. They further contend Trealoff failed to offer any evidence that Forest River or Liegl did not intend to keep their promise. We disagree.

To the extent Defendants are reasserting that the evidence was insufficient to support the jury's finding for Trealoff on his promissory fraud claim, we have already rejected such assertion. (See discussion, *ante*.) We conclude there was more than substantial evidence to support an award of punitive damages. The evidence shows Liegl was intentionally dishonest, showing a conscious disregard of Trealoff's rights. Not only did Liegl never tell Trealoff that he would not receive the 3%/1% commission, but on a few occasions, Liegl continued to assure Trealoff he would receive the 3%/1% commission; however, Forest River was still a growing company that was a relatively new entry in the market. In reality, Liegl never intended to pay Trealoff the 3%/1% commission; rather, it appears Defendants knew that Trealoff was the top salesman in the field, they did not want him working for a competitor while they were trying to get Forest River started, and they did whatever it took to keep him at Forest River. The fact that the only evidence Trealoff had to offer was his own testimony is irrelevant. Trealoff's version, if believed by the jury, provides adequate grounds to show that Defendants were

guilty of oppression, fraud, or malice. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 308.) This is especially true given the evidence that Liegl lied about his knowledge of the 3%/1% commission. Prior to trial, Liegl signed a declaration, under penalty of perjury, which stated he had never discussed the 3%/1% commission. However, at trial he admitted that such statement was false; he claimed that it "was the result of his misunderstanding of what it said." The jury was assigned the task of deciding what to believe. There was sufficient evidence to support the jury's decision.

3. Computer claims

Next, Defendants challenge the sufficiency of evidence supporting the punitive damages award on Trealoff's claims of conversion, trespass to personal property, invasion of privacy, and violation of Penal Code section 502. Defendants argue, "Evidence that merely established the commission of the torts Trealoff alleged is insufficient to demonstrate conscious disregard of his rights. And the uncontradicted fact that Trealoff's personal files were accessed inadvertently negates any possibility that that conduct could be deemed 'despicable.'" They further claim there is no evidence of an intent to humiliate or cheat Trealoff out of his commissions. Again, we disagree.

As Trealoff points out, the trial court entered a directed verdict on Trealoff's claims of violation of Penal Code section 502, conversion and trespass to personal property. Penal Code section 502, subdivision (c)(1), punishes a person for a variety of types of misconduct involving the unauthorized access of computer systems, including a person who "[k]nowingly accesses and without permission alters, damages, deletes, destroys, or otherwise uses any . . . computer system . . . in order to either (A) devise or

execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data." In addition to the directed verdict, the record shows that Defendants stole Trealoff's personal computer without warning, refused to return it when asked, and directed Trealoff's inquiries to "corporate." Defendants authorized the invasion of Trealoff's computer, the copying or taking of files, and the destruction of other files. All of this was done without Trealoff's knowledge, guidance or direction, and without any way of knowing which files contained company property and which were personal. In contrast, when other employees left the company, they were not subjected to the same treatment.

Contrary to Defendants' argument, we conclude the jury could logically infer that Defendants acted with "oppression, fraud, or malice" when they took, and invaded, Trealoff's personal computer. For all intents and purposes, Trealoff was a hard-working, good employee. Because he was the number one salesman in the industry, Forest River wanted him when the company first opened its doors for the purpose of building its market. To that extent, Trealoff worked for six years building Forest River's customer base. However, it appears that once Defendants were comfortable with their market share, they decided that they no longer needed Trealoff, the highest paid salesman in the company. By taking his computer, Defendants were able to obtain the information about Trealoff's specific customers and pending sales for the purpose of turning them over to another salesman. Defendants never met with Trealoff to discuss any concerns they may have had with his performance, or the fact that he kept customer sales information on his personal computer. They simply waited for him to go to lunch so they could seize his

computer before they informed him that he was terminated. It appears that Defendants acted for the purpose of denying Trealoff his commissions on pending sales, harassing or intimidating him, or discovering his customer list to turn over to another salesman. Nonetheless, this conduct was despicable, because it was carried on by Defendants with a willful and conscious disregard of Trealoff's rights.

4. Excluded evidence

Defendants contend that "Evidence the jury did *not* hear because the trial court wrongly excluded it as hearsay would have negated even Trealoff's speculative arguments that the defendants acted maliciously." Specifically, Liegl notes he was prevented from testifying that (1) a Forest River salesman was told by a dealer that Trealoff had bought Forest River's exact RV chassis from Forest River's supplier, and (2) Liegl received an anonymous telephone call from a Forest River employee that Trealoff was trying to obtain blueprints of Forest River trailers.

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "Although proffered evidence may have some relevance, '[t]he [trial] court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' [Citation.] We review a trial court's evidentiary rulings for an abuse of discretion.

[Citations.]" (*Winfred D. v. Michelin North America, Inc*. (2008) 165 Cal.App.4th 1011, 1026.)

The evidence Defendants sought to introduce amounted to nothing more than a smear on Trealoff's character. Although Liegl argues that the evidence "would have conclusively *disproven* Trealoff's contention that Liegl fired him as part of a malicious plot," we note that Liegl did nothing to investigate any claim that Trealoff was trying to acquire Forest River's blueprints for the purpose of starting his own company. Moreover, Liegl did not even confront Trealoff with this information. Given these circumstances, the statements lack trustworthiness. Thus, we find no abuse of discretion in the trial court's decision to exclude them.[4]

V. PUNITIVE DAMAGES AWARDS WERE NOT EXCESSIVE

Defendants contend the punitive damages awards must be reduced to the amount of compensatory damages.

A. Standard of Review

"The due process clause of the Fourteenth Amendment to the United States Constitution places constraints on state court awards of punitive damages. [Citations.] . . . . [¶] In *State Farm* [*Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418 (*State Farm*)], the high court articulated 'three guideposts' for courts reviewing punitive damages: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the

[4] At oral argument, Defendants asserted this evidence was relevant regarding the issue of punitive damages. However, as Trealoff pointed out, Defendants could have renewed their request to offer this evidence during the punitive damages phase of the trial but failed to do so.

disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' [Citations.]" (*Roby*, *supra*, 47 Cal.4th at p. 712.) "In deciding whether an award of punitive damages is constitutionally excessive under *State Farm* and its predecessors, we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct. [Citations.]" (*Simon v. San Paolo U.S. Holding Co., Inc*. (2005) 35 Cal.4th 1159, 1172 (*Simon*).)

B. Analysis

1. Reprehensibility factors

"'Of the three guideposts that the high court outlined in *State Farm*, *supra*, 538 U.S. at page 418 [123 S.Ct. 1513], the most important is the degree of reprehensibility of the defendant's conduct. On this question, the high court instructed courts to consider whether "[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident." [Citation.]' [Citations.] 'The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.'

[Citation.]" (*Amerigraphics, Inc. v. Mercury Casualty Co.*, *supra*, 182 Cal.App.4th at p. 1562.)

Applying these factors to this case, we find (1) the harm caused by Defendants was physical, albeit it affected Trealoff's emotional and mental health (*Roby*, *supra*, 47 Cal.4th at p. 713); (2) it was objectively reasonable to assume that their acts would affect Trealoff's emotional well being, and thus evinced an indifference or reckless disregard of Trealoff's health; and (3) the harm inflicted on Trealoff was the result of intentional malice or deceit. The third and fourth reprehensibility factors (Trealoff was financially vulnerable and the conduct was repeated) were not present.

Defendants dispute the first factor, arguing that "Trealoff's emotional distress was not remotely analogous to that of the plaintiff in *Roby*." However, the evidence shows that no witness could account for all the people who had accessed the files on Trealoff's laptop. When Trealoff got his laptop back, the files were in a state of devastation; his personal information was not there, had been deleted, or was missing. The Traxs program he had created could not be opened. As a result of this personal invasion, Trealoff suffered rage and anger, and could not sleep at night. The theft made it difficult for him to be intimate or to experience feelings such as joy and laughter.

Regarding the second factor, Defendants argue they did not set out to search for or destroy Trealoff's personal information and there was no evidence to show that it was objectively reasonable to assume that personal information might be deleted or that he would suffer emotional distress. We disagree. Defendants knew the laptop they were searching was Trealoff's personal laptop, which he had used for both personal and

business information, because Defendants refused to provide any employee with a computer or laptop for business use. Defendants could have met with Trealoff to obtain the business information, just as they did when Poole left the company. Instead, Defendants waited for Trealoff to go to lunch so they could take his laptop without his permission. When he returned, they refused to return it to him or allow him access to it.

Regarding the fifth factor, Defendants continue to argue there was insufficient evidence of promissory fraud, and thus, there is no evidence of intentional malice, trickery, or deceit for purposes of punitive damages. We disagree. Defendants convinced Trealoff to work for Forest River by promising him a 3%/1% commission rate. They convinced him to continue working for Forest River by promising him the company would make good on what was owed him when it was in a financial position to do so. It appears Defendants intentionally deceived Trealoff into staying at Forest River so that he would not work for a competitor and take business away. Ultimately, Defendants' intentional actions harmed Trealoff. Instead of going to another company, Trealoff worked at Forest River and was fired after he established a strong customer base for the company.

During oral argument, Defendants challenged this court's reference to their actions associated with the promissory fraud claim. They asserted that a finding of malice must relate to their access to Trealoff's computer claims. However, this argument was not raised in their briefing, nor did they offer any legal authority during oral argument in support of their assertion. Accordingly, we deem it waived. Nonetheless, we agree with Trealoff that the manner in which Defendants acted with regard to their accessing his

personal computer, going through his personal files, and refusing to return the computer when asked constituted oppression, fraud or malice, especially in light of their treatment of other employees (i.e., Poole) upon departure from the company.

2. Ratio of punitive damages to actual harm

Trealoff sought $1,807,808 in economic damages. The jury awarded Trealoff $1.7 million in compensatory damages against Forest River and $850,000 in compensatory damages against Liegl. After hearing evidence as to Defendants' wealth, namely $927 million for Forest River and $696 million for Liegl, the jury awarded punitive damages of $7 million against Forest River and $8 million against Liegl. The trial court reduced the punitive damages awards to $3 million and $4 million, respectively. Defendants contend the reduced punitive damages awards are unconstitutionally excessive.

"Although the United States Supreme Court has 'consistently rejected the notion that the constitutional line is marked by a simple mathematical formula' [citation], the high court has concluded that 'few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.' [Citation.] The high court 'also explained that past decisions and statutory penalties approving ratios of 3 or 4 to 1 were "instructive" as to the due process norm, and that while relatively high ratios could be justified when "'a particularly egregious act has resulted in only a small amount of economic damages' [citation] . . . [t]he converse is also true . . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."' [Citation.]

"Our high court has interpreted this language from *State Farm* to mean that it established a 'type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause.' [Citation.]" (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1223-1224.)

Here, as Trealoff points out, the total compensatory damages award against Defendants amounted to $2.55 million, of which $1,807,808 represented economic damages. The trial court reduced the amount of punitive damages awards, resulting in multiples of 1.76 to 1 ($3,000,000 divided by $1,700,000) against Forest River and 4.71 to 1 ($4,000,000 divided by $850,000) against Liegl, for a total of 2.75 to 1 ($7,000,000 divided by $2,550,000) against Defendants combined. Nonetheless, Defendants contend that $742,192 out of the total $2.55 million compensatory award "was the *minimum* amount of the compensatory award that could have been for emotional distress, given Trealoff's evidence that his economic damages, including prejudgment interest, did not exceed $1,807,808." We disagree. The jury's verdict failed to segregate economic from noneconomic damages; however, Trealoff sought $1,807,808 in economic damages. Thus, when the economic damages award is subtracted from the total compensatory damages award, the remainder represents noneconomic damages of $742,192.

Contrary to Defendants' argument, we conclude that this case is not analogous to *Roby*, *supra*, 47 Cal.4th 686, *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th

1, 10-12 [imposing one-to-one cap based on presence of two reprehensibility factors, where defendant was liable for fraud and conversion in falsifying purchase agreements and pocketing the difference], or *Walker v. Farmers Ins. Exchange* (2007) 153 Cal.App.4th 965, 972, 974 [imposing one-to-one cap based on presence of one reprehensibility factor, where defendant insurer was liable for bad-faith refusal to defend insured and jury awarded $51,931.80 in economic damages and $500,000 against each defendant for emotional distress]. The *Roby* case involved employment discrimination and harassment. The jury awarded $1,905,000 in compensatory damages, of which only $605,000 represented Roby's economic losses. (*Roby*, *supra*, 47 Cal.4th at p. 718.) Our high court observed that "the remaining $1.3 million in compensatory damages was awarded solely for Roby's physical and emotional distress and may have reflected the jury's indignation at [defendant's] conduct, thus including a punitive component." (*Ibid*.) Thus, the court concluded that an additional punitive damages award would be duplicative. (*Ibid*.) However, the *Roby* court cautioned that it was basing "this conclusion on the specific facts of this case. We note . . . the relatively low degree of reprehensibility on the part of employer . . . and the substantial compensatory damages verdict, which included a substantial award of noneconomic damages." (*Id*. at p. 719.)

Unlike the cases referenced by Defendants, here, the jury's award for noneconomic damages was less than half of the award for economic damages. Considering Liegl's key role in Defendants' conduct, the award of punitive damages against him was appropriate. For these reasons, we conclude that the 1.76 to 1 ratio of punitive to compensatory damages against Forest River and 4.71 to 1 against Liegl, for a

total of 2.75 to 1 against Defendants combined, is reasonable and does not raise due process concerns under *State Farm.*

3. Comparable civil penalties

"Finally, we consider 'the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases,' the last of the three guideposts the high court set forth in *State Farm*, *supra*, 538 U.S. at page 418, to assess the constitutionality of punitive damages awards." (*Roby*, *supra*, 47 Cal.4th at p. 718.) The parties are silent as to this final guidepost; however, at the trial level, Trealoff noted the civil penalty of a $10,000 fine, along with punitive damages (Pen. Code, § 502, subds. (d)(1) & (e)(4)), along with the possibility of incarceration (Pen Code, § 502, subd. (d)(2)), and the waiting time penalties under the Labor Code. Defendants were sued and found liable for breach of common law tort duties, i.e., fraud, conversion, trespass and invasion of privacy, which do not lend themselves to a comparison with statutory penalties. (*Simon*, *supra*, 35 Cal.4th at pp. 1183-1184.) Given the possible consequences that Defendants faced as a result of their actions, this guidepost weighs in favor of affirming the punitive damages awards.

VI. REDUCTION OF PUNTIVE DAMAGES AWARDS

In his cross-appeal, Trealoff contends the trial court erred in reducing the jury's awards of punitive damages against Defendants.

A. Standard of Review

"In California, a trial court reviews a motion challenging the excessiveness of an award of punitive damages similar to other motions for new trial, as a 'thirteenth juror':

'The trial court is in a far better position than an appellate court to determine whether a damage award was influenced by "passion or prejudice." [Citation.] In reviewing that issue, moreover, the trial court is vested with the power, denied to us, to weigh the evidence and resolve issues of credibility. [Citation.]' [Citation.] We review the trial court's determination for an abuse of discretion. [Citations.]" (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1689 (*Boeken*).)

B. Analysis

Trealoff repeats his arguments stated above in support of his defense of the jury's awards of punitive damages; however, he adds that the trial court erred in (1) reducing the awards to a particular point, rather than policing a range, and (2) failing to analyze all three constitutional guideposts.

In reducing the punitive damages awards, the trial court found that "the amount of the award of punitive damages as to both Defendants is unconstitutionally disproportionate within the meaning of *Simon*[, *supra*,] 35 Cal.4th 1159. After considering the evidence independently with that review giving deference to the decision of the jury the evidence does not support the amounts awarded by the jury." In *Simon*, the action arose from the plaintiff's failed attempt to purchase an office building from the defendant. (*Simon, supra*, 35 Cal.4th at p. 1166.) Finding that the defendant had committed promissory fraud, the jury awarded $5,000 in economic compensatory damages and $1.7 million in punitive damages. (*Ibid*.) This award of punitive damages was 340 times the award of compensatory damages. (*Id*. at p. 1183.) The *Simon* court concluded that the punitive damages award was grossly excessive. (*Ibid*.)

In discussing the constitutionally acceptable range for the ratios of punitive to compensatory damages, the *Simon* court noted that for ratios exceeding the single-digit level, the "presumption of unconstitutionality applies." (*Simon*, *supra*, 35 Cal.4th at p. 1182, fn. 7.) "Multipliers *less* than nine or 10 are not, however, presumptively *valid* under *State Farm*. Especially when the compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee.' [Citation.]" (*Id*. at p. 1182.)

It has been recognized that "the Supreme Court in *State Farm* meant for ratios to be *instructive*, not *binding*. It refused, as it has in the past, 'to impose a bright-line ratio which a punitive damages award cannot exceed,' observing that it had '"consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award" [citation].' It stated that 'there are no rigid benchmarks that a punitive damages award may not surpass.' [Citation.]

"The Supreme Court suggested examples of circumstances that might justify ratios greater than previously upheld, such as 'where "a particularly egregious act has resulted in only a small amount of economic damages,"' or 'where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."' [Citation.] But it acknowledged that '[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.' [Citation.]

"The Court also stated that where 'compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.' [Citation.] The Court's holding was expressly based on the fact that, in that case, '[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries.' [Citation.]" (*Boeken*, *supra*, 127 Cal.App.4th at pp. 1695-1696.)

With the above in mind, the trial court found that the punitive damages awards of $8 million and $7 million (for a total of $15 million), in reference to the compensatory damages award of $2.5 million, were constitutionally disproportionate with a ratio of 6 to 1, given the facts in this case. If the noneconomic damages amount is deducted, the ratio is nearly 9 to 1. Accordingly, the trial court reduced the punitive damages awards to $4 million and $3 million (for a total of $7 million), leaving a ratio of 2.75 to 1 (including noneconomic damages) or 4.1 to 1 (excluding noneconomic damages). Given the facts in this case and our previous discussion of the guideposts prescribed by the high court, we cannot conclude that the trial court's decision to reduce the punitive damages awards amounted to an abuse of discretion.

VII. ATTORNEY FEES

Defendants contend the award of attorney fees to Trealoff pursuant to the Labor and Penal Codes "is legally erroneous in several respects, and should be reversed and remanded for further proceedings."

A. Standard of Review

We review a trial court's determination of reasonable attorney fees under the abuse of discretion standard: "[T]here is no question our review must be highly deferential to the views of the trial court. [Citation.] As our high court has repeatedly stated, '"'[t]he "experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong"—meaning that it abused its discretion.'"' [Citations.]" (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 777.) However, we review "[t]he legal basis for an award of attorney fees . . . de novo." (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1511.)

B. Use of Prevailing Rates Outside of San Bernardino Area

Both parties note that in assessing attorney fees, the proper method to use is the "lodestar" method. "Under the lodestar method, attorney fees are calculated by first multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate of compensation. [Citations.] [¶] As the Supreme Court explained in *Ketchum v. Moses* [(2001)] 24 Cal.4th 1122: 'Under *Serrano III*,[5] the lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including . . . (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the

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5 *Serrano v. Priest* (1977) 20 Cal.3d 25 (*Serrano III*).

litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. [Citation.] *The purpose of such adjustment is to fix a fee at the fair market value for the particular action.* In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. The "'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'" [Citation.]' [Citation.] 'The lodestar adjustment method . . . has also been widely applied by the Courts of Appeal under a broad range of statutes authorizing attorney fees. [Citations.] [¶] Indeed, . . . "[T]he Legislature appears to have endorsed the [lodestar adjustment] method of calculating fees, except in certain limited situations." [Citation.] When the Legislature has determined that the lodestar adjustment approach is not appropriate, it has expressly so stated.' [Citation.]" (*Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1259.)

Here, Defendants do not challenge the award of fees "based on an unreasonable number of attorney hours." Rather, they fault the trial court for not using San Bernardino area hourly rates. They argue that use of the Los Angeles hourly rates was unreasonable and "[i]t was Trealoff's burden to establish he was unable to retain counsel 'in the local community' of San Bernardino." We disagree.

To begin with, we note there is no clearly delineated relevant legal community. However, recently our colleagues in Division One of this district observed: "In *Horsford*

[*v. Board of Trustees of California State University* (2005)] 132 Cal.App.4th 359, [339], an action for employment discrimination brought under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), the court rejected the notion that fee awards are invariably limited to local rates, despite language in *Ketchum v. Moses, supra*, 24 Cal.4th at page 1132, that 'the lodestar is the basic fee for comparable legal services in the community.' [Citation.] The *Horsford* court explained: '[The Supreme Court] has never hinted that, in the unusual circumstances that local counsel is unavailable, the trial court is limited to the use of local hourly rates. The purpose of statutory attorney fee provisions is to provide financial incentives necessary for the private enforcement of important civil rights. [Citation.] If a potential defendant is too intimidating to the local bar or so replete with resources as to potentially overwhelm local counsel, or if the local plaintiffs' bar has not the resources to engage in complex litigation on a contingency-fee basis, the public interest in the prosecution of meritorious . . . cases requires that the financial incentives be adjusted to attract attorneys who are sufficient to the cause. *In the absence of any realistic indication plaintiffs could have found local counsel, it was an abuse of discretion to fail even to consider an hourly rate based on counsel's "home" market rate.*' [Citation.]

"In *Horsford*, the court held the trial court erred by 'failing adequately to consider the propriety of a higher hourly rate for Murray, a San Francisco attorney, in order to accomplish the purposes of FEHA.' [Citation.] The plaintiff submitted 'overwhelming and uncontradicted' evidence he had contacted several attorneys in the local Fresno area, but not one of them was willing to represent him. [Citation.] The court explained the

'method of achieving adequate compensation for out-of-town counsel, when reasonably necessary, rests within the trial court's discretion. If all lawyers for the prevailing party are from the high-fee area, the court might consider that factor in determining whether to award an enhancement multiplier to a lodestar initially calculated using local hourly rates. In cases like the present, where only some attorneys are from the high-fee area, the court should consider making the adjustment for the hourly rate of that attorney, rather than adjusting upward all of the fees through a multiplier, which might unjustly compensate local attorneys.' [Citation.]

"In *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233 . . . the court clarified that in *Horsford* it had concluded that because the plaintiff showed '"'a good-faith effort to find local counsel'" and "demonstrate[d] . . . that hiring local counsel was impracticable," the trial court should have considered the out-of-town counsel's higher rates, either in (1) calculating the initial lodestar figure *or* (2) evaluating whether to award a multiplier to a lodestar initially calculated using local hourly rates.' [Citations.]" (*Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 616-617.)

Here, counsel for Trealoff pointed out that (1) Defendants, from the outset, had retained Los Angeles counsel, Musick, Peeler & Garrett, a 125-lawyer firm, along with Indiana counsel; and (2) Trealoff initially tried local counsel; however, the "first San Bernardino lawyer . . . withdrew when he realized this case was going to get big, ugly, complicated, and nasty," and the second counsel found itself sanctioned monetarily on a motion to compel and Trealoff was forced to turn over books and records the lawyers said he should not have to turn over. Thus, according to counsel for Trealoff, his client

realized he was "going to have to hire somebody from Los Angeles and match . . . what the largest company in the field has brought against [him]. So that [he was not] outgunned, outmanned and slaughtered." More to the point, in their cross-action, Defendants used a trade secret claim to access Trealoff's books and records; however, Defendants were unable to show any lost customers. The fact that Defendants ultimately failed in their claim speaks volumes of their approach to this case. Moreover, given that Forest River was a very big company in the industry, whereas Trealoff was a new player with a small company, Defendants' assertion of a meritless trade secrets claim exemplifies the "outgunn[ing], outman[ing] and slaughter[ing]" that Defendants planned.

According to the record before this court, the evidence supports the above reasons for seeking counsel outside of the San Bernardino area. From the time that Defendants filed their response to Trealoff's complaint on February 4, 2003, they were represented by counsel from Los Angeles. Trealoff was represented by Robert D. Andrews of Wrightwood, James P. Carr of Los Angeles and John H. Kibbler of Glendora. Defendants' initial cross-complaint was filed on March 25, 2003, and Trealoff filed his answer the following month, still using the same counsel. On March 4, 2004, Trealoff moved for and was granted leave to file his second amended complaint. Following Defendants' filing of their cross-complaint to the second amended complaint, on April 23, 2004, Trealoff moved to substitute the Hodel Firm in place of counsel James P. Carr. By December 2004, Defendants successfully moved to compel answers and production of documents by Trealoff, with a sanction against Trealoff in the amount of $2,970. Shortly thereafter, on January 4, 2005, Trealoff substituted Baute & Tidus, his

current counsel, in place of the Hodel Firm. Defendants continued to deluge Trealoff with various discovery motions, motions for summary adjudication, and a motion for judgment on the pleadings.

Although Trealoff did not submit a declaration setting forth the necessity for seeking counsel from Los Angeles, given the circumstances surrounding this litigation, such declaration is unnecessary. Clearly, as Trealoff's counsel represented at the attorney fees hearing, Trealoff initially used local counsel in association with other counsel. When it appeared that Trealoff needed more experienced counsel, he went in search of a firm that could not only handle the issues raised in the pleadings, but also the attacks that would be launched by the Goliath-like firm representing Defendants. The evidence shows Trealoff acted in good faith in his approach to prosecuting his claims and defending those of Defendants. While Defendants offer the declarations of Richard D. Marca and Bradley R. White, local counsel, who state they were ready, willing and able to represent Trealoff, we note Defendants did not choose to use local counsel to represent them. As the trial court recognized, Los Angeles, San Diego, and Orange counsel often try cases in its court.

Given the above evidence, the trial court correctly observed that because Trealoff "had suffered what . . . reasonably appeared to be setbacks" with his original attorneys, and because he "had tried local counsel and was not satisfied with their performance it was reasonable for him to look outside the San Bernardino Riverside area for new counsel." Citing *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 155-156 [trial court abused its discretion by limiting the fee award to rates set by a local

Imperial County rule, as opposed to rates in the region that included San Diego County], Trealoff points out, "These cases support a flexible approach that makes good common sense. In this commuter age, when lawyers and litigants alike are mobile and travel long distances for work (including sometimes by air), a rigid rule that attorney rates must be based on lawyers in the exact city or county as the courthouse makes little sense." We agree, finding this to be especially true given the number of people who commute on a regular basis between Los Angeles, Orange, San Bernardino and Riverside Counties. Accordingly, the trial court was well within its discretion in determining that Los Angeles rates were appropriate to use in calculating Trealoff's fee award.

C. Determination the Claims Involved a Common Core of Facts

Defendants fault the trial court for not apportioning Trealoff's attorney fees between "time spent in prosecuting particular claims, or in defending all, or any particular, counterclaims." They argue, "there is no common core of facts between any of Trealoff's own claims for relief and any of Forest River's counterclaims."

"*Hensley* [*v. Eckerhart* (1983) 461 U.S. 424] 'instructs that the initial lodestar calculation should exclude "hours that were not 'reasonably expended'"' in pursuit of successful claims. [Citations.] 'If questioned charges are included in the initial lodestar calculation, they are then subject to challenge under *Hensley* as being unrelated to the plaintiff's successful claims. . . . *Hensley* directs the court to consider whether the plaintiff failed "to prevail on claims that were unrelated to the claims on which he succeeded?" [Citation.] Counsel's work on such unsuccessful and unrelated claims "cannot be deemed to have been 'expended in pursuit of the ultimate result

achieved[’] . . . and therefore no fee may be awarded for services [on such claims].” [Citation.] The court recognizes that “there is no certain method of determining when claims are ‘related’ or ‘unrelated,’” [citation] but it instructs the court to inquire whether the “different claims for relief . . . are based on different facts and legal theories.” [Citation.] If so, they qualify as unrelated claims.’ [Citation.]”

“Conversely, ‘“Attorney’s fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.” [Citation.] “Attorneys fees need not be apportioned between distinct causes of action where plaintiff’s various claims involve a common core of facts or are based on related legal theories.” [Citation.] Apportionment is not required when the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney’s time into compensable and noncompensable units.’ [Citations.]” (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 417, fn. omitted.)

Here, the trial court found no need to apportion the attorney fees because there was a common core of facts among Trealoff’s claims and Forest River’s counterclaims. According to the record, Trealoff’s claims involve his termination from Forest River, namely, the unlawful theft of his computer, Defendants’ search and deletion of personal files on that computer, their attempt to interfere with the commissions he would receive, and the decision to firm him in order to avoid paying him what he was promised. In their defense, Defendants justified the theft of Trealoff’s computer by claiming they were trying to retrieve company property. They further claimed Trealoff was not fired because

they were not trying to avoid paying him what he was promised, rather he was fired because they heard he was planning to start a new business to compete against Forest River. One of their affirmative defenses was that their "conduct with respect to all matters alleged in the Complaint was justified." They further claimed the only way to protect themselves from Trealoff's actions was to take his personal computer.

In its cross-action, Forest River alleged that Trealoff misappropriated its trade secrets as found in documents on his personal computer. The evidence to support this claim was the same evidence that Defendants were looking for when they took Trealoff's computer and searched through its files. As a result of Trealoff's alleged misappropriation of Forest River's trade secrets that Defendants found as a result of searching his personal computer, Forest River asserted claims for breach of fiduciary duty, breach of duty of loyalty, unfair competition, intentional interference with contractual relations, intentional interference with prospective economic advantage, and conversion. Trealoff was also accused of improperly accessing Forest River's computer systems to obtain this information. Thus, Defendants questioned Trealoff about the information found on his computer, the events surrounding his termination, and his subsequent efforts to restore deleted files on his computer. In closing argument, Defendants' counsel argued, "we believe there is undisputed evidence that Mr. Trealoff, on or about August 8th, through Mike Fisher [the second computer technician hired by Trealoff to recover files that were destroyed or taken from his computer], acquired our trade secret information . . . . [¶] . . . [W]e contend that . . . there was a violation of the disclosure provision at the time that Mr. Trealoff chose to upload the trade secrets that I

just identified from his old laptop to his new Dell laptop at Eclipse . . . . [¶] . . . [¶] . . . [H]opefully that clarifies the basis of our cross-complaint. . . ."

Clearly, as demonstrated by the pleadings, the evidence presented, and the argument of counsel, all the claims asserted by the parties arose from a common core of facts. Thus, the trial court did not err in refusing to allocate Trealoff's attorney fees award between his successful prosecution of the statutory claims and his successful defense of Forest River's counterclaims.

D. Computational Error

Defendants contend, and Trealoff concedes, that a math error in the attorney fees award increased the award by $37,242. Both parties agree that this court may correct this ministerial error without otherwise altering the judgment or remanding to the trial court. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 62-63 [affirming judgment with modification of $39,398.39 based on a clerical error].) Accordingly, we will order the award of attorney fees be reduced by $37,242.

E. Award of Fees Charged by One of Trealoff's Prior Counsel

Finally, Defendants challenge the award of fees to the Hodel Firm on the ground that the "only evidence relating to these fees was submitted by attorney Jeffrey A. Tidus of the Baute firm." Defendants claim the Tidus declaration "provides no basis for concluding that Tidus had personal knowledge of the accuracy or validity of the Hodel billing statements, of the time the Hodel lawyers expended on Trealoff's case, or of their hourly rates or professional qualifications."

"To enable the trial court to determine whether attorney fees should be awarded and in what amount, an attorney should present '(1) evidence, documentary and oral, of the services actually performed; and (2) expert opinion, by [the applicant] and other lawyers, as to what would be a reasonable fee for such services.' [Citations.] 'In many cases the trial court will be aware of the nature and extent of the attorney's services from its observation of the trial proceedings and the pretrial and discovery proceedings reflected in the file.' [Citation.] However, in the absence of such crucial information as the number of hours worked, billing rates, types of issues dealt with and appearances made on the client's behalf, the trial court is placed in the position of simply guessing at the actual value of the attorney's services. That practice is unacceptable and cannot be the basis for an award of fees. [¶] . . . [¶] In California, an attorney need not submit contemporaneous time records in order to recover attorney fees, although an attorney's failure to keep books of account and other records has been found to be a basis for disciplinary action. [Citation.] Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records. [Citations.]" (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 558-559.)

Here, while Trealoff offered the billing statements of the Hodel Firm, the only declaration offered in support of the request for the Hodel Firm's attorney fees was that of Jeffrey A. Tidus, Trealoff's current counsel. Mr. Tidus declared: "The matters contained in this declaration are within my personal knowledge and I could and would competently so testify i[f] called upon to do so." Regarding the Hodel Firm's fees,

Mr. Tidus stated, "Prior to the engagement of Baute & Tidus, Mr. Trealoff and Eclipse were represented by the firm of Hodel, Briggs & Winter, LLP from April 2004 through December 2004. During the course of that representation Hodel, Briggs prepared the initial summary judgment papers, responded to discovery and opposed the initial motions to compel related to a search of Mr. Trealoff's and Eclipse's computers. Work on the matter was performed primarily by Michael S. LeBoff, at $225 an hour, and name partner Matthew A. Hodel at $350 an hour. Hodel, Briggs was paid $71,087.50 in attorneys' fees. Mr. Hodel received his J.D. degree in 1980 from the University of California, Hastings College of Law and has been a trial lawyer for over 25 years, concentrating in complex civil litigation. Mr. LeBoff graduated from Loyola Law School in 1999, magna cum laude, and was an Editor of the Loyola Law Review. Attached hereto as **Exhibit "B"** are true and correct copies of Hodel, Briggs' billing statements documenting the time spent on work for Mr. Trealoff and Eclipse on this matter. I have caused redaction of some of the descriptions contained in the bills, because of attorney-client and work-product privilege concerns. However, the unredacted bills can be made available to the Court for in-camera review should the Court wish to do so."

In awarding fees to the Hodel Firm, the trial court stated, "As to those fees generated by the firm of Hodel, Briggs & Winter, the court finds that they are sufficiently documented to show that the work was, in fact, done for [Trealoff] with respect to the instant case."

Given the record before this court, we find no merit to the argument that the request for the Hodel Firm's attorney fees was not adequately documented with billing

records detailing the hours spent and the services provided. The trial court could make its own evaluation of the reasonable worth of the work done in light of the nature of the case and of the credibility of counsel's declaration substantiated by the Hodel Firm's billing statements. It is not our job to reweigh the evidence. (*Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1398; *Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1587; see also *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 624-625 [evidence of actual work performed, including pleadings and depositions, was sufficient].)

VIII. DISPOSITION

The jury's verdict on Trealoff's Labor Code claims is reversed as to Liegl only. In all other respects the judgment is affirmed. Trealoff shall recover his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

KING
J.