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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 THREE

VW CREDIT, INC., Plaintiff and Respondent, v. VIKEN KEUYLIAN et al., Defendants and Appellants.	G044632 (Consol. with G045182) (Super. Ct. No. 30-2008-00115059) O P I N I O N

Appeal from judgments of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed as modified.

Ropers, Majeski, Kohn & Bentley, Richard L. Charnley, Terry Anastassiou; Law Offices of William J. Kopeny and William J. Kopeny for Defendants and Appellants.

Danner & Martyn, Daniel E. Martyn, Jr., Michael D. Schulman, Diana S. Ponce-Gomez;Law Offices of Michael D. Schulman and Michael D. Schulman for Plaintiff and Respondent.

Plaintiff VW Credit, Inc. (VCI) sued certain individuals, business entities, and trusts (collectively, defendants) for failure to repay loan obligations taken on by two Lamborghini dealerships. After defendants ignored discovery requests and refused to comply with ensuing court orders, the trial court granted terminating sanctions (Code Civ. Proc., § 2023.030, subd. (d)) against defendants. Thereafter, two default judgments were entered awarding VCI sizable compensatory (approximately $14 million) and punitive (approximately $44 million) damages against some of the defendants, including individuals Viken Keuylian, Nora Keuylian, Asdghig Keuylian, and Sossi Keuylian (appellants).[1] Appellants take issue with the punitive damage awards. Because we agree with their contentions, we modify the judgment by striking the awards of punitive damages. There was insufficient notice of the amount of punitive damages demanded by VCI. (Code Civ. Proc., §§ 425.115, 580, subd. (a).) Moreover, there was insufficient evidence of appellants' financial condition presented at the default judgment prove-up hearing.

FACTS[2]

VCI filed its operative complaint against defendants on January 30, 2009. The complaint alleged defendants breached several promissory notes, failed to repay loans taken against lines of credit, and breached a guaranty. The complaint also alleged

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[1] A separate judgment was entered against Sossi Keuylian because the case against her was delayed following her bankruptcy filing. Thus, Sossi Keuylian filed a separate appeal from the judgment against her, which we consolidated with the other appellants' appeal.

[2] For purposes of this opinion, we will ignore (to the extent possible) the manifold procedural quirks and technical morasses that plague the factual record (e.g., attorney withdrawal/substitution issues, identities of various non-appellant defendants, various bankruptcy filings). We will focus only on facts and procedural history pertinent to the disposition of the legal issues raised in this appeal.

defendants committed the tort of conversion by selling inventory that served as VCI's collateral without notification or payment to VCI, instead diverting the proceeds of these sales to themselves. In its prayer for relief, VCI requested a total of $19,593,102 in compensatory damages (the total amount allegedly owed on the various notes and lines of credit), plus interest, reasonable attorney fees, and costs of suit. With regard to its cause of action for conversion, VCI requested "exemplary and punitive damages in a sum to be determined at the time of trial or entry of judgment." Defendants answered the operative complaint.

VCI served a plethora of written discovery requests on defendants in January 2009. As responses were not forthcoming from defendants, VCI then filed and served a series of motions to compel in May 2009. There were no responses to the discovery at the time of the hearing and no opposition to the motions filed. The court granted each motion, awarded monetary sanctions against defendants, and ordered defendants to respond without objections within 20 days. Despite this order, defendants failed to respond to VCI's discovery requests.

VCI filed a motion for terminating sanctions on August 24, 2009, with the hearing noticed for October 15, 2009. The attached proof of service indicated appellants had been served with the moving papers by mail on August 21, 2009. Appellants did not file any opposition papers. On October 6, 2009, VCI served by mail a notice of its intent to seek punitive damages in the amount of $51 million. The hearing on the motion for terminating sanctions occurred as scheduled on October 15, 2009. Defendants did not appear at the hearing. The court issued a minute order the same day confirming its tentative ruling to grant terminating and monetary sanctions; the minute order specifically ordered the answer stricken and default entered against all applicable defendants, including appellants. The court signed a more formal order on October 27, 2009, which simply reiterated the relief provided on October 15. In May 2010, defendants unsuccessfully moved to set aside the entry of default.

In its default judgment prove-up papers, VCI showed in detail how millions of dollars were removed from the auto dealerships and transferred into the hands of appellants and entities controlled by appellants, a process VCI described as "an outrageous and unprecedented disappearance of [54] vehicles in a 13 day period of time." VCI also cited the refusal of defendants to participate in the discovery process.

On October 29, 2010, the court entered default judgment against five of the defendants (all of the appellants except Sossi Keuylian) as follows: (1) $14,104,594.40 in compensatory damages; (2) $713,897.40 in prejudgment interest; (3) $143,595.94 in attorney fees; (4) $560 in costs; and (6) $44,455,475.40 in punitive damages. Appellants (except Sossi Keuylian) filed a timely notice of appeal from this judgment on December 28, 2010.

On March 22, 2011, the court entered default judgment against Sossi Keuylian in amounts identical to those listed in the prior judgment. Sossi Keuylian filed a timely notice of appeal on May 2, 2011. This court subsequently granted a stipulated motion to consolidate the two appeals.

DISCUSSION

Appellants do not challenge the court's order granting terminating sanctions. Nor do appellants take issue with the court's denial of appellants' motion to set aside default or most aspects of the default judgments (i.e., compensatory damages, prejudgment interest, attorney fees, and costs). Instead, this appeal is limited to the question of whether the court erred by awarding punitive damages.

Appellants raise both procedural and substantive arguments pertaining to the punitive damages awarded in the default judgments. Procedurally, it is claimed VCI did not provide sufficient notice prior to the entry of default of the amount of punitive damages sought. Substantively, it is posited there was insufficient evidence of

appellants' financial condition presented by VCI at the default judgment prove-up hearing.

Notice of Punitive Damages Prior to Entry of Default

Principles of due process require that defendants be provided with notice of the specific relief sought by a plaintiff prior to entry of default. (See *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1520-1521.) "[A]ctual notice of the damages sought is not sufficient; due process requires 'formal notice.'" (*Stein v. York* (2010) 181 Cal.App.4th 320, 326.) Thus, certain statutory provisions have been enacted "to ensure that a defendant who declines to contest an action does not thereby subject himself to open-ended liability." (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826 (*Greenup*).) Ordinarily, "[i]f the recovery of money or damages is demanded [in a complaint], the amount demanded shall be stated [in the complaint]." (Code Civ. Proc., § 425.10.)

However, a complaint may not "state an amount" of punitive damages sought. (Civ. Code, § 3295, subd. (e); see also Code Civ. Proc., § 425.10, subd. (b).) Instead, a plaintiff may serve a statement notifying defendant of the specific amount plaintiff intends to seek in punitive damages, thereby "preserv[ing] the right to seek punitive damages . . . on a default judgment . . . ." (Code Civ. Proc., § 425.115, subd. (b).) "The plaintiff *shall serve the statement* upon the defendant pursuant to this section *before a default may be taken*, if the motion for default judgment includes a request for punitive damages." (*Id.*, subd. (f), italics added.)[3]

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[3] Similarly, "where an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated [in the complaint]." (Code Civ. Proc., § 425.10, subd. (b).) Code of Civil Procedure section 425.11 sets forth a procedural mechanism whereby a plaintiff may provide notice to a defendant of the damages sought in a personal injury or wrongful death action. Because of similarities in text and purpose, cases assessing whether plaintiffs have provided reasonable notice under Code of Civil Procedure section 425.11 are pertinent to a case like this one, in which Code of Civil Procedure section 425.115 is applicable.

A failure to provide notice prior to default of the amount of punitive damages sought precludes the recovery of punitive damages pursuant to a default judgment. "The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint, in the statement required by [Code of Civil Procedure] Section 425.11, or in the statement provided for by [Code of Civil Procedure] Section 425.115 . . . ." (Code Civ. Proc., § 580; see also Code Civ. Proc., § 585, subds. (a), (b).) "[A] default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction." (*Greenup, supra*, 42 Cal.3d at p. 826; see also *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 286.)[4]

"This rule applies to defaults entered as a terminating sanction for misuse of the discovery process — the situation here — as well as to routine defaults, where a defendant fails to file an answer." (*Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans* (2011) 195 Cal.App.4th 1275, 1286.) "[D]ue process requires notice to defendants, whether they default by inaction or by wilful obstruction, of the potential consequences of a refusal to pursue their defense. Such notice enables a defendant to exercise his right to choose — at any point before trial, even after discovery has begun — between (1) giving up his right to defend in exchange for the certainty that he cannot be held liable for more than a known amount, and (2) exercising his right to defend at the cost of exposing himself to greater liability." (*Greenup, supra*, 42 Cal.3d at p. 829.)

Although a punitive damages statement was served by VCI prior to the entry of default in this action, appellants contend the service of this statement was not

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[4] These notification rules are largely irrelevant to a case that is decided on the merits in an adversarial proceeding. When an ordinary, non-default judgment is entered, "the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue." (Code Civ. Proc., §§ 580, subd. (a), 425.115, subd. (c) ["If the plaintiff seeks punitive damages pursuant to Section 3294 of the Civil Code, and if the defendant appears in the action, the plaintiff shall not be limited to the amount set forth in the statement served on the defendant pursuant to this section"]; see *Greenup, supra*, 42 Cal.3d at pp. 826-827.)

timely because service occurred shortly before the hearing date on which the court granted VCI's motion for terminating sanctions and entered default. Code of Civil Procedure "[s]ections 580, 425.11, and 425.115 do not specify the amount of time before a default is entered that a statement of damages must be served on the defendant." (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 61 (*Matera*).) Pursuant to case authority, notification of damages sought (including a Code of Civil Procedure section 425.115 statement) must be served within "'a reasonable period of time before default may be entered.'" (*Matera*, at p. 61.)

There are two cases directly on point, as they both address the timeliness of service of a damages statement in the context of a motion for terminating sanctions leading to default judgment. In *Matera*, the court held that personal service of a statement of damages on defendants' attorney two days before the court struck the defendants' answer and entered default pursuant to a motion for terminating sanctions was "not a reasonable period of time to apprise the defendants of their substantial potential liability for purposes of due process." (*Matera, supra,* 145 Cal.App.4th at p. 62.) Conversely, in *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1178 (*Electronic Funds*), the court held that service of a "notice of punitive damages concurrently with [a] motion for terminating sanctions" was sufficient to accord defendant due process.[5]

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[5] There are also cases involving the timeliness of damages notices when a defendant does not respond to a complaint. In *California Novelties, Inc. v. Sokoloff* (1992) 6 Cal.App.4th 936 (*California Novelties*) (superseded by an amendment to Code of Civil Proc., § 425.11 on a different point), defendant Sokoloff was timely served "by mail with a statement of damages pursuant to Code of Civil Procedure section 425.11" 17 days before plaintiff filed a request for entry of default. (*California Novelties*, at pp. 939, 945.) In the context of rejecting a bright-line rule that personal service 30 days before default was necessary, the court instead determined "there is no hard and fast rule regarding the precise method or timing of service of the [Code of Civil Procedure] section 425.11 statement of damages. Rather, we are to determine in each case whether minimum standards of due process have been met." (*Id*. at p. 945.) And in *Schwab v.*

In the instant case, on October 6, 2009, VCI served (by mail) a punitive damages statement on appellants and various affiliated entities. This document, which was filed with the court on October 7, 2009, indicated VCI "currently believes that its actual damages will be approximately $17,000,000.00 (Seventeen Million Dollars) and as such, it intends to seek an award of $51,000,000.00 (Fifty-One Million Dollars) in punitive damages when [VCI] seeks a judgment . . . ." The document was served: (1) nine days before the hearing on terminating sanctions (the same date default was entered pursuant to the court's minute order); (2) four days *after* written opposition to the motion for terminating sanctions was due pursuant to Code of Civil Procedure section 1005, subdivision (b); and (3) more than one month after the notice of motion and motion for terminating sanctions and entry of default was filed.

Southern California Gas Co. (2004) 114 Cal.App.4th 1308 (*Schwab*), another case in which the pertinent defendant failed to respond to the complaint in a timely fashion, personal service on defendant of a Code of Civil Procedure section 425.11 statement of damages 15 days before the entry of default was reasonable notice. (*Schwab*, at pp. 1316, 1322-1323 [also rejecting view of older cases that minimum of 30 days notice was required].)

Cases from the standard default judgment context (e.g., *Schwab*, *supra*, 114 Cal.App.4th 1308; *California Novelties*, *supra*, Cal.App.4th 936) are not particularly helpful to our task of analyzing whether sufficient notice of punitive damages has been provided in the terminating sanctions context. It must be recalled that a clerk enters the default of a defendant in ordinary default cases: (1) when no timely response (e.g., an answer, demurrer, or other qualifying document) to the complaint has been filed; and (2) "upon written application of the plaintiff . . . ." (Code Civ. Proc., § 585, subds. (a), (b).) "[I]t is now well established by the case law that where a pleading is belatedly filed, but at a time when a default has not yet been taken, the plaintiff has, in effect, granted the defendant additional time within which to plead and he is not strictly in default." (*Goddard v. Pollack* (1974) 37 Cal.App.3d 137, 141.) Thus, a plaintiff accords due process to the defendant in these cases by (in effect) giving the defendant an extension (more than two weeks in *California Novelties* and *Schwab*) to respond to the complaint after serving a defendant with notice of the maximum potential liability in the case. All a defendant needs to do is file an answer before default is entered to avoid a default judgment in the amount demanded in the damages notice.

Remarkably, by mailing its punitive damages statement to appellants nine days before the terminating sanctions hearing, VCI managed to create a fact pattern perfectly situated in between available guideposts in the case law pertaining to notice of punitive damages in terminating sanctions cases. On one hand, two days of personal service is too little. (*Matera*, *supra*, 145 Cal.App.4th at p. 62.) On the other hand, notice provided concurrently with service of the motion for terminating sanctions is enough (presumably "at least 16 court days before the hearing" pursuant to Code of Civ. Proc. § 1005, subd. (b)). (See *Electronic Funds*, *supra*, 134 Cal.App.4th at p. 1178.) What about nine days (actual, not court) by mail?

"The striking of a defendant's answer as a terminating sanction leads inexorably to the entry of default." (*Matera*, *supra*, 145 Cal.App.4th at p. 62.) Merely appearing at the terminating sanctions hearing or filing a pro forma response to a meritorious motion for terminating sanctions will not forestall the granting of an order striking the answer and entering defendant's default. To meaningfully oppose a terminating sanctions motion, a defendant must file and serve written opposition "at least nine court days . . . before the hearing." (Code Civ. Proc., § 1005, subd. (b).) In addition, to defeat a meritorious motion for terminating sanctions, a defendant may need to take swift remedial action regarding its prior litigation misconduct. By waiting to serve a statement of punitive damages until after a defendant's time to file written opposition to a motion for terminating sanctions has expired, a plaintiff takes away a defendant's last chance to change course and convince the court it will take part in the litigation process in an opposition to the motion for terminating sanctions. (See *Matera*, at p. 62.)

Thus, we hold that in the context of motions for terminating sanctions, a plaintiff must serve its punitive damages notice, at the very latest, concurrently with its properly noticed motion for terminating sanctions. (See Code Civ. Proc., § 1005, subd. (b) [notice of motion and motion "shall be served and filed at least 16 court days before

the hearing"]; see also *Electronic Funds, supra,* 134 Cal.App.4th at p. 1178.) Although more notice was provided in this case than in *Matera, supra,* 145 Cal.App.4th at page 62, there is no principled basis for deeming the notice in this case (nine days by mail) sufficient while the notice in *Matera* (two days personal service) was insufficient.

VCI points out appellants did not appear at the terminating sanctions hearing and did not fully comply with discovery obligations, even when attempting to set aside the entry of default. The implication of this argument is that there should be a "harmless error" analysis afforded to VCI. In other words, the fact that appellants did not bother to show up at the hearing to contest terminating sanctions suggests they would not have filed a written opposition, taken remedial action with regard to discovery misconduct, or appeared at the hearing even if they had been provided with reasonable notice of the actual amount of punitive damages demanded pursuant to Code of Civil Procedure section 425.115. Thus, the default judgment entered by the court would have been identical. There is some logic in this contention, particularly under the circumstances of this case. From the complaint, appellants were aware VCI was seeking nearly $20 million in actual damages plus punitive damages. How much more incentive did appellants need to participate in the action and oppose the motion for terminating sanctions on the merits? Moreover, even if they had opposed the motion, was there anything appellants realistically could have done to avoid terminating sanctions once the case had reached the point it had in August 2009?[6]

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[6] Indeed, it is possible to question the logic and practical efficacy of the entire edifice of the law of punitive damages and default judgments as set forth above. If it is a matter of due process to inform a defendant of the specific amount of punitive damages sought by plaintiff, does it really make sense to preclude a plaintiff from stating this amount in a complaint? According to one respected treatise, "[t]he rule prevents plaintiff from using exaggerated demands for punitive damages as a financial bludgeon or for publicity purposes." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 6:292, p. 6-82.) Are there actual instances in which a plaintiff seeking publicity has been hampered by this rule? Is there a way to prevent the Code of Civil Procedure section 425.115 statement (or the substance thereof) from

But we are unaware of any authority for the application of a "harmless error" analysis in the context of a plaintiff's failure to provide timely notice to a defendant of the amount of damages sought. Our Supreme Court observed in response to a related argument that "no matter how reasonable an assessment of damages may appear in the specific case, we cannot open the door to speculation on this subject without undermining due process — a protection to which every defendant is entitled, even one as obstreperous and as guilty of reprehensible conduct as this defendant." (*Greenup*, *supra*, 42 Cal.3d at p. 829.) We will stick to this clear rule. The entire punitive damages award is void for lack of reasonable notice of the amount demanded. A rule potentially excusing VCI's unreasonable notice of punitive damages based on conjecture about a counterfactual world in which VCI's notice was timely would require this court to make speculative findings about: (1) whether appellants would have done anything differently had they been provided with reasonable notice of the punitive damage demand; and (2) whether appellants' hypothetical conduct would have affected the trial court's exercise of discretion in granting terminating sanctions.

Meaningful Evidence of Financial Condition Required for Punitive Award

We also address the contention that VCI failed to present sufficient evidence of appellants' financial condition at the time of the default prove-up hearing.

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code,

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becoming public if the plaintiff wishes it to become public? It seems implausible that courts are routinely issuing gag orders on plaintiffs' attorneys or others, ordering them to avoid using the amount sought in punitive damages as a financial bludgeon or for publicity purposes.

§ 3294, subd. (a).) "An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct." (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 914 (*Kelly*).) "[W]e review a trial court's determination of punitive damages under the substantial evidence standard." (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 545 (*Walsh*).)

Typically, "an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition" at the time of trial. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109 (*Adams*); *Kelly*, *supra*, 145 Cal.App.4th at p. 915.) Plaintiffs have the burden of proof as to a defendant's financial condition. (*Adams*, at p. 109.) "The absence of this evidence thwarts effective appellate review of a claim that punitive damages are excessive." (*Ibid*.) The *Adams* court declined "to prescribe any rigid standard for measuring a defendant's ability to pay. . . . We cannot conclude on the record before us that any particular measure of ability to pay is superior to all others or that a single standard is appropriate in all cases." (*Id*. at p. 116, fn. 7.) Net worth is often "the critical determinant of financial condition, but there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth." (*Walsh*, *supra*, 158 Cal.App.4th at p. 546.)

A selective, cherry-picked presentation of financial condition evidence will not survive scrutiny under *Adams*. Appellate courts have interpreted *Adams* to require plaintiffs to provide a balanced overview of defendant's financial condition. (See *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 676, 681 [record "silent with respect to . . . liabilities" is insufficient]; *Kelly*, *supra*, 145 Cal.App.4th at pp. 916-917; *Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1151-1153; *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1063-1064.) Courts may not infer sufficient wealth to pay a

punitive award from a narrow set of data points (such as ownership of valuable assets or a substantial annual income).

VCI, while noting some very limited evidence of appellants' assets in the record, does not argue that there was sufficient evidence of appellants' financial condition in the record to sustain the award of punitive damages. Instead, VCI claims it should not have been required to present evidence of appellants financial condition at the prove-up hearing because appellants' blocked discovery throughout the case.

One exception to the *Adams* rule is that a plaintiff's burden may be excused if the defendant violates an order compelling production of financial information at trial. (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 37-38, 41 [failure to comply with court order to produce current financial statement at time of bench trial]; *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608-609 [by ignoring court order to produce financial documents following finding of liability, "defendant improperly deprived plaintiff of the opportunity to meet his burden of proof on the issue"].) Relatedly, a lack of clarity in the financial condition evidence can be forgiven if the evidence supports an inference of financial and testimonial chicanery on the part of the defendant. (*Walsh, supra*, 158 Cal.App.4th at p. 547 [defendants "intentionally concealed their assets, testified falsely regarding many factual issues, and were, at best, evasive and nonresponsive in answering questions as to their financial condition. This conduct gave the court wide latitude to make inferences from the evidence unfavorable to" defendants]; see also *Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, 453-454.)

It is clear appellants' litigation misconduct in 2009 deprived VCI of the ability to develop its case during pretrial discovery. Moreover, appellants violated pre-default discovery orders and failed to fully comply with discovery requests even when they moved to set aside default. VCI points to information and documents it requested in written discovery that could have borne on appellants' financial condition (e.g., interrogatories requesting identification of assets owned by defendants; requests to

inspect defendants' financial statements, tax returns, and bank account documents). Certainly, had appellants supplied this discovery, VCI would have had more evidence of appellants' financial condition. Of course, compliance with these pre-default requests would not necessarily have provided an updated, balanced view of each of appellants' respective assets, liabilities, and current income in 2010.

It should be remembered that, absent a court order, financial condition evidence for purposes of a punitive damages claim is *not* the subject of proper *pretrial* discovery. (Civ. Code, § 3295, subds. (a)(2), (c).) To establish evidence of financial condition at trial, a plaintiff can either "subpoena documents or witnesses to be available at the trial for the purpose of establishing the [defendant's] profits or financial condition" or request a court order requiring defendant to produce evidence of his or her financial condition. (See Civ.Code, § 3295, subd. (c); *StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 243.) "The record does not suggest [VCI] utilized these procedures." (*Kelly, supra*, 145 Cal.App.4th at p. 919.)

We decline to extend the intransigent litigant exception to *Adams* by allowing a plaintiff to bootstrap terminating sanctions based on pretrial discovery misconduct into a punitive damages award without regard to the defendant's ability to pay. The purpose of punitive damages is not to destroy a defendant or express symbolic contempt for the defendant's actions. Instead, a punitive damages award should properly punish and deter a defendant by imposing a proportionate award based on a defendant's ability to pay. Before a court awards $45 million in punitive damages against a defaulted defendant, there should at least be an effort to force the defendant to testify or submit documentation as to financial condition as of the time of the default judgment. Because there was an unexcused lack of financial condition evidence in the record, the punitive damages award cannot stand.

Remedy

The parties disagree with regard to the proper remedy in this situation. Appellants urge the court to simply strike the awards of punitive damages. VCI states in its brief that if the punitive damages awards are reversed, we should remand solely for a retrial on the question of punitive damages. But VCI's proposed remedy would be meaningless in light of our conclusion that untimely notice of the punitive damage amount was provided to appellants. Any punitive damages awarded in a retrial of the issue would be void for lack of due process as described above. The only way VCI could recover any punitive damages would be for this court to reverse the default judgments, the entry of default, and the order granting terminating sanctions. (See *Matera*, *supra*, 145 Cal.App.4th at pp. 62-63.) This course of action would allow VCI to start over with a timely notice of punitive damages. Neither party requested this remedy and the narrow issues raised by appellants do not suggest such a remedy would be appropriate. Moreover, VCI had a fair opportunity to pursue and then (if defendants complied) present financial condition evidence at the default judgment prove-up hearing. (*Kelly*, *supra*, 145 Cal.App.4th at pp. 919-920.) We agree with appellants that the judgments should be modified by striking the punitive damages awards and the remainder of the judgments should be affirmed. (See *Kim v. Westmoore Partners, Inc.*, *supra*, 201 Cal.App.4th at p. 286 [default judgment may be modified to maximum amount warranted].)

DISPOSITION

The default judgments entered against appellants are modified by striking the punitive damages awards. In all other aspects, the judgments are affirmed. Appellants shall recover costs incurred on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.