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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROSARIO JUAREZ Plaintiffs, v. AUTOZONE STORES, INC., Defendants.	Case No: 08-cv-00417-WVG **PLAINTIFF ROSARIO JUAREZ'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT AUTOZONE STORES, INC.'S MOTION FOR A NEW TRIAL** Judge: Hon. William V. Gallo Courtroom: 2A Trial: November 3, 2014

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Plaintiff, ROSARIO JUAREZ, respectfully submits the following memorandum of points and authorities in opposition to Defendant AUTOZONE STORES, INC.'s motion for a new trial:

I. Grounds and Standards For New Trial Motions.

Defendant AutoZone Stores, Inc. ("AutoZone") raises five challenges to the jury's verdict in its motion for new trial. Three of these challenges — attorney misconduct; refusing to allow testimony from Dr. Kalish; and failing to show that AutoZone's numerous acts of misconduct were committed in or ratified by a managing agent – amount to requests to reconsider legal rulings this Court previously made before or during the course of trial. These rulings were either legally correct or well within this Court's discretion in light of the evidence. None of the aforementioned challenges supply any basis to retry this action.

AutoZone's fourth challenge - that the jury's compensatory damages award was excessive - is also without merit because each part of the award is supported by the evidence and within the range of the testimony given. To the extent AutoZone purports to invoke this Court's powers to reweigh the evidence, it has merely disputed the jury's well-considered verdict and failed to demonstrate that the damages award is against the *clear* weight of the evidence.

Moreover, although the court certainly exercises discretion in considering a new trial motion, discretion is carefully limited as follows: "[A] trial court may grant a new trial if, '*the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice*.'" *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001); emphasis added.

A new trial motion is not an occasion to substitute the court's views for those of the jury when the jury's findings are not against the *clear weight* of the evidence. As the Ninth Circuit has held:

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> "The trial court may grant a new trial only if the jury's verdict was against the clear weight of the evidence. *We may conclude that the district court abused its discretion if the jury's verdict is not against the clear weight of the evidence*." *Tortu v. Las Vegas Metropolitan Police Department*, 556 F.3d 1075, 1083 -1084 [reversing district court for second-guessing the jury on two factual grounds and improperly deciding a legal matter on a motion for new trial] (9th Cir. 2009), citing *Union Oil Co. of Cal. V. Terrible Herbst, Inc*., 331 F.3d 735, 742 (9th Cir. 2003); emphasis added.

The Ninth Circuit has expressly cautioned district courts against substituting their "evaluations for those of jurors". *Id.* at 743; *Tortu* at 556 F.3d at 1084. "[A] district court may not grant a new trial simply because it would have arrived at a different verdict." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001).

Finally, AutoZone's challenge to the constitutionality of punitive damages is likewise forfeited because it cannot be advanced on motion for new trial. Under the U.S. Supreme Court's decisions and those of the Ninth Circuit, the maximum permissible constitutional award of punitive damages involves *a question of law* and not a re-examination of facts tried by the jury. Because AutoZone has improperly chosen to advance that argument on a new trial motion and declined to include in its motion for judgment as a matter of law, it has forfeited the challenge. *White v. Ford Motor Co*., 500 F.3d 963, 974 (9th Cir. 2007) ["[D]etermining the constitutional ceiling on a punitive damages award is a question of law, reserved to the court."); *Tortu* at 556 F.3d at 1085 (refusing to consider immunity defense raised on motion for new trial because: "This legal matter cannot be appropriately considered on a motion for new trial, where the issue is whether the jury's verdict is against the clear weight of the evidence.").]

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II. Misconduct

AutoZone asserts that it is entitled to try this case a second time because of alleged misconduct of counsel and Plaintiff, Rosario Juarez ("Juarez"). It cites four alleged instances in a transcript that approaches 2,000 pages. It does not deny that, upon AutoZone's proper objections and requests, this Court admonished the jury. "*There is a strong presumption that the curative instructions given by the district court were followed by the jury and therefore [the appellate court] . . . so presume[s].*" *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1270 (9th Cir. 2000); emphasis added [three episodes of misconduct in 717 pages did not justify new trial]. AutoZone offers nothing that serves to rebut the "strong presumption".

In rejecting AutoZone's mistrial motions, this Court itself assessed the prospect of prejudice and determined that none had occurred. The jury demonstrated rationality and attention to its duties. Nothing, including the damages awards, suggested anything but the jurors' desire to compensate Juarez and punish Autozone for its egregious treatment of her. The jury simply followed the jury instructions it was given, none of which have been challenged by AutoZone.

Under these circumstances, AutoZone cannot carry its burden of showing prejudice and a miscarriage of justice. As the Ninth Circuit has held:

> "To warrant reversal on grounds of attorney misconduct, the flavor of the misconduct 'must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'. . In making this evaluation, we must bear in mind that the trial court "is in a far better position to gauge the prejudicial effect of improper comments than an appellate court which reviews only on the cold record. . . " *Doe ex rel. Rudy-Glanzer, supra*, 232 F.3d at 1270 (9th Cir. 2000); emphasis added.

A new trial is not to be granted as a punitive measure, but only to prevent a miscarriage of justice. *Maricopa County v. Maberry*, 555 F.2d 207, 221 (9th Cir. 1977). AutoZone has not demonstrated the need for retrial here.

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III. Dr. Kalish

AutoZone claims another trial is required because Juarez violated a stipulation to confine her emotional distress claim to, "the normal day-to-day stuff that people would experience as a result of losing a job or the other aspects of discrimination." (New Trial Memo, pp. 6-7.) AutoZone claims it suffered a miscarriage of justice because it needed an expert to offer psychiatric diagnoses to respond to *eight lines* of Ms. Juarez' testimony, *to which AutoZone made no objection*, in which she complained of sleeplessness, stomach aches, and headaches occurring at some indefinite time after she was fired by AutoZone.

Although AutoZone declines to say so, the trial court's ruling excluding Dr. Kalish's testimony is reviewed for abuse of discretion. *Lust v. Merrell Dow Pharms*., 89 F.3d 594, 597 (9th Cir.1996). Initially, as this Court ruled, AutoZone waived any error by failing to timely object to the alleged violation of the stipulation regarding the scope of emotional distress testimony. (Vol. VII, 7:6 – 9:18). The lack of any objection speaks volumes here. AutoZone obviously did not believe the stipulation had been "egregiously violated" (NTM 7:4-6) when Juarez made a brief reference to some physical manifestations of her firing and maltreatment by AutoZone. Nor did it think it had been prejudiced. Even if the stipulation had been violated, any possibility of error would have been cured by a simple objection and admonition to disregard the reference. Under these circumstances, this Court certainly had discretion to impose a waiver.

Moreover, on the merits, this Court's ruling was well within its discretion. (Vol. VII, 3:6 – 11:16). Under the leading case decided in this district, a plaintiff's emotional distress is not "in controversy" so as to allow a mental examination under Rule 35 unless it involves one or more of the following: (1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff's offer of expert testimony to support a claim of emotional

distress and/or (5) plaintiff's concession that his or he mental condition is 'in controversy' within the meaning of Rule 35. *Turner v. Imperial Stores*, 161 F.R.D. 90, 95 (S.D. Cal. 1995).

This case satisfies *none* of the *Turner* factors. There is neither an emotional distress cause of action nor do any of Juarez's allegations cited by AutoZone consist of a specific psychiatric disorder. Juarez never conceded her mental condition was in controversy, nor did she offer any expert testimony. Having sleepless nights, headaches, or an upset stomach is part of the "normal everyday stuff" that someone who has experienced employment termination, retaliation, and maltreatment might suffer. AutoZone's own authority so acknowledges. *Vinson v. Superior Court*, 43 Cal.3d 833, 839-840 ["A simple sexual harassment claim asking compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal would not normally create a controversy regarding plaintiff's mental state . . . To hold otherwise would mean that every person who brings such a suit implicitly asserts he or she is mentally unstable, obviously an untenable position . . ."

The reference to emotional distress in Juarez' testimony was brief and transitory. Had AutoZone been permitted to call a psychiatric expert to rebut just eight lines of Juarez's testimony, she would have suffered prejudice from the lack of an expert of her own. AutoZone has not even attempted to show, let alone succeeded in showing, an abuse of discretion.

IV. Compensatory Damages

The economic damages awards are within the range allowed by the evidence. *Passantino v. Johnson & Johnson Consumer Products, Inc*., 212 F.3d 493, 510-513 (9th Cir. 2000) [back pay and front pay awards upheld in part based on bonuses and other compensation plaintiff might have earned]. Here the evidence showed, through testimony, Juarez's past and future economic losses. (Vol. IV, 138:22 – 140:1; Vol. VI, 19:24 – 20:17). However, the evidence demonstrated that Juarez

had the potential for bonuses of $24,000.00 per year for both past and future earnings that were not calculated into the experts' calculations. (Vol. VI, 136:16-21; Vol. VII, 103:5 – 104:18).

"[C]ompensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, whether or not plaintiffs submit evidence of economic loss of mental or physical symptoms." *Johnson v. Hale*, 13 F.3d 1351, 1352 (9th Cir. 1994); see also *Tortu*, supra, 556 F.3d at p. 1086 (reversing order granting new trial based on alleged excessiveness of $175,000.00 emotional distress award for unreasonable force in arrest).] Contrary to AutoZone's epithets, $250,000.00 is not an excessive award for emotional distress from discrimination and retaliation. (See, e.g., *Anderson v. American Airlines*, 352 Fed. Appx. 182 (9th Cir. 2009) (upholding $1 million in emotional distress and $288,333.00 in economic damages for employment discrimination in violation of the California Fair Employment and Housing Act); *Passantino*, supra, 212 F.3d at p. 513-514 ($1 million in emotional distress damages in discrimination and retaliation claims citing numerous other cases noting subjectivity of such damages upheld in those cases including a $550,000.00 award.)

V. AutoZone's Challenge To the Punitive Damages Award Is Both Forfeited And Lacking in Merit.

AutoZone challenges the jury's award of $185 million in punitive damages on two grounds:

(1) *Any* punitive damages award is against the "clear weight of the evidence" because Juarez "failed to present sufficient evidence to identify any . . . individual [managing agent] in this case by clear and convincing evidence," as allegedly required by California Civil Code section 3294. (NTM 17:22-24).

(2) The jury's award here violates the Due Process Clause of the United States Constitution and must be remitted "to an amount no greater than the constitutional limit under the circumstances of this case." (NTM 25:21-22).

The first ground asks this Court to grant a new trial for the same reason as AutoZone seeks judgment on punitive damages in its motion for judgment as a matter of law – an alleged lack of evidence to show malice, oppression, or fraud by a managing agent. This argument was thoroughly addressed by this Court when it denied AutoZone's prior motion for judgment on the identical ground. (Doc. 283). Juarez incorporates her Opposition to AutoZone's Motion for Judgment As A Matter of Law, filed herewith, and her prior opposition to AutoZone's motion for the same relief. (Doc. 257).

AutoZone's recasting of this argument as a motion for new trial allows the court to reweigh the evidence, but, as AutoZone has explained in Section I above, does not give it license to substitute its judgment for the jury's on any disputed factual issues. Juarez's discussion of the managing agent proof in her opposition papers demonstrates that the evidence she presented was not only legally sufficient, it clearly outweighed any contrary evidence or inferences. The jury's managing agent findings were not, "against the clear weight of the evidence," and AutoZone's new trial motion on this ground should be denied.

The second ground advances *only* a U.S constitutional challenge to the amount of punitive damages awarded by the jury. It claims that what it calls: "The unprecedented $185,000,000 punitive damages verdict rendered by the runaway jury in this case unquestionably violates the due process clause and cannot be allowed to stand." (NTM 19:24-26). It does not ask the court to review the award under state common law state or constitutional standards or suggest that it was contrary to the great weight of the evidence or excessive on any ground other than the alleged federal due process violation. Juarez will respond to AutoZone's argument as presented.

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AutoZone's second ground raises only a question of law. It cannot justify *a new trial under any circumstances* – only a *de novo* judicial review of the damages amount resulting in *a judgment for the maximum award* allowed by due process. As Juarez will show, AutoZone has forfeited this ground by failing to present it in its motion for judgment as matter of law.

Moreover, even if this Court were to consider the merits of this ground, the jury's award, while large, must be measured against the flexible guideposts in *State Farm v. Campbell*, 538 U.S. 408, 416-418 (2003) and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996), and the stated exceptions to those guideposts. The amount chosen by the jury, or a similarly calculated amount, is essential to punish and deter AutoZone's above-scale reprehensible conduct in this case and its persistent refusal to obey established California state law and rules prohibiting discrimination in the workplace and retaliation against employees. AutoZone had adequate notice of the possible repercussions of its misconduct from the substance of California law and its own stubborn determination to defy its precepts -- whatever they might be.

This Court's decision on the present motions will resolve multiple questions of great importance to all Californians:

1. Can a California employer that discriminates against and harasses a pregnant female employee, and then fires her when she complains, avoid the consequences of a jury's assessment of its *repeated violations* of California law?

2. Can such an employer arrogantly declare that it considers itself to be above California law securing equal opportunity in the workplace, *and immune to the effects* of *any and all possible punishments*?

3. And can such an employer, in the face of its misconduct and its declarations, now assert that it somehow lacked sufficient notice that a court might choose an above-scale punishment for its

extraordinarily reprehensible acts?

A. AutoZone Has Forfeited Its Constitutional Challenge By Failing to Raise It Properly As a Ground for Judgment As A Matter of Law in the Maximum Punitive Amount Allowed by Due Process. In the Event This Court Nonetheless Considers the Challenge, It Should Determine the Maximum Constitutional Award and Enter Judgment Accordingly.

AutoZone's challenge to the constitutionality of punitive damages is forfeited because it cannot be advanced on motion for new trial, and AutoZone elected not to move for judgment as a matter of law on this ground. The maximum permissible constitutional award of punitive damages involves *a question of law* and not a re-examination of facts that can be undertaken on a new trial motion. *Cooper Industries Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436-443 (2001); *White v. Ford Motor Co*., 500 F.3d 963, 974 (9th Cir. 2007) ["[D]etermining the constitutional ceiling on a punitive damages award is a question of law, reserved to the court."); *Simon v. San Paulo U.S. Holding Co*., 35 Cal.4th 1159,1188 (2005) ("Once a maximum constitutional award has been determined, . . . a new trial on punitive damages would be futile."); see also *Tortu v. Las Vegas Metropolitan Police Department*, 556 F.3d 1075, 1083 -1085 (9th Cir. 2009) (immunity defense was a "legal matter" that could not be considered on a new trial motion).]

In the event this Court, nonetheless, considers AutoZone's improperly made challenge, it should establish the constitutional maximum award of punitive damages as a matter of law and enter judgment accordingly. Neither party is entitled to a new trial on punitive damages. *Simon*, supra, 35 Cal.4th at 1188.

VI. In Compliance with the Due Process Clause, AutoZone Had Adequate Notice of a Large Punitive Award.

"'[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State

may impose.'" *State Farm*, supra, 538 U.S. at p. 417; citations omitted. Notice to AutoZone here arose from: (1) its malicious and despicable acts of discrimination, harassment, and retaliation against Juarez; (2) its repeated transgressions against California law securing equal employment opportunity; and (3) its blatant refusal, apparently, based on its enormous wealth, to alter its reprehensible conduct in response to multiple compensatory and punitive damages awards against it within traditional legal guidelines.

As AutoZone acknowledges, in establishing the constitutional maximum award of punitive damages that may be imposed to punish and deter its misconduct, this Court must consider the three *Gore* guideposts. *Id.* at p. 1520. Those guideposts, together with other important factors, reveal that only a very large award of punitive damages – above the scale of typical awards – will offer the potential of punishing and deterring AutoZone's misconduct and, thereby, advancing California's vital interest in protecting employees from invidious discrimination and establishing equality in the workplace.

A. Degree of Reprehensibility

The "degree of reprehensibility of the defendant's conduct" is the "most important indicium of the reasonableness of a punitive damages award." *State Farm*, 538 U.S. at p. 419. The reprehensibility of AutoZone's misconduct here is over the top. It substantially satisfies each of the five reprehensibility factors identified in *State Farm* and adds two more of equal or greater importance – the affront to personal liberty resulting from intentional discrimination and retaliation, and AutoZone's abject refusal, as shown by its statements and conduct in this and other cases, to adhere to California employment law.

1. *Physical as opposed to economic harm*.

Employment discrimination and retaliation threaten harms that are emotional and physical, as well as economic. California law is designed to protect employees from all three kinds of harm. While pregnant, Juarez was repeatedly subjected to

harassment by an AutoZone's district manager. The evidence showed that Kent McFall, Juarez's district manager, became more aggressive, mean and critical of her after learning of her pregnancy. (Exh. 35; Vol. II, 110:14 – 112:5; Vol. II, 116:14 – 118:1; Vol. II, 161:19 – 162:19; Vol. II, 163:25 – 164:12; Vol. II, 185:11 – 186:1; Vol. IV, 105:25 – 111:4; Vol. IV, 113:7-12; Vol. IV, 114:13-21; Vol. IV,115:23 – 116:22; Vol. IV, 117:6 – 118:20; Vol. IV, 121:20 – 124:2; Vol. V, 185:16 – 194:1; Vol. V, 205:25 – 207:19; Vol. VII, 69:16 – 70:6; Vol. VII, 73:14 – 77:13; Vol. VII, 108:2-5; Vol. VII, 111:9 – 113:24). He would assign lists consisting of multiple pages of time consuming menial tasks that he made her redo again and again. (Ex. 87; Vol. II, 111:23 – 113:19; Vol. II, 130:2-21; Vol. II, 155:4-16; Vol. II, 121:19 – 128:25; Vol. II, 152:18 – 157:10; Vol. IV, 125:20 – 128:24; Vol. IV, 152:18 – 156:17; Vol. V, 71:9 – 75:20; Vol. V, 191:13 – 194:1). McFall would humiliate Juarez by commenting in front of co-workers and customers that she could not perform the work in her "condition.". (Vol. II, 117:12 – 118:1; Vol. II, 161:19 – 162:19; Vol. IV, 121:20 – 124:2; Vol. V, 205:19 – 207:19). A reasonable person could also find that the evidence showed that McFall initiated the process to have Juarez demoted by placing her on a PIP, despite the evidence showing Juarez was beating her sales targets. (Exh. 24, Exh. 36; Vol. II, 123:1 – 124:2; Vol. IV, 121:3-18; Vol. IV, 169:12 – 174:18; Vol. V, 50:18 – 51:14; Vol. V, 197:2-13; Vol. V, 200:12-20; Vol. V, 208:1 – 209:4; Vol. VII, 48:23 – 52:12; Vol. VII, 151:9-16; Vol. VII, 153:2-14).

A reasonable person could conclude that the evidence showed that Juarez was then subjected to a sham investigation, after which she was demoted based on false information which AutoZoner Relations ratified. (Exh. 24; Exh. 47; Exh. 50; Exh. 51; Vol. II, 120:21 – 123:9; Vol. II, 127:9 – 130:1; Vol. II, 188:17-25; Vol. IV, 131:1 – 134:20; Vol. IV, 144:21-25; Vol. IV, 164:14 – 174:10; Vol. V, 50:18 – 51:14; Vol. VII; 151:9-16; Vol. VII, 153:2 – 154:8). After being demoted, Juarez filed a complaint with the Department of Fair Employment and Housing ("DFEH")

for discrimination based on her sex, which the evidence showed that AutoZoner Relations was aware of. (Exh. 36; Exh. 218; Doc. 283, 7: 11-18; Vol. IV, 179:18 – 181:14; Vol. VII, 67:17 – 86:16; Vol. X, 67:23 – 68:11). In fact, AutoZoner Relations responded to the DFEH in a letter, which a reasonable person could determine that AutoZoner Relations falsely claimed that they "thoroughly investigated" Juarez's complaint. (Exh. 218; Vol. III, 98:22 – 99:3; Vol. III, 102:17-25; Vol. IV, 137:22 – 138:4; Vol. IV, 138:16-21; Vol. V, 202:20-23; Vol. VII, 67:17 – 86:16; Vol. VII, 110:23 – 111:8; Vol. VII, 140:5-10; Vol. VII, 154:13-15; Vol. X, 67:23 – 68:11).

After returning from maternity leave, Juarez performed exceptionally at her position. (Vol. IV, 182:12 – 184:11). Then one month after giving a deposition in her discrimination case, Juarez became the target of a loss prevention investigation. (Vol. I, 91:3 – 92:24; Vol. I, 93:6 – 94:5; Vol. I, 97:4 – 98:7; Vol. I, 107:11-21; Vol. I, 109:16 – 110:7; Vol. I, 124:10-12; Vol. II, 65:2 – 69:10; Vol. II, 70:22 – 71:2; Vol. III, 13:19 – 16:14; Vol. III, 18:4-21; Vol. III, 23:12-15; Vol. III, 24:3 – 29:5; Vol. III, 32:11-15; Vol. IV, 185:10-20; Vol. IV, 188:3 – 196:17; Vol. V, 18:10 – 36:25; Vol. V, 38:12 – 40:6). The evidence then showed that immediately following this investigation into the missing cash, Juarez was placed on suspension and then was terminated shortly after. (Vol. I, 107:14-21; Vol. II, 58:21-22). A reasonable person could conclude based on all of this evidence that this loss prevention investigation was driven by AutoZoner Relations to retaliate against Juarez for the discrimination claim she filed against AutoZone. (Vol. I, 115:21 – 116:8; Vol. I, 116:16-25; Vol. II, 44:5-14; Vol. III, 13:19 – 16:14; Vol. III, 18:4-21; Vol. III, 28:9-11; Vol. III, 29:1-5; Vol. III, 32:17-22; Vol. III, 38:18-21; Vol. III, 89:24 – 90:1; Vol. III, 98:17 – 99:3; Vol. III, 108:14 – 109:11; Vol. III, 127:12 – 131:18; Vol. V, 181:11-18; Vol. VI, 67:14-18, Vol. VI, 112:20-23). In fact, the person who conducted the investigation even believed that Juarez was being targeted and retaliated against, especially given the fact that the loss prevention

investigation was not even closed before Juarez was terminated (Vol. II, 54:17 – 55:7; Vol. II, 58:23 – 59:22; Vol. II, 60:1-9; Vol. II, 60:21-25; Vol. II, 68:10-12). Even more suspicious, is the fact a reasonable person could conclude that no one was even aware of why Juarez was even terminated. (Vol. 1, 122:18-23; Vol. III, 118:24 – 122:22; Vol. III, 126:14 – 129:17; Vol. IV, 52:18 -25; Vol. IV, 59:19-23; Vol. IV, 60:11-14; Vol. VI, 68:17-19; Vol. VII, 148:17 – 149:7).

As AutoZone acknowledges, Juarez suffered the emotional and physical consequences of this harassment and adverse treatment. Her stomach ached and swelled. She experienced severe headaches. She did not eat. And she was tormented by fear that she would not be able to pay her bills or, otherwise, function in her life. (NTM 7:11-20, citing Vol. V, 51:15 – 52:9.) She felt like a bad parent for not being able to provide for her kids. (Exh. 113; Vol. IV, 138:22 – 140:1; Vol. IV, 177:23 – 179:3). She was embarrassed and stressed. (Vol. IV, 176:21 – 177:17). She cried, her whole body shook, and she was completely heartbroken, especially given that she was now unable to provide for her family. (Vol. V, 37:1 – 43:22).

The infliction of emotional and psychological, even without related physical harm, is "exceedingly reprehensible". *Goldsmith v. Bagby Elevator Co*., 513 F.3d 1261, 1283 (11th Cir. 2008) [defendant employer used racial slurs and discriminated and retaliated against employee causing both economic and "emotional and psychological harm"]; *E.E.O.C. v. W&O Inc*., 213 F.3d 600, 95 F.3d 627, 614-615 (11th Cir. 2000) [same]; *Miller v. Equifax Information Services*, LLC, 2014 WL 2123560 (D. Or. 2014) pp. 3-4 [emotional injuries are sufficient to trigger reprehensibility].

2. *Indifference to the health or safety of others*.

AutoZone's treatment of Juarez, especially when she was pregnant, evinced complete and utter indifference to and disregard of her physical and mental heath and safety. It amounted to vicious abuse. This conduct is described above. *See Miller*, supra, pp. 4-5 [victim of Fair Credit Reporting Act violations suffered

emotional injury, "on the continuum of harm affecting the 'health and safety of others'].

3. *Financial vulnerability*.

As an employee using her wages to support a household, including two young child, Juarez as a single mother, was certainly financially as well as emotionally vulnerable. Juarez was constantly worried about providing for her children. (Vol. IV, 177:23 – 179:3; Vol. V, 40:7 – 44:9). In order to support her family after she was terminated, Juarez had to sell burritos on the street. (Vol. V, 42:11 – 43:12). When a plaintiff is of "limited means" and is "subject to the recklessness of a large corporate bureaucracy," this sub-factor is satisfied. *Arizona v. ASARCO, LLC*, 733 F.3d 882, 887 (9th Cir. 2013); *Miller*, supra, pp. 5-6. Indeed, this factor is enhanced because AutoZone intentionally abused a pregnant woman who was psychologically and physically, as well as emotionally, susceptible to injury. *Bullock v. Philip Morris USA, Inc*., 198 Cal.App.4th 543, 561-562 ["physical or physiological vulnerability of the target of defendant's conduct is an appropriate factor to consider . . . particularly if defendant exploited that vulnerability."].

4. *Repeated actions*.

AutoZone's actions were "repeated" and not "isolated" on two levels. As to Juarez, AutoZone harassed and bullied her, repeatedly subjecting her to hardships not endured by other employees, and then fired her when she dared to complain. This conduct is described above. *United States v. State of Arizona*, 733 F.3d 882, 887 (9th Cir. En Banc 2014) [repeated harassment and cruel treatment of a single employee satisfied "repeated" factor]. As to female employees in general, AutoZone persistently degraded and discriminated against them – especially in regard to store management employment. AutoZone had been subject to a consent decree that they inherited from Chief Auto Parts, which required them to keep track of the females they hired. (Vol. IV, 29:7 – 30:11) A former district manager, Randy Cosby, testified that there was a celebration from upper level management within

AutoZone when this consent decree ended. (Vol. IV, 30:12 – 32:19). Cosby also testified that in order for him to be promoted by Daniel Merchant he had to fire all the women in his store. (Vol. IV, 25:8 – 29:6). The evidence also showed that the management team would talk about visiting strip clubs and prostitutes in Tijuana in front of their female employees. (Vol. IV, 106:18 – 107:23; Vol. VII, 113:25 – 114:4; Vol. V, 183:5 – 185:5). Additionally, the evidence showed that there were very few women promoted to management within AutoZone. (Vol. IV, 82:12 – 83:15; Vol. IV, 91:7 – 93:17). A reasonable person could conclude based on all of this evidence that the culture within AutoZone was discriminatory toward women.

5. *Intentional malice or mere accident.*

Without question, AutoZone's harassment and discriminatory treatment of Juarez, and its retaliation against her, was calculated and intentional, and certainly not accidental. This conduct is described above. *State Farm*, supra, 538 U.S. at p. 419; *United States*, 733 F.3d at p. 888 ["lengthy periods of harassment and discrimination" are highly reprehensible]. Like the other factors, it merits a large award.

6. *Additional factors*.

State Farm and *Gore* nowhere suggest that the five reprehensibility sub-factors are exclusive. AutoZone's conduct here goes above and beyond the five listed factors in two critical ways that merit an above-scale award of punitive damages. Both of these additional considerations render AutoZone's conduct unusually reprehensible and provide it with additional due-process notice – from its own malicious conduct and attitude – that a large punitive award is or should be forthcoming.

First, the Ninth Circuit has recognized that, "intentional discrimination is a different kind of harm, a serious affront to personal liberty." *Zhang v. American* Gem *Seafoods, Inc.*, 339 F.3d 1020, 1043 (9th Cir. 2003). Indeed, acts of discrimination have merited large punitive awards, even in the face of limited

economic and non-economic damages. *Id.* at pp. 1043-1044. The State of California has an especially vital and legitimate interest in rooting out discrimination in the workplace and punishing acts of harassment and retaliation that deprive California employees of equal opportunities to work, earn a living, and provide for themselves and their families.

It will come as no surprise to California's employers that our state's laws are more protective of employee rights, and afford a greater range and greater amounts of remedies for discrimination in employment than those permitted in other states or by federal law. A job is the embodiment of the California Dream for many of our citizens and communities. Upward mobility through equal opportunity is essential to realize the dream in the face of the ever-increasing costs of living here. A California employer that transgresses the rights and individual liberties of its employees and threatens their economic, emotional, and physical well-being is on notice that it may face punishment that far exceeds any "norms" that might be imposed in other kinds of cases.

As a pregnant female, Juarez was doubly vulnerable and AutoZone's reprehensible abuse of her amounted to a far greater degree than maltreatment of other employees. Moreover, AutoZone not only engaged in unlawful discrimination and harassment, it then swiftly and decisively retaliated against Juarez by firing her when she complained about the abuse. This conduct is described above. The vicious combination of these distinct violations of California law is significantly worse than those violations considered separately. The combination sends a clear message to employees that they must bear illegal abuse without complaint. It gives rise to fear and intimidation. Indeed, the testimony and conduct of AutoZone's current and former employees show they are both fearful and intimidated in the exercise of their rights in the workplace. For example, AutoZone claims their employees do not need a union because they treat them fairly; however, the evidence showed that AutoZone interrogates their employees and many are fearful of retaliation. (Vol.

VI, 76:6 – 82:8). The testimony of witnesses Perez, Cortez, Fausto, Cosby, and Lopez all contained references to the fact that they were afraid of retaliation from AutoZone during their employment. (Vol. II, 38:24 – 40:10; Vol. II, 40:21 – 42:4; Vol. II, 46:20 – 47:22; Vol. II, 129:21 – 130:1; Vol. IV, 33:9-19; Vol. V, 195:2-13; Vol. V, 200:25 – 201:12; Vol. V, 213:25 – 218:11; Vol. VI, 104:11 – 108:15).

Second, AutoZone's conduct here adds a factor and a dimension not yet encountered in case law. AutoZone has taken intentional and repeated abuse of Juarez and other employees to an entirely new level. By words and conduct, it has announced that it is oblivious to any punishment any court or jury might inflict. In this way, it places itself above the law and in defiance of its norms. This is manifested in multiple ways. AutoZone has been sued multiple times in California for its acts of discrimination and retaliation toward employees. Yet it shows no sign, and offers no evidence, that it has altered its conduct to conform to the *law*. *See Kell v. Autozone, Inc.*, 2014 Cal. App. Unpub. LEXIS 993, 2014 WL 509143 (Cal. App. 3d Dist. Feb. 10, 2014); *Robles v. Autozone*, 2008 Cal. App. Unpub. LEXIS 5856, 2008 WL 2811762 (Cal. App. 4th Dist. July 22, 2008).

AutoZone's flagrant and intentional disregard of California's employment law is not simply the product of inference from repeated violations. AutoZone managers cheered and expressed their joy at relief from a court judgment that required them to keep track of women's progress in management. (Vol. IV, 29:16 – 32:19). One manager declared that AutoZone could now fire all its female store managers. (Vol. IV, 29:16 – 32:19). A reasonable person could determine that the only role for women within AutoZone was to be a young, good-looking commercial driver. (Vol. IV, 34:10 – 37:16). This shows a singular disregard for the institution of law itself. AutoZone also expressly declared, in SEC filings and testimony given at the punitive damages phase of this case, that none of the numerous lawsuits brought against it for employment discrimination could have *any* conceivable material impact on the company's finances. (Vol. X, 66:23-67:14). The translation

is obvious: No ordinary amount of punitive damages imposed on AutoZone will alter its financial status or, therefore, its policies, practices, or conduct toward its employees. It can and will act with impunity because it perceives itself to be immune from effective punishment.

AutoZone's professed attitude is understandable given its wealth. An award of $20 million in punitive damages amounts to less than one week's worth of AutoZone's excess cash. (Vol. X, 34:25 – 36:19). The jury's award here of $185 million can still be absorbed in about 8.9 weeks. (Vol. X, 34:25 – 36:19). This higher level of discomfort would be more difficult to hide from shareholders as utterly immaterial and would, unlike lesser amounts, most likely bring the misconduct to the attention of the board of directors and the public. If punitive damages are to fulfill their function of punishment and deterrence, they must at least sting a bit. In the case of large business entity, whether they do so will necessarily depend upon its wealth.

In sum, every conceivable factor recognized by law and disclosed by the evidence shows abnormally high reprehensibility. Few, if any, cases in employment or similar fields even approach this level. Extraordinary reprehensibility merits above-scale punishment.

B. Ratio of Harm or Potential Harm to Punitive Damages.

As the Supreme Court reaffirmed in *State Farm*: "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." 538 U.S. at p. 425. "The 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." *Id.* Even a comparison of all actual *and* potential harm emanating from a defendant's conduct to a punitive award is not subject to any fixed ratio limiting an award of punitive damages. *Id.* at p. 424. The Court has intimated, however, that "[s]ingle-digit multipliers are more likely to comport with due process [] while still achieving the State's goals of deterrence and retribution." *Id.* at p. 425.

The Court regarded as exceptionally generous, and potentially punitive, the jury's award of $1 million in pure emotional distress damages for 18 months of potential concern about a piece of property that was subject to a judgment in excess of insurance policy limits. It concluded that the 145-to-1 ratio of punitive to compensatory damages in that case was constitutionally excessive. *Id.* at p. 426. Any ratio consideration in this case must consider, in addition to an over-the-top AutoZone reprehensibility, the full actual and potential harm emanating from its misconduct and the precedent addressing similar cases.

1. The full actual and potential harm arising from AutoZone's misconduct, including the attorney's fees it is required to pay plaintiff, must be compared with the punitive award.

A vitally important part of the monetary relief payable to prevailing plaintiffs in discrimination cases brought under the California Fair Employment and Housing Act ("FEHA") includes an award of attorney's fees. California Government Code section 12965(b) provides: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party…reasonable attorney's fees and costs, including expert witness fees." A prevailing plaintiff is generally entitled to a full fee award unless special circumstances render such an award unjust. *Leek v. Cooper*, 194 Cal.App.4th 399, 419-420 (2011).

As the Ninth Circuit has recognized, FEHA attorney's fee awards ensure that, regardless of the relatively small monetary value of a case or the intransigence of the opposition, plaintiff's attorneys will be available to bring meritorious suits. According to the court, those suits, "vindicate important public interests whose value transcends the dollar amounts that attach to many civil rights claims." *Beaty v. BET Holdings, Inc*., 222 F.3d 607, 612 (9th Cir. 2000). As a result, it is not unusual for a plaintiff's fee award to exceed significantly the plaintiff's damage recovery in a FEHA discrimination case – on occasion by as much as ten times or more. *Id.* at 613.

Juarez requests that this Court include the fee award made to her as an item of harm or damage in any ratio assessment or calculation. She believes the award may well exceed the jury's verdict and amount to $1 million or more. AutoZone and other defendants are given clear and unequivocal notice by statute and case law that they will be expected to pay a prevailing plaintiff's fees in a FEHA case. The certainty of that award – based on a judicial assessment of hours and marketplace rates – is comparable to or greater than that of any damages award or other monetary recovery.

Case law, both federal and state, generally confirms that attorney's fee awards should be considered as part of the compensatory damages or harm in any ratio calculation. For example, in *Clausen v. Icicle Seafoods, Inc*., 174 Wash.2d 70, 87, 272 P.3d 827 (2011), the Washington Supreme Court held that attorney's fees were part of the ratio in a maritime maintenance and cure action, stating:

> "The compensatory nature of attorney fees does not change because the attorney fees are awarded post trial rather than with the jury's compensatory damages award. Courts in other jurisdictions include attorney fees as part of the compensatory damages award for punitive damages ratio comparison purposes. See, e.g., *Blount v. Stroud*, 395 Ill.App.3d 8, 27, 915 N.E.2d 925, 944 (2009) "[*T]he majority of the courts across the country that have considered this issue have agreed that an award of attorney's fees should be taken into account a part of the compensatory damages in the Gore analysis*.") Emphasis added.

At least two federal circuits have joined the Washington court's analysis. *Action Marine, Inc. v. Cont'l Carbon Inc*., 481 F.3d 1302, 1321 (11th Cir. 2007); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co*., 399 F.3d 224, 235–236 (3rd Cir. 2005). See also *Blount*, 915 N.E.2d at p. 944 [citing numerous cases].

No California court has addressed the issue as applied to FEHA fee awards. One case has suggested that insurance bad faith fee awards are not included in compensatory damages simply because they are made after verdict. But, as the Washington Supreme Court has pointed out, that fact does not mean those awards

are not compensatory and do not serve to give notice to the defendant of the amount for which it may be held liable. *Amerigraphics, Inc*. v. *Mercury Cas. Co*., 182 Cal.App.4th 1538, 1565 (2010). On the other hand, another California appellate court has suggested a fee award might be taken into account in determining the ratio. *Walker v. Farmers Insurance Exchange*, 153 Cal.App.4th 965, 973, fn. 8 (2007). The Washington Court's analysis is the better-reasoned position and in accordance with the majority of decided cases. It would most likely be adopted by the California Supreme Court.

State Farm also provides that, "ratios greater than those we have previously upheld may comport with due process" where [1] "a particularly egregious act has resulted in only a small amount of economic damages" or [2] "the injury is hard to detect" or [3] "the monetary value of noneconomic harm might have been difficult to determine." 538 U.S. at 425. This case also qualifies for an above-scale ratio under these criteria. "Small" is a relative term. "Small" as compared to what? The economic damages here included $220,729.00 in back pay and $228,960.00 in front pay for a total award of $449,689.00. (Vol. IX, 23:12-17). This award was fully compensatory and based only on economic loss actually suffered by Juarez. Indeed, AutoZone assails it, although incorrectly, based on compensatory damages law. (NTM 12-14.) Given the destruction of Juarez' career that her retaliatory dismissal entailed, the amount is modest. The further award of $250,000.00 for emotional distress is also modest and compensatory in light the decided cases which have included $1 million plus judgments.

AutoZone's treatment of Juarez also entailed a significant prospect of much greater potential harm to Juarez and other employees, especially pregnant women and women aspiring to store management. AutoZone's audacious harassment of Juarez threatened her health, and the health and life of the unborn child she carried while simultaneously suffering such egregious harassment. Had she suffered a miscarriage, personal injury, or death, the damages award could have been much,

much greater. *See TXO Production Corp. v. Alliances Resource Corp*., 509 U.S. 443, 459-462, favorably cited in *State Farm*, 518 U.S. at pp. 424-425 [ratio of 526:1 or $19,000 to 10 million in punitive damages not unconstitutional in view of potential loss from defendant's unsuccessful "illicit scheme"]; see also *In re USA Commercial Mortgage Co*., 802 F. Supp.2d 1147, 1187 (D. Nev. 2011) [risk of harm to others part of reprehensibility]. Moreover, because of the prospect of speculation about an employee's future, economic damages can be difficult to detect and to prove. Non-economic damages for emotional distress are also difficult to prove with precision. These additional factors favor an above-guidepost award.

a. Case law supports an above-guidepost award.

Although, the maximum punitive award in any case is a question of U.S. Constitutional law, *State Farm* admonishes that the particular sum the court chooses, "must be based upon the facts and circumstances of the defendant's conduct and the harm to plaintiff." 518 U.S. at 425. And as the Ninth Circuit has observed: "[K]nowing that the ratio guidepost must inform our analysis does not tell us what ratio would be appropriate in a given case." *Arizona*, supra, 733 F.3d at 889 [noting with approval that Fifth Circuit had upheld 125,000:1 ratio and approving a ratio of "less than half" of that].

With the understanding that cases are unique and different, a review of state and federal cases reveals an abundance of above-guidepost awards in employment and other contexts. The cases unquestionably reveal that 10:1 is neither a talisman nor an unbreakable legal ceiling. *Swinton v. Potomac Corp*., 270 F.3d 794, 818 (9th Cir. 2001), cited with approval [28:1 ratio and $1 million punitive award upheld in racial harassment case with $5,612 in economic and $30,000 in emotional distress damages]; see also *Bullock v. Phillip Morris USA, Inc*., 198 Cal.App.4th 543, 566 (2011) [16:1 ratio in tobacco case with $850,000 in compensatory damages]; *Hamlin v. Hampton Lumber Mills, Inc*., 349 Or. 526, 532-534, 246 P.3d 1121, 1125-1127 (2011) [nearly 30:1 ratio in light of "extraordinary reprehensibility" in

disability discrimination case based on $6,000 in economic loss and other factors not identified in *State Farm*]; *Madeja v. MPB Corp*., 149 N.H. 371, 387-388, 821 A.2d 1034, 1049-1050 (2003) [35:1 ratio in sexual harassment case in light of all factors].

C. Civil Penalties

Finally, AutoZone claims that the Fair Employment and Housing Commission could have imposed a maximum civil administrative fine of $150,000.00 under Government Code sections 12970(a)(3) & (4), which is 1,200 times smaller than the jury's award here. It asks that this Court "dramatically reduce" the award. (NTM 25:5-12). AutoZone is wrong about the law. Its request for a dramatic reduction in the punitive damages award is accordingly misplaced.

The California Legislature has repealed section 12970, on which AutoZone relies, and abolished the Fair Employment and Housing Commission. A series of sections, from 12967 to 12970, were repealed by Stats.2012, c. 46 (S.B.1038), §§ 47 to 50, operative January 1, 2013. The civil administrative fine imposed by the Commission has expired with its demise; the Commission's investigative duties have been assumed by the Department of Fair Employment and Housing. Gov. Code, § 12960, et seq.

The civil administrative fine relied by AutoZone has been replaced by civil litigation against employers who violated the FEHA – expressly including *unlimited* punitive damages. The DFEH has given notice to all employers in its website (a copy of which is attached) of the consequences befalling them in any litigation:

- "There is no limit on damages."
- ***"Instead of administrative fines, unlimited punitive damages may be awarded."***
- "The prevailing party, including the DFEH, may recover reasonable attorney's fees, expert witness fees and costs." Emphasis added.

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AutoZone's reliance on a *repealed statute* to escape from the jury's verdict – which is the only effective deterrent to its abuse of employees — is further proof of its willful and continuing disregard of California employment law.

In sum, it is for this Court to assess, as a matter of law, the maximum constitutional award AutoZone can be required to pay in this case. That award should be many times the normal guidepost ratios in view of the off-the-charts reprehensibility of AutoZone's conduct and its singular and continuing disregard of California employee rights. In any event, the motion for new trial has no merit on any ground and should be denied.

VII. Conclusion

For the foregoing reasons Plaintiff, ROSARIO JUAREZ, respectfully requests that this Court deny Defendant, AUTOZONE STORES, INC.'s, motion for new trial.

Date: January 15, 2015

By: /S/: *Lawrance A. Bohm*

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