2d Civil No. B222284

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 8

ESTHER GINSBERG, et al.,

Plaintiffs, Respondents and Cross-Appellants,

vs.

HANNA GAMSON,

Defendant, Appellant and Cross-Respondent.

Appeal from Los Angeles Superior Court, No. BC346782
Honorable Ricardo Torres, Department CCW-316

HANNA GAMSON'S COMBINED APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

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INTRODUCTION

It's a classic diversion strategy: Even though every issue in both Gamson's appeal and Ginsberg's cross-appeal turns on pure questions of law, Ginsberg devotes much of her brief to irrelevant personal attacks on Gamson. Ginsberg apparently justified including these attacks on the basis that they are relevant to her arguments that parts of the trial court's injunction (RB/XAOB 70-74) and the jury's punitive damages determination (RB/XAOB 82-87) are supported by substantial evidence. But those arguments have nothing to do with this appeal: Gamson has not challenged either determination—or any other jury or trial court determination—for lack of substantial evidence. That is because, though she profoundly disagrees with Ginsberg's evidence and the jury's and trial court's interpretation of it, Gamson recognizes that basic rules of appellate law insulate them from review.

Ginsberg's strategy does not work. The law is what it is—and it is definitely not what Ginsberg says it is. Correct application of law requires reversal of the judgment, except as to the order striking punitive damages.

Gamson's Appeal. Gamson's appeal is not complicated. Under California law, if lease renewal language is at all uncertain, then the court must reject a tenant's claim of a perpetual lease and construe the lease to confer only a single renewal. Thus, contrary to Ginsberg's contention, Gamson need not show that the Conservator Lease's renewal language unambiguously confers a single renewal. Gamson prevails as a matter of law so long as the Conservator Lease's renewal language is ambiguous—and it is. That's exactly what the trial judge who initially presided over this case found when he denied summary judgment, saying

that the renewal language "show[s], at best, that there is ambiguity as to whether an option or options were granted to the tenant." (2 AA 281.)

Ginsberg's tortured construction of the Conservator Lease is not credible: She would have the Court transform the most basic stationery-store short-term form lease into a perpetual lease. Precedent and policy preclude that result.

If the Court chooses to break with precedent requiring entry of judgment in Gamson's favor, it should reverse for a new trial: Ginsberg cannot demonstrate that the Conservator Lease—viewed as a whole—unambiguously confers perpetual renewals as a matter of law. Accordingly, the trial court erred by entering judgment in Ginsberg's favor without a trial. On remand, the trial court must also reassess the portions of the judgment issuing the permanent injunction and awarding Ginsberg attorney's fees and costs.

Ginsberg's Cross-Appeal. The cross-appeal tacitly recognizes that the trial court properly rejected Ginsberg's theory for recovering punitive damages—that is, the trial court properly ruled that a breach of the implied covenant of quiet enjoyment cannot support punitive damages and that there is no such tort as a landlord's "intentional interference with use of property." Instead, Ginsberg urges an entirely new theory: wrongful eviction. According to Ginsberg, a handful of cases involving residential tenants who vacated their leased premises show that there exists an independent claim for "tortious" breach of quiet enjoyment in the commercial context and that the jury found Gamson liable for that "tort." Ginsberg is wrong on every level: She is *not* a residential tenant, she did *not* vacate the premises, and she was *not* evicted, constructively or

otherwise. Equally important, Ginsberg never alleged a claim for wrongful eviction, and the jury neither was instructed on it nor made any findings that would support such a claim.

But even if Ginsberg had pleaded and proven a viable tort, the Court must nevertheless affirm the order striking punitive damages because it fails to pass constitutional muster.

- Because the damages special verdict form lumps all compensatory damages together, it is impossible to know whether the jury awarded *any* tort damages—a prerequisite for punitive damages.
- Even assuming the jury awarded *some* amount of tort damages, the unitary damages verdict form precludes the Court from conducting the requisite independent review of the proportionality of the punitive and tort damages.
- Even if the entire $49,100 compensatory damages award were attributable to a cognizable tort, the $385,000 punitive damages award would be constitutionally excessive: For multiple reasons, the 8:1 ratio between the punitive and compensatory awards is unsupported and unsupportable.

Accordingly, this Court should affirm the order striking the punitive damages award.

APPELLANT'S REPLY BRIEF

ARGUMENT

I.

GAMSON IS ENTITLED TO JUDGMENT BECAUSE THE CONSERVATOR LEASE DOES NOT CONFER A PERPETUAL RIGHT OF RENEWAL.

A. The Conservator Lease Confers A Single Renewal That Expired In April 2006.

1. Ginsberg is not entitled to a trial on the meaning of the Conservator Lease's ambiguous renewal language because, as a matter of law, an ambiguous renewal clause confers only a single renewal.

Ginsberg grounds her arguments on a misunderstanding of California law governing purportedly perpetual leases.

According to Ginsberg, the Court must affirm the trial court's misinterpretation of the Conservator Lease's renewal language because "Gamson has not provided any analysis (nor could she) as to how the Lease could be read *unambiguously in her favor*." (RB/XAOB 63, italics added; see also RB/XAOB 66.) But Gamson has no such burden. She need only show that the lease is ambiguous, and she has done that. (AOB 24-40.) "[L]eases which may have been intended to be renewable in perpetuity, *if at all uncertain in that regard*, will be construed as importing *but one renewal*." (*Becker v. Submarine Oil Co.* (1921) 55 Cal.App. 698, 700 (*Becker*), italics added; see also AOB 18-19.)

For the same reason, Ginsberg is also wrong in claiming that she has an "absolute right" to present evidence at a retrial. (RB/XAOB 62.) She has no "right" to a retrial, because no amount of extrinsic evidence can inject clarity into the Conservator Lease's *facially* ambiguous renewal language. (See pp. 10-16, *post*; AOB 24-40.) As *Becker* requires, the Court should instead "construe[]" the Conservator Lease "as importing but one renewal" (55 Cal.App. at p. 700) and enter judgment that Ginsberg's lease expired in April 2006, at the end of her one and only renewal, and she has been a holdover tenant ever since (see 4 AA 815, ¶ 3; 4 AA 820, ¶ 20; 4 AA 823, ¶ 1).

2. Contrary to Ginsberg's contention, California—like virtually every other jurisdiction that has considered the question—disfavors perpetual leases.

Ginsberg concedes, as she must, that *Becker*—which is the *only* California decision that has interpreted purportedly perpetual lease language—controls the interpretation of the Conservator Lease's renewal language. (RB/XAOB 43.) She also concedes, as she must, that under *Becker*, California courts will enforce a purportedly perpetual lease only if the renewal language is clear and unmistakable. (RB/XAOB 43, citing *Becker*, *supra*, 55 Cal.App. at p. 700.)

Because *Becker* is the only California authority addressing the interpretation of lease language that is ambiguous but purportedly perpetual, the opening brief presented a thorough survey of relevant authority from other jurisdictions—authority that overwhelmingly mirrors *Becker*. (AOB 20-29 & fn. 14, 19.) Ginsberg ticks through much of this authority

without seriously trying to distinguish any of it. (Compare *ibid.* with RB/XAOB 53-57.) Her only effort to discredit the majority rule is to direct the Court to the two outlier cases that we identified in the opening brief: *Pope v. Lee* (2005) 152 N.H. 296 [879 A.2d 735] (*Pope*), and *Pechenik v. Baltimore & Ohio Railroad Co.* (1974) 157 W.Va. 895 [205 S.E.2d 813] (*Pechenik*). (RB/XAOB 53-54; see AOB 24, fn. 12.) That Ginsberg could find no other cases reflecting the minority view confirms our research: These aren't just minority cases, they are the *only* minority cases. And not even they support Ginsberg's position.

Ginsberg suggests that in *Pope, supra,* 879 A.2d 735, the New Hampshire Supreme Court upheld a perpetual lease with terms analogous to those in the Conservator Lease. (RB/XAOB 54.) That is incorrect. *Pope* specifically explained that it did not address a perpetual lease—instead, *Pope* considered the right to automatic renewals: "On appeal, the parties do not challenge the trial court's ruling that the 1998 lease agreement did not confer upon the defendant the right to perpetual renewals." (879 A.2d at p. 740; see also *Pope v. Lee* (N.H. 2005) 885 A.2d 427, 427-428 [in granting reconsideration in part, court clarified that the only issue addressed was the right to automatic renewals without the need for additional writings, not a perpetual lease].)

Even if *Pope*'s discussion of automatic renewal rights could be analogized to a disputed perpetual lease, Ginsberg still gets *Pope* wrong. A very recent New Hampshire Supreme Court opinion explains the flaws in Ginsberg's analysis of *Pope*. *Winecellar Farm, Inc. v. Hibbard* (July 21, 2011) _ N.H. _ [2011 WL 2976753, at *1, 7] (*Winecellar*), considered a lease stating that the tenant could cultivate and harvest hay on the

landlord's property "in perpetuity." *Winecellar* held that despite the "in perpetuity" language, the lease did not establish a disfavored perpetual leasehold in view of the totality of circumstances. (*Id.* at *7-8.) For example, as is true here, the *Winecellar* tenant's consideration for the property was meager and the tenant made no showing that a "bona fide purchaser" seeking to buy the farm "would be willing to do so in light of the existence of the Haying Agreement." (*Id.* at *8 [tenant rendered services in exchange for use of property but paid no rent or property taxes].) And *Winecellar*'s concerns about restraints on alienation are equally valid here. (*Id.* at *7-8.)

Winecellar distinguished *Pope*: Unlike *Winecellar*, the *Pope* lease "established a lease payment based on the applicable consumer price index, and included clauses governing rental increases, adjustments and taxes." (*Id.* at *8, citing *Pope*, *supra*, at pp. 737-741.) For example, the *Pope* lease expressly provided for an automatic annual rent increase of 3.5%. (*Pope*, *supra*, 879 A.2d at p. 739.) *Pope* concluded that the dependable income stream might be attractive to a prospective purchaser. (*Winecellar*, *supra*, at *8, citing *Pope*, *supra*, at p. 745.) But that's not true in our case. Although the Conservator Lease does have a rent escalation clause tied to the Consumer Price Index, it's capped at a number so low as to render it almost valueless to the landlord—and even that meager rent increase kicks in only once every five years, not annually as in *Pope*. (4 AA 823, ¶ 1.) That means that Ginsberg is much more like the *Winecellar* tenant than the *Pope* tenant: Her grossly under-market rent destroys the property's commercial value. (See 4 RT 463-464; but see 5 RT 787-788 [sustaining objections to evidence regarding fair market rent].)

Ginsberg's reliance on *Pechenik* is flawed, too. (RB/XAOB 53-54.) Ginsberg omits a cornerstone of *Pechenik*'s reasoning: "West Virginia law disfavors perpetual leases, but *doubtful questions will usually be construed in favor of the lessee*." (205 S.E.2d at p. 815, italics added.) California law is explicitly contrary: Unlike West Virginia, our courts "*will*" construe ambiguous—but purportedly perpetual—lease renewal language "as importing *but one renewal*." (*Becker*, *supra*, 55 Cal.App. at p. 700, italics added.)

3. Ginsberg's reliance on California decisions that consider the rule against perpetuities is misplaced.

Also off-base is Ginsberg's discussion of *Becker* and California cases that analyze perpetual leases under the rule against perpetuities. (RB/XAOB 36-38, 43-44.)

First, Gamson never "assert[ed]" that *Becker* does not "apply to this case." (RB/XAOB 43, citing AOB 44-45.) To the contrary, Gamson provided the Court with the factual context underlying the dispute in *Becker* and explained that the rule announced in *Becker* not only governs (or "applies") here, but dictates that Gamson prevail as a matter of law. (AOB 19, 20, 43-46.) Where *Becker* does *not* "apply" is in its factual analysis regarding the particular lease considered there. But that's because of factual differences between *Becker*'s oil-and-gas lease and the commercial lease here—not differences in legal principles.

Second, Ginsberg misunderstands case law interpreting the significance of *Becker*'s oil-and-gas lease context. (RB/XAOB 38 & 43, citing *Fisher v. Parsons* (1963) 213 Cal.App.2d 829, 841 (*Fisher*).) The

cited portion of *Fisher* concerns only the question of whether there is a difference between oil-and-gas leases and other leases *for purposes of applying the rule against perpetuities*, an issue not present here (*Fisher* rejected application of the rule to leases). (213 Cal.App.2d at p. 841.) More to the point, *Fisher* left no doubt about its holding by "emphasiz[ing]" that "we do not deal with an option for perpetual renewal here." (*Ibid.*)

Finally, Ginsberg's reliance on two additional rule-against-perpetuities cases is similarly misplaced: *Shaver v. Clanton* (1994) 26 Cal.App.4th 568 (*Shaver*) and *Epstein v. Zahloute* (1950) 99 Cal.App.2d 738 (*Epstein*). (RB/XAOB 36-38, 43-44.) Throughout these proceedings, Ginsberg has claimed that *Shaver* is controlling authority because that decision supposedly considered and rejected a challenge to a lease's perpetual renewal language. (See, e.g., RB/XAOB 36-38, 43-44; 1 AA 196, 239, 247-250; 2 AA 272-274, 333; 2 RT B-4, B-10–B-11, 5.) That's just not so. As *Shaver* explained, "[a]t issue is whether a lease amendment *which provides for perpetual options to renew* is void because it violates the rule [against perpetuities]." (26 Cal.App.4th at p. 571, italics added.) *Epstein* ruled on the same issue. (99 Cal.App.2d at p. 739.) Neither case interpreted lease language: The perpetual nature of the leases was a given in each. Nonetheless, Ginsberg led the trial court astray by claiming that *Shaver* upheld a perpetual renewal clause *based on an analysis of the lease's language*. (E.g., 2 RT 18-19, 24, 33-34, 37, 40-42.)

4. Taken as a whole, the Conservator Lease evinces an intent to create a short-term commercial lease. Its language is inconsistent with an intent to create a perpetual lease.

a. Ginsberg cannot show that the Conservator Lease is unambiguously perpetual.

Ginsberg argues that the Conservator Lease is unambiguously perpetual. (RB/XAOB 32-43.) Her arguments are not persuasive.

Plain language. The renewal language does not bear the hallmarks of an unambiguous renewal clause. (See RB/XAOB 32-33.) For example, the provision in *Becker*—the only on-point California decision—is markedly different. There, the lease gave the tenant the "right of renewal for a further term of ten years at the end of such term, or at the end of *any subsequent term for which it may be renewed*." (55 Cal.App. at p. 699, italics added.) The Conservator Lease does not refer to a "subsequent" or later rental term. It says only that Ginsberg has the right to renew: "Tenant shall have the option to extend the term of the lease for additional five year periods upon the same terms and conditions contained in the lease." (4 AA 823, ¶ 1.) Although this language might suggest plural renewals, it is not nearly as explicit as *Becker*'s reference to "any subsequent term" and also lacks other indicia of perpetual leases. That is why the trial judge who initially presided over this case (Judge Ferns) found the renewal language ambiguous. (2 AA 281-283.)

Crossed-out lease provisions. Ginsberg suggests that crossing out some of the preprinted lease provisions evinces an intent to create

a perpetual lease. (RB/XAOB 33-35.) Hardly. Crossing out provisions says nothing about the ambiguity in the renewal language—it shows only that the parties signed a lease with terms differing from the stationery-store preprinted lease terms.

Stationery-store form's boilerplate terms. Ginsberg argues that some of the most boilerplate terms of a stationery-store lease form evince an intent to create a perpetual lease. (RB/XAOB 35, 41, 42.) For example, she says without explanation that the use of the defined terms "Landlord" and "Tenant" (4 AA 815) instead of the parties' proper names "expresses the intent that the Parties agreed that Ginsberg and Eden shall have a perpetual renewal right" (RB/XAOB 35).[1] But if this were correct, every form lease would create the disfavored and rare perpetual lease. That cannot be—and is not—right.

Capital improvements. The Conservator Lease states that Ginsberg loaned Gamson $11,950 for capital improvements; Ginsberg testified that the total was around $30,000. (4 AA 823, ¶ 3; 3 RT 238.) Regardless of the amount, the Conservator Lease entitled Ginsberg to deduct from her rent not only the specified $11,950 but also any additional amounts spent on "[o]ther critical repairs." (4 AA 823, ¶ 3; but see 3 RT 239:22-240:9

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[1] Ginsberg's other examples of provisions purportedly evincing an intent to create a perpetual lease are similarly flawed, including her reliance on standard lease provisions about heirs and assigns and subordination. (RB/XAOB 35, 42; 4 AA 819-821, ¶¶ 14, 18, 19.) And, contrary to her contention, a purchase option (like the one included in the Conservator Lease, 4 AA 824, ¶ 6) is common and it does not reflect a "long-term interest in the Leased Premises." (RB/XAOB 41; see *Spaulding v. Yovino-Young* (1947) 30 Cal.2d 138, 141 [purchase option is "commonly found in a lease"].)

[Ginsberg apparently only took the benefit of the initial $11,950].) In any case, the $11,950 loan was nothing more than a rent reduction for eight months. (See 4 AA 823, ¶ 3 [$11,950 loan to be offset by $1,500 monthly rent reductions].) Since Ginsberg was reimbursed for the $11,950 loan through the rent reductions, her capital investment was at most $18,050, not $30,000.

Yet Ginsberg claims that the very short-term $11,950 loan plus the alleged $18,050 capital investment demonstrate that she would not have agreed to a lease conferring a single renewal, especially given that the Rubinfeld Lease with Gamson's father conferred, at most, a base five-year term plus five five-year options. (RB/XAOB 39-40.)[2] The argument doesn't work. For one thing, Ginsberg concedes that she undertook the $11,950 worth of repairs *before* signing the Conservator Lease (3 RT 236:5-13, 238:2-15; 1 AA 46-47, ¶¶ 7-12 [first amended complaint]; RB/XAOB 39)—therefore, her supposed $11,950 loan was not given in consideration for the Conservator Lease, but rather was given while the Rubinfeld Lease was still in effect. For another, even overlooking this faulty factual premise, Ginsberg's conclusion is hardly obvious and it certainly is not compelling evidence of a *perpetual* lease. Most importantly, her argument does nothing to dispel the Conservator Lease's ambiguity precluding a perpetual lease.

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[2] Ginsberg misstates—yet again—Gamson's argument, which is that Ginsberg is entitled to only one renewal *as a matter of law*. Gamson does *not* argue that the Conservator Lease unambiguously confers only a single renewal.

b. Ginsberg has not rebutted Gamson's analysis showing that the Conservator Lease taken as a whole is inconsistent with a perpetual lease.

Gamson demonstrated that the Conservator Lease taken as a whole is inconsistent with a perpetual renewal right. (AOB 24-40.) Ginsberg's responses (RB/XAOB 44-49) are facially unavailing. At most, they are arguments—and not very good ones (for instance, the suggestion that "etc." is somehow not ambiguous, RB/XAOB 45)—why Gamson's reading of the Lease as a whole does not *necessarily* establish that the Conservator Lease's *cannot* be perpetual. But unlike Ginsberg, we acknowledge that the Conservator Lease's renewal language is ambiguous and that the renewal provision must be interpreted in conjunction with all of the lease terms. (See Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"].) While one *might* find some of the clauses we discuss in a perpetual lease, one wouldn't expect to—and collectively it would be almost unthinkable. This means that *viewed as a whole*, the Conservator Lease cannot be construed as perpetual.

One of Ginsberg's arguments, however, is wrong as a matter of law: her argument regarding the payment of documentary transfer taxes. (RB/XAOB 49.) The opening brief explained that unlike true long-term leases, the Conservator Lease does not allocate liability for documentary transfer taxes. (AOB 40.) Ginsberg responds that "[d]ocumentary transfer taxes are considered real property taxes and assessments" and that Gamson is responsible for real property taxes under the Conservator Lease. (RB/XAOB 49.) Not so: A "[documentary] transfer tax [is] a tax on the

exercise of the right or privilege of transferring property and *not a tax on real property*." (*City of Huntington Beach v. Superior Court* (1978) 78 Cal.App.3d 333, 340, italics added.)

Ginsberg's authority is not to the contrary. *Thrifty Corp. v. County of L.A.* (1989) 210 Cal.App.3d 881, 884-886, held that the term "realty sold" as used in the documentary transfer tax statute (Rev. & Tax. Code, § 11911) includes long-term leaseholds. If anything, *Thrifty* illustrates why long-term leases allocate liability for documentary transfer taxes: The creation of such a leasehold triggers significant tax consequences. (It is unclear why Ginsberg cites *E. Gottschalk & Co., Inc. v. County of Merced* (1987) 196 Cal.App.3d 1378, which says nothing about documentary transfer taxes—it doesn't even contain the phrase.)

5. Code of Civil Procedure section 1864 does not trump the more specific rule governing the interpretation of ambiguous renewal language purportedly creating a perpetual lease.

Ginsberg leads off her respondent's brief by resorting to an obscure rule of contract construction: Code of Civil Procedure section 1864 (section 1864), which applies "when different constructions of a provision are otherwise equally proper"—in other words, if other rules of contract construction do not resolve an ambiguity, then the ambiguous term should be interpreted in favor of the party benefitted by the term. (RB/XAOB 31-

32.)[3] By its very language, section 1864 cannot supplant the specific rule that ambiguous renewal language is deemed to confer only a single renewal. That rule means that there are no ambiguities to be resolved: The finding of ambiguity is itself dispositive. And even if the ambiguity did have to be resolved, section 1864 would not come into play unless the established rules of interpretation failed. (Cf. *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1332, fn. 15 ["We conclude that (the) general rule of construction of contracts does not supersede the more specific statutory requirement for disclosure in insurance policies set forth in (Insurance Code) section 381, subdivision (f)"].) But here, they do not fail—they negate any perpetual interpretation.

The case Ginsberg cites, *Mitchell v. Exhibition Foods, Inc.* (1986) 184 Cal.App.3d 1033, illustrates section 1864's limited application. *Mitchell* looked to section 1864—which it termed "one of the less familiar canons of construction"—*only* because the meaning of the ambiguous lease term could not be nailed down by the provision's "express language" or the

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[3] Section 1864 states in full: "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

"general rules" of contract construction. (184 Cal.App.3d at pp. 1041-1043.)[4]

Our case is different: Because *Becker* controls the interpretation of the Conservator Lease's ambiguous renewal language, and because other rules of construction also apply, section 1864 is irrelevant.

B. No Statute Of Limitations Bars Gamson's Cross-Action Seeking Declaratory Relief On The Meaning Of The Conservator Lease's Renewal Language.

1. Gamson's declaratory relief claims are governed by a four-year limitations period because her cross-action arises from a dispute about the meaning of the Conservator Lease's renewal language.

The gravamen of a claim dictates the operative limitations period. (*San Filippo v. Griffiths* (1975) 51 Cal.App.3d 640, 644-645.) The declaratory judgment claims at issue in this appeal add up to an "action upon" the meaning of the Conservator Lease's renewal language. (See generally 1 AA 131-134, ¶¶ 7-23.) The four-year limitations period therefore governs. (See Code Civ. Proc., § 337, subd. (1) ["action(s) upon any contract, obligation or liability founded upon an instrument in writing" must be filed within four years of accrual of claim]; *Maguire v. Hibernia*

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[4] Ginsberg's reliance on *Wu v. Interstate Consolidated Industries* (1991) 226 Cal.App.3d 1511, is misplaced. *Wu* did not hold that a lease's renewal language must always be interpreted in the tenant's favor and it said nothing about the interpretation of ambiguous renewal language. In *Wu* there was no doubt that the lease conferred renewal options. *Wu* simply considered the tenant's indisputable right to renewals in interpreting the lease's rent-escalation clause. (*Id.* at pp. 1514-1515.)

Savings & Loan Soc. (1944) 23 Cal.2d 719, 733-734 (*Maguire*) [same limitations period governs contract action whether party seeks legal or declaratory relief].)[5]

But Ginsberg claims that a three-year limitations period governs because the "'nature' of Gamson's claims are [sic] that in 1996 when Gamson signed the Conservator Lease, Gamson 'did not intend to create options in perpetuity.' (AA 132:22-25.)" (RB/XAOB 64, citing 1 AA 132, ¶ 15(b).) She cites a single phrase from the third amended cross-complaint, which she takes out of context and grammatically alters, to contend that the "nature" of Gamson's cross-action is that Gamson signed the Conservator Lease by mistake and that *she* did not intend to create a perpetual lease. But that's not what the cross-complaint alleges. It says, with the relevant language underlined,

> Cross-Complainant [Gamson] contends that the Conservatorship Lease provides for one only [sic] renewal period (which was exercised in 2001 and expired in 2006), and that <u>the Conservatorship Lease does not provide for, and the parties did not intend to create, options in perpetuity</u>.

(1 AA 132, ¶ 15(b), underlining added.) In context, the phrase has nothing to do with "mistake"—it rather alleges that *the parties did not agree* to a perpetual lease.

Ginsberg's theory of the cross-action might be viable if the third amended cross-complaint alleged that the renewal clause was

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[5] See 1 AA 208:16-20 (Ginsberg pleaded a statute of limitations affirmative defense).

unambiguously perpetual but that Gamson mistakenly agreed to that unambiguous clause. That is not the gravamen of Gamson's operative pleading and Ginsberg's characterization cannot be squared with any reasonable reading of it. In any case, the tussle over the three-year or four-year limitations period is not decisive—the real issue here is when Gamson's causes of action accrued: In April 1996 when the parties signed the Conservator Lease, or in April 2006 when Ginsberg breached the Conservator Lease by holding over.

2. Gamson's declaratory relief causes of action did not accrue when she signed the Conservator Lease in 1996; indeed, Ginsberg's perpetual lease theory did not even surface until *after* she filed this action.

Ginsberg evidently contends that Gamson knew or should have known when executing the Conservator Lease in 1996 that Ginsberg would dispute the meaning of its renewal language ten years later. (See RB/XAOB 67 [arguing that Gamson's declaratory judgment claims concern the "actual words of the Renewal Clause," rather than Ginsberg's breach of the Conservator Lease].) According to Ginsberg, the limitations period therefore began to run in 1996—not 2006, when she breached the Conservator Lease by holding over. (RB/XAOB 64-67.)

But a contract claim accrues upon the breach—not execution—of the contract. Any other rule would be unworkable:

> [It] would require the filing of a declaratory relief action whenever terms of a contract revealed the slightest hint of disagreement. After signing any contract, parties would have

> to conjure up every imaginable hypothetical ground for future disagreement and then decide whether to sue immediately or to risk losing their rights if an actual disagreement erupts more than four years later. There is no reason to encourage, much less require, that sort of premature litigation.

(*Garver v. Brace* (1996) 47 Cal.App.4th 995, 1000-1001 (*Garver*) [declaratory relief claim regarding promissory note's pre-payment penalty accrued when penalty imposed, not upon execution of note]; *Niles v. Louis H. Rapoport & Sons, Inc.* (1942) 53 Cal.App.2d 644, 651 ["The statute of limitations does not begin to run from the time of making a contract, but commences from the time the cause of action accrues. (Citations.) The statute commences as of the date of breach of the obligation"].) That is why a claim for breach of an option agreement accrues only when the option is ultimately exercised—not when the option is agreed to. (See *Newberger v. Rifkind* (1972) 28 Cal.App.3d 1070, 1077 [stock option]; *Dinkelspiel v. Nason* (1911) 17 Cal.App. 591, 600 [claim for broker's commission accrued when purchase option exercised].)

Garver's concerns are particularly apt here. Ginsberg did not urge the theory that the Conservator Lease confers unlimited renewals *until after filing this lawsuit*. Before then, her conduct showed that she believed that the Conservator Lease conferred no more than five renewals. (See *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393 ["A party's conduct occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean"].)

• In April 1997, almost a year after executing the Conservator Lease and long before a dispute over its renewal language arose, Ginsberg proposed revised terms to add a tenant and to "limit[] our lease to four five year options." (1 SAA 955, ¶ 10 [Ginsberg declaration in opposition to Gamson's summary judgment motion, cited at RB/XAOB 62; see 1 RA 140, ¶ 10]; 1 SAA 957; 1 SAA 966, ¶ 1 [exhibits to declaration].) There is no reasonable scenario under which Ginsberg would have preemptively asked Gamson to swap a lease with perpetual renewals for one with only 20 years' worth of renewals—her request would only make sense if she believed that the Conservator Lease already conferred something less than perpetual renewal options. After all, Ginsberg herself argues that she wouldn't have traded a lease with five renewal options for one with a single option. (RB/XAOB 40.)

• In November 2004, Ginsberg again communicated her belief that the Conservator Lease was not perpetual, this time writing to Gamson: "I am officially giving you notice that I am exercising my next option (2nd of 5) to extend my lease for the next 5 years, when the current option expires." (4 AA 854-855.)

• Neither Ginsberg's complaint nor her first amended complaint alleged that the Conservator Lease conferred perpetual options. (1 AA 4-17, ¶¶ 12, 18, 49; 1 AA 46-58, ¶¶ 12, 16, 19, 41.)

Ginsberg never explains how Gamson could have anticipated a contract dispute in 1996 on a theory that Ginsberg herself didn't think up until ten years later. (See *Garver*, *supra*, 47 Cal.App.4th at pp. 1000-1001.)

3. Gamson's declaratory relief claims are timely using any feasible accrual date: April 2006, November 2004, or December 2003.

February 1, 2006—the date that Ginsberg commenced her action—is the operative filing date of Gamson's cross-complaint. (See RB/XAOB 65; *Liberty Mutual Insurance Co. v. Fales* (1973) 8 Cal.3d 712, 715, fn. 4.) Accordingly, Gamson's cross-action was timely under either any possible statute of limitations—three years or four years—if her causes of action accrued after February 1, 2003. As we now demonstrate, they did.

a. Gamson's declaratory relief claims accrued in April 2006, when Gamson first became entitled to evict Ginsberg.

Like any breach of contract claim, the four-year limitations period on Gamson's declaratory judgment claims began to run when those claims accrued. (See Code Civ. Proc., § 312 ["Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued"]; *Maguire, supra,* 23 Cal.2d at p. 733-734.) A declaratory relief claim founded on a contract dispute accrues for limitations purposes when the contract is breached. (*United Pacific-Reliance Insurance Co. v. DiDomenico* (1985) 173 Cal.App.3d 673, 677; *Garver, supra,* 47 Cal.App.4th at pp. 1000-1001.) Additionally, a declaratory judgment action seeking a "determination of any question of construction or validity arising under the instrument or contract" is viable even before a breach. (Code Civ. Proc., § 1060; *Maguire, supra,* 23 Cal.2d at p. 734.)

Under Gamson's interpretation of the Conservator Lease, Ginsberg breached the lease in April 2006, when Ginsberg's single five-year renewal period expired and Ginsberg refused to vacate. At that point, Gamson was entitled to evict her as a holdover tenant. (See Code Civ. Proc., § 1161, subd. 1 [unlawful detainer]; *Ryland v. Appelbaum* (1924) 70 Cal.App. 268, 270.) Thus, Ginsberg's April 2006 breach of the Conservator Lease started the clock on the four-year limitations period, and Gamson's cross-action was timely.

b. At most, events before April 2006 amounted to anticipatory repudiations that did not trigger any statute of limitations—and, in any event, they occurred within the limitations period.

Ginsberg arguably repudiated the Conservator Lease's renewal provision on November 11, 2004—when she purportedly exercised the "2nd of 5" five-year renewal options and said that she would not vacate the premises when the Conservator Lease expired in April 2006. (4 AA 854-855.) November 2004 was therefore the earliest that Gamson could have stated a viable anticipatory breach claim—meaning that November 2004 is the very earliest that those claims could have accrued for limitations purposes. (See *Cavalli v. Macaire* (1958) 159 Cal.App.2d 714, 718; *Fitzgerald v. Provines* (1951) 102 Cal.App.2d 529, 539.)

But just because Gamson *could* have sued Ginsberg for anticipatory breach in November 2004 does not mean that she *had* to sue then. Gamson had the option of either suing immediately or waiting until Ginsberg refused

to vacate when the Conservator Lease expired in April 2006. (See *Romano v. Rockwell Intern., Inc.* (1996) 14 Cal.4th 479, 488-489.)

In any event, even if Ginsberg's November 2004 conduct triggered the limitations period, Gamson's cross-action was timely filed 15 months later on February 1, 2006.

Ginsberg suggests a third alternative accrual date: December 2003, when Gamson first had notice that there might have been something "wrong" with the Conservator Lease. (RB/XAOB 65 & 67, citing 4 RT 458-459.) Even assuming that Gamson was vaguely aware of a problem with the Conservator Lease as of December 2003, her contract claims nonetheless did not accrue at that time.

First, a contract claim accrues for statute of limitations purposes upon breach—before then, plaintiff has sustained no injury and therefore has no cause of action. (*McCaskey v. Cal. State Automobile Assn.* (2010) 189 Cal.App.4th 947, 957-962; *Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, 31-32 (*Cleveland*).) Gamson's declaratory judgment claims therefore did not accrue until April 2006. (See pp. 18-20, *ante*.)

Second, this Court has expressly rejected an interpretation of the discovery rule that would accelerate the running of the limitations period: The "discovery rule may extend the statute of limitations, but it cannot decrease it, and a statute of limitations does not accrue until a cause of action is 'complete with all of its elements,' including injury. [Citation.]" (*Cleveland*, *supra*, 171 Cal.App.4th at p. 32.)

Finally, even if the limitations period did begin to run in December 2003, Gamson's cross-action was still timely filed just 26 months later, on February 1, 2006.

Ginsberg's theories that Gamson's contract claims are governed by a three-year limitations period and that those claims accrued in 1996 are untenable. Gamson's cross-action is not barred by any statute of limitations.

II.

IF THE COURT DOES NOT ORDER JUDGMENT IN GAMSON'S FAVOR, IT SHOULD REMAND FOR A TRIAL LIMITED TO THE INTERPRETATION OF THE RENEWAL LANGUAGE AND RELATED MATTERS.

A. There Is No Basis For Ginsberg's Request For A New Trial On Compensatory Damages.

If the Court remands for reconsideration of the renewal language, then the trial should be limited to that single issue. Ginsberg is not entitled to a new trial on compensatory damages. (See RB/XAOB 68; Code Civ. Proc., § 43 [reviewing court "may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had"].)

Ginsberg does not claim any error in the trial of her compensatory damages claims, nor could she credibly do so. She got the best possible trial on that subject, with no restrictions on evidence about the source or amount of her claimed damages. And because of the trial court's misinterpretation of the Conservator Lease, she could even seek relief on

the basis of Gamson's efforts to get her to sign a new lease. (See, e.g., 3 RT 246-269, 340-342 [Ginsberg testified that lucrative sublease was delayed because Gamson insisted that Ginsberg first agree to a new lease with less advantageous terms, including no renewal options]; 3 RT 319-321 [Ginsberg testified that Gamson refused to remove a "for lease" sign from the building unless Ginsberg signed a new lease]; 3 RT 345-346 [Ginsberg testified that Gamson refused to allow Ginsberg to repair her interior floor unless she signed a new lease]; 4 RT 454-464 [Gamson cross-examined about her efforts to enter into new lease with Ginsberg].) Best of all for Ginsberg, on this issue Gamson was defenseless, because the trial court barred her from explaining why she wanted Ginsberg to sign a new lease—that is, Gamson could not adduce evidence of her good-faith belief that the Conservator Lease would expire in April 2006. (See, e.g., 5 RT 743-745 [sustaining objections to Gamson testimony]; 5 RT 787-788 [sustaining objections to testimony of Gamson's real estate lawyer Saul Jaffe]; see also 5 RT 737 [Gamson's trial lawyer explaining the relevance of such testimony]; 4 RT 454-457 [striking Gamson's cross-examination testimony about Conservator Lease terms].)

In effect, Ginsberg seeks a reversal despite the absence of error—an impermissible result. (See *Mancuso v. Southern Cal. Edison Co.* (1991) 232 Cal.App.3d 88, 106 [remanding for limited retrial on defendant's liability, but not the amount of damages awarded in first trial]; accord, *Soils v. Oilfields Trucking Co.* (1979) 90 Cal.App.3d 349, 355; *Gilmore v. Caswell* (1924) 65 Cal.App. 299, 305-306.)

Ginsberg's improper request for a retrial on compensatory damages, however, does not affect how the Court should rule on Gamson's appeal.

That is, if the Court concludes that the Conservator Lease's renewal language is ambiguous, but chooses not to enter judgment in Gamson's favor, then the Court must remand for a new trial on the meaning of the ambiguous renewal cause. A new trial—entailing the trial court's consideration of extrinsic evidence regarding the parties' intent—would be necessary because the Conservator Lease is facially ambiguous for the reasons detailed in the opening brief.

B. The Trial Court, Not This Court, Should Consider Ginsberg's New And Disputed Extrinsic Evidence Arguments In The First Instance.

The Court should also reject Ginsberg's request that the Court rely on her new, unsupported factual arguments to uphold the trial court's misinterpretation of the Conservator Lease. (See RB/XAOB 52-53, 59-60.)[6]

Ginsberg's unsupported factual representations and speculative theories. Ginsberg asserts that Gamson has 30 years of experience in negotiating leases and that, during those 30 years, (1) she once proposed a lease that did not modify the preprinted form's renewal terms (a December 2003 proposed lease that was not signed by the parties), and (2) she once signed a lease that modified preprinted terms (the 1996 Conservator Lease). (RB/XAOB 52-53; see also RB/XAOB 9.) Ginsberg also represents that "*she* [meaning Gamson] crossed out the preprinted form

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[6] Because the Court denied Ginsberg's motion to take evidence on appeal, we do not address, and the Court should disregard, Ginsberg's arguments that are based on lease documents purportedly between Gamson and third parties. (RB/XAOB 46, 48, 50-52.)

Option to Extend clause and agreed to the Renewal Clause in the [Conservator] Lease's Addendum." (RB/XAOB 52, italics added.)

Relying on these "facts," Ginsberg concludes (1) that Gamson was aware that parties can elect whether to modify preprinted lease renewal clauses, and (2) that Gamson "understands the significance of using different renewal language in different leases." (*Ibid.*) The record does not bear out any of Ginsberg's factual representations or speculative conclusions, and because these issues were never tried, she is entitled to no favorable appellate presumptions. Moreover, even if her "facts" were true (they're not), they still wouldn't add up to the requisite "intent" to create a perpetual lease.

• Gamson admittedly filled in the blanks in the proposed December 2003 preprinted lease with her own hand. (4 RT 459; 2 RA 320-329 [exhibit 60].) But she testified that she could not recall its terms and that "[w]hatever Mr. Sknolick [her lawyer in 2003] put in there is what he put in there." (4 RT 460.) Ginsberg does not cite this testimony—even though it rebuts her theory that Gamson understands the "significance of using different renewal language in different leases." (RB/XAOB 52.)

• Ginsberg tells the Court that *Gamson* "crossed out" the Conservator Lease's preprinted renewal language. (*Ibid.*) But there is no *evidence* that Gamson "crossed out" anything on the Conservator Lease—and Ginsberg cites none. Instead, Ginsberg directs the Court to the *Conservator Lease itself*, which does not indicate how or why or when the renewal language was modified. (*Ibid.*, citing 2 RA 294, 301.) Ginsberg's representation that Gamson "crossed out" the preprinted renewal clause is further undercut by her *own* respondent's brief, which relies on the

allegation in Gamson's first amended cross-complaint that Gamson did not even read the Conservator Lease before signing it. (RB/XAOB 65, citing 1 RA 5:27-6:1, 6:14-6:15.) Moreover, the only relevant record evidence is Gamson's testimony that Ginsberg asked her to sign the Conservator Lease to supersede the Rubinfeld Lease. (5 RT 735:4-9, 735:27-736:2.)

Ginsberg raises these theories for the first time on appeal. Ginsberg does not demonstrate that she raised these arguments in the trial court. (See RB/XAOB 52-53, 59-60.) Therefore, even if Ginsberg had admissible evidence to back up her speculative assertions (she doesn't), it is the trial court—not this Court—that must consider her evidentiary arguments in the first instance. (See *Walsh v. Walsh* (1941) 18 Cal.2d 439, 443, quoting *Barlow v. Frink* (1915) 171 Cal. 165, 173.)

Ginsberg misstates the significance of her November 11, 2004 letter. If extrinsic evidence is relevant to these proceedings, then, contrary to Ginsberg's representations, her November 11, 2004 letter to Gamson is dispositive in Gamson's favor. (See RB/XAOB 59-60; 4 AA 854-855.)

In that letter, Ginsberg wrote: "I am officially giving you notice that I am exercising my next option (2nd of 5) to extend my lease for the next 5 years, when the current option expires." (4 AA 854-855.) This letter was consistent with Ginsberg's April 1997 proposal that Gamson sign a new lease to replace the Conservator Lease—she proposed *a limited number* of renewal options, something she never would have offered if she already had a perpetual lease. (1 SAA 955, ¶ 10; 1 SAA 957; 1 SAA 966, ¶ 1.)

Accordingly, if Ginsberg's November 2004 letter is to play any role in this appeal, it must be to negate her perpetual lease claim. That is

because it is a "cardinal rule of construction that when a contract is ambiguous or uncertain the practical construction placed upon it by the parties before any controversy arises as to its meaning affords one of the most reliable means of determining the intent of the parties." (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 772-773, internal quotation marks omitted.)

Ginsberg argues that this interpretation of the Conservator Lease—her *own* interpretation—is irrelevant because by November 11, 2004, the "controversy" between the parties had already arisen. (RB/XAOB 60-61.) But according to her brief, at that time, the parties' communications primarily (if not exclusively) concerned Ginsberg's rent and request to sublet—not renewal options. (*Ibid.*) And even if the parties had discussed the Conservator Lease's renewal language before November 11, 2004, Ginsberg hadn't yet contended that she was entitled to a perpetual lease—she didn't adopt that argument until sometime after filing her amended complaint in August 2006. (See p. 20, *ante*.) Perhaps most importantly, if Ginsberg were right, and she asserted this interpretation *after* the parties were already locked in a dispute about the meaning of the renewal language, then her interpretation would be entitled to *more*—not less—weight. In the midst of that dispute, Ginsberg would have been highly motivated to interpret the contested language in the light most favorable to her position, but the most favorable interpretation she came up with was that the Conservator Lease conferred a base term plus five five-year options.

Finally, Ginsberg's after-the-fact spin on her November 11, 2004 repudiation of the Conservator Lease lacks evidentiary support and defies common sense. She tells the Court that the "letter, at best, states only

Ginsberg's intent as of November 11, 2004 to exercise her '2nd' option and that she intends as of November 11, 2004 to exercise '5' options." (RB/XAOB 59-60, citing the letter at 2 RA 360-361.) In other words, in November 2004, Ginsberg gratuitously chose to signal that she would forgo her alleged right to a perpetual lease in favor of one with only three five-year renewals remaining (by then, Ginsberg had already exercised two of her purported five options). No reasonable jury would accept such a notion—"'[t]he trier of the facts may not believe impossibilities.'" (*Gaffney v. Downey Savings & Loan Assn.* (1988) 200 Cal.App.3d 1154, 1168.)

III.

THE PERMANENT INJUNCTION FAILS AS A MATTER OF LAW.

Instead of responding to Gamson's challenges to the injunction, Ginsberg mounts a defense to a substantial evidence argument that Gamson hasn't made. (Compare AOB 50-53 with RB/XAOB 69-74.) Most notably, Ginsberg does not defend the impracticablity of judicial supervision over day-to-day maintenance requests for the next 80-plus years, nor does she address the trial court's error in imposing obligations on Gamson beyond those in the Conservator Lease and even beyond those Ginsberg requested. (AOB 52-53.)[7]

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[7] Gamson does not challenge the injunction's terms for providing Ginsberg with keys and access to telephone connections. (Compare AOB 50 with RB/XAOB 72-74.)

A. The Trial Court Abused Its Discretion By Issuing An Injunction That Is Not Practicable Because It Requires 80-Plus Years Of Court Supervision.

The final judgment decrees that for the next 80-plus years, "Gamson is ordered to make repairs to the Building within 48 hours of notice of the need for repairs from Ginsberg; and if repairs are not made by Gamson within 48 hours, then Gamson is to immediately provide access to the Building to Ginsberg for Ginsberg to undertake and complete such repairs" (2 AA 495).

This judgment threatens to condemn generations of judicial officers to being called on to spring into action whenever Ginsberg (or her successor) complains that Gamson (or her successor) hasn't maintained the building up to Ginsberg's exacting standards. That is not the proper role of the courts. Ginsberg apparently agrees: In the respondent's brief, she relies on rhetorical flourishes rather than any attempt to argue that the injunction is practicable. (RB/XAOB 70.)

B. The Trial Court Abused Its Discretion By Issuing An Injunction That Gives Ginsberg More Rights Than She Has Under The Conservator Lease.

Even if the injunction hadn't required 80-plus years of judicial supervision, the trial court nonetheless abused its discretion by awarding Ginsberg more rights than the Conservator Lease gives her and even more rights than Ginsberg herself proposed.[8]

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[8] Gamson raised these arguments in the trial court. (See 2 SAA 1181-1184, 1190-1191; see also 7 RT 1055:10-12.)

The 48-hour repair-or-access injunction. Ginsberg requested an order compelling Gamson—in perpetuity—to provide Ginsberg "access" to areas in the building that Ginsberg unilaterally believes require repairs so that Ginsberg can make the repairs herself. (2 AA 401, ¶ 1; 2 AA 402; 2 AA 406, ¶¶ 4-5; 7 RT 1046:19-24.) During the injunction hearing, Ginsberg seemed to narrow her request to an injunction that would cover only access required to repair the holes in her ceiling and a pipe above her store. (7 RT 1046-1049.) Ginsberg's briefing did not specify a window of time for Gamson to provide such "access." (See generally 2 AA 400-410.) But during the hearing, she proposed a seven-day window, telling the court: "And I am happy to condition it on, you know, seven days' notice or something like that." (7 RT 1049:22-23.) Gamson countered, among other things, that "[w]hat this plaintiff is asking you to do, Your Honor, is to rewrite the Lease." (7 RT 1055:10-12.)

At the end of the hearing, the trial court granted the repair-or-access injunction: "I will give them a chance, as long as, you know, they say that you tell them what is under, what the repairs are, if the water starts to leak and they don't come in there and fix the water with that pipe up there that's exposed that I know what we are talking about, if they don't fix that and it starts to leak, then you can, you know, go in there and fix it." (7 RT 1059-1060.) The order did not account for the Conservator Lease's limitations on Gamson's repair obligations. (See pp. 40-41, *post.*) In addition, although the trial court initially considered giving Gamson a 15-day window to repair any leaks, and although Ginsberg had asked for a seven-day window, it sua sponte chose a 48-hour window and refused to hear argument from Gamson. (7 RT 1049, 1059-1061.)

The trial court improperly rewrote the Conservator Lease.

A contract-based injunction cannot confer rights that exceed those granted by the contract. (See, e.g., *Gordon v. Landau* (1958) 49 Cal.2d 690, 695 [reversing permanent injunction because no basis to enforce non-solicitation clause beyond the one year provided by contract]; *Ellis v. Rademacher* (1899) 125 Cal. 556, 559 [reversing permanent injunction in part because trial court ordered appellant to perform contractual terms regardless of whether respondent also performed: The permanent injunction decree "makes it the duty of the appellant absolutely to perform the contract without any reference to the payment of the consideration by the respondent Ellis by performing the covenants of said contract on his part to be performed"].)

But the 48-hour repair-or-access order does just that. The trial court effectively—and improperly—rewrote the Conservator Lease. Under Code of Civil Procedure section 1858, a trial court's job is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." In the landlord-tenant context, this translates to the "long-established rule that no court has authority to make a contract for the parties, or to write into a lease material terms which, as in the present case, would greatly broaden a lessee's rights." (*Textile v. Coleman* (1954) 122 Cal.App.2d 756, 760.)

As our Supreme Court has explained, "[c]learly, neither the trial court nor this court is empowered to make for the parties a contractual arrangement which they did not see fit to make themselves." (*Apra v. Aureguy* (1961) 55 Cal.2d 827, 830.) Therefore, a trial court cannot order specific performance of terms not contained in the agreement. (*Moss v.*

Minor Properties, Inc. (1968) 262 Cal.App.2d 847, 854.) Similarly, a trial court cannot issue declaratory relief that includes terms not contained in the contract. (*Ellison v. City of San Buenaventura* (1975) 48 Cal.App.3d 952, 960-962.)

The same is true here: The trial court improperly rewrote the Conservator Lease's repair obligations by ordering Gamson to maintain her own building to satisfy Ginsberg's unilateral specifications. (See *Textile v. Coleman*, *supra*, 122 Cal.App.2d at p. 760; compare 2 AA 492-496 [judgment] with 4 AA 816-817, ¶¶ 9(a), 9(b), 11(e) [Conservator Lease].) The trial court's error of law constitutes an abuse of discretion. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 ["Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion"].)

The injunction is overbroad in another respect: It exceeds the terms that Ginsberg requested at the hearing, when she limited her access request to the ceiling holes and leaks and also expressly asked for a seven-day window for such access. (See p. 32, *ante*.)

Accordingly, this Court should reverse the 48-hour repair-or-access injunction as an abuse of discretion.

IV.

IF GAMSON PREVAILS ON THE INTERPRETATION OF THE LEASE'S RENEWAL LANGUAGE, THEN HER SECTION 998 OFFER MUST BE RECONSIDERED.

A. Overview.

Gamson offered to settle before trial under Code of Civil Procedure section 998 (section 998). (2 AA 507-510.) Gamson's section 998 offer provided that (1) Gamson would pay Ginsberg $135,000 and dismiss the cross-action if (2) Ginsberg dismissed her lawsuit and Ginsberg and Eden agreed—as co-tenants—that the Conservator Lease would expire on April 14, 2011. (2 AA 508-509.)[9] Ginsberg and Eden rejected the offer by failing to respond. (2 AA 505, ¶ 2.) If the Court agrees that the Conservator Lease is not perpetual, then Gamson will have achieved the exact result she proposed in her section 998 offer regarding the interpretation of the renewal language. Accordingly, if the section 998 offer was valid, then the trial court will have to reassess whether she can recover costs.

Gamson did not address the validity of her section 998 offer in the opening brief because the only issue on appeal is whether the trial court should reconsider the award of costs in the event of reversal. (AOB 49-50.) Ginsberg does not address this issue in her respondent's brief. She instead argues that Gamson's offer was invalid because it was conditioned on acceptance by both Ginsberg and her husband and co-tenant Eden.

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[9] Ginsberg is the only plaintiff suing Gamson (Eden is a defendant in Gamson's cross-action). Therefore, the financial component of Gamson's offer was necessarily directed to Ginsberg alone. (See 2 AA 508-509.)

(RB/XAOB 67-68.) Gamson properly responds to Ginsberg's new argument here. (See *Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 711, fn. 2; *Fratessa v. Roffy* (1919) 40 Cal.App. 179, 188.)

The Court independently reviews the validity of Gamson's offer. (*Po-Jen Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117, 122.)

B. A Section 998 Offer May Properly Include Multiple Conditions.

Ginsberg argues that the trial court "properly determined that the offer is invalid" and intimates that the court struck Gamson's offer because, as Ginsberg argues on appeal, it was an impermissible joint offer. (RB/XAOB 67-68.) But that was not the basis of the trial court's ruling. Instead, the trial court struck Gamson's section 998 offer on a different—but equally erroneous—ground: The trial court incorrectly concluded that the offer was invalid because "it was also conditional on a number of things and that the condition is that a new lease, et cetera, and that doesn't make it, a 998 offer, when you put in a bunch of conditions. [¶] So therefore the 998 is not valid at all. [¶] So it doesn't even apply in this case." (7 RT 1074:10-16; accord, 7 RT 1078:20-22 ["That's not a valid 998 unless you accept all offers. You can't break the $135,000 out by itself"].)

The trial court was wrong: We have found no authority holding that a section 998 offer may include only a financial payout in exchange for dismissal. To the contrary, a section 998 offer is valid so long as its terms are sufficiently "clear and specific" to allow plaintiffs to "clearly evaluate

the worth of the extended offer." (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 727.) Moreover, a section 998 offer may include nonmonetary terms. (See, e.g., *Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 Cal.App.4th 847, 855.) Ginsberg never argued—either in the trial court or on appeal—that Gamson's offer was fatally uncertain. (See 4 AA 766-773; 7 RT 1074-1081; RB/XAOB 67-68.)

Accordingly, the trial court erred by concluding that Gamson's section 998 offer was invalid on this ground.

C. Gamson Was Not Required To Tender Separate Section 998 Offers To Ginsberg And Eden.

1. Gamson's joint offer was proper because Ginsberg and Eden are co-tenants.

Contrary to Ginsberg's argument (RB/XAOB 67-68), there is no blanket prohibition on offers contingent on multiple parties' acceptance. Joint offers are improper only where they would frustrate the odds of settlement. That can occur when "an offer which provides it must be accepted by all plaintiffs is fundamentally unfair to the plaintiff who believes the offer is reasonable as to her and wants to accept it. Such a conditional offer frustrates the chances of settlement, which is the whole purpose behind section 998." (*Vick v. DaCorsi* (2003) 110 Cal.App.4th 206, 211 (*Vick*).) But courts recognize that "where there is more than one plaintiff, a defendant may still extend a single-joint offer, conditioned on acceptance by all of them, if the separate plaintiffs have a 'unity of interest such that there is a single, indivisible injury.' [Citation.]" (*Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498, 505.) That is the case here.

Separate offers to Ginsberg and Eden would not foster section 998's purpose of encouraging pretrial settlements. To the contrary, the nature of Gamson's declaratory judgment claims precluded settlement with just one of them. As co-lessees, Ginsberg and Eden are tenants in common (*Schmitt v. Felix* (1958) 157 Cal.App.2d 642, 646), and a "cotenant has no authority to bind another cotenant with respect to the latter's interest in common property" (*Lindsay-Field v. Friendly* (1995) 36 Cal.App.4th 1728, 1734). So, both Ginsberg and Eden would have had to agree to the offer's proposed construction of the Conservator Lease's renewal language for the settlement to be enforceable—otherwise one could accept the offer while the other could continue disputing the Conservator Lease's meaning. (2 AA 508-509, ¶¶ 3, 4.) That result would eviscerate any settlement value.

The authority Ginsberg relies on, *Wickware v. Tanner* (1997) 53 Cal.App.4th 570 (*Wickware*), does not compel a different result. The *Wickware* defendant offered a lump-sum settlement payment to multiple plaintiffs prosecuting a personal injury action. (*Id.* at p. 573.) *Wickware* held that a financial settlement offer cannot be contingent on the acceptance by all plaintiffs. (*Id.* at pp. 575-578.) *Wickware*'s prohibition on conditional, lump-sum offers makes some sense when only money is changing hands, but not when interrelated, *non*monetary rights are at stake.

2. Gamson's joint offer was proper because Ginsberg and Eden are married.

Ginsberg and Eden not only are co-tenants, but also are married. This has both practical and legal consequences for Gamson's section 998 offer.

As a practical matter, it is impossible to imagine a scenario under which Eden could accept Gamson's offer in good faith if Ginsberg rejected it. (Cf. *Vick, supra,* 110 Cal.App.4th at pp. 212-213 ["requiring (that) married couples with a common interest in the chose in action be allowed to accept or reject joint offers individually could result in the plaintiffs gaming the system by having one spouse accept the offer and the other reject it"].)

As a legal matter, a joint section 998 offer to a married couple is valid. (*Barnett v. First Nat. Insurance Co. of America* (2010) 184 Cal.App.4th 1454, 1458-1461; *Vick, supra,* 110 Cal.App.4th at pp. 211-213.) As a married couple, Ginsberg and Eden have an "equal, undivided half-interest" in the rights conferred by the Conservator Lease or an award of attorney's fees or costs; therefore, under community property principles, either one "could have accepted [Gamson's] offer on behalf of the community." (*Vick, supra,* at p. 212; see Fam. Code, § 760 ["all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property"].) Therefore, Gamson's joint offer was valid.

CROSS-RESPONDENT'S BRIEF

STATEMENT OF FACTS

Gamson's cross-respondent's brief demonstrates that there is no *legal* basis for a punitive damages award. Accordingly, this statement of facts does not respond to Ginsberg's drumbeat of ad hominem accusations against Gamson. Rather, we focus on the evidence concerning whether, as a legal matter, punitive damages were available.

Part of that analysis does require the Court to consider Ginsberg's evidence about Gamson's underlying conduct. The issue there, however, is not what Ginsberg's evidence shows, but rather what it omits, and that will be our primary focus.

Finally, we address the trial court's erroneous exclusion of relevant evidence offered by Gamson on punitive damages—a subject that comes into play only if this Court accedes to Ginsberg's request that it expand the availability of punitive damages beyond well-established boundaries.

A. The Conservator Lease's Limitations On Gamson's Repair Obligations.

Ginsberg's entire case was about physical damage to her premises and her merchandise arising from leaks and other problems for which she alleged Gamson was responsible.

Like most leases, the Conservator Lease allocates responsibility for these matters between the landlord and tenant, and it strictly limits Gamson's responsibility:

- Gamson is not obligated to repair "damage caused by any negligent or intentional act or omission of Tenant, Tenant's agents, employees, or invitees." (4 AA 816, ¶ 9(a).)
- Gamson is not "liable to Tenant for any damages arising from any act or neglect of any other tenant." (4 AA 817, ¶ 11(e).)
- Gamson's repair obligations are limited to the "foundations, exterior walls, and exterior roof"; the "unexposed electrical, plumbing and sewage systems"; the "window frames, gutters and down spouts on the building" (but not show windows); and the "heating, ventilating and air-conditioning systems." (4 AA 816, ¶ 9(a).)
- Absent a "hazard or emergency situation," Gamson has "thirty (30) days after notice from Tenant to commence to perform [her repair] obligations." (4 AA 816, ¶ 9(a).)
- "Tenant at Tenant's sole cost and expense shall keep in good order, condition and repair the Premises and every part thereof including, without limitation, all Tenant's personal property, fixtures, signs, store fronts, plate glass, show windows, doors, interior walls, interior ceiling, and lighting facilities." (4 AA 816, ¶ 9(b).)
- "Except for Landlord's willful or grossly negligent conduct, Tenant hereby agrees that Landlord shall not be liable for any injury to Tenant's business or loss of income therefrom or for damage to the goods, wares, merchandise, or other property." (4 AA 817, ¶ 11(e).)

These limitations affect some of Ginsberg's claims. For example, Ginsberg complained about a December 2003 episode of water intrusion caused by an upstairs tenant who left his faucet turned on—what the parties called "Jack's flood." (3 RT 269:5-24, 330:13-19, 332:1-18, 343:5-15.) Gamson repaired the interior of Ginsberg's store, so Ginsberg sued only for breach of a claimed oral promise by Gamson's employee to pay for damaged merchandise. (3 RT 233:14-21, 269:11-272:13; 6 RT 933:1-6; 5 RT 750:12-18 [during cross-examination, Gamson agreed with Ginsberg's counsel that "(t)here was no dispute in this case about whether or not you paid the repairs of the patching; correct?" and that the "dispute is whether or not you paid her (sic) merchandise; correct?"]; see also 1 AA 60-61, ¶¶ 56-59 [first amended complaint's claim for breach of oral contract].) Under the Conservator Lease, however, Gamson is not "liable to Tenant for any damages arising from any act or neglect of any other tenant" (4 AA 817, ¶ 11(e)) or, except where Gamson was guilty of willful or grossly negligent conduct, "for damage to the goods, wares, merchandise, or other property" (*ibid.*).

Ginsberg also complained that Gamson did not repaint peeling paint on her interior floor and refused to repair an indentation in the floor. (2 RT 190:15-24, 191:17-20; 3 RT 228:15-231:17, 329:1-330:12, 345:18-347:12, 414:7-416:15, 417:14-17; 6 RT 926:28-927:23; see also 3 RT 433:13-24 [Ginsberg's expert testified that the indentation did not threaten the building's foundation or structural soundness]; 4 RT 532:2-9, 562:16-565:3, 569:9-15 [Gamson's expert witness described the indentation as a "divot"].) Under the Conservator Lease, however, Gamson is not responsible for repairing the interior of the leased property. (4 AA 816, ¶ 9(a), (b).)

B. Ginsberg Presents No Evidence Of Lost Business Attributable To Water Intrusion.

Ginsberg testified that her store had been plagued by episodes of recurrent, destructive water intrusion while she was a tenant in Gamson's building—and specifically during the five and a half years before trial (from December 2003 through the eve of trial in September 2009). (See generally 3 RT 269:11-297:14 [Ginsberg's testimony regarding leaks]; see also RB/XAOB 10-24.) Ginsberg estimated that water had leaked into her store at different locations "at least *a dozen times*" during that period. (3 RT 272:14-273:8, italics added; accord, 3 RT 350:24-28 [Ginsberg employee's testimony].) Ginsberg also testified that during this period her show window leaked "*every time* there's a heavy rain" (3 RT 273:15-274:27, italics added) and that another area of her store (under the Apartment 3 patio) leaked "*every time* it rained" (3 RT 275:18-276:4, italics added). Ginsberg testified that one of her employees spent 30 minutes *every single day* during those *five and a half years* dealing with these leaks and Ginsberg's other complaints. (3 RT 311:17-26; 2 AA 335.)

Despite these allegations, Ginsberg did not seek lost profits and presented no evidence that she was unable to conduct business for any appreciable period:

Continuous operation of business. Ginsberg testified that her store was closed for a "few days" in December 2003 due to "Jack's flood." (3 RT 270:28-271:4.) But other than those "few days," Ginsberg neither alleged nor presented any evidence that the conditions she complained about caused her to close her store or otherwise vacate the premises. Nor did she allege or present evidence that Gamson actually or constructively

evicted her. (See generally 2 RT 187-192 [Ginsberg opening statement]; 3 RT 201-321 [Ginsberg direct examination]; 6 RT 923-940 [Ginsberg closing argument]; 1 AA 44-62 [first amended complaint]; 2 AA 329-330 [Ginsberg trial brief]; 2 AA 335 [Ginsberg damages chart]; see pp. 90-91, *post*.)

No lost profits. Ginsberg did not seek—and presented no evidence about—damages for lost customers, lost profits, or lost good will. (E.g., 6 RT 932-938 [Ginsberg closing argument]; 2 AA 335 [Ginsberg damages chart].)

C. During Trial, The Court Excludes Evidence Of Why Gamson Believed The Conservator Lease Expired In 2006.

During her opening statement, Ginsberg told the jury that Gamson knowingly tried to break the Conservator Lease because it had become disadvantageous: "You will hear that Ms. Gamson no longer liked" the Conservator Lease's terms and "wanted more rent. So starting in 2003, she undertook a campaign to get rid of my client or to have her pay more rent." (2 RT 188:24-27; see generally 2 RT 187-192 [entire Ginsberg opening statement].) Ginsberg framed this theory near the beginning of her direct examination, when she testified: "My contention is that she's doing this damage to force me to give up my lease, to move out or to sign a new lease and pay triple my rent at least. So either I move out or I sign a new lease that gives up my options to renew that she promised me and changes all the conditions that I originally had when—on my first lease." (3 RT 234:5-10.)

Gamson could rebut this theory only by presenting evidence of her good-faith and well-founded understanding that the Conservator Lease was

set to expire in 2006. Her trial lawyer (David Felsenthal) explained this to the court: "He [Ginsberg's lawyer, Mr. Weiss] made a number of points about [Gamson] wanted increased rent but [Gamson] didn't want to pay for any repairs. I mean, he went all up and down this issue about [Gamson] wanted more rent but wouldn't do repairs. I want to give context to that." (5 RT 737:16-19.) The court responded ". . . *we already know about the lease and so forth*. If you want to ask specific questions, ask questions. But don't go around and bring all this stuff up that we've heard already." (5 RT 737:24-27, italics added.)

Similarly, at the outset of Gamson's case in chief, the trial court made clear that it would exclude evidence regarding the terms of the Conservator Lease because it had already held that the lease conferred unlimited renewals with minimal rent increases once every five years. Soon into Gamson's direct examination, the trial court sustained objections to questions about the circumstances surrounding the execution of the Conservator Lease and the differences between the Rubinfeld Lease and the Conservator Lease. (5 RT 743-745.) The court concluded that the testimony implicated "legal" issues on which it had "already ruled." (5 RT 744-745.)

The trial court also sustained objections to testimony from Gamson's real estate lawyer Saul Jaffe about Ginsberg's under-market rent. The court held that this topic also implicated a "question of law" that it had "already ruled on":

> Q: At that point in time [around early 2005, see 5 RT 783-784], was Ms. Ginsberg paying less than market rent?
>
> A: Yes.
>
> Q: Based on your personal experience and knowledge, how much under market rent was she paying at that time?
>
> A: It's grossly under market.
>
> Q: Can you explain what you mean and give—
>
> Mr. Weiss: Objection. Relevance.
>
> The Court: Sustained.
>
> Mr. Felsenthal: Your Honor, his theory of the case is that defendant was trying to increase her rent and refused to do any repairs.
>
> The Court: Counsel, they have a lease for the amount of the rent. They have options to renew. She pays according to her lease. It's a question of law, and I've already ruled on all those.

(5 RT 787-788.)

So, throughout the trial, the jury primarily (if not exclusively) heard Ginsberg's seemingly undisputed side of the story: Gamson *knew* that Ginsberg had a perpetual, binding, under-market lease and therefore intentionally campaigned either to "extort" additional rent from Ginsberg (6 RT 930, 938, 984, 986) or, failing that, to oust Ginsberg so as to charge more rent to a new tenant (e.g., 3 RT 233-235, 256 [Ginsberg examination]; 4 RT 453-455, 460-464 [Gamson examination]; 6 RT 923, 925, 927, 928, 930, 931, 937-939 [Ginsberg closing argument]).

D. The Jury Awards $49,100 In Compensatory Damages, Less Than A Tenth Of What Ginsberg Sought—But Almost Eight Times That Amount in Punitive Damages.

Ginsberg asked for about $545,000 in economic damages (2 AA 335; 2 RT 189-192; 6 RT 932-938, 990-991), including over $41,000 on her trespass-to-chattels count that the jury rejected (2 AA 335, 391; 6 RT 932-934). On the counts for breach of contract and "intentional interference with use of premises," the jury awarded a lump sum of $49,100, or about 9% of what Ginsberg had asked for. (2 AA 389-390, 392-393.) The jury awarded $385,000 in punitive damages, or almost eight times the compensatory damages award. (2 AA 393; see 6 RT 938-939 [Ginsberg asked for $1.2 million in punitive damages].)

On Gamson's motion for partial judgment notwithstanding the verdict, the trial court struck the punitive damages verdict. (3 AA 527-531; 4 AA 791; 7 RT 1067-1074.) The trial court concluded that the basis for the punitive damages verdict was the jury's finding on the count alleging "intentional interference with use of premises," but that this purported tort amounted to a contract claim for the breach of the implied covenant of quiet enjoyment that could not support punitive damages. (7 RT 1067-1074.)

ARGUMENT

I.

GINSBERG DOES NOT SEEK, AND COULD NEVER BE ENTITLED TO, PUNITIVE DAMAGES BASED ON THE JURY'S BREACH OF CONTRACT FINDINGS.

A. A Breach Of Contract, Even If Willful Or Malicious, Cannot Support A Punitive Damages Award.

Civil Code section 3294 allows punitive damages only in an "action for the breach of an obligation *not arising from contract*." (§ 3294, subd. (a), italics added.) "The statutory scheme for allowance of punitive damages requires *both* a tort action *and* a finding of 'oppression, fraud, or malice.' (Civ. Code, § 3294.)" (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 961 (*Myers*), original italics.) Punitive damages are unavailable for breach of contract, even if the breach was "wilful, fraudulent, or malicious"; accordingly, the defendant's motivation for the breach is irrelevant. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514-516 (*Applied Equipment*).)

B. Because It Is An Implied *Contractual* Term, A Breach Of The Covenant Of Quiet Enjoyment Cannot Support A Punitive Damages Award.

Every lease contains an implied covenant of quiet enjoyment. (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 588-591 (*Andrews*); Civ. Code, § 1927 ["An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the

term of the hiring, against all persons lawfully claiming the same"].) Breach of this implied covenant gives rise to a contract—not a tort—claim. (*Nathan v. Locke* (1930) 108 Cal.App. 158, 162 (*Nathan*); see also, e.g., *Butler-Rupp v. Lourdeaux* (2005) 134 Cal.App.4th 1220, 1229-1230 (*Butler-Rupp*) [only contract—not tort—damages are available for breach of quiet enjoyment]; pp. 52-55, *post.*) Ginsberg knows this: Over the life of this case, she filed several sets of proposed jury instructions that would have instructed the jury to award *contract* damages on her quiet enjoyment claim. (1 SAA 1057, 1058; 2 SAA 1145, 1146, 1175, 1176.)

Because a breach of quiet enjoyment is not a tort, punitive damages are not available. (*Cyrus v. Haveson* (1976) 65 Cal.App.3d 306, 309-310, 316.) The trial court therefore properly refused Ginsberg's proposed instruction saying that the jury could award punitive damages if it found Gamson liable for a contractual breach of quiet enjoyment. (2 SAA 1176; 6 RT 910:6-26; see also 2 AA 330 [Ginsberg trial brief].) The court instead instructed the jury to consider punitive damages only if Ginsberg prevailed on her purported tort alleging "intentional interference with use of premises." (2 AA 381; 6 RT 910; see also 6 RT 932 [Ginsberg closing argument]; cf. *Myers*, *supra*, 13 Cal.App.4th at pp. 960-961 [reversing punitive damages special verdict because jury "was neither requested to nor did it make the necessary factual findings for a fraud or other tort cause of action"].)

On appeal, Ginsberg essentially drops her earlier argument that a contractual breach of quiet enjoyment can support punitive damages. (Compare, e.g., 2 SAA 1176 with RB/XAOB 78-98.) Instead, she contends that she alleged and prevailed on a completely different claim supporting

her request for punitive damages: "tortious" breach of quiet enjoyment. (RB/XAOB 76-77.) As we now show, this contention is meritless.

II.

GINSBERG'S MADE-UP CLAIM—"INTENTIONAL INTERFERENCE WITH USE OF PREMISES"—IS NOT A COGNIZABLE TORT AND PROVIDES NO BASIS FOR A PUNITIVE DAMAGES AWARD.

The crux of Ginsberg's cross-appeal is her contention that "Gamson's conduct in deliberately trying to destroy Ginsberg's ability to operate her store through a series of intentionally annoying acts designed to compel the tenant to vacate, was a *tortious breach of the covenant of quiet enjoyment* independent of any contractual obligation." (RB/XAOB 76-77, italics added.) Ginsberg argues that case law about the *wrongful eviction* of *residential tenants* demonstrates that a *commercial tenant* can recover for a "tortious" breach of quiet enjoyment. (RB/XAOB 78-81, 87-98.) She juggles these three tort theories interchangeably: "intentional interference with premises," "tortious breach of quiet enjoyment," and wrongful eviction. Her tort theory fails regardless of terminology.

A. The Trial Court Properly Rejected Ginsberg's Attempt To Recast Her Contractual Claim For Breach Of Quiet Enjoyment As A Tort.

1. A simple breach of contract almost never gives rise to tort liability.

Ginsberg's tort theory improperly conflates contract and tort liability: "A person may not ordinarily recover in tort for the breach of duties that

merely restate contractual obligations." (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 643, superseded in part by statute on other grounds as stated in *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1202.) "If the breach is both contractual and tortious, we must ascertain which duty is the quintessence of the action. If it is unclear, courts generally will consider the action to be in contract rather than in tort." (*Voth v. Wasco Public Utility Dist.* (1976) 56 Cal.App.3d 353, 356-357.)

Disputes alleging breach of implied-by-law contractual terms (which would include the implied covenant of quiet enjoyment) sound in contract, not tort. (See *Fairchild v. Park* (2001) 90 Cal.App.4th 919, 927 [actions alleging breach of covenant of habitability (a term statutorily implied in residential leases) sound in contract, not tort].) And California courts have expressly held that quiet enjoyment claims sound in contract: "As between landlord and tenant, where the lease contains a covenant for quiet enjoyment, the usual remedy for the tenant is an action for a breach of the covenant." (*Nathan, supra*, 108 Cal.App. at p. 162; see also, e.g., *Standard Live Stock Co. v. Pentz* (1928) 204 Cal. 618, 642 [tenant prevailing on a claim for breach of quiet enjoyment may recover only contract damages under Civ. Code, § 3300]; pp. 52-55, *post.*) Furthermore, Ginsberg and Gamson are "parties to a commercial lease; as such, they [are] in no special relationship that would give rise to a duty in tort." (*Ilkhchooyi v. Best* (1995) 37 Cal.App.4th 395, 412.)

2. Ginsberg's purported tort amounts to a garden-variety contract claim alleging breach of quiet enjoyment.

Even though Ginsberg argued that Gamson was liable for an "intentional interference with use of property," she did not propose an instruction on that purported tort. (6 RT 873-875; see generally 6 RT 873-890.) She instead proposed a private nuisance instruction (CACI No. 2021) because it was "frankly, the closest one [she] could find." (6 RT 873:20-874:5.)[10] The trial court refused the instruction. (6 RT 988-990.)

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[10] Ginsberg's proposed nuisance instruction said:

> Esther Ginsberg claims that Hanna Gamson interfered with Esther Ginsberg's use and enjoyment of her land. To establish this claim, Esther Ginsberg must prove all of the following.
>
> One, that Esther Ginsberg leased the property;
>
> Two, that Hanna Gamson by acting or—excuse me—by acting or failing to act created a condition that was an obstruction to the free use of the property so as to interfere with the comfortable enjoyment of life or property;
>
> Three, that this condition interfered with Esther Ginsberg's use of enjoyment of her land;
>
> Four, that Esther Ginsberg did not consent to Hanna Gamson's conduct;
>
> Five, that an ordinary person would be reasonably annoyed or disturbed by Hanna Gamson's conduct;
>
> Six, that Esther Ginsberg was harmed;
>
> Seven, that Hanna Gamson's conduct was a substantial factor in causing Esther Ginsberg's harm;
>
> And, eight, that the seriousness of the harm outweighs the public benefit of Hanna Gamson's conduct.

(6 RT 874-875; see also 1 SAA 1017-1019; 2 SAA 1108-1110.)

Gamson objected throughout the trial court proceedings that there was no cognizable tort for a landlord's "intentional interference with use of [the tenant's] property." (4 RT 497-498; 6 RT 893-897.) Nonetheless, because the trial court overruled her objections (4 RT 497-498; 6 RT 896, 898), Gamson proposed an instruction covering both Ginsberg's contract claim for breach of quiet enjoyment and her purported tort for "intentional interference with use of property" (6 RT 880-888).[11] But neither side ever located any relevant authority that even addressed the existence of Ginsberg's claim for "intentional interference with use of property."

Instead, the instruction on Ginsberg's purported "tort" was patterned on authority construing a *contractual* breach of quiet enjoyment in a *residential* lease, not any tort: *Andrews, supra,* 125 Cal.App.4th at pp. 585, 590. (6 RT 880-888.) *Andrews* does not even suggest tort liability or punitive damages. It just defines the implied covenant of quiet enjoyment, stating that "[m]inor inconveniences and annoyances are not actionable breaches of the implied covenant of quiet enjoyment. To be actionable, the landlord's act or omission must substantially interfere with a tenant's right to use and enjoy the premises for the purposes contemplated by the tenancy." (125 Cal.App.4th at p. 589; see also 2 SAA 1173-1174.) *Andrews* further recognizes that a tenant who refuses to vacate the leased premises "may elect 'to stand upon the lease, remain in possession and *sue for contract damages*.'" (125 Cal.App.4th at p. 590, italics added, quoting

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[11] Gamson proposed this instruction only because the trial court overruled her objections, so she is not estopped from arguing on appeal that the purported tort for "intentional interference with use of property" does not exist. (See *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213.)

Guntert v. City of Stockton (1976) 55 Cal.App.3d 131, 141 (*Guntert*); see pp. 59-60, *post*.)

Ginsberg apparently agreed that the instruction on her intentional interference claim should be patterned after *Andrews*. (6 RT 880-888.) She even argued that the trial court should adopt her proposed special instruction because it—unlike Gamson's—"mimic[ked]" *Andrews*' breach of quiet enjoyment language. (6 RT 883.) Ginsberg ultimately persuaded the trial court to modify Gamson's proposed tort instruction in a way that she believed more closely followed the *Andrews* standard for a breach of quiet enjoyment. (6 RT 883-888; 2 AA 372.)

The as-given special instruction says:

> Implied in every rental agreement is a covenant of quite [sic] enjoyment by which the landlord impliedly promises to allow the tenant possession and "quiet enjoyment" of the premises during the lease term and not to, through act or omission, disturb the tenant's possession and beneficial enjoyment of the premises for the purposes contemplated in the lease.
>
> In order to prevail on her claim for Intentional Interference with Use of Property, plaintiff must prove that acts or omissions of defendant substantially interfered with plaintiff's right to use and enjoy the leased premises. Acts or omissions amounting only to inconvenience and annoyance are not sufficient to meet this standard of proof.

(2 AA 372; see also 6 RT 887-888, 1004.)

This instruction does not define any *tort*—it only sets out the prima facie elements of a *contract* claim arising from a landlord's breach of the

covenant of quiet enjoyment. It is indistinguishable from this black-letter formulation of a contractual quiet enjoyment claim: A "landlord's failure to fulfill an obligation to repair or to replace an essential structure or to provide a necessary service [c]an result in a breach of the covenant if the failure substantially affects the tenant's beneficial enjoyment of the premises." (*Petroleum Collections, Inc. v. Swords* (1975) 48 Cal.App.3d 841, 846; see p. 53, *ante* [quoting *Andrews*'s breach of quiet enjoyment definition].) So, just as Ginsberg wanted, the final instruction "mimic[ked]" *Andrews*' definition of a *contract* claim, not a tort.

B. Ginsberg's Reliance On Cases Addressing The Wrongful Eviction Of *Residential* Tenants Fails To Support Her Contention That There Exists A Tort For The Breach Of Quiet Enjoyment In The *Commercial* Context.

Ginsberg argues for the first time on appeal that cases recognizing a tort for the *wrongful eviction of a residential tenant* support her contention that there exists a tort for the *breach of a commercial tenant's quiet enjoyment*. (See RB/XAOB 80-81, quoting *Barkett v. Brucato* (1953) 122 Cal.App.2d 264, 274-275 (*Barkett*).) Her argument fails.

1. The gravamen of Ginsberg's cross-appeal is her new theory that she was wrongfully evicted.

The elements of a prima facie claim for wrongfully evicting a residential tenant, as explained by *Barkett* and later cases, are: (1) the residential tenant was actually or constructively evicted from the premises by (2) the landlord's "series of intentionally annoying acts" that (3) were "designed to compel the tenant to vacate." (*Barkett*, *supra*,

122 Cal.App.2d at p. 274; *Green v. Superior Court* (1974) 10 Cal.3d 616, 625, fn. 10.) Accordingly, this claim lies *only if the tenant vacates the residence*. (*Green v. Superior Court, supra*, 10 Cal.3d at p. 625, fn. 10.)

Ginsberg's newly-conceived wrongful eviction theory is grounded on a misunderstanding of the tort set out in *Barkett*. (RB/XAOB 80-81, 87-88.) According to Ginsberg, *Barkett* held that to prevail on a wrongful eviction claim, the tenant need show only the elements for nuisance as defined by the Restatement (First) of Torts section 822. (RB/XAOB 80-81, quoting *Barkett, supra*, 122 Cal.App.2d at pp. 274-275.) Not so. *Barkett* considered a "willful wrongful eviction" of a residential tenant who had vacated the premises—not a simple claim for nuisance or breach of quiet enjoyment. (122 Cal.App.2d at pp. 272, 274-275 [distinguishing this tort from a contractual breach of quiet enjoyment].)

Ginsberg similarly misconstrues the two other cases that she says show that a commercial tenant can state a claim for a "tortious" breach of quiet enjoyment: *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004 (*Spinks*) and *Tooke v. Allen* (1948) 85 Cal.App.2d 230 (*Tooke*). (RB/XAOB 88-89.) Once again, both cases involved *residential* tenants. (*Spinks, supra*, 171 Cal.App.4th at pp. 1017-1018, 1055 ["wrongful eviction" of a residential tenant based on landlord's changing tenant's locks mid-lease]; *Tooke, supra*, 85 Cal.App.2d at p. 232 [residential tenant vacated apartment after filing suit].)

Ginsberg cites *no* authority for the proposition that a *commercial* tenant can prevail on a wrongful eviction theory. (See RB/XAOB 80-81, 87-89.) But even assuming that such a claim were cognizable, it would lie only after the tenant *vacated* the leased premises: "In order that there be

a constructive eviction it is *essential* that the tenant should *vacate* the property. There is no constructive eviction if the tenant continues in possession of the premises however much he may be disturbed in the beneficial enjoyment." (*Lori, Limited v. Wolfe* (1948) 85 Cal.App.2d 54, 65, italics added; *id.* at p. 66 [constructive eviction claim failed because the tenants "not only continued in possession but were litigating, seeking to remain in possession"]; accord, *Munoz v. MacMillan* (2011) 195 Cal.App.4th 648, 655 [wrongful eviction lies only if the "tenant is *forcibly removed* from premises without judicial process," italics added].)

2. Because Ginsberg has not shown that she relied on a wrongful eviction theory in the trial court, this Court should not consider it.

Whatever the elements of her wrongful eviction claim are, Ginsberg has not shown that she raised the claim in the trial court. (See generally RB/XAOB 78-98.)

To the contrary, Ginsberg's primary theory on punitive damages throughout the trial court proceedings was simple: Punitive damages are available to a commercial tenant who prevails on a contract claim for breach of quiet enjoyment. (2 AA 330 [Ginsberg trial brief]; 2 SAA 1175, 1176; 6 RT 895-897; accord, 1 SAA 1057, 1058; 2 SAA 1145, 1146.) The trial court rejected this argument (6 RT 910) and Ginsberg has essentially abandoned it on appeal.

In the trial court, Ginsberg also argued that she could recover tort damages for Gamson's alleged "intentional interference with use of premises." (See, e.g., 6 RT 893:22-897:8, 932:8-16.) But she never

proposed any instructions on that purported tort or cited any authority holding that such a tort—assuming one even existed—was applicable to the facts of this case. (See generally 6 RT 854-903 [jury instruction conference]; 2 SAA 1172-1178.) And she certainly did not ground her "intentional interference" theory on case law regarding the wrongful eviction of residential tenants. (See, e.g., 6 RT 873:20-874:5 [relying on CACI private nuisance instruction]; 6 RT 879:19-888:14 ["tort" instruction based on authority regarding contractual breach of quiet enjoyment]; 3 AA 527-529, 596-598, 615-617 [Ginsberg opposition to motion for partial JNOV]; 7 RT 1067-1073 [hearing on motion for partial JNOV]; see also 4 AA 779-781 [Gamson reply in support of motion for partial JNOV]; pp. 52-55, *ante*.)

Because Ginsberg has not demonstrated that she raised her wrongful eviction theory in the trial court, this Court should not consider it. (See, e.g., *Cable Connection, Inc. v. DIRECTV* (2008) 44 Cal.4th 1334, 1350, fn. 12; *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 349 (*Franklin Mint*).) In any case, Ginsberg's theory fails on the merits.

C. Even Assuming That There Exists A Claim For The Wrongful Eviction Of A Commercial Tenant, Ginsberg Failed To Establish It By Proof, Jury Instructions, Or Special Verdict.

1. Ginsberg did not allege or establish that she was evicted.

Essential to a claim of wrongful eviction is that there actually *be* an eviction—the tenant must have vacated the premises. A tenant who remains has only a contract claim for damages for breach of the covenant of quiet enjoyment. That is what happened in *Guntert v. City of Stockton*, *supra*, 55 Cal.App.3d 131, where the tenant—like Ginsberg—was "not suing for a wrongful, constructive eviction but for the lessor's *unjustified and unauthorized interference* with his profitable use of the leased property. The rule requiring ouster or surrender prior to suit for wrongful eviction does not preclude the tenant from his election to stand upon the lease, *remain in possession* and sue for *breach of contract damages*." (*Id.* at p. 141, italics added.) Later authorities relying on *Guntert* confirm that a tenant remaining in the leased premises may recover only contract damages:

> *Guntert* merely clarified that a landlord's interference with a tenant's quiet enjoyment may support an action for damages even if the tenant does not move out of the premises. [Citation.] While a claim for breach of the covenant of quiet enjoyment is similar to a constructive eviction claim, the critical difference is that *the latter claim may not be brought until the tenant has vacated the property*. [Citation.]

(*Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141, 1152-1153, italics added; accord, *Andrews, supra*, 125 Cal.App.4th at p. 590; *Marchese v. Standard Realty and Development Co.* (1977) 74 Cal.App.3d 142, 148.)

Ginsberg did not vacate the premises and she presented no evidence of actual or constructive eviction. (See generally 3 RT 201-321 [entire Ginsberg direct examination]; 2 AA 335 [Ginsberg damages chart].) Accordingly, her only potential remedy is contract damages.

2. The jury was not instructed on wrongful eviction.

The jury's verdict must be judged solely by the law given in the instructions: "[S]ince [Ginsberg] assert[s] no claim of error in the jury instructions, the rules are properly located in the instructions given the jury." (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1534; see also *People v. Williams* (2001) 25 Cal.4th 441, 463 ["We reaffirm, therefore, the basic rule that jurors are required to determine the facts and render a verdict in accordance with the court's instructions on the law"].)

Ginsberg never proposed an instruction on the wrongful eviction theory that she urges on appeal, and the jury received no such instruction. (2 AA 372; 2 SAA 1172-1178; 6 RT 854-903 [jury instruction conference].) She instead proposed an instruction on private nuisance (CACI No. 2021), which was supposed to cover her purported "intentional interference with property" tort. (6 RT 873-875; see pp. 52-53 & fn. 10, *ante*.) The trial court refused that instruction (6 RT 988-990), which did not set out the prima facie elements for the wrongful eviction theory that she now pursues in any case (see p. 52, fn. 10, *ante*).

The as-given "intentional interference with use of premises" instruction tracks a run-of-the-mill contractual quiet enjoyment claim—not a claim for wrongful eviction. (2 AA 372; see pp. 53-57, *ante*.) Specifically, the jury was *not* instructed that it could hold Gamson liable for "tortious breach of quiet enjoyment" (or "intentional interference with property" or "wrongful eviction") only if it found that: (1) Ginsberg was actually or constructively evicted by (2) Gamson's "series of intentionally annoying acts" that (3) were "designed to compel [her] to vacate." (See pp. 55-56, *ante*.)

Ginsberg's cross-appeal therefore fails: She cannot prevail by asserting a theory about which the jury was not instructed. (See *Blake v. Arp* (1919) 180 Cal. 144, 148 [refusing to consider new defense theory because "(t)his point was not presented by instructions to the jury, and it is not involved in any requested instruction, and the point was therefore waived"]; *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 464, fn. 5 [rejecting theory because it "was not presented to the jury by instructions at trial"].)

3. The jury's special verdict made no findings that would support a claim for wrongful eviction.

Perhaps the Court could overlook Ginsberg's failure to allege and put on evidence regarding a wrongful eviction theory and the absence of instructions on the claim if the jury's factual findings nevertheless supported such a claim. But they don't.

A special verdict does not benefit from a general verdict's presumption of correctness. A reviewing court does not imply findings in favor of the prevailing party; rather, the verdict's correctness is determined

as a matter of law. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285.) In addition, "[u]nlike a general verdict (which merely *implies* findings on all issues in favor of the plaintiff or defendant), a special verdict presents to the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that 'nothing shall remain to the court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.)" (*Myers*, *supra*, 13 Cal.App.4th at pp. 959-960, original italics; internal quotation marks and citations omitted.)

Judged by these standards, the special verdict form here does not support any kind of tort claim, wrongful eviction or otherwise.

The relevant special verdict form is entitled "Intentional Interference with Use of Premises." It reads:

> We answer the questions submitted to us as follows:
>
> 1. Did Esther Ginsberg prove that acts or omissions of Hanna Gamson substantially interfered with Esther Ginsberg's rights to use and enjoy the leased premises for the purposes contemplated in the lease?
>
> X Yes _ No
>
> If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.
>
> 2. Do you find by clear and convincing evidence that Hanna Gamson engaged in conduct with malice, oppression or fraud?
>
> X Yes _ No

(2 AA 392.)

Like the jury instruction, the special verdict finding that Gamson "substantially interfered with Esther Ginsberg's rights to use and enjoy the leased premises for the purposes contemplated in the lease" addresses only the elements for a contractual breach of quiet enjoyment, and not those for wrongful eviction. (See pp. 53-57, 60-61, *ante*.) Absent those wrongful eviction findings, however, Gamson cannot be liable under a wrongful eviction theory as a matter of law: A "special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue. [Citations.]" (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325, 326 [special verdict on "informed consent" was defective because it "did not require the jury to make a finding on battery"]; *Fuller-Austin Insulation Co. v. Highlands Insurance Co.* (2006) 135 Cal.App.4th 958, 1005-1006 [special verdict on "inequitable misconduct" was defective because it did not require jury to make a finding on "reasonableness"]; *Myers, supra,* 13 Cal.App.4th at pp. 960-961 [punitive damages award was defective because special verdict form did not require jury to make findings on an underlying tort].)

Accordingly, Ginsberg's purported tort claim grounded on a "wrongful eviction" theory (or "tortious" breach of quiet enjoyment or "intentional interference with use of premises" or any other label Ginsberg might suggest) fails because the jury was not instructed, and made no findings, on that claim.

D. The Trial Court Properly Relied On *Erlich* and *Butler-Rupp* To Conclude That Ginsberg Could Not Recover Tort Damages On Her Breach Of Contract Claim.

In striking the punitive damages verdict, the trial court relied on *Erlich v. Menezes* (1999) 21 Cal.4th 543 (*Erlich*) and *Butler-Rupp*, *supra*, 134 Cal.App.4th 1220. (6 RT 1067-1073.) These cases acknowledge the unremarkable proposition that tort damages generally cannot be tacked onto a contract claim. (*Erlich*, *supra*, 21 Cal.4th at pp. 551-554; *Butler-Rupp*, *supra*, 134 Cal.App.4th at pp. 1227-1228.) Ginsberg contends that *Erlich* and *Butler-Rupp* do not preclude tort liability because those rulings hinged on the "negligent" nature of the tortious conduct, whereas the jury here supposedly found Gamson liable for an intentional tort bearing the hallmarks of wrongful eviction. (RB/XAOB 97-98.) Ginsberg misstates both the holdings of *Erlich* and *Butler-Rupp* and the jury's verdict.

Erlich concluded that a homeowner could not recover tort damages against a contractor for what was essentially a contractual construction defect claim. (21 Cal.4th at p. 552.) The obligations between the homeowner and contractor were defined exclusively by contract; therefore, tort damages were unavailable. (*Id.* at p. 554.) *Butler-Rupp* held that a commercial tenant cannot recover on a tort claim arising from the landlord's alleged breach of the covenant of quiet enjoyment. (134 Cal.App.4th at pp. 1229-1230.) *Butler-Rupp* also rejected the notion—implicit in Ginsberg's cross-appellant's opening brief—that case law allowing residential tenants to recover punitive damages operates in the commercial context. (*Id.* at p. 1230 [residential tenant may recover tort damages under Civ. Code, § 1941 (warranty of habitability in residential

leases), but that statute "has no application to commercial leases"].) Moreover, contrary to Ginsberg's contention (RB/XAOB 98), although *Erlich* and *Butler-Rupp* both considered the tort of negligent infliction of emotional harm, neither limited its analysis to negligence claims.

Ginsberg also misstates, once again, the claim about which the jury was instructed and rendered a verdict. Contrary to Ginsberg's assertion, the jury did *not* consider or make any findings on the "independent tort" of "intentional interference with use and quiet enjoyment of leased premises, accomplished by a series of intentionally annoying acts designed to compel the tenant to vacate." (RB/XAOB 98; see 2 AA 372, 392 [jury instruction and special verdict]; pp. 60-63, *ante*.) The jury rendered a verdict on a contract claim, period. There was no basis for punitive damages and therefore no basis for reversal.

III.

AS A MATTER OF PUBLIC POLICY, PUNITIVE DAMAGES SHOULD NOT BE AVAILABLE FOR THE BREACH OF THE COVENANT OF QUIET ENJOYMENT IN A COMMERCIAL LEASE.

A. Even If Punitive Damages Were Available For The Breach Of The Covenant Of Quiet Enjoyment, They Would Be Inappropriate In The Commercial Context.

Tort and contract law promote distinct policies, which explains why the damages available are similarly distinct: "Contract actions are created to protect the interest in having promises performed," while "[t]ort actions are created to protect the interest in freedom from various kinds of harm."

(*Applied Equipment*, *supra*, 7 Cal.4th at p. 515, internal citation and quotation marks omitted.) Given that distinction, contract damages are limited to those within the contemplation of the contracting parties. (*Ibid.*; Civ. Code, § 3300.) Tort-type damages, which can include punitive damages, are almost never available in contract actions. (*Erlich*, *supra*, 21 Cal.4th at p. 553.) "Conduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law." (*Applied Equipment*, *supra*, 7 Cal.4th at p. 515.)

Courts are careful not to "blur the distinction between contract and tort." (*Butler-Rupp*, *supra*, 134 Cal.App.4th at p. 1229.) This is especially true in the commercial context. Our Supreme Court has recognized that the limitation on contract damages "serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise." (*Applied Equipment*, *supra*, 7 Cal.4th at p. 515.) The Court articulated a similar concern when refusing to expand tort remedies in the wrongful termination context: "The expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 699 (*Foley*).)

The same holds true in the commercial landlord-tenant context. Tort remedies are unavailable because the landlord and tenant are "parties to a commercial lease; as such, they [are] in no special relationship that would give rise to a duty in tort." (*Ilkhchooyi v. Best*, *supra*, 37 Cal.App.4th at p. 412.) Another court explained that a commercial landlord and tenant share no "special or fiduciary relationship" because "each contracted strictly out of a profit motive, and ordinary damages for breach of a lease were

available equally to both." (*Girard v. Delta Towers Joint Venture* (1993) 20 Cal.App.4th 1741, 1749.) Accordingly, where—as here—a landlord's "duties were circumscribed by [her] obligations under the lease and were confined to fulfilling [the commercial tenant's] contractual expectations of economic gain," only contract damages are available. (*Butler-Rupp*, *supra*, 134 Cal.App.4th at p. 1229 [rejecting emotional distress claim].) Any additional recovery would be "superfluous" because the commercial tenant "is made whole by the recovery of contract damages." (*Ilkhchooyi v. Best*, *supra*, 37 Cal.App.4th at p. 412.)

Ginsberg nonetheless asks the Court to jump at what she calls the "opportunity" to carve out an exception to these principles (RB/XAOB 94) to allow punitive damages against a commercial landlord for the breach of quiet enjoyment if that "breach is (1) accomplished by a series of intentionally annoying acts designed to compel the tenant to vacate and (2) committed with 'oppression, fraud, or malice'" (RB/XAOB 91). But she does not address the settled rules that (a) a breach of contract *never* supports tort remedies, including punitive damages, absent the breach of some extra-contractual duty, and (b) motive is *never* relevant to a claim for breach of contract. (See, e.g., *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 102; *Applied Equipment*, *supra*, 7 Cal.4th at pp. 515-516; *Foley*, *supra*, 47 Cal.3d at pp. 692-694.)

What limited authority there is in the commercial landlord-tenant context demonstrates that Ginsberg's allegations very likely do not make out *any* intentional tort. In *McDonell v. American Trust Co.* (1955) 130 Cal.App.2d 296, 299, commercial tenants sued their landlord alleging that "defendant, aware of the defective condition of the roof and drains and

knowing they could cause damage, refused to repair them." *McDonell* held that "[t]hose facts do not spell an intentional tort" and therefore could not support punitive damages. (*Id.* at pp. 299-300 [demurrer properly sustained to punitive damages count].)

Finally, even if the Court believed that Ginsberg's suggested formulation were a good idea, Ginsberg still would not be entitled to punitive damages: The jury wasn't even instructed, much less made findings, about whether Gamson breached the covenant "by a series of intentionally annoying acts designed to compel [Ginsberg] to vacate" the premises. (Compare RB/XAOB 91 with 2 AA 372, 392 [jury instruction and special verdict]; see pp. 60-63, *ante*.)

B. Ginsberg's California Case Law Does Not Support Her Position.

Although she acknowledges that "[n]o California case has directly addressed the recoverability of punitive damages against a landlord under a commercial lease for breach of the covenant of quiet enjoyment," Ginsberg claims that "several California cases have touched on the issue." (RB/XAOB 90.) But her authority consists of three cases that have nothing to do with the "issue." (RB/XAOB 90-91; see *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 694, fn. 14 (*Sonic-Calabasas*) ["(I)t is axiomatic that cases are not authority for propositions not considered," alteration in original; internal quotation marks and citation omitted].)

Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal.2d 633 (*Beckett*). Ginsberg suggests that *Beckett* "implicitly acknowledged that [a commercial tenant] might be entitled to punitive damages" for breach of

quiet enjoyment. (RB/XAOB 90, alteration added.) Not true. The underlying claim in *Beckett* was wrongful eviction—*not* breach of quiet enjoyment. (14 Cal.2d at pp. 638-639.)[12]

Tooke v. Allen, supra, 85 Cal.App.2d 230. Ginsberg argues that although *Tooke* concerned a residential tenant, the court "touched on" commercial leases by affirming a punitive damages award "for, in part, 'loss of business earnings.'" (RB/XAOB 90.) Not true. *Tooke* considered only whether the residential tenant's "[l]oss of earnings" should have been "pleaded by way of special damages." (85 Cal.App.2d at p. 238.)

Panoutsopoulos v. Chambliss (2007) 157 Cal.App.4th 297 (*Panoutsopoulos*). Although she relied on *Panoutsopoulos* in the trial court, Ginsberg now concedes that "punitive damages are not at issue" in that case. (RB/XAOB 90-91; see 3 AA 597; 6 RT 895; 7 RT 1070.) But she cites it anyway because it "noted" that an arbitrator in a prior proceeding had awarded "$100,000 in punitive damages against the commercial landlord on claims of breach of the covenant of quiet enjoyment and intentional infliction of emotional distress." (RB/XAOB 91.) Again, not true. For one thing, *Panoutsopoulos* identified nothing of "note" in the arbitrator's award—it described the award only as a matter of procedural background. (157 Cal.App.4th at p. 303.) For another, the arbitrator awarded $100,000 in punitive damages on a claim for

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[12] *Beckett* did not consider or rule on the viability of a wrongful eviction tort in the commercial context—it merely assumed that the tort existed. Thus, *Beckett* is not authority for the viability of that purported tort. (See *Sonic-Calabasas, supra,* 51 Cal.4th at p. 694, fn. 14.)

intentional infliction of emotional distress—*not* breach of quiet enjoyment. (*Ibid.*)

C. Ginsberg's Out-Of-State Authority Does Not Support Her Position.

Ginsberg cites two out-of-state opinions that she says "expressly affirmed punitive damages awards against landlords under commercial leases for tortious breach of the covenant of quiet enjoyment": *Daniels v. Dean* (1992) 253 Mont. 465 [833 P.2d 1078] (*Daniels*), and *I.H.P. Corp. v. 210 Central Park South Corp.* (N.Y. App. Div. 1962) 16 A.D.2d 461 [228 N.Y.S.2d 883], affd. (N.Y. 1963) 12 N.Y.2d 329 [189 N.E.2d 812] (*I.H.P. Corp.*). (RB/XAOB 94-97.) Yet again, not true.

Ginsberg relies on the egregious facts in *Daniels* while misstating its holding. (RB/XAOB 94-96.) She contends that under *Daniels*, the Court should uphold the punitive damages award because, she says, the evidence proves that—as happened in *Daniels*—"Gamson's deliberate failure to make repairs created a substantial risk to Ginsberg's business by turning away customers." (RB/XAOB 96.) She intimates that *Daniels*' reference to tortious interference with the tenant's lease is the same cause of action that she alleged here. (RB/XAOB 94-96.) It isn't. In *Daniels*, the tenant complained about the landlord's tortious interference with contractual or business relationships *with customers*. (833 P.2d at p. 1084.) The *Daniels* punitive damages award was predicated on factual findings underlying *that* tort, plus a defamation count. (*Id.* at pp. 1083-1084.) In contrast, Ginsberg never alleged a claim for tortious interference with contractual or business relationships with customers, and the jury was never instructed on that

theory and made no findings that could support it.[13] Accordingly, Ginsberg's argument works only by ignoring both *Daniels*' holding and the procedural posture of her own case.

Ginsberg gets *I.H.P. Corp.* wrong, too. (RB/XAOB 96-97.) The legal issue in *I.H.P. Corp.* was whether equitable relief could support a punitive damages award. (228 N.Y.S.2d at pp. 885-888, affd. 189 N.E.2d at pp. 812-814.) The intermediate appellate court held that the two forms of relief could be combined, and New York's Court of Appeals affirmed. (*Ibid.*) But neither court considered whether, as a matter of public policy, punitive damages should be available to a commercial tenant prevailing on a purported claim for "tortious" breach of quiet enjoyment—and it is not even clear whether the underlying cause of action in *I.H.P. Corp.* sounded in contract or tort. (222 N.Y.S.2d at pp. 885, 888-889, affd. 189 N.E.2d at pp. 812, 814.) *I.H.P. Corp.* is not authority for Ginsberg's position. (See *Sonic-Calabasas*, *supra*, 51 Cal.4th at p. 694, fn. 14.)

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[13] Ginsberg implies that she sought damages for customer loss, stating that the evidence showed and "Judge Torres found" that the alleged lack of repairs created "a substantial risk to Ginsberg's business by turning away customers." (RB/XAOB 96.) But Judge Torres made no such finding, either at the place Ginsberg cites or anywhere else, and the claim was never part of Ginsberg's case. (See generally 1 AA 44-62 [first amended complaint]; 2 AA 335 [Ginsberg damages chart]; 2 RT 189-192 [Ginsberg opening statement]; 3 RT 200-349 [Ginsberg trial testimony]; 6 RT 854-912 [conference on instructions and special verdict forms]; 6 RT 932-938 [Ginsberg closing argument]; 6 RT 990-991 [referring to damages chart used during closing argument]; 7 RT 1072:1-7 [trial court recognized that Ginsberg did not allege "loss of profits," only "loss of quiet enjoyment"].)

IV.

THIS COURT SHOULD AFFIRM THE ORDER STRIKING THE PUNITIVE DAMAGES VERDICT EVEN ASSUMING THAT GINSBERG PLEADED AND PROVED TORTIOUS CONDUCT BY GAMSON.

A. The Special Verdict Fails To Support A Punitive Damages Award.

1. As a matter of constitutional due process, punitive damages must bear a reasonable relationship to compensatory damages.

The Court independently reviews whether the punitive damages verdict is constitutionally excessive. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172 & fn. 2 (*Simon*).)[14] A punitive damages award must bear a "reasonable relationship" to compensatory damages. (*Id.* at p. 1181, citing *BMW of North America v. Gore* (1996) 517 U.S. 559 and *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 (*State Farm*).) In assessing the constitutionality of punitive damages awards, courts must consider the ratio between the compensatory

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[14] Gamson's challenges to the special verdict as described in this section are properly before the Court. She preserved these challenges by raising them in her post-trial motions. (3 AA 532-536, 548-558; 4 AA 779-788; see *American Modern Home Insurance Co. v. Fahmian* (2011) 194 Cal.App.4th 162, 170.) Moreover, "[Ginsberg], as the plaintiff, had responsibility for submitting a verdict form sufficient to support her causes of action. [Citation.] If she chose not to include a proposed factual finding essential to one of her claims, it is not incumbent on [Gamson], as the defendant, to make sure the omission is cured." (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 531-532; accord, e.g., *Myers, supra,* 13 Cal.App.4th at pp. 961-962.)

and punitive damages awards. (See, e.g., *Simon*, *supra*, 35 Cal.4th at pp. 1181-1183; *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1, 9-10 (*Jet Source*).)

2. Because the special verdict does not distinguish between damages awarded for breach of contract and tort, it is impossible to determine whether the ratio of punitive damages to compensatory tort damages satisfies due process.

At the trial court's insistence, the special verdict has only a single determination of damages. (2 AA 378, 393; 6 RT 866:6-21, 868:25-28, 1016:17-1017:25.) It makes no distinction between Ginsberg's contract and purported "tort" claims. (2 AA 393.) Even assuming that Ginsberg alleged and prevailed on *any* tort claim, this failure to distinguish tort from contract damages necessarily dooms a punitive damages award.

a. Only tort damages may be considered in assessing whether punitive damages are constitutionally excessive.

Punitive damages are only available for torts—not breaches of contract. (Civ. Code, § 3294; see p. 48, *ante*.) Therefore, assuming that Ginsberg's purported "intentional interference" claim was a cognizable tort, only the damages awarded on that claim may be considered in assessing whether the punitive damages award is constitutionally excessive or otherwise defective. (See *Textron Financial Corp. v. Nat. Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1084 (*Textron*) ["our consideration of the disparity between plaintiff's actual harm and the

punitive damage award must be limited to its tort relief"]; *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1056 & fn. 35, disapproved of in part on other grounds by *Simon, supra,* 35 Cal.4th at pp. 1182-1183.)

b. The punitive damages award fails because there is no special verdict finding that Gamson's purported "intentional interference" damaged Ginsberg.

Overview. There is no explicit special verdict finding of damages attributable to Ginsberg's purported tort claim for "intentional interference," as distinguished from her contract claims. (2 AA 389-390 [breach of oral and written contract verdicts]; 2 AA 392 ["intentional interference with use of premises" verdict]; 2 AA 393 [damages verdict].) A jury finding of actual tort damages, however, is an absolute "predicate" for punitive damages. (*Mother Cobb's Chicken Turnovers, Inc. v. Fox* (1937) 10 Cal.2d 203, 205 (*Mother Cobb's*).) As the California Supreme Court explained long ago: "Evil thoughts or acts, barren of result, are not the subject of exemplary damages." (*Id.* at p. 206.) Thus, a jury verdict that expressly awards zero tort damages cannot support a punitive damages award. (See *Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 (*Cheung*) [reversing punitive damages award where jury "made an express determination not to award compensatory damages"]; *California v. Altus Finance S.A.* (9th Cir. 2008) 540 F.3d 992, 1001 (*Altus Finance*) ["California law is well-established and quite clear. Where the jury here explicitly found '$0' of compensatory damages, the general rule precludes punitive damages"].)

This requirement is rigorously enforced. For example, a punitive damages award will be reversed on this ground even if substantial evidence supports the jury's finding of "fraud, oppression or malice." (*Cheung, supra*, 35 Cal.App.4th at p. 1677.) The same is true even if another special verdict shows that the jury believed plaintiff had been "harmed." (*Altus Finance, supra,* 540 F.3d at p. 1002 ["jury's award of '$0' in compensatory damages established that, notwithstanding the 'harm' found in Form 5, the Commissioner did not suffer the 'actual damages' necessary to sustain the jury's punitive damages award," citing *Cheung* and *Mother Cobb's*].)[15]

The damages special verdict. The damages verdict form required the jury to award a single compensatory damage amount if Ginsberg prevailed on any one of her four counts. (2 AA 393; see p. 73, *ante.*) Because the jury found Gamson liable for breaches of contract (2 AA 389-390), there is no way to know from the verdict if the jury intended to award *any* compensatory damages—much less the amount of those damages—on the "intentional interference with use of premises" count (2 AA 392). The damages special verdict directed that if the jury found liability and harm on *any* of Ginsberg's theories—which it did on breach of written contract, breach of oral contract, and "intentional interference with use of premises" (2 AA 389-392)—it was to answer the question "What amount of

[15] There is a narrow exception: Punitive damages are available where the jury finds actual harm but plaintiff is statutorily barred from recovering tort damages. (*Altus Finance, supra*, 540 F.3d at pp. 1001-1002, citing *Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1603-1605.) The exception is irrelevant—if Ginsberg had a tort claim, there was no statutory impediment to her recovery of tort damages.

compensatory damages, if any, do you award Esther Ginsberg?" (2 AA 393). It found $49,100. (*Ibid.*)

The special verdict then instructed that if the jury "answered 'yes' to question 2 in Verdict Form No. 4"—i.e., the question in the "intentional interference" verdict asking "Do you find by clear and convincing evidence that Hanna Gamson engaged in conduct with malice, oppression or fraud?" (2 AA 392)—then it should answer question 2 in the damages special verdict:

> "2. What amount of punitive damages, if any, do you award Esther Ginsberg?
>
> "$385,000"

(2 AA 393.)

This is the entirety of the jury's damages finding. There is no finding that connects the $49,100 compensatory award to any particular cause of action, and there is no way to tie the number to any particular component of Ginsberg's damages claims.

The punitive damages award fails as a matter of law. The absence of a special verdict finding of actual tort damages is fatal because a punitive damages award must be grounded on a finding of actual tort damages. (See pp. 73-75, *ante.*) For example, a punitive damages verdict fails as a matter of law if the jury's special verdict omits findings on the requisite elements of the underlying tort cause of action. (*Myers*, *supra*, 13 Cal.App.4th at p. 960-961 [punitive damages verdict failed because jury was "neither requested to nor did it make the necessary factual findings for a fraud or other tort cause of action"].)

This defect provides an independent basis on which this Court should affirm the trial court's order striking the punitive damages verdict: "[I]n those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper. [Citation.] Where such an award is made, the reviewing court may modify the judgment to strike the punitive damages and affirm the judgment as so modified. [Citation]." (*Id.* at p. 960.) Moreover, the punitive damages verdict fails as a matter of law even assuming—as Ginsberg argues—that the jury's "malice, oppression or fraud" finding is supported by substantial evidence. (See RB/XAOB 82-87; *Cheung*, *supra*, 35 Cal.App.4th at p. 1677; *Myers*, *supra*, 13 Cal.App.4th at p. 961.)

c. The punitive damages award violates due process because the lump-sum compensatory damages verdict precludes meaningful judicial review of the proportionality of the award.

Even assuming that the $49,100 compensatory award includes *some* amount of tort damages, so that punitive damages might be theoretically permissible, the punitive damages award still fails because the verdict's lack of specificity violates due process.

Due process mandates meaningful appellate review of punitive damages awards. (*Honda Motor Co., Ltd. v. Oberg* (1994) 512 U.S. 415, 432 [holding unconstitutional Oregon law precluding such review].) "[U]nder *Oberg*, [courts] must consider whether a punitive damages award passes 'muster under federal due process analysis' in addition to reviewing

whether the evidence is sufficient as a matter of law to support the award." (*In re Exxon Valdez* (9th Cir. 2001) 270 F.3d 1215, 1240, footnote omitted.)

This Court cannot meaningfully review the damages special verdict because it does not apportion the lump-sum $49,100 compensatory damages award between Ginsberg's contract and "tort" claims. (See 2 AA 393; see pp. 73, 75-76, *ante*.) The jury might have intended to award $0 on the purported "intentional interference with use of premises" tort or $10 or $100 or $1,000, with the remainder compensating Ginsberg on the contract counts. Without a special verdict apportioning the "tort" and contract compensatory damages, this Court cannot determine whether the $385,000 punitive damages award bears a reasonable relationship to the actual tort damages. (See *Textron*, *supra*, 118 Cal.App.4th at p. 1084 [punitive damages award must be based only on jury's finding of tort—not contract—damages].)

Our Supreme Court, however, *requires* de novo appellate review of punitive damages awards, which must include "making an independent assessment of the reprehensibility of the defendant's conduct, [and] the relationship between the award and the harm done to the plaintiff." (*Simon*, *supra*, 35 Cal.4th at p. 1172.) The punitive damages verdict facially forecloses this mandatory "[e]xacting appellate review" on proportionality. (*Ibid.*, original alteration, quoting *State Farm*, *supra*, 538 U.S. at p. 418.)

The Court must therefore affirm the striking of the punitive damages verdict.[16]

B. Punitive Damages Could Not Be Awarded In Light Of Gamson's Well-Founded Beliefs That She Was Complying With Her Repair Obligations And That Ginsberg Was Holding Over.

1. Punitive damages cannot attach where the defendant had a well-founded belief that her conduct was proper.

The trial court prejudicially erred by submitting the punitive damages issue to the jury because the evidence—and there would have been more had the trial court not excluded it—demonstrated that Gamson had a reasonable basis for asserting that Ginsberg's tenancy expired in

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[16] Last year, Division Two of this District upheld a punitive damages award even though the jury's lump-sum compensatory damages award did not include special verdict factual findings on the amount of compensatory damages awarded for bad faith and breach of contract. (*Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1557-1558 (*Amerigraphics*).) But while the *Amerigraphics* verdict form is similar to the one challenged here, *Amerigraphics* is irrelevant because the court did not consider any argument similar to Gamson's constitutional proportionality challenge. (See *Sonic-Calabasas*, *supra*, 51 Cal.4th at p. 694, fn. 14.)

In any event, *Amerigraphics*' rationale is unsound. *Amerigraphics* recognized the verdict's anomaly, but affirmed anyway because the "special verdict form here did not *preclude* a finding of punitive damages." (182 Cal.App.4th p. 1557, original italics.) *Amerigraphics* was mistaken: The constitutionally mandated de novo review of punitive awards means that the dispositive question must be whether the verdict affirmatively *supports* the punitive award, not merely whether it doesn't preclude the award. *Amerigraphics* asked the wrong question, and so came up with the wrong answer.

April 2006 and that she had complied with her repair responsibilities under the Conservator Lease. (See *Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 648-651 [defendant's actions in plowing field leased to plaintiffs and to which defendant had no leasehold rights could not support a punitive award where defendant had no knowledge of plaintiffs' interest and believed, though erroneously, that he had a valid oral lease], overruled in part on other grounds by *Flores v. Arroyo* (1961) 56 Cal.2d 492, 497.)[17]

"Exemplary damages are not recoverable against a defendant who acts in good faith and under the advice of counsel." (*Fox v. Aced* (1957) 49 Cal.2d 381, 385.) This is so because punitive damages are imposed only if the defendant acted with the requisite state of mind: A "tort committed by mistake, in the assertion of a supposed right, or without any wrong intention, and without such recklessness as evinces malice or a conscious disregard of the rights of others, does not warrant punitive damages" because the "wrongful personal intention to injure is the factor that calls forth the penalty of exemplary damages." (*Roth v. Shell Oil Co.* (1960) 185 Cal.App.2d 676, 682, disapproved of in part on other grounds by

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[17] Gamson preserved these challenges by raising them in the trial court. (See, e.g., 2 SAA 1153-1162 [nonsuit motion]; 4 RT 502-517 [hearing on nonsuit motion]; 3 AA 554-556 [new trial motion]; 4 AA 783-784 [reply in support of post-trial motions].) In addition, Gamson argued throughout these proceedings that the Conservator Lease expired in April 2006, and that, as a holdover tenant, Ginsberg either had to vacate or enter a new lease. (E.g., 2 RT 4, 12 [hearing on Gamson's bifurcation motion]; 2 RT 48 [hearing on Gamson's requested declaratory relief]; 1 AA 132-134, ¶¶ 15, 20, 21 [third amended cross-complaint]; 1 SAA 891, ¶¶ 5-9 [Gamson declaration in support of summary judgment motion]; 1 SAA 896-897, ¶¶ 4-5, 7-8 [separate statement in support of Gamson summary judgment motion]; see also 1 AA 164, 172-174 [memo in support of Gamson summary judgment motion].)

Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal.2d 461, 470-471.) At the very least, a defendant's good-faith reliance on counsel is a factor for the jury to consider in assessing punitive damages. (*Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 754.)

Our Supreme Court has rejected punitive damages in this very context. In *Wolfsen v. Hathaway, supra*, 32 Cal.2d at pp. 650-651, the Court held that the trial court erred by putting the punitive damages question to the jury given the evidentiary record: "Since the record indisputably shows that [defendant's] tortious acts upon the premises in question stemmed not from any 'malice in fact,' but wholly from a mistaken claim of right under the belief that his 'oral lease' was valid and enforceable, the 'wrongful personal intention to injure' that calls forth the penalty of punitive damages was not established and the court erred in submitting the matter of such award to the jury."

2. As a matter of law, Gamson had a reasonable basis for asserting that Ginsberg's lease expired in April 2006 and that she was a holdover tenant.

a. Gamson's interpretation of the renewal language was reasonable.

We have demonstrated that, as a matter of law, Ginsberg's lease is not perpetual and therefore conferred only one renewal term that expired in 2006. Even if the Court disagrees that the law requires this conclusion, Gamson's claim is certainly tenable given that it is consistent with settled California law (AOB 18-21; pp. 4-5, *ante*) and the law in the overwhelming

majority of jurisdictions throughout the United States (AOB 21-24 & fn. 12).

Moreover, Gamson testified without contradiction or impeachment that two different lawyers told her that the Conservator Lease had to be revised. (See, e.g., 4 RT 454:7-9 [Gamson testified (under Evid. Code, § 776) regarding raising Ginsberg's rent: "As far as whatever the lease said, I'm a law-abiding citizen. I'm going by the lease. And at the time there was some confusion about that lease"]; 2 RA 318 [exhibit 57]; see generally 4 RT 453:15-464:17 [Gamson testimony (under Evid. Code, § 776) regarding Ginsberg's rent and renewal options].) After Gamson retained her now-current real estate lawyer Saul Jaffe in late 2004 or early 2005 (5 RT 749, 753-754), Mr. Jaffe communicated with Ginsberg's previous lawyer "to clarify the number of options [Ginsberg] had and to bring her to a market rent at some point" (5 RT 787; see also 5 RT 782-785, 788-789).

And that's not all. Judge Ferns, who presided over this case before Judge Torres, *agreed* that Ginsberg's right to remain in the property was uncertain. (2 AA 281-283 [denying parties' cross-motions for summary judgment]; see also 2 RT B-1–B-17 [hearing].) In a detailed ruling, he found that the "[renewal] provision, and the provisions in the Estoppel Certificates show, at best, that there is ambiguity as to whether an option or options were granted to the tenant." (2 AA 281.)

b. Gamson's interpretation of the renewal language cannot support punitive damages as a matter of law.

Given Gamson's construction of the renewal language, she had two choices: either commence unlawful detainer proceedings against Ginsberg after the Conservator Lease expired in April 2006 or preemptively negotiate a new lease with her. Since neither course could amount to anything more than the assertion of contractual rights, neither could ever support punitive damages. (See *Gaffney v. Downey Savings & Loan Assn.* (1988) 200 Cal.App.3d 1154, 1170 ["Defendant's sole remedy was foreclosure and nothing in its attempt to pursue that remedy can be construed as evidence of oppression, fraud or malice"].)

This conclusion would stand even if the Court ultimately disagrees with Gamson's legal position: She did nothing more than assert a right that she had probable cause to assert in light of the law that we have presented and as confirmed by Judge Ferns' summary judgment ruling. Certainly, her "position cannot be deemed so unreasonable as to evidence malice, fraud, or gross negligence." (*Food Pro International., Inc. v. Farmers Insurance Exchange* (2008) 169 Cal.App.4th 976, 994-995 (*Food Pro*) [punitive damages unavailable in part because trial court had agreed with defendant insurer's duty-to-defend position].) Gamson's situation is analogous to that of a malicious prosecution defendant who prevailed against a summary judgment motion in the underlying action: Under the "interim adverse judgment rule," that fact alone conclusively establishes the defendant's

probable cause to assert the underlying claim because the ruling "necessarily impl[ies] that the judge [found] at least some merit" in the claim. (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 450-451.) So, too, here: That Judge Ferns rejected Ginsberg's summary judgment challenge to Gamson's interpretation of the Conservator Lease conclusively shows that Gamson had probable cause to urge that interpretation. That being the case, Gamson should not be subject to punitive damages, regardless of whether her position ultimately turns out to be correct.

To put it another way, the Conservator Lease's very ambiguity bars recovery of punitive damages: "Where an issue is one of first impression or where a right has not been clearly established, punitive damages are generally unavailable." (*Waits v. Frito-Lay, Inc.* (9th Cir. 1992) 978 F.2d 1093, 1104 [construing California law]; accord, *Food Pro*, *supra*, 169 Cal.App.4th at p. 995 [although appellate court rejected insurer's position on its duty to defend, punitive damages were nonetheless unavailable in part because insurer had relied on advice from two law firms]; *Morgan Guaranty Trust Co. of N.Y. v. American Savings & Loan Assn.* (9th Cir. 1986) 804 F.2d 1487, 1500 ["Although we reverse, we acknowledge that this is a close case and that the key issue is one of first impression. Punitive damages are inappropriate in this case"].)

Like probable cause in a malicious prosecution action, the determination of whether a party has a reasonable basis for asserting a contractual right is necessarily a question of law. (See *Franklin Mint*,

supra, 184 Cal.App.4th at p. 333 [in the malicious prosecution context, the "existence or absence of probable cause is a question of law to be determined by the court from the facts established in the case"].) At least this must be true where the only issue is—as it was here—the interpretation of a contract on its face. Since a face-of-the-agreement interpretation is for the court, only the court can properly determine whether a party's interpretation is reasonable—or, in the words of probable cause jurisprudence, "'whether any reasonable attorney would have thought the claim tenable.'" (*Ibid.*, citation omitted.) "This is an objective standard, and does not take into account the subjective mental state of the defendant; if the underlying claims were objectively tenable, the malicious prosecution claim fails, regardless of any evidence of malice on the part of the defendant." (*Ibid.*)

Because Gamson's lease interpretation was reasonable, as a matter of law her assertion of it cannot support punitive damages.

3. The trial court's erroneous exclusion of evidence of Gamson's good faith entitles her to a new trial.

If the Court decides to chart new territory by holding that punitive damages can be available under facts like ours, then at the very least Gamson will be entitled to a new trial because of the trial court's exclusion of evidence about Gamson's good-faith beliefs and advice from counsel that she had not breached the Conservator Lease. (E.g., 5 RT 737, 743-745, 787-788, 796; 6 RT 809-810; pp. 44-46, *ante*; see *Beneficial Fire and Casualty Insurance Co. v. Kurt Hitke & Co., Inc.* (1956) 46 Cal.2d 517, 522

[offer of proof not required "(w)here an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue"].) The trial court's evidentiary rulings were prejudicially erroneous because Gamson's state of mind was directly relevant to the availability of punitive damages and it is therefore "reasonably probable" that the jury would not have imposed punitive damages—at least not $385,000's worth—had it known about Gamson's good-faith reliance on counsel. (See *Bell v. Mason* (2011) 194 Cal.App.4th 1102, 1107 [standard for prejudicial error].)

Gamson presented ample evidence—or at least tried to—of her good-faith and well-founded belief that she had complied with or even exceeded her repair obligations under the Conservator Lease. (See, e.g., 5 RT 796; 6 RT 809-810 [sustaining objections to questioning of Mr. Jaffe about Gamson's contractual obligation to repair Ginsberg's floor and awning].) For example, Gamson testified in detail about what she believed to be timely responses to Ginsberg's complaints and the expenses that she incurred in inspecting and repairing Ginsberg's store. (E.g., 4 RT 473-474, 482-483, 486-487; 5 RT 744-750; 2 SAA 1247-1249 [exhibit 627].) In addition, after her lawyers reviewed the Conservator Lease and inspected the premises, they told Gamson that she was complying with her contractual repair obligations. (E.g., 2 SAA 1241-1242 [exhibit 614]; 3 RT 347-348; 6 RT 814 [Mr. Jaffe testified that Gamson was not obligated to repair Ginsberg's floor under the Conservator Lease].) Moreover, Gamson trusted Mr. Jaffe, her real estate lawyer, to handle Ginsberg's repair demands

properly: "Saul Jaffe would have done the best he can [sic] to resolve the problem." (4 RT 478.) And Mr. Jaffe testified that Gamson has "exceeded her obligations under the lease." (5 RT 789; see also, e.g., 6 RT 814-817, 834-835 [Mr. Jaffe testimony regarding Gamson's repairs]; 2 SAA 1243-1246 [exhibits 623, 624].) Here, too, Gamson was neither contradicted nor impeached. (See generally 4 RT 464:18-490:1 [Gamson testimony (under Evid. Code, § 776) regarding repairs].)

The lease provisions quoted above bear out Gamson's views. (See p. 41, *ante*.) Gamson was entitled to read the Conservator Lease as casting upon Ginsberg the responsibility for at least some of the problems Ginsberg complained about. To be sure, there were disagreements—for example, was the hole in Ginsberg's floor part of her premises and therefore her responsibility, or part of the building's foundation and therefore Gamson's? Their views differed and the trial court ultimately agreed with Ginsberg that the jury would have to decide. (6 RT 862:4-16; 2 AA 363; see also 4 RT 516-517 [denying Gamson's nonsuit motion].) But if there was enough of a dispute to go to a jury, there was enough of a dispute to make Gamson's interpretation reasonable—and immune from punishment by punitive damages. Her error, if any, should only result in paying contract damages—nothing more. (See *Kendall Yacht Corp. v. United Cal. Bank* (1975) 50 Cal.App.3d 949, 959 [punitive damages were inappropriate in a case alleging breach of bank's claimed agreement to honor overdrafts because "(e)vidence of an evil motive is required, a showing that the Bank deliberately breached *a recognized duty* to the plaintiffs with knowledge that the breach was likely to result in serious injury. . . . (I)t remains purely

speculative as to whether the Bank acted with such malice rather than out of a bona fide disagreement over how far the Bank was required to go in helping the (plaintiffs) with their financial problems," italics added].)

C. Even If Punitive Damages Could Be Awarded, They Must Be Reassessed If The Court Agrees That Ginsberg's Lease Expired In April 2006.

If Gamson prevails in her appeal and the Court concludes that the Conservator Lease's renewal language is ambiguous such that Ginsberg's lease expired in April 2006, then the predicate of Ginsberg's claims for "tort" damages and ancillary punitive damages would either dissipate or disappear. In that case, Gamson would have been justified in asking Ginsberg to sign a new lease and electing not to make repairs beyond those required by the Conservator Lease. Thus, if Gamson prevails, then the Court either should hold that punitive damages are unavailable as a matter of law or, at the very least, should remand for a new trial on Ginsberg's purported tort claim (assuming that the Court holds that Ginsberg alleged a cognizable tort) and the availability and amount of punitive damages.

V.

THE $385,000 PUNITIVE DAMAGES AWARD IS CONSTITUTIONALLY EXCESSIVE EVEN IF THE FULL $49,100 COMPENSATORY DAMAGES AWARD IS ATTRIBUTABLE TO GINSBERG'S PURPORTED "INTENTIONAL INTERFERENCE" CLAIM.

The $385,000 punitive damages verdict cannot withstand the Court's independent review even assuming that the jury awarded the entire $49,100 on the purported "intentional interference" count.

Constitutional principles. In determining whether the punitive damages award is constitutionally excessive, the Court considers three "guideposts": "(1) the degree of reprehensibility of the defendant's misconduct; (2) the 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." (*Walker v. Farmers Insurance Exchange* (2007) 153 Cal.App.4th 965, 973 (*Walker*), quoting *Simon, supra*, 35 Cal.4th at pp. 1171-1172.)[18]

As the Court has recognized, reprehensibility is the paramount criterion when considering the reasonableness of a punitive damages verdict. (*Walker, supra*, 153 Cal.App.4th at p. 973, fn. 9, quoting *State Farm, supra*, 538 U.S. at p. 419; accord, e.g., *Roby v. McKesson Corp.*

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[18] We are not aware of any analogous civil penalties for the breach of a commercial tenant's implied covenant of quiet enjoyment.

(2009) 47 Cal.4th 686, 713; *Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1288 (*Grassilli*).) Relevant factors include whether the "harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*Jet Source*, *supra*, 148 Cal.App.4th at p. 8, quoting *State Farm*, *supra*, 538 U.S. at p. 419.)

Ginsberg's minimal evidence of "reprehensibility." Ginsberg's evidence does not demonstrate that Gamson acted with the extreme reprehensibility required to support the jury's $385,000 punitive damages verdict—almost *eight times* the compensatory damages verdict. (2 AA 393.)

The jury didn't accept Ginsberg's story of intolerable physical conditions and crushing economic damages—it found that Ginsberg's economic damages amounted *not* to the $545,000 she asked for, but rather to *barely 9%* of that figure, $49,100. (2 AA 335, 393; 2 RT 189-192 [opening statement]; 6 RT 932-938 [closing argument].) The jury had good reason not to credit Ginsberg's histrionics, and this Court must also be guided by Ginsberg's failure to present evidence backing up her charges. A punitive damages award with an 8:1 ratio—like this one—is "close to the upper constitutional limits." (*Grassilli*, *supra*, 142 Cal.App.4th at p. 1289.) Thus, the jury's punitive damages award cannot stand unless Ginsberg

demonstrated the requisite "extraordinary factors" to "justify[]" that ratio. (*Ibid.*) She did not. For example:

• Ginsberg testified about disastrous and recurrent water intrusion. (See p. 43, *ante.*) She described veritable flash floods running through her store—conditions that would have undoubtedly destroyed any ongoing business. Yet Ginsberg presented *no* evidence that she lost a single dollar or a single customer because of water intrusion during the five and a half years from December 2003 through the beginning of trial in September 2009. She didn't even bother asking for an award of lost profits. (See generally 2 RT 187-192 [Ginsberg opening statement]; 3 RT 201-321 [Ginsberg direct examination]; 6 RT 923-940 [Ginsberg closing argument]; 1 AA 44-62 [first amended complaint]; 2 AA 329-330 [Ginsberg trial brief]; 2 AA 335 [Ginsberg damages chart].)[19]

Nor did Ginsberg present *any* evidence that she closed her store for anything other than a "*few days*" after another tenant caused a leak in December 2003. (3 RT 270:28-271:4, italics added; see also 3 RT 332, 343 [regarding cause of leak].) Instead, she identified just *six days* on which water intrusion had allegedly damaged her merchandise during the *five and a half years* before trial: December 8, 2003; October 17, 2005; October 18, 2005; October 23, 2005; October 24, 2005; and May 1, 2008. (2 AA 329-330, 335; 6 RT 932-938.) For purposes of this appeal only, we assume—even though Ginsberg did not allege or prove—that her store was closed for those six days. If so, then Ginsberg would have closed her store for *0.002%* of those *five and a half years*.

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[19] She claimed that some merchandise was damaged, but the jury rejected her claim for "trespass to chattels." (2 AA 391.)

• Ginsberg alleged that her store was in poor repair, but she did not prove resulting physical harm. This Court has held that a "conclusory claim" of physical harm lacking evidentiary support cannot support a high multiplier. (*Walker*, *supra*, 153 Cal.App.4th at pp. 973-975; see also *Jet Source*, *supra*, 148 Cal.App.4th at p. 11 ["solely economic" harm militates against high multiplier].)

• Similarly, although Ginsberg accused Gamson of failing to maintain the property, she did not prove that Gamson was indifferent to or recklessly disregarded anybody's health or safety. (See *Walker*, *supra*, 153 Cal.App.4th at p. 975.)

• Gamson acted in good faith and Ginsberg's harm—if any—"was the result of oversight" in interpreting the Conservator Lease. (See *id.* at p. 973; pp. 81-85, *ante*.)

• Ginsberg herself demonstrated that she is not financially vulnerable. Quite the contrary, she is an established, successful entrepreneur who built up a well-known vintage clothing business. (3 RT 201-224 [Ginsberg examination]; 3 RT 370-371 [examination of Ginsberg's vintage clothing expert witness]; see also 2 RT 187-188 [Ginsberg opening statement].)

The Court should therefore hold that the jury's punitive damages award is constitutionally excessive.

CONCLUSION

Gamson should prevail on her appeal. The Court should reverse the judgment granting Ginsberg the unfettered option to renew the Conservator Lease for the next 99 years—that is, through the year 2095—under Civil Code section 718 (see AOB 8, fn. 6); ordering Gamson to comply with the 48-hour repair-or-access order until the Conservator Lease statutorily expires in 2095; and awarding attorney's fees and costs to Ginsberg.

In the alternative, this Court should reverse and remand for a new trial on the meaning of the renewal language because Ginsberg has not shown—and cannot show—that the Conservator Lease unambiguously confers perpetual renewals. On remand, the trial court must also reconsider the judgment's permanent injunction and award of attorney's fees and costs.

On the cross-appeal, there has never been a basis for punitive damages, and even if there were, the punitive award is defective for multiple reasons. Accordingly, regardless of the result on the lease interpretation, the Court must affirm the trial court's decision to strike the punitive award. And even if punitive damages might be available, a reversal on lease interpretation necessarily compromises the basis for the punitive award, and the claim must be retried.

Dated: October 18, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204 (c)(1), the attached **HANNA GAMSON'S COMBINED APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF** was produced using 13-point Times New Roman type style and contains 22,081 words not including the tables of contents and authorities, caption page, or this Certification page, as counted by the word processing program used to generate it.

Dated: October 18, 2011

Lara M. Krieger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **October 18, 2011**, I served the foregoing document described as: **HANNA GAMSON'S COMBINED APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF** on the parties in this action by serving:

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The Honorable Ricardo Torres
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(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Joyce McGilbert