2d Civil No. B143750
(Consolidated with 2d Civil No. B145559)

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PERRY E. HANSTAD,

Plaintiff and Respondent,

vs.

TRUCK INSURANCE EXCHANGE,

Defendant and Appellant.

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Appeal from the Los Angeles Superior Court, Case No. BC 156849
Honorable Frank Gafkowski, Jr., Judge

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# APPELLANT'S REPLY BRIEF

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## INTRODUCTION

Truck's opening brief detailed multiple prejudicial errors mandating that the $40 million punitive damage award and the $404,000 *Brandt* fee award be reversed. Hanstad's response fails to refute our arguments. For example:

- Truck established that the punitive damage award is unconstitutional both because the ratio between it and the compensatory award established by the verdict was dramatically escalated in the judgment and because the punitive damage award is excessive. Hanstad does everything but confront these arguments head-on. He opts to conduct a lengthy evidentiary review in lieu of responding to the legal points raised. He also baselessly accuses Truck of misrepresenting the jury-determined ratio and ignores the governing body of constitutional law that limits punitive-compensatory ratios to numbers far smaller than what the jury imposed here and drastically smaller than the inflated ratio embodied in the judgment.

- We showed that because Civil Code section 3294 permits punitive damages *only* in an action *not* arising from contract, such damages are impermissible in an insurance bad faith action, which necessarily does arise out of contract. Hanstad's response begs the question by arguing that punitive damages have long been awarded in such actions. What he ignores is that no case has addressed the statutory preclusion we raise. The real question—an issue of first impression—is whether the statute permits punitive damages in suits for breach of the implied covenant of good faith and fair dealing. The answer is that it does not.

- We showed how the receipt of evidence of pooling agreements and the net worth of *other* companies in addition to Truck gave

the jury a grossly distorted picture of Truck's wealth that likely prompted the jury to inflate the punitive damage award. Hanstad defends the trial court's admission of this *irrelevant* financial evidence as a routine exercise of discretion. But irrelevant evidence is never admissible.

- We demonstrated that the trial court improperly usurped the jury's role by failing to submit any managing agent issue to the jury and that, in any event, there is no substantial evidence that any person handling the underlying claim qualified as a managing agent. Hanstad claims Truck failed to object, but that argument doesn't work because it was Hanstad's *own* burden to prove his punitive damage case before a properly-instructed jury, and it was the trial court's *sua sponte* duty to assure that the jury was properly instructed as to the fundamental issues in the case. Although Hanstad recounts the testimony of Lori Reilly in some detail, he fails to address what matters. He doesn't point to any evidence (let alone the required clear and convincing evidence) that would support a conclusion that Lori Reilly was responsible for promulgating Truck company policy. Under the law, unless the malicious, fraudulent or oppressive conduct is attributable to a person possessing a policy-making level of company responsibility, punitive damages may not be imposed.

- Finally, we demonstrated that the *Brandt* fee award is unproven and excessive. Hanstad has no real response. He confuses *Brandt* fees with post-judgment attorney fees. He fails to confront the legal reality that *Brandt* fees are economic damages that must be proven in terms of an amount actually incurred by the insured, just like medical bills must be actually incurred by the victim in a personal injury action.

Hanstad argues that the trial court committed no error and there is nothing to retry. He is wrong. Truck acknowledges that it might have done a better job of handling this claim, but that does not justify upholding a

judgment that is unconstitutional and prejudicially erroneous. Under our constitution, a punitive damage award commands searching appellate review—particularly where, as here, the jury's vote on the enormous $40 million amount was a bare 9-3. This judgment doesn't withstand such scrutiny.

Under the law, the $40 million punitive damage award and the $404,000 *Brandt* fee award should be reversed with directions to enter judgment in Truck's favor. At the least, there must be a retrial of all punitive damage issues. That, in turn, compels a retrial of all issues encompassing both bad faith liability and compensatory damages, other than *Brandt* fees, which must be eliminated.

## LEGAL DISCUSSION

### I.

### THE PUNITIVE DAMAGE AWARD MUST BE REVERSED. IT VIOLATES TRUCK'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

#### A. The Punitive Damage Judgment Unconstitutionally Infringes Truck's Right To A Jury Trial.

As demonstrated in the opening brief (AOB 16-23), Truck has a constitutional right to have a jury determine the appropriate amount of punitive damages to be imposed in light of its evaluation of several criteria, including the quantum of injury—compensatory damages—that the jury decides was caused by the tortious conduct. The greater the compensatory injury, the greater the permissible punishment. As our Supreme Court has put it: "Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928; see, e.g., *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1536 [quoting *Neal*].) Reprehensibility without injury does not permit a punitive award.[1]

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1/ If no compensatory damages are awarded, there can be no punitive damages at all, regardless of the reprehensibility of defendant's conduct. (E.g., *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147 ["actual damages are an absolute predicate for an award of exemplary or punitive

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Here, the jury deliberated and reached a decision. It returned a verdict (albeit by a bare 9-3 margin) awarding $40 million in punitive damages, based on its determination that Hanstad sustained about $2.1 million in compensatory damages. The ratio resulting from these jury-determined damage figures is 18.72:1. In other words, the jury determined that $18.72 in punishment should be awarded for every dollar of injury that it decided Hanstad had suffered.

The problem is that the amount of compensatory damages found by the jury was insupportable. It was duplicative and excessive and, at Hanstad's instigation, was reduced to $1.39 million after the jury was discharged. This reduction occurred in two steps. Hanstad first waived the verdict's $239,176.20 contract award because it duplicated damages embodied in the tort award; then, to use Hanstad's words, he "stipulated to a $530,301 reduction of the compensatory damages award in order to defeat Truck's motion for new trial." (RB 10.)

As a result of these reductions in the compensatory award, the jury's 18.72:1 punitive-to-compensatory ratio was elevated dramatically—without the jury's participation or consent—to a ratio of nearly 30:1. In other words, the quantum of compensatory injury on which the jury factored the level of punishment went down, while the magnitude of punishment went up.

This is unconstitutional. It is solely within the jury's purview to weigh the various elements governing punitive damage awards, including the level of injury caused by the wrongful conduct, so as to fix the correct "quantum of bile" (*Vallbona v. Springer*, *supra*, 43 Cal.App.4th at p. 1539,

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damages"]; *Cheung v. Daley* (1995) 35 Cal.App.4th 1673 [if no compensatory damages, punitive damages impermissible].)

fn. 16) that the jury decides is warranted by the severity of the injury and other circumstances. If the compensatory injury is less than the jury believed or the law permitted (here, it was substantially less), then the whole calculus is thrown off. This requires that a new calculation of punitive damages be made by a new jury in light of the accurate compensatory figure.

At a bare minimum, therefore, the jury's 18.72:1 ratio (not the improperly escalated 30:1 ratio) would have to be applied to the reduced compensatory damage figure to yield a maximum punitive damage award of $26.1 million, not the $40 million embodied in the judgment.[2] While such a reduction would afford Truck *some* relief from the unconstitutional judgment, it would not be *adequate* relief: Even a reduction in punitive damages to preserve the jury-selected ratio would not preserve Truck's jury-trial guarantee.

Had the jury known that the injury was really far less than it believed (at least $769,477.20 less), it might well have adopted a lower punitive damage figure to reflect the lower level of injury. Certainly, the revelation that that Hanstad's compensatory damages were substantially less than the jury thought would not have led it to pump up the level of punishment. Yet that is exactly the effect of the trial court's decision to leave the $40 million punitive award intact notwithstanding the steeply reduced compensatory award.

The constitutional error is magnified by the additional fact that the already-twice-reduced compensatory damage figure must be reduced even

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2/ Even Hanstad obliquely promotes this solution: "Even if the jury's ratio were sacred, which . . . it is not, courts could maintain that ratio simply by amending the punitive damages award *pro rata* any time the compensatory damages award is amended." (RB 37, fn. 18.) In fact, as we demonstrate above, additional relief is constitutionally required.

further, namely, by the $404,000 improperly awarded by the jury as *Brandt* fees. (See AOB 42-47; §VII, *infra.*) When that amount is deducted as the law requires, compensatory damages must be reduced (if liability is not retried altogether) to $963,496, which is $1.17 million less than the amount on which the jury premised its punitive award. If the $40 million punitive award were left untouched following the additional *Brandt* reduction, the jury's 18.72:1 ratio would be inflated even more grotesquely, to 41.5:1. Such a result is inconsistent with the level of punishment the jury deemed appropriate given the quantum of injury it erroneously believed was caused by Truck's tortious conduct.

In sum, the punitive damage award is unconstitutional and cannot stand.

### B. None Of The Arguments Advanced By Hanstad Undermines The Merits Of Truck's Constitutional Argument.

Hanstad has no effective response to these constitutional defects. He contends: (1) Truck has exaggerated the reduction in compensatory damages and concomitant inflation in the ratio; (2) it is permissible for the trial court, rather than the jury, to determine the ultimate ratio between punitive and compensatory damages; and (3) the $40 million punitive damage award is sustainable because it is reasonable in light of Truck's particularly-reprehensible conduct. (See RB 11-33, 36-41.)

These responses miss the mark.

### 1. Truck has stated the record accurately.

Hanstad repeatedly accuses Truck of misrepresenting the amount of reductions in the compensatory damage award following the verdict. (E.g., RB 11, 28 fn. 13, 36-37.) Truck has depicted the numbers accurately.

Hanstad says the total post-verdict reduction in compensatory damages was $530,301. (RB 28, fn. 13.) This is untrue. It totaled $769,477.20, just as Truck asserts.

These differing views are resolved when one understands what happened to the $239,176.20 that the jury awarded Hanstad on his breach of contract claim. Hanstad denies the jury awarded this amount twice. (RB 36, fn. 17.) It clearly did, however.

The verdict sets forth awards of $239,176.20 for breach of contract (CT 6205), $1,397,797 for tortious breach of implied covenant (CT 6206), and $500,000 for physical or emotional injury (*ibid.*), yielding a grand compensatory total of $2,136,973.20 —the precise amount cited in Truck's opening brief. (AOB 19.) After the verdict was returned and the jury was discharged, Hanstad immediately conceded that the tort damages duplicated the contract damages. (See RT 4254, 4455.) He then made an election of remedies, opting for the tort recovery. As a result, the $239,176.20 contract award dropped from the case and never appeared in the judgment. (See RT 4454-4455.) Thus, the amount of compensatory damages set forth in the original judgment was $1,897,797, not the $2,136,973.20 total appearing on the face of the verdict. (See CT 6217-6222.)[3]

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3/ Hanstad never explains his basis for denying what the special verdict expressly spells out. He might claim the jury knew the contract damages would drop away, because his counsel said something to this effect in

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After judgment was entered, Hanstad asked the court to reduce the compensatory damages by *another* $530,301. (See RT 4455-4456; CT 6501, 6711; RB 10, 28.) When this reduction is added to the $239,176.20 reduction, the total compensatory reduction equals $769,477.20. This was more than a 33⅓% reduction in the quantum of injury on which the jury premised its $40 million punitive damage award.

Contrary to Hanstad's unsupported assertions, our opening brief's discussion of the reductions in compensatory damages is completely accurate. As a result of those reductions, the ratio derived from the jury's award of compensatory and punitive damages grew by more than 55 percent, from $18.72 in punitives for each $1 of compensatory damages, to $29.25 in punitives for each compensatory $1, exactly as stated in the opening brief. (AOB 20.) And, if the $404,000 *Brandt* fee award is eliminated, the ratio will escalate even further, to 41.5:1. (See AOB 42-47; Section VII, *infra*.)

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3/(...continued)
closing argument. (See RT 4254.) But counsel's comments cannot supplant the jury instructions. Here, the jury was instructed as to each theory of liability—both the contract theory and the bad faith theory—to award Hanstad "all" damages. (CT 6122 [on the contract theory, "all the loss"], 6129 [on the tort theory, "all the detriment"].) The jury received no instruction that the damages would be anything less than it awarded; and the jury *was* instructed that statements of counsel are not evidence (CT 6099) and that the damage amounts claimed by counsel in argument are not evidence of reasonable compensation (CT 6186).

The verdict form required the jury to award separate amounts for breach of contract and bad faith damages, and it must be presumed that when the jury awarded punitive damages, it adhered to the court's specific instruction that "the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff." (CT 6199.) In applying this instruction, the jury necessarily had in mind the sum total of damages it determined was caused by Truck's conduct, namely, $2,136,973.20.

### 2. Truck is constitutionally entitled to have a jury set punitive damages in light of the real amount of recoverable compensatory damages.

To defend the dramatic inflation in the jury-determined ratio between punitive and compensatory damages brought about by post-verdict reductions in compensatory damages, Hanstad insists Truck had no right to have the ultimate level of its punishment determined by the jury. (See RB 36-41.) Hanstad's position is indefensible.

a. Under our constitution, it is the jury's job to decide all fact questions, including the amount of compensatory damages and, consistent with legally-imposed guidelines, the amount of punitive damages. (E.g., *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 284; *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1190.) When a defendant is entitled to a jury determination and doesn't get one, reversal for retrial is required. (E.g., *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 392.)

In determining the amount of punitive damages, the jury's task is to level the correct quantum of punishment based on established factors that include, prominently, assessment of the correct amount of compensatory damages. (*Liodas v. Sahadi, supra*, 19 Cal.3d at p. 284.)[4] Under the law,

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4/ To the same effect, see, e.g., *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 541-542 [jury can't determine reasonable relationship between punitive and compensatory damages without considering an appropriate amount of compensatory damages] and, analogously, *Adams v. Murakami* (1991) 54 Cal.3d 105 [remanding for *jury* determination of punitive damages where original punitive award was fashioned by jury that didn't hear evidence of defendant's financial

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the compensatory and punitive damage figures are symbiotic; there must be a reasonable relationship between the two.

Hanstad tries to distinguish *Liodas* and *Auerbach*. (RB 39-41.) He argues, for example, that *Liodas* is inapposite because there the compensatory damages had to be completely retried, whereas here they were simply reduced. (RB 39-40.) This is a distinction without a difference. The bottom line is that here, as in *Liodas*, the compensatory figure changed, and it is the change that requires a new punitive determination. The point is that when the compensatory damage award cannot withstand scrutiny, neither can the punitive award.

Hanstad misses the dispositive reasoning that drives the *Liodas* decision. The Supreme Court made clear that punitive damages had to be retried because the law requires that they be determined in the first instance by a jury having in mind the appropriate amount of compensatory damages. (*Liodas v. Sahadi*, *supra*, 19 Cal.3d at p. 284 ["Exemplary damages must be redetermined as well, as 'it would be improper and premature to assess such damages until or concurrently with the assessment of "the actual damages"' . . . and 'exemplary damages must bear a reasonable relation to actual damages' . . . even though no fixed ratio exists to determine the proper proportion" (citations omitted)].)

This principle is every bit as unfulfilled here as it was in *Liodas*. Here, the jury didn't know it was awarding the same $239,176.20 contract damages twice; the jury didn't know that Hanstad would invite the court to eliminate another $530,301 from the compensatory award in order to preempt a new trial; the jury didn't know that its $404,000 *Brandt* award was legally insupportable; the jury didn't know that Hanstad's proven

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condition].

compensatory damages were $1.17 million less than it believed. Thus, the jury meted out punishment based on an injury that was not as grave as it believed.

Exactly as in *Auerbach*, the jury was misled as to the amount of compensatory damages it could award in the first instance. Thus, the jury did *not* determine punitive damages in the first instance based on an accurate evaluation of Hanstad's injury.

Both *Liodas* and *Auerbach* compel that the punitive damage award be reversed.

b. Hanstad tries to defend the trial court's post-verdict retooling of punitive damages by arguing that this case is governed by Code of Civil Procedure section 662.5, which Hanstad asserts demonstrates that "[c]ourts routinely amend compensatory damage awards after trial." (RB 36.) Hanstad misplaces his reliance.

Code of Civil Procedure section 662.5 comes into play when a court, in the context of deciding a new trial motion, determines that a new trial should be granted unless the plaintiff agrees to a reduction of compensatory damages.[5] If the plaintiff agrees to the reduction, the new trial motion is denied; if the plaintiff refuses it, there must be a new trial. Consent by the party affected is the crucial, constitutionally-required ingredient. Absent consent, the trial court must grant a new trial; it has no constitutional power to supplant a jury-calculated damage figure with a new court-determined one. Any other result would deprive the litigant of his or her constitutional right to a jury trial. (See, e.g., *Thompson v. Friendly Hills Regional Medical Center* (1999) 71 Cal.App.4th 544, 548, quoting *Schelbauer v.*

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5/ The statute also governs the converse situation, in which the plaintiff will be awarded a new trial unless the defendant agrees to a court-calculated increase in damages. (See Code Civ. Proc., § 662.5, subd. (b).)

*Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 454 ["The remittitur is a judicially developed device, codified in Code of Civil Procedure section 662.5, to allow trial judges who disagree with a jury's determination of damages to order a conditional new trial unless the plaintiff agrees to a reduced damage award. The Supreme Court has held the remittitur is only to be used 'to reduce excess damages' and cannot be employed 'beyond that limited context'"].)

Here, Hanstad consented to the reductions in the compensatory damages (indeed, he instigated them), but Truck never consented to the concomitant increase in the punitive-to-compensatory ratio decided by the jury. Just as the compensatory damages could not be reduced without Hanstad's consent, neither could the punitive-to-compensatory ratio adopted by the jury be increased without Truck's consent.

The alteration of the jury's ratio without Truck's consent was unconstitutional. A new trial must be granted so that a jury can determine the correct quantum of punishment in light of a correctly-determined compensatory award.

### 3. Hanstad's reliance on case law is misplaced.

Hanstad relies on *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, and *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514 for the proposition that a change in compensatory damages doesn't require any particular ratio to be maintained. (RB 36-39.)

These decisions do not so hold. None focuses on the issue presented here—the necessity of having a *jury* decide both the compensatory and

punitive figures giving rise to the damage ratio. Cases are not authority for propositions not considered or decided. (E.g., *In re Tartar* (1959) 52 Cal.2d 250, 258.)

The cases relied on by Hanstad are also inapposite for another reason. In decisive contrast to what happened here, each of these cases involved a true application of Code of Civil Procedure section 662.5, in which the trial court was poised to grant defendant a new trial had plaintiff not consented to the reduction.

### 4. Hanstad ignores the controlling significance of the *relative* reprehensibility requirement in determining punitive damage awards.

Hanstad defends the punitive damage award on the ground, he says, that Truck's conduct was "truly reprehensible." (See RB 13-25, quote at RB 13.) This is non-responsive to the legal point we advance.

Conduct warranting punitive damages necessarily must be capable of characterization as "reprehensible." If the evidence didn't lend itself to such a characterization, then punitive damages could not be imposed. Truck's point—ignored by Hanstad—is that a controlling element in the calculus of punitive damages is not blameworthiness considered in a vacuum or in comparison to blameless conduct, but rather it is *relative* reprehensibility. The question is blameworthiness "in light of the types of

misconduct that will support punitive damages." (*Adams v. Murakami, supra*, 54 Cal.3d at p. 111, fn. 2.)[6]

As established in the opening brief (AOB 22-23), the conduct here was not proven to involve a pattern of misconduct (see, e.g., *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1288 ["It is notable that punitive damages have been assessed against insurance companies most commonly where a showing has been made of a continuous policy of nonpayment of claims"]) or a decision undertaken with knowledge it was likely to cause widespread injury (see, e.g., *Grimshaw v. Ford Motor Corp.* (1981) 119 Cal.App.3d 1757, 1812-1816 [Ford knew the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20- to 30-mile-per-hour collision]). Instead, the facts involve an individual instance of wrongful failure to afford insurance benefits to one who was not named as an insured under an insurance policy as it was written and paid for. On the scale of relative reprensibility, Truck's conduct is far less reprehensible, relatively speaking, than that involved in many other cases where punishment was warranted. In many California cases, including wrongful death cases based on murder or mass market intentional torts involving widespread threats to public health, sizeable punitive damages have been imposed, yet the $40 million punitive award here, based on far

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6/ Truck has not challenged the jury's malice, oppression and fraud findings, electing instead to focus on constitutional and other legal deficiencies that fatally undermine the punitive damage award. (See, e.g., AOB 5 ["Truck concedes this case does not represent a model of claims handling. Yet that cannot overcome the factual, legal and constitutional deficiencies that drive the outcome here"]; cf., RB 10 [Hanstad notes that Truck doesn't dispute findings made in interim statement of decision].) This is not to say that Truck agrees with Hanstad's depiction of its conduct. As noted in the opening brief (AOB 6, fn. 1), there was evidence at trial that supported a different view of the facts.

less reprehensible conduct, is vastly greater than the punitive awards imposed in such cases. (See AOB 23, fn. 9.)

Hanstad repeats the reprehensibility mantra, but ignores the controlling *relative* reprehensibility standard. Once again, the punitive damage award cannot stand.

## II.

## THE PUNITIVE DAMAGE AWARD MUST BE REVERSED BECAUSE IT IS UNCONSTITUTIONALLY EXCESSIVE.

### A. At Nearly 30 Times The Reduced Compensatory Damage Award, The Punitive Damage Award Is Unconstitutional, And The Ratio Will Increase To Over 40:1 When *Brandt* Fees Are Eliminated.

The punitive damage award must be reversed because it is nearly 30 times the compensatory damages and is unconstitutionally excessive as a matter of law; when the unproven *Brandt* award is eliminated, the ratio will grow more disproportionate, exceeding 40:1.

The punitive award is inconsistent with constitutional principles of fair notice, due process and equal protection. It greatly exceeds established civil and criminal penalties that are rarely greater than treble damages. It outstrips the less-confiscatory ratios that the federal courts and various justices of the California Supreme Court have cited with increasing frequency as establishing the constitutional limit on most punitive damage awards, except those where the compensatory award is small or the conduct

in question involves a pattern of repeated or widespread wrongdoing, neither of which circumstances is present here. (See AOB 21-23.) The award exceeds what is needed to punish for the instance of misconduct in handling a single claim evidenced in this case.

### B. Hanstad's Response Is Ineffectual.

#### 1. Cases affirming large ratios almost inevitably involve relatively small compensatory damage awards.

Hanstad defends the inflated 30:1 ratio, arguing that courts have upheld "widely varying punitive to compensatory ratios." (RB 27.) Indeed, they have. What Hanstad ignores, however, is that the California cases with high punitive/compensatory damage ratios almost always involve relatively small compensatory awards. (AOB 22, fn. 8.)

Hanstad also fails to come to grips with the recent decisional trend enforcing federal constitutional limits on punitive damage awards. The U.S. Supreme Court, for example, has declared that a 10:1 ratio is the constitutional limit (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 581 [134 L.Ed.2d 809, 116 S.Ct. 1589, 1602] ("*BMW*") [ratio of "not more than 10 to 1" is permissible under Due Process Clause]), except where the compensatory damages are low (*id.* at p. 582 [116 S.Ct. at p. 1602] ["Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly

egregious act has resulted in only a small amount of economic damages"].) Numerous courts have followed the Supreme Court's lead.[7]

The small compensatory awards in the cases cited by Hanstad distinguish them decisively from the situation presented here.[8] The compensatory award on which the jury based its punitive damage decision was $2,136,973.20—far from a nominal sum.

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7/ E.g., *Continental Trend Resources, Inc. v. Oxy USA Inc.* (10th Cir. 1996) 101 F.3d 634, 639 ("if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio"); *Federal Deposit Ins. Corp. v. Hamilton* (10th Cir. 1997) 122 F.3d 854, 861 ("even a 10:1 ratio will be unconstitutionally excessive in a broad range of cases"); *San Huan New Materials High Tech, Inc. v. International Trade Commission* (Fed. Cir. 1998) 161 F.3d 1347, 1363 (citing Supreme Court cases suggesting 10:1 ratio ceiling); *Groom v. Safeway, Inc.* (W.D.Wash. 1997) 973 F.Supp. 987, 995 ("The Supreme Court has suggested that a ratio of 10-to-1 might be close to the limit; this Court finds that a ratio of 10-to-1 is certainly the limit in the instant case").

8/ E.g., *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1137 [70:1, but only $50,000 in compensatory damages]; *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1651 [78:1 ratio, but only $25,660.17 in compensatory damages]; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 384 [26.6:1; compensatory damages of $3,425.69]; *Pistorius v. Prudential Insurance Co.* (1981) 123 Cal.App.3d 541, 544 [22:1; $45,000 in compensatory damages]; *Delos v. Farmers Group, Inc.* (1979) 93 Cal.App.3d 642, 668 [33:1; $10,500 compensatory damages].

### 2. Hanstad ignores federal constitutional strictures limiting the size of punitive damage awards.

Hanstad's intimation that a limitless range of ratios is permissible (RB 27) is inconsistent with the United States Supreme Court's repeated warnings that punitive damage awards command the highest level of *de novo* review in order to assure they do not transgress due process boundaries. (E.g., *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424 [149 L.Ed.2d 674, 121 S.Ct. 1678]; see, e.g., RB 39.)

Hanstad contends that the courts have never "adopted a fixed ratio between punitive and compensatory damages that marks the line between reasonable and excessive punitive damage awards" (RB 26), and he challenges as a "personal opinion" (RB 26, fn. 11) Justice Brown's articulation of reasons why punitive damages should should rarely exceed compensatory damages by more than a factor of three. (See *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 429 (conc. opn. of Brown, J.).)[9] He ignores the warnings in two United States Supreme Court decisions that a ratio of 4:1 generally may be "close to the line." (*Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23-24 [113 L.Ed.2d 1, 111 S.Ct. 1039, 1046] [4:1]; *BMW, supra*, 116 U.S. at p. 1602.)

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9/ Hanstad cites the 526:1 ratio in *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 446 [125 L.Ed.2d 366, 113 S.Ct. 2711, 2714]. What he overlooks is the Court's later clarification that the *TXO* ratio was really not more than 10:1. (See *BMW, supra*, 517 U.S. at p. 581 [116 S.Ct. at p. 1602] ["Thus, in upholding the $10 million award in *TXO*, we relied on (information indicating) that the relevant ratio was not more than 10 to 1"].)

While it is true that courts have resisted a one-size-fits-all test, they have repeatedly condemned as unconstitutional punitive damage awards that are disproportionate to compensatory damages. Just recently, for example, the Ninth Circuit observed that "a unique body of law governs punitive damages" and that modern Supreme Court jurisprudence has "expanded the way courts review constitutional challenges to large punitive damage awards." (*In re: Exxon Valdez* (9th Cir. 2001) 270 F.3d 1215, 1246.)

In *Exxon*, the Ninth Circuit reversed a $5 billion punitive award imposed in litigation arising from the notorious Alaskan oil spill, which inflicted irreparable damage on property and the environment. Nonetheless, the court concluded that the 17.42:1 ratio employed in that case against one of the world's largest oil companies was unconstitutionally excessive. It remanded the matter to the district court for redetermination of punitive damages in light of the drastically lower constitutional ceiling suggested in the latest Supreme Court decisions.

Other than arguing that Truck's conduct was "truly reprehensible," Hanstad fails to grapple with the governing law imposing strict appellate scrutiny and severe constitutional boundaries on punitive awards. Such boundaries should particularly apply here, where the 18.72:1 ratio adopted by the jury based on its belief that Hanstad's injury was substantially greater than the law recognizes was subsequently inflated by the Court to nearly 30:1 and, when the unlawful *Brandt* award is eliminated, will rise to 41.5:1. While such a ratio might work when the compensatory damages are small, it cannot pass constitutional muster where, as here, even the fully reduced compensatory damages approach $1 million.

### 3. Hanstad's "fair notice" argument is speculative at best.

Hanstad claims that Truck had fair notice it might be subjected to $40 million in punitive damages for mishandling a single claim because, he theorizes, its actions could have resulted in suspension of its insurance license for up to one year under Insurance Code section 704, and if that had happened, the resulting revenue loss would have exceeded the amount of punitive damages awarded. (RB 32-33.) There are gaping holes in this theory.

The civil and criminal penalties that have been recognized as germane to punitive damage analysis have uniformly been limited to fines and similar monetary penalties. (See, e.g., *Lane v. Hughes Aircraft*, *supra*, 22 Cal.4th at pp. 425-426 (conc. opn. of Brown, J.) [noting 30 examples]; *BMW*, *supra*, 517 U.S. at p. 583 [116 S.Ct. at p. 1603] [noting that comparison to "the civil or criminal penalties that could be imposed for comparable misconduct" provides an "indicium of excessiveness"and providing as examples various statutory fines].)

Hanstad does not even articulate the basis on which Truck's conduct in this case really could have subjected it to suspension under the statute he cites. (See, e.g., RB 33 ["Truck's behavior in this case *may* meet the above criteria" (italics added)].) Nowhere does he attempt to show how Truck's misconduct in this case could have resulted in such severe punishment.

The language of Insurance Code section 704 reveals why Hanstad must hedge. That statute applies only when an insurer *makes a practice* of conducting its business fraudulently, not carrying out its contracts in good faith, or habitually compelling claimants or judgment creditors of the insured to either accept less than the amount due under the insured's policy

or resort to litigation to secure the payment of such amount due. There is no evidence of such habitual conduct here.

A ratio of nearly 30:1 (which will increase to 41.5:1 once the unproven *Brandt* award is stricken) is unconstitutionally excessive. (AOB 16-21.) Hanstad has not come close to demonstrating otherwise. The punitive damage award must be reversed.

## III.

## THE PUNITIVE DAMAGE AWARD SHOULD BE STRICKEN BECAUSE, AS A MATTER OF LAW, PUNITIVE DAMAGES ARE NOT RECOVERABLE IN THIS CASE: THE LEGISLATURE HAS MANDATED THAT PUNITIVE DAMAGES ARE PRECLUDED IN AN ACTION (SUCH AS A BAD FAITH ACTION) ARISING OUT OF A CONTRACT.

### A. Because A Bad Faith Action Necessarily Arises Out Of Contract, Civil Code Section 3294's Plain Language Prohibits Awarding Punitive Damages In This Case.

This is an issue of first impression. But its outcome is compelled by a controlling statute and by Supreme Court authority.

Civil Code section 3294 explicitly makes punitive damages available *only* "for the breach of an obligation *not arising from contract.*" (Civ. Code, § 3294, subd. (a), italics added.) Under settled California law, the implied covenant of good faith and fair dealing is not an independent obligation. It derives exclusively from contractual obligations and exists

solely to support the expectations of the contracting parties derived from the contract's terms. Absent a contract, there is no such thing as an implied covenant of good faith and fair dealing, and only parties to the contract can sue or be sued for breach of the implied covenant. (See AOB 40-41.)

Since a bad faith action can only arise out of a contract, Civil Code section 3294, subdivision (a), on its face precludes an award of punitive damages in this or any other bad faith case. (AOB 40-41.)

### B. Hanstad's Response Avoids Confronting The Statutory Limitation On Punitive Damages.

Hanstad responds several ways. None addresses the real issue.

#### 1. What happens in the context of a tort that might *incidentally* involve a breach of contract is irrelevant here.

Hanstad declares that California courts have long permitted punitive damages to be imposed in tort actions "'upon a proper showing of malice, fraud or oppression even though the tort *incidentally* involves a breach of contract.'" (RB 52, quoting *Haigler v. Donnelly* (1941) 18 Cal.2d 674, 680, italics added, and citing other cases to similar effect.)[10]

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10/ One of the cases Hanstad cites, *Quigley v. Pet, Inc.* (1984) 162 Cal.App.3d 877, 887, held punitive damages to be potentially available in an action for breach of the implied covenant in a non-insurance context. It so concluded on the strength of *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752. (See *Quigley v. Pet, Inc., supra,* 162 Cal.App.3d at pp. 890-894.) *Seaman's*, however, has been overruled. (continued...)

This argument misses the boat. Civil Code section 3294, subdivision (a), does not talk in terms of whether a tort involves a breach of contract incidentally or directly. Rather, it speaks only about the breach of an obligation that does *not* arise out of contract. The obligations attendant in the implied covenant of good faith and fair dealing always do arise out of contract. When insurance bad faith is alleged, the insurance contract and its breach are by no means merely "incidental" to the cause of action. On the contrary, the contract and its breach are *central* to such a claim; they are its *sine qua non*.

Under *Waller* and *Foley*, there can be no bad faith claim without a contractual duty and its breach. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36 ["there can be no action for breach of the implied covenant . . . because the covenant is based on the contractual relationship between the insured and the insurer"]; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683 ["The covenant of good faith and fair dealing was developed in the contract arena and is aimed at making effective the agreement's promises"].)

Given this Supreme Court authority, there is no room for debate. A cause of action for breach of the implied covenant *is* one squarely "arising from contract." Punitive damages are unlawful in such cases.

### 2. Hanstad's reliance on other case law is equally misplaced.

Hanstad relies on two cases that we addressed in the opening brief. Neither avails him.

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10/(...continued)
(*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 102.)

One is *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820-821. As we pointed out (AOB 41), *Egan* doesn't mention, let alone address or resolve, the statutory issue Truck raises here. It doesn't decide how awarding punitive damages in the insurance bad faith context can be squared with the express language of Civil Code section 3294, subdivision (a). "Cases are not authority for propositions not considered." (*In re Tartar, supra*, 52 Cal.2d at p. 258.)

Hanstad cites the other case, *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43-44, for the proposition that punitive damages have been allowed in insurance bad faith actions upon a showing of malice, fraud or oppression. (RB 52-53.) This is not the issue. True, punitive damages have been awarded in bad faith insurance cases, but not one of them addresses the statutory preclusion asserted here. Moreover, *Cates Construction* is not even an insurance case, so the passage cited by Hanstad is merely dicta.

### 3. That the cause of action for breach of the implied covenant sounds in tort doesn't change the fact that it arises out of contract.

Hanstad argues that punitive damages are permissible in an implied covenant claim because such a cause of action sounds in tort. (RB 53.) True, it does sound in tort. But that doesn't change the fact that the cause of action necessarily arises out of a contract.

All the tort label means is that a tort measure of compensatory damages is available. However, just because a tort measure of

compensatory damages is permissible doesn't change the fact that the statute precludes punitive damages.

Nor does the tort label alter the fundamental contractual essence of the cause of action. Under Supreme Court decisions such as *Gourley* and *Waller*, the gist, the essence is what matters. (E.g., *Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 127-129 [essence of bad faith is contractual financial injury, not personal injury].) Here, the gist is contractual as a matter of law.

### 4. The statutory language precludes awarding punitive damages in a claim for breach of the implied covenant.

The language in Civil Code section 3294, subdivision (a), is explicit. It prohibits awarding punitive damages in an action for breach of an obligation arising from contract. No court has the power to ignore the statute's language or to rewrite it. (E.g., *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633.)

Truck is asking that the statute be enforced in accordance with its clear terms. The punitive damage award is unlawful. It should be reversed with directions to dismiss Hanstad's punitive damage claim.

## IV.

## THE PUNITIVE DAMAGE AWARD MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING HANSTAD TO INTRODUCE EVIDENCE OF THE NET WORTH OF OTHER COMPANIES IN ADDITION TO TRUCK.

### A. The Admission Of Irrelevant Evidence About Pooling Agreements And Non-Defendants' Net Worth Gave The Jury A Distorted Picture Of Truck's Wealth And, Thus, An Improper License To Inflate The Punitive Damage Award.

As demonstrated (AOB 24-26), the trial court prejudicially erred in allowing Hanstad to introduce evidence of financial data going far beyond Truck's own net worth.

To recover punitive damages, Hanstad bore the burden of establishing *the defendant's* financial condition. (*Adams v. Murakami*, *supra*, 54 Cal.3d at p. 119; see, e.g., *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1593 [punitive damage award "must be tailored to the *defendant's* financial status" (emphasis added)].) Truck is the only defendant here, and Hanstad didn't purport to try any issue of alter ego. Therefore, only *Truck's* financial condition was relevant.

It was error for the trial court, over Truck's objection, to permit Hanstad to present evidence not only of defendant Truck's financial condition, but also of the interrelationship of the various exchanges with which Truck has entered into pooling agreements, as well as the

relationship of these entities with their ultimate owner, and the net worth of one and all.

The error was prejudicial because it improperly gave the jury a distorted impression of what size punitive damage award was warranted in order to punish and deter Truck.

### B. None Of Hanstad's Responses Salvages The Trial Court's Prejudicial Admission Of This Irrelevant Evidence.

Hanstad contends (RB 34-35): (1) the trial court had discretion under Evidence Code section 352 to admit the challenged evidence; (2) evidence of the other entities' finances was relevant because it shows Truck will receive assistance from those entities and from the pooling arrangements in paying any punitive damage award assessed against it; and (3) Truck is mistaken in relying on *Tomaselli v. Transamerica Ins. Co.*, *supra*, 25 Cal.App.4th 1269. None of Hanstad's points has merit.

#### 1. The trial court lacked discretion to admit irrelevant evidence.

Hanstad's argument based on Evidence Code section 352 widely misses the mark. Hanstad ignores that the court's discretion under that statute extends only to whether admissible *relevant* evidence should nonetheless be excluded because its prejudicial effect outweighs its probative value. However, that statute has nothing to do with *irrelevant* evidence. Irrelevant evidence is never admissible. As Evidence Code section 350 states explicitly, "No evidence is admissible except relevant

evidence." No court has discretion to rule otherwise. (E.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 132.)

Evidence Code section 352 has no application here because evidence concerning the finances of *non-defendants* is irrelevant to the questions of *Truck's* net worth and punitive damage liability. The trial court had no discretion to admit the evidence.

### 2. The pooling agreement evidence was as irrelevant as the evidence of nondefendants' finances.

The evidence as to the pooling agreements should have been excluded for two reasons.

First, the pooling agreements don't reflect Truck's net worth at all. Rather, at most, they are a benefit available to Truck. For example, if an individual's net worth is $100,000 and his uncle guarantees payment of the debt or he purchases a $1 million insurance policy, the individual's net worth is still $100,000. The benefit involved protects against a loss of net worth, but is not itself net worth.

Second, absent any showing of alter ego (again, Hanstad made none), evidence that Truck, the lone defendant, might receive a benefit from someone else is *not* relevant to the jury's determination of the amount of punitive damages to be awarded against Truck based on its own net worth.

### 3. *Tomaselli* supports Truck's position.

Notwithstanding Hanstad's protestations (RB 35), Truck's reliance on *Tomaselli* is sound. In a discussion directly relevant here, that decision holds that absent proof of alter ego, a parent entity's financial condition is irrelevant and, accordingly, inadmissible. (See AOB 24-25.)

It's true, as Hanstad states, that the court also found the financial evidence deficient for its failure to supply separate information on the defendant's financial status. (25 Cal.App.4th at p. 1283.) But there is no question that the court held the parent's financial data irrelevant absent trial of an asserted alter ego issue.[11]

If Hanstad wanted legitimately to expose the jury to financial data pertaining to pooling agreements and to entities other than Truck, he should have tried to prove the entities are really one by litigating alter ego. He didn't do so. Absent such proof, the non-Truck financial evidence was irrelevant to the punitive damage claim against Truck, and the trial court therefore erred in admitting it.

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11/ "Here, alter ego was not litigated or decided, nor is there any significant showing of unity of interest. More importantly, there is nothing to suggest how an 'injustice' would befall [the] Tomasellis if the punitive damage award were limited to a percentage of appellant's value rather than that of the parent company. (Citation.) [¶] Accordingly, we must reverse the portion of the judgment based on the punitive damage verdict." (25 Cal.App. 4th at pp. 1285-1286; see *id.* at p. 1283 [terming the parent company's financial data "irrelevant evidence"].)

### 4. The admission of the irrelevant financial evidence was severely prejudicial to Truck.

The prejudice from the trial court's error in admitting extraneous financial data is palpable. (AOB 25-26.)

There is more than a tenfold difference between Truck's net worth and that of the aggregate entities about which Hanstad introduced evidence. The jury was instructed that it should consider Truck's wealth in deciding what level of punishment it should impose. (CT 6199.) There is at least a reasonable chance that the enormous $40 million punitive damage award (adopted by bare 9-3 vote) was influenced by the irrelevant financial evidence depicting Truck's net worth as substantially greater than it is. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [error is prejudicial where there is "a *reasonable chance*, more than an *abstract possibility*" that it affected the verdict].)

The prejudice caused by the error is magnified even further when one adds to the mix the fact that the jury was also misled as to the amount of Hanstad's compensable injury. When the two misperceptions are considered in tandem, it is inconceivable that the jury was not prompted to award significantly higher punitive damages than if neither error had been committed. This is particularly true since the misperceptions pertained to critically-important components of the punitive damage equation—the quantum of injury and the defendant's wealth.

Truck, the sole defendant in this lawsuit, was entitled to have the jury formulate punitive damages based solely on its own net worth. Because the trial court admitted irrelevant evidence of other entities'

collective worth and of the irrelevant pooling arrangement, the $40 million punitive damage award must be reversed.

## V.

## THE PUNITIVE DAMAGE AWARD MUST BE REVERSED AND THE ENTIRE BAD FAITH CASE RETRIED BECAUSE THE TRIAL COURT (A) USURPED THE JURY'S ROLE IN DECIDING THE THRESHOLD "MANAGING AGENT" ISSUE AND (B) FAILED TO INSTRUCT THE JURY THAT TRUCK CANNOT BE HELD LIABLE FOR PUNITIVE DAMAGES UNLESS A MANAGING AGENT WAS CULPABLE OF MALICE, OPPRESSION OR FRAUD.

### A. The Trial Court Prejudicially Mishandled The "Managing Agent" Issue In Multiple Respects.

As shown in the opening brief (AOB 27-31, 33-34), California law establishes that punitive damages can be awarded against a corporate entity only where a "managing agent"—an employee having authority to establish corporate policy—personally committed, authorized or ratified the conduct determined by the jury to constitute fraud, oppression or malice. (E.g., *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [Civil Code section 3294, subdivision (b), requires that "the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent'"]; and additional sources cited at AOB 30.)

The reason why managing agent involvement is essential is this: "'The entire basis of the doctrine of vindictive [punitive] damages is that the *person*, himself, *who is sued* has been guilty of recklessness or wickedness which amounts to a criminality that should be punished for the good of society, and as a warning to the individual; but to award such damages against the master for the criminality of the servant is to punish a man for that of which he is not guilty.'" (*White v. Ultramar, Inc., supra,* 21 Cal.4th at p. 569, quoting *Warner v. Southern Pacific Co.* (1896) 113 Cal. 105, 112].)

The $40 million punitive damage award is insupportable because the jury was not instructed as to any managing agent issue. It was clueless as to these statutory constraints when it determined that Truck committed fraud, oppression and malice. Without instruction as to the governing managing agent issues, the jury could not possibly have decided key issues essential to any determination that Truck is liable for punitive damages.

### 1. "Managing Agent" is a fact question that the trial court erred in deciding as a matter of law.

The issue whether wrongful conduct was committed by a managing agent is a fact question; thus, it must be decided by the jury. The Supreme Court has made this clear: "The scope of a corporate employee's discretion and authority under our test is . . . a question of fact for decision on a case-by-case basis." (*White v. Ultramar, Inc., supra,* 21 Cal.4th at p. 567.)

The trial court, however, ruled that the managing agent question was one of law and refused to submit it to the jury. (RT 4140-4141.) This was

clear constitutional error: A fact question can be taken from the jury and decided as a matter of law only when the evidence is uncontroverted or permits drawing but a single conclusion. (See, e.g., AOB 27-29.) This case did not present that situation. (See AOB 27-29 and Section VI, *infra.*) This error alone requires reversal. But this was not the only error regarding the managing agent issue.

Compounding its mistake, the court ruled broadly that *anybody* who makes a coverage decision is a managing agent. (See RT 4140-4143.) This ruling, too, contravenes the Supreme Court's and this court's teaching. (*White v. Ultramar, Inc.*, *supra*, 21 Cal.4th at pp. 571 [the punitive damage focus is on managers who "were vested with a degree of discretion over decisions that would ultimately determine *corporate policy*" (emphasis added)], 573 [Legislature intended to limit punitive damages to involvement in punishable conduct by "those employees who exercise substantial independent authority and judgment over decisions that ultimately determine *corporate policy*" (emphasis added)]; *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 163 ["A corporation is not deemed to ratify misconduct, and thus become liable for punitive damages, unless its officer, director, or managing agent actually knew about the misconduct and its malicious character. A 'managing agent' is an employee with authority to establish corporate policy, that is, the broad principles and rules of general application which govern corporate conduct"].)

Truck was entitled to a jury trial on these managing agent issues: (a) whether one of its managing agents, responsible for making corporate policy, was involved in handling Hanstad's claim; *and* (b) whether such managing agent, if any, actually knew about the misconduct *and* its malicious character. The jury was not instructed as to either of these

points. Proof of and a verdict favorable to Hanstad on *both* was essential to his right to recover punitive damages.

The trial court's errors in refusing to submit these matters to the jury require reversal of the punitive damage award.

### 2. By failing to instruct the jury as to the controlling managing agent issues, the trial court guaranteed that the punitive damage award would not satisfy the statutory prerequisites to such recovery.

The trial court erred in failing to give the jury *any* instruction on *any* managing agent issue. This is fatal to Hanstad's punitive damage entitlement.

Even if we assumed *arguendo* that the trial court's determination that anybody who makes a coverage decision is a managing agent was somehow correct, the jury *still* had to be made aware that other managing agent issues existed and that the court had decided the threshold issue—i.e., who qualified as a managing agent—a certain way.

Why was this necessary? Because the ultimate question of whether Truck acted with malice, oppression or fraud *did* go to the jury. The problem, however, is that the jury was not given crucial guidance as to how to resolve that issue. Without guidance concerning who qualified as a managing agent and how Civil Code section 3294, subdivision (b), limited the availability of punitive damages based on that determination, the jury could not decide (as the statute required it to do) that a managing agent

personally committed, authorized or ratified the particular act or acts that the jury found to constitute fraud, oppression, and malice.[12] .

Hanstad had the burden to see that the jury was properly instructed as to all elements essential to his right to recover and then to prove the elements of his case by clear and convincing evidence. (See, e.g., *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205 ["(I)n order for the plaintiff to prevail the record must contain sufficient evidence to support a finding in its favor on each and every element which the law requires to support recovery. (Citation.) No matter how overwhelming the proof of some elements of a cause of action, a plaintiff is not entitled to a judgment unless there is sufficient evidence to support all of the requisite elements of the cause of action"].)

Hanstad failed to carry his burdens here. Indeed, the way the case went to the jury, it is entirely possible the punitive damage award is based on acts of persons whom neither the trial court nor the law would characterize as managing agents. After all, *seven* individuals who took part in handling the subject claim testified at trial (see, e.g., AOB 35, fn. 14 [identifying the seven]), and each was charged with wrongdoing. But even Hanstad characterizes only *three* of them as managing agents. (See RB 43-50.)

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12/ To illustrate, consider this: Had the trial court instructed the jury that it determined as a matter of law that Lori Reilly (or anybody else) was a managing agent of Truck, the statute still would have required the jury to decide whether the managing agent personally committed, authorized or ratified the particular conduct that the jury found to constitute fraud, oppression and malice. Without instruction, the jury could not possibly have connected the dots between a particular managing agent and whatever particular conduct it determined warranted imposing punitive damages on Truck. *It didn't know there were any dots to connect.*

Oblivious to the requirement that only a managing agent's malicious acts could support punitive damage liability, the jury may well have imposed $40 million in punitive damages on Truck based on the conduct of one or more claims handlers who didn't approach having the level of responsibility necessary in order for his or their conduct to support a punitive damage award against Truck. This was prejudicial error.

### B. Hanstad's Arguments Are Not Responsive.

Hanstad argues that Truck waived the managing agent issue by failing to object to the trial court's handling of it (RB 43-44) and that the trial court appropriately decided the issue as a matter of law because, he says, the evidence established without contradiction that Lori Reilly was a managing agent of Truck. (RB 44-50).[13] Hanstad's arguments do not salvage the punitive damage award.

#### 1. Since Truck wasn't obliged to try Hanstad's case, there was no waiver in its "failure" to object to the trial court's errors.

Hanstad contends Truck cannot challenge the trial court's mishandling of the managing agent issues, because Truck "failed to object." (See RB 43-44.) But Truck had no responsibility to try Hanstad's case for him.

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13/ Hanstad asserts that Adam LaPierre and Howard Hirsch also were managing agents of Truck, although Hanstad doesn't claim the evidence as to them was undisputed. (See RB 50, fn. 23.) Thus, any issue as to whether they qualified as managing agents had to go to the jury.

Just as a defendant "has no duty to appear as a witness for his adversary unless subpoenaed" (*Hosford v. Henry* (1951) 107 Cal.App.2d 765, 773 ["It was still the burden of respondent to prove his case"]; *Vaughn v. Coccimiglio* (1966) 241 Cal.App.2d 676, 678 [quoting *Hosford*]), Truck had no duty to carry Hanstad's burden of seeing that the jury was properly instructed as to the elements essential to Hanstad's recovery. (E.g., *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 951.) It was also the trial court's *sua sponte* duty to see that the jury was instructed as to all elements essential to the imposition of liability. (See 7 Witkin, Cal.Procedure (4th ed. 1996) Trial, § 273, p. 321 [citing cases].) Hanstad himself admitted that the key managing agent instructions were essential to his case. (See RT 4140-4143, AOB 28.)

There being no managing agent instructions, the jury wasn't allowed to decide an issue that the law required it to decide. Where, as here, a defendant is entitled to a jury trial and has requested one, it is prejudicial error to preclude the jury from deciding an essential factual issue. (E.g., *Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1490-1491; *Walker v. Northern San Diego County Hospital Dist.* (1982) 135 Cal.App.3d 896, 905.)

There is no evidence that Truck waived the point. Waiver is the intentional relinquishment of a known right. (E.g., *Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 31.) Truck didn't relinquish any right, intentionally or otherwise. Contrary to Hanstad's assertion (see RB 43-44), California law doesn't deem Truck to have waived anything by means of its failure to help Hanstad obtain instructions he needed in order to prevail.[14]

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14/ A litigant cannot waive the State's interest in limiting imposition of (continued...)

### 2. Even if Reilly were shown to be a managing agent, that wouldn't salvage the punitive damage award from the jury's failure to decide other pertinent managing agent issues.

Hanstad insists (RB 44-50) the evidence was undisputed that Lori Reilly was a Truck managing agent and that the trial court therefore appropriately so determined as a matter of law. Hanstad is wrong.

First, Hanstad's argument doesn't reflect the record accurately. When Hanstad's counsel asked the trial court point blank whether it had "concluded that Reilly was a managing agent," the court answered broadly that "I'm satisfied that anybody that had the — who could make a determination by the company to cover or deny coverage or to deny a defense or to grant a defense is a managing agent under the cases." (RT 4143.) As demonstrated, this is *not* what the cases hold. Unless an employee is responsible for promulgating company policy, he or she is not a managing agent. Thus, the court had the wrong standard in mind when it

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14/(...continued)
punitive damages to cases in which punishment is warranted under the governing statute. As declared in response to a similar argument in *Tomaselli v. Transamerica Ins. Co.*, "the rationale of the *Adams* [*v. Murakami*] court concerning the *purpose* of punitive damages leads us to conclude a private litigant's error or omission, such as failure to object to irrelevant evidence, cannot obviate the public's interest in meaningful judicial oversight of punitive damage awards. *Adams* explained that the function of punitive damages is 'a purely *public* one . . . to punish wrongdoing and thereby to protect itself from future misconduct.'" (25 Cal.App.4th at p. 1283, quoting *Adams v. Murakami, supra*, 54 Cal.3d at p. 110, italics originating in *Adams*.)

determined that Reilly (and, apparently, everyone who ever handled the underlying Shafer file) was a managing agent. Far from what Hanstad claims, the record reveals that no legally-sound managing agent determination ever was made.

But even if the trial court had ruled as Hanstad says, and even if the evidence concerning Lori Reilly really had pointed only in one direction (it didn't; see Section VI, *infra*), the judgment still would have to be reversed. This is because the managing agent issue involves more than just the bare determination of who is a managing agent. It also includes the statutory requirement that the particular conduct that the jury finds to constitute fraud, oppression or malice was actually committed by a managing agent. The jury was clueless about this issue as well.

Because the trial court refused to instruct the jury on managing agent issues, the jury was oblivious to the necessity of determining *who* is a managing agent *and* then making a connection between the managing agent and the punishable conduct. Having no hint of the managing agent concept, they jury lacked the information necessary to do its job under the governing law. Although we argued this point at length in our opening brief, Hanstad utterly fails to respond to it. Complete silence!

Once again, the punitive damage award lacks foundation. It must be reversed.

## VI.

## THE PUNITIVE DAMAGE AWARD MUST BE REVERSED WITH DIRECTIONS TO ENTER JUDGMENT IN TRUCK'S FAVOR BECAUSE HANSTAD FAILED TO INTRODUCE EVIDENCE THAT ANY PERSON HAVING AUTHORITY TO MAKE CORPORATE POLICY FOR TRUCK COMMITTED OR RATIFIED ACTS OF MALICE, OPPRESSION OR FRAUD.

### A. In Addition To Fatal Instructional Errors On The Managing Agent Issue, Hanstad's Evidence Is Insufficient To Support A Determination That A Managing Agent Of Truck Committed Malice, Oppression Or Fraud.

Not only is the punitive damage award unsupported by any jury determination of essential managing agent issues, but Hanstad also failed to introduce evidence that any managing agent *of Truck*—someone responsible for promulgating Truck company policy—personally committed, authorized or ratified conduct constituting malice, oppression or fraud. (AOB 31-39.) So, even if there had been correct instructions, the judgment still would have to be reversed. Hanstad called as witnesses seven employees of Farmers Insurance Exchange who worked on the underlying Shafer claim. But the evidence he elicited failed to prove the managing agent prerequisites to imposing punitive damages.

Even construing the evidence in the light most favorable to the judgment, Hanstad failed to elicit any evidence sufficient to establish by the required clear and convincing standard (or even by a preponderance of the evidence) that any person was a managing agent of Truck—that is, an employee with authority to establish corporate policy. (See, e.g., *Cruz v. HomeBase*, *supra*, 83 Cal.App.4th at p. 163 ["A 'managing agent' is an employee with authority to establish corporate policy, that is, the broad principles and rules of general application which govern corporate conduct"].)

### B. Hanstad Points To No Evidence That Anyone Involved In Adjusting The Underlying Claim Was Responsible For Promulgating—As Opposed To Implementing—Truck Company Policy.

Hanstad argues that (1) Truck is merely "a paper entity through which Farmers issues CGL policies" (RB 42), (2) undisputed evidence establishes Lori Reilly was a managing agent of Truck (RB 45-49), and (3) there was sufficient evidence to show that Reilly "approved of and engaged in malicious, oppressive and fraudulent conduct against Hanstad" (RB 51). None of these arguments refutes Truck's position.

### 1. Hanstad failed to introduce evidence showing that any person handling the underlying file was responsible for promulgating *Truck's* company policies.

Hanstad's characterization of Truck as a paper entity misses the point. Hanstad was required to prove each element of his punitive damage case by clear and convincing evidence. (E.g., *White v. Ultramar, Inc.*, *supra*, 21 Cal.4th at p. 566, fn. 1; *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 318-319.) That included establishing that a managing agent *of Truck* personally committed, authorized or ratified the acts of malice, oppression or fraud for which punitive damages were awarded.

Even assuming *arguendo* that Truck is a paper entity, it still had to act through *someone*. Hanstad was required to prove that that *someone* engaged in the conduct that the jury found to be malicious, fraudulent or oppressive and was also a managing agent authorized by Truck to formulate its company policies.

There is no such proof here. Hanstad elicited testimony from each of the claims-handling witnesses that he or she worked *for Farmers Insurance Exchange, not* for Truck. (See AOB 35, fn. 14; RB 3, fn. 3.) But there was no evidence that any of the claims-handling witnesses were managing agents for Truck. Perhaps *Farmers Insurance Exchange* was given that status; or perhaps someone in *Farmers Insurance Exchange*'s hierarchy was given that status. But it was Hanstad's burden to establish the chain of command, and he didn't do so. He never made (and never tried

to make) that showing. Hanstad never established how it was that employees of a different (non-defendant) entity promulgated—not merely implemented—*Truck's* corporate policy.

The evidence didn't even touch upon these topics until Phase Three of the trial, *after* the jury had returned its verdict finding malice, oppression and fraud by *someone*.

There being no jury determination that the someone found guilty of malice, oppression or fraud was a managing agent of Truck, punitive damages were imposed without Hanstad's laying the evidentiary foundation required under Civil Code section 3294.

### 2. Even as depicted by Hanstad, the evidence concerning Lori Reilly is insufficient to establish she was a managing agent for Truck.

Hanstad's detailed recounting of Lori Reilly's testimony doesn't establish that Reilly was a managing agent of Truck.

Construed favorably to Hanstad, the evidence concerning Reilly may have established she possessed supervisory authority, both in general and in respect to the Shafer claim, but it did not establish that Reilly, who was an employee of Farmers Insurance Exchange and whose every decision was subject to reversal by her superiors Frank Brooks and Tom Smith (RT 3806), was a managing agent for Truck.[15] (See AOB 36-38.)

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15/ Hanstad argues in passing that two other witnesses, Adam LaPierre and Howard Hirsch, were also managing agents for Truck. (RB 50, fn. 23.) The only support he offers, however, is that they "handled" various aspects (continued...)

Further, as demonstrated in Section V above, these issues were wrongfully taken from the jury. In effect, the trial court directed the jury's verdict on the question of *who* may have been a managing agent of Truck. Accordingly, since a nonsuit or directed verdict was effectively entered against Truck on that issue, the standard of review actually requires construing the evidence on this point in the light most favorable to Truck. (E.g., *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) Hanstad's argument that Reilly was necessarily a managing agent of Truck as a matter of law doesn't confront the governing standard of review. Hanstad doesn't discuss the point in the context of viewing the evidence—which, even construed favorably to Hanstad, is insufficient—in the light most favorable to Truck.

### 3. Even if the evidence supported calling Reilly a managing agent, it doesn't support a finding that she committed, authorized or ratified conduct constituting malice, oppression or fraud.

But even if Reilly—a Farmers Insurance Exchange employee—had been proven to be a managing agent for Truck, and even if the issue had not been improperly taken from the jury, the punitive award *still* could not

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15/(...continued)
of the underlying claim. As shown above and in the opening brief, a significantly greater level of responsibility is required to establish an individual as a managing agent within the meaning of Civil Code section 3294, subdivision (b). These witnesses—also employed by Farmers Insurance Exchange—were never shown to be managing agents who promulgated corporate policy for Truck.

stand because the evidence doesn't come close to showing that Reilly "approved of and engaged in malicious, oppressive and fraudulent conduct against Hanstad." (RB 51.)

Hanstad makes all types of factual assertions, but he dodges what is controlling. For example, Hanstad claims that the evidence shows that Reilly "had authority to make the decisions she made with respect to Hanstad" (RB 46); that she had "possession of the claim file related to the Policy at the time she decided to deny Hanstad's request for a defense and acknowledged 'she was charged with knowing [the] contents [of the file] at the time when [she] made [that] decision'" (RB 48, citing RT 3818); and that she "was charged with knowing that Truck had waived its intentional acts defense by failing to reserve its rights with respect to Hanstad and by virtue of its second reservation of rights letter to DeMay" (RB 48).

This isn't enough to support a punitive damage award. Knowledge about a file does not equate to malice. What is missing is *clear and convincing* evidence that Reilly—assuming *arguendo* she was a managing agent—*personally committed, authorized or ratified* the wrongful conduct for which punitive damages were awarded. (E.g., *White v. Ultramar, Inc.*, *supra*, 21 Cal.4th at p. 569.) At most, Hanstad shows that some of the salient events in the underlying claim happened on Reilly's watch and that she had some knowledge and authority regarding the claim's handling. That, however, is insufficient to lay a foundation for imposing punitive damages on Truck.

For all these reasons, the punitive damage award must be reversed. Since Hanstad had free rein to prove his punitive damage claim at trial but failed to do so, the reversal should be with directions to strike the award permanently from the judgment. (See authorities cited at AOB 39, fn. 19.)

## VII.

## THE *BRANDT* FEE AWARD IS BOTH EXCESSIVE AND UNPROVEN. IT MUST BE REVERSED WITH DIRECTIONS TO ENTER JUDGMENT FOR TRUCK ON THE *BRANDT* CLAIM.

### A. The *Brandt* Fee Award Must Be Reversed Because Hanstad Failed To Prove That It Reflects His Damages—The Amount He Actually Owes His Attorneys For Obtaining His Contract Recovery.

Hanstad was awarded $404,000 in *Brandt* fees. (See *Brandt v. Superior Court* (1985) 37 Cal.3d 813.) The *Brandt* fee award must be reversed with directions: Hanstad failed to prove that it reflects the damages he suffered, i.e., the amount he actually owes his attorneys (see AOB 42-45); and he failed to prove what amount of fees were incurred in obtaining his contract recovery, the only fees recoverable under *Brandt* (AOB 45-48).

### B. Hanstad's Response Fails To Perceive That The Purpose Of *Brandt* Fees Is To Compensate For Damages Actually Sustained.

Hanstad relies on cases governing the calculation of reasonable attorney fees awardable by contract or under Civil Code section 1717 or

other statutes. He defends the *Brandt* fee award based on his counsel's testimony detailing how much effort he put into the case. (RB 53-66.)

These arguments misperceive what *Brandt* held, what the differences are between *Brandt* fees and attorneys fees awarded under Civil Code section 1717, and what the term "economic compensatory damages" means.[16]

### 1. Hanstad misunderstands the purpose of *Brandt* fees.

Hanstad's response is founded almost exclusively on cases addressing contractual or statutory post-judgment attorney fees governed by Civil Code section 1717 or other attorney fee statutes. (See RB 56-61.) Relying on such cases, Hanstad urges that the trial court had leeway here to award *Brandt* fees based on the reasonable value of his attorneys' services rather than on the amount he actually owes.

Hanstad misunderstands the purpose of *Brandt* fees. *Brandt* fees are not attorney fees *qua* attorney fees; that is, their purpose is not to fashion reasonable compensation for an insured's attorneys. (See *Brandt v. Superior Court*, *supra*, 37 Cal.3d at p. 817 [quoted above].) Rather, they are an item of the insured's compensatory damages, designed to make the

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16/ Hanstad also misperceives the standard of review. He claims that because Truck raised the *Brandt* issue in its new trial motion and lost, this Court's task is merely to review the trial court's new trial ruling for abuse of discretion. (RB 54-55.) Wrong. What this Court reviews is the *judgment*, not the order denying a new trial (a nonappealable order). What Truck presents here are legal issues demonstrating that the portion of the judgment awarding *Brandt* fees has no legal foundation. These issues of law are reviewable under the de novo standard. (E.g., *People v. Louis* (1986) 42 Cal.3d 969, 985 ["Questions of law are reviewed under the non-deferential, de novo standard"].)

insured whole for money he must expend. (E.g., *Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 906 ["the insurer is liable in a tort action for *that expense* . . . . Why? Because they are *damages* resulting from a tort" (italics added)].)

In determining what amount of damages is appropriately awarded under *Brandt*, the controlling question is this: How much must the plaintiff pay his attorneys for obtaining his contract recovery? If the plaintiff recovers that amount, he has been made whole, regardless whether his attorneys have been reasonably compensated for their efforts.[17]

### 2. Decisions about Civil Code Section 1717 attorney fees and the like are irrelevant to a *Brandt* fee analysis.

Section 1717 fees and the like are something else entirely. They *are* attorney fees *qua* attorney fees. They are awarded when a contract or statute provides an exception to the usual American Rule, codified in Code of Civil Procedure section 1021, which provides that "each party to a

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17/ *Andre v. City of West Sacramento* (2001) 92 Cal.App.4th 532, presents an analogous situation. There, the court overturned attorney fees obtained under Code of Civil Procedure section 1036. Andre, like Hanstad, had failed to introduce the contingency fee agreement that governed her payment obligations to her lawyers. The Court noted that "(t)o receive an award of fees under section 1036, the court must first determine what fees were actually incurred." (*Id.* at p. 537.)

Hanstad distinguishes *Andre* from *Brandt* on the ground that Section 1036 provides for an award of fees "actually incurred," and "[b]y contrast, *Brandt* provides for an award of fees 'incurred,' not 'actually incurred.'" (RB 61.) This is nonsense. It is a classic distinction without a difference. *Brandt* unmistakably limits the fees available as damages to those actually incurred, just as in *Andre*.

lawsuit must ordinarily pay his own attorney fees." (*Trope v. Katz* (1995) 11 Cal.4th 274, 278; see, e.g., *City and County of San Francisco v. Sweet* (1992) 12 Cal.4th 105, 115.)

Where attorney fees are recoverable by reason of contractual or statutory authorization, a court is required to determine what amount constitutes a reasonable attorney fee for obtaining the victory giving rise to the attorney fee entitlement. The focus is on the reasonable value of the attorney's services, rather than on what will make the plaintiff whole. In such contexts, cases such as the ones Hanstad cites may be relevant.[18]

That isn't the situation here. Hanstad was awarded *Brandt* fees—fees awarded as tort damages to compensate *him* for *his* loss, *not* to compensate his attorneys for the value of their services. Since Hanstad is not entitled to attorney fees under Civil Code section 1717 or any other statute, his attempt to defend the $404,000 *Brandt* award is based on the wrong body of law. He ignores the right body of law. Under the applicable

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18/ E.g., *Serrano v. Priest* (1977) 20 Cal.3d 25, 49, fn. 23 (addressing the "lodestar" method of attorney fee calculation); *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 833, quoting *Lealao v. Beneficial California Inc.* (2000) 82 Cal.App.4th 19, 26 (same); *Heppler v. J.M. Peters Co., Inc.* (1999) 73 Cal.App.4th 1265, 1296 (applying lodestar method in contingency fee context); *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 479 (reasonable Section 1717 attorney fees not limited to terms of contingency agreement); *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084 (applying lodestar method to calculation of award of Section 1717 attorney fees to corporate in-house counsel); *Garfield Bank v. Folb* (1994) 25 Cal.App.4th 1804, 1810 (same), and additional cases cited by Hanstad at RB 59-60.)

Even in a lodestar situation, the claimant's actual billing arrangement with his attorneys "is a significant factor in determining what rate is 'reasonable.'" (*Crescent Publishing Group, Inc. v. Playboy Enterprises, Inc.* (2d Cir. 2001) 246 F.3d 142, 149.) Here, Hanstad steadfastly and successfully resisted introduction of evidence documenting his actual fee agreement with his attorneys. (See AOB 44, fn. 22, and Section VI(C), *infra.*)

law, Hanstad's award can only be founded on, and is strictly limited to, whatever amount of fees he *actually incurred* with his attorneys for obtaining the policy benefits that were tortiously withheld. Once he has been paid that amount, he has been made whole for his damages.

Hanstad's reliance on *Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563 doesn't change this outcome. Still mixing Section 1717 apples with *Brandt* fee oranges, Hanstad insists, relying on *Campbell*, that "[t]here is no exception to the lodestar rule for determining attorneys fees awards (*sic*) under *Brandt*." (RB 57.)

True, *Campbell* is a *Brandt* fee case. In *Campbell*, the appellate court determined that the trial court erred in denying the plaintiff a *Brandt* fee award; it then awarded her the attorney fees attributable to her contract cause of action, noting that "[a]t trial she documented that amount to be $13,010." (*Id.* at p. 572.) From this, Hanstad runs wild with speculation, none of which is supported by the language in *Campbell*.[19] Hanstad's guesswork, however, establishes nothing. It doesn't begin to establish that *Campbell* utilized a lodestar method to determine *Brandt* fees. *Campbell* neither addressed nor resolved any lodestar issue. "It is fundamental that a case is not authority for a proposition not considered and decided." (*Aero-Crete, Inc. v. Superior Court* (1993) 21 Cal.App.4th 203, 212; e.g., *In re Tartar, supra*, 52 Cal.2d at p. 258 ["(c)ases are not authority for propositions not considered"].)

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19/ Specifically, Hanstad speculates, "[b]ecause the plaintiff recovered only $2500 on her contract claim, assuming a one third portion for her attorney, the amount of attorney fees allocable to her contract claim that she would have 'actually incurred' would have presumably been only $833." (RB 57.) He further guesses that a lodestar analysis must have been employed: "The only way she could have 'documented' $13,010 in attorneys fees for her contract claim would have been to introduce evidence as to the value of the legal services rendered to her." (RB 57.)

### 3. The *Brandt* fee award must be reversed with directions.

Hanstad failed to prove that he owes his attorneys $404,000, or any amount at all, for his contract recovery. (See AOB 45-47.) He has only himself to blame. He elected not to introduce such proof. Not only did he fail to introduce evidence showing how much he really owes his attorneys for any particular aspect of the case, but he prevented Truck from introducing in evidence his contingency fee agreement. (See AOB 44, fn. 22; RT 4042-4044, 4070-4071.) Accordingly, the *Brandt* fee award lacks evidentiary foundation and must be reversed.

Hanstad responds that the jury heard his trial counsel, Mr. Rossell, testify to how much time and effort he put into the case and that apportionment between his tort and his contract recoveries was unnecessary because his claims were "inextricably intertwined." (See RB 62-66.) These responses have nothing to do with how much damages Hanstad suffered. They do not salvage his unsubstantiated *Brandt* award.

#### a. The controlling question is how much Hanstad owes his attorneys, not how much effort his attorneys devoted.

*Brandt* fees are measured by the amount the insured actually owes his counsel. To ascertain that figure, one must consider the fee agreement between Hanstad and his counsel. Since Hanstad concededly has a contingency fee agreement with his attorneys (see, e.g., RB 55-56), what he

actually owes his attorneys, obviously, is determined by the terms of the agreement.

Mr. Rossell's testimony about how much resources he put into the case is immaterial to determining how much Hanstad owes his attorneys. The issue at hand isn't how much effort counsel put into the case, but rather how much Hanstad must pay. Having aggressively precluded introduction of the contingency agreement into evidence, Hanstad himself rendered it impossible for there to be any evidentiary foundation for any *Brandt* award. This compels reversal of the *Brandt* award with directions.

### b. *Brandt* makes clear that only fees attributable to obtaining policy benefits are recoverable.

*Brandt* holds that only fees attributable to obtaining the contract recovery can be awarded. (See AOB 45-46.) Hanstad also failed to introduce evidence that would permit the *Brandt*-compelled apportionment between a contract and a tort recovery. This, too, is fatal to his *Brandt* recovery, and this, too, compels reversal with directions. (See *Slottow v. American Cas. Co.* (9th Cir. 1993) 10 F.3d 1355, 1362 [failure to allocate amount of fees allocable to contract recovery as required by *Brandt* equals failure of proof].)

For all the reasons expressed, the $404,000 *Brandt* fee award must be reversed with directions. Hanstad having failed to prove his entitlement to *Brandt* fees in any amount, judgment must be entered in Truck's favor on the *Brandt* fee issue.

## VIII.

## THE ENTIRE BAD FAITH CASE MUST BE RETRIED, BECAUSE THE BAD FAITH LIABILITY AND DAMAGES ISSUES ARE INEXTRICABLY INTERTWINED.

Our opening brief demonstrates why the conjunction of erroneously determined punitive and compensatory damages requires a retrial of the *whole* bad faith case, including both damages and bad faith liability. (AOB 47-48.)

Hanstad fails to respond. He simply asserts that the trial court committed no error and, accordingly, there is nothing to retry. End of argument. (RB 67.)

It is difficult to conceive how a jury could intelligently formulate compensatory damages here without redetermining issues going to the heart of the liability question. Whether Truck's conduct was reasonable, unreasonable, mistaken, or something more, is a critical factor in assessing whether to impose a tort damage measure of compensatory damages, as opposed to only contract damages. (E.g., *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 347 ["before an insurer can be found to have acted tortiously (i.e., in bad faith), for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted *unreasonably* or *without proper cause*"]; *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 68 [punitive damages "must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case*"].)

It is equally difficult to conceive how a jury could redetermine punitive damages without also hearing the evidence necessary to establish

whether the conduct was tortious, whether a managing agent was involved in the malicious conduct and all the other elements of a punitive damage claim. The issues of liability and damages are inextricably intertwined.

Under any reasoned analysis, the conclusion is inescapable that "the matter of liability is substantially inseparable from that of damages in the present posture of this case. A partial new trial would be prejudicial to [Truck]. A new trial on all issues is thus required." (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 286.)

## CONCLUSION

Nothing in Hanstad's Respondent's Brief undermines Truck's demonstration that the huge judgment here is riddled with prejudicial error. The $40 million punitive damage award and the $404,000 *Brandt* fee award must fall. Moreover, since Hanstad failed to prove he is entitled to punitive damages or to *Brandt* fees, the reversal must be with directions to enter a new judgment in Truck's favor as to these claims. Finally, should the Court decide to remand the punitive damage claim for retrial, the remand should encompass retrial of all liability and damages issues, except for *Brandt* fees, to which Hanstad has squandered any entitlement.

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