

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

Randall Chapman,

Plaintiff and Respondent/Cross-Appellant,

vs.

UnumProvident Corporation: The Paul Revere Life Insurance Company;
Provident Life and Accident Insurance Company; David W. Hover; and
Does 1-20,

Defendants and Appellants/Cross-Respondents.

Appeal from the Superior Court of Marin County
Case No. CV012323
The Honorable Lynn O'Malley Taylor

APPELLANTS' REPLY BRIEF AND CROSS-RESPONDENTS' BRIEF

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Defendants denied Chapman’s disability claim because, in their opinion, the evidence of his condition—which was limited to an uncorroborated self-report and which was accompanied by multiple indicia of a suspicious claim—was insufficient to show that he was disabled from performing any of his job duties. The jury and the superior court disagreed; and recognizing that Chapman’s self-report constitutes at least some evidence supporting the partial-disability verdict, defendants have not appealed from that result. But the rest of the trial departed completely from reality, transforming defendants’ denial of an obviously debatable claim—through a series of evidentiary and instructional errors, improper arguments, and general incitement of the jury—into, first, bad faith, then “vile” and “despicable” conduct justifying imposition of punitive damages, and finally, conduct of such extreme reprehensibility that it must be punished more severely than the O.J. Simpson murders.

The superior court concluded that the jury “clearly” should have reached a different result with respect to its finding that Chapman was totally (as opposed to only partially) disabled (AA2234), the amount of emotional distress damages (AA2237), and the amount of punitive damages (AA2238). And in the course of so holding, it expressly found that “there [was] no evidence of a deliberate intent to deny plaintiff’s legitimate claim” and “no evidence of oppression or equally reprehensible conduct.” AA2238. But the court did not go far enough, upholding both the bad-faith verdict and the finding of liability for punitive damages on the basis of the very irrelevancies and confusion that caused the jury to depart so drastically from the record in the first place.

Rather than acknowledge the devastating effect of the superior court’s findings on his claim or defend the balance of the court’s ruling on its merits, Chapman launches into a 59-page diatribe (a four-page introduction, plus a 55-page statement of facts) characterized by invective against defendants and their

counsel and distortions of the record. Because so much of that diatribe is fictionalized, we are, regrettably, required to correct the record at some length in the course of deconstructing the legal arguments that Chapman has built on this unsupportable factual foundation. In addition, however, because many of his distortions are irrelevant to the issues in the case, we have prepared an appendix containing a point-by-point refutation of the accusations and distortions that are not directly addressed elsewhere in this brief; the Court may review it or not as necessary to resolve any doubt it may have about which party is playing fast and loose with the record.

Once Chapman’s distortions of the record are rectified, it should become clear not only that the trial court was correct in concluding that “the jury should clearly have reached a different result” as to both the amount of punitive damages and the finding of total disability, but also that the court (i) should never have admitted Chapman’s “bad company” evidence, without which (and even with which) the findings of bad faith and punitive liability are unsustainable; (ii) should not have allowed the jury to award future benefits; (iii) should not have refused to instruct the jury not to punish defendants for hypothetical injuries to non-parties or to enhance punishment because of defendants’ financial condition; (iv) should have prohibited the egregiously improper rhetoric of Chapman’s counsel; (v) and, at minimum, should have reduced the punitive damages to no more than the amount of compensatory damages.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO JNOV OR, AT MINIMUM, A NEW TRIAL ON THE BAD-FAITH CLAIM.

A. Chapman’s “Bad Company” Evidence Was Improperly Admitted.

Chapman acknowledges that *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 requires “a nexus between” evidence of

a defendant's alleged "pattern of wrongdoing and the manner in which the defendant injured the plaintiff." RB65. Yet he does nothing to demonstrate the existence of any such nexus between the tale of corporate malfeasance that he wove at trial (out of the Fuller, Feist, and McSharry testimony and certain Provident internal documents) and the handling of his claim. Instead, he uses three separate brushes to whitewash his failure to establish the required nexus; the deficiencies in his case bleed through nonetheless.

First, Chapman points to the trial court's rulings "that the evidence reflected company-wide practices and procedures." *Id.* But the nexus requirement—which the U.S. Supreme Court announced after the jury had returned its verdict and the trial court had ruled on defendants' post-trial motions—prohibits just this sort of "bad company" evidence. *See* 538 U.S. at 422-24. The trial court's admission of the evidence without considering whether there was a sufficiently close nexus to Chapman's claims was an error of law, and hence an abuse of discretion necessitating a new trial. *See Paterno v. State* (1999) 74 Cal.App.4th 68, 84-85 ("reversal is required" where court fails to apply the correct legal standard as announced in a subsequent, but retroactively applicable, opinion); *see generally Conservatorship of Scharles* (1991) 233 Cal.App.3d 1334, 1340 (applying wrong legal standard is an abuse of discretion).

Second, Chapman contends that in our opening brief we "concede[d] that [he] presented extensive evidence that [defendants] 'pressured claim handlers, implemented improper economic incentives, and orchestrated roundtable reviews to deny valid claims' and that 'Provident's senior management developed improper claim termination goals, infected Paul Revere with them after the merger, and then used them to inflict on claim handlers an aggressive program of denying valid claims.'" RB65-66 (citations omitted). That is simply false. What we actually said is:

Chapman presented a litany of supposedly improper claim-handling practices that the various defendants allegedly employed at different times over the course of almost a decade, including charges that defendants pressured claim handlers, implemented improper economic incentives, and orchestrated roundtable reviews to deny valid claims. But, as in *State Farm*, Chapman adduced *no* smoking-gun document, *no* testimony by any past or present employee of any of the defendants, *no* medical evidence, and indeed *no* evidence of any kind to establish the required nexus between his “bad company” evidence and the handling of his claim.

AOB17 (emphasis in original). And we also explained that:

At trial, Chapman tried to tie the generalized Fuller/McSharry/Feist mudslinging to the handling of his claim by introducing into evidence documents regarding claim-handling initiatives and claim resolution rates that were prepared at Provident when it was still a competitor of Paul Revere. Chapman wove these documents into a tale of corporate malfeasance, in which Provident’s senior management developed improper claim termination goals, infected Paul Revere with them after the merger, and then used them to inflict on claim handlers an aggressive program of denying valid claims. But he offered no evidence that anyone involved in the handling of his claim was even aware of the alleged claim termination goals that he contended the documents had established, much less that the investigation or resolution of his claim was the product of them.

AOB21-22 (footnote and citations omitted). In short, our supposed concessions were nothing more than a summary of the flaws in Chapman’s case.¹

^{1/} Chapman also claims that defendants “conceded at trial that ‘[p]attern and practice evidence is admissible as a general matter’” and that “the practices which occurred during the time period Plaintiff’s claims was handled were properly admitted.” RB66 (alteration in original). But he does not suggest that defendants conceded that the “bad company” evidence at issue here is admissible—for good reason. In making the quoted comment, all that defense counsel said was that so-called “pattern and practice evidence” is not inadmissible *per se*, but is instead subject to the usual requirements that it be

Third, Chapman points generically to thirteen pages of his Statement of Facts and then makes the conclusory statement that “there is overwhelming evidence supporting the trial court’s exercise of discretion in concluding there was a sufficient nexus between UNUM’s pattern of conduct and its handling of Plaintiff’s claim.” RB66. Quite apart from the fact that the trial court made no such ruling (*see* page 3, *supra*), the only link between the alleged corporate practices—or the spin that Chapman puts on them—and the handling of Chapman’s claim is the *ipse dixit* of his lawyers.

Notably, Chapman says nothing to contradict the fact that geography alone renders the testimony of Fuller, McSharry, and Feist irrelevant to the handling of his claim. None of these witnesses ever worked in Worcester; none of them had any direct knowledge of the Worcester facility or how claims were handled there; and Chapman offered no evidence that any of the alleged practices that these witnesses described were implemented by—or even known to—those in Worcester who played a role in the handling of his claim. Thus, everything that Fuller, McSharry, and Feist said about their experiences at other facilities and how claims might have been handled at those facilities, was irrelevant under Section 350, lacked probative value under Section 352, and bore no nexus to the handling of Chapman’s claim under *State Farm*.

1. *Mary Fuller*. Chapman’s own brief makes clear (*see* RB55) that Fuller worked only at the Portland, Maine, facility. RT1617, 1626-27, 1734-35. Her testimony as a fact witness about claim handling in Portland thus had no nexus to the handling of Chapman’s claim. While Chapman suggests, based on Fuller’s testimony, that the so-called “Arnold Theory” was the

both relevant and more probative than prejudicial. RT26-27 (Oct. 16, 2002). As for the second purported concession, that applied only to testimony of employees who had knowledge of claim-handling practices at the Worcester facility during the relevant time period (RT1456-58), not to Fuller, McSharry, and Feist, each of whom lacked such knowledge.

mechanism that defendants used to put improper pressure on claim handlers to terminate claims, the person who developed that metric, and the only person who employed it, was Tim Arnold—Fuller’s supervisor *in Portland*. RB55-56; RT1634-37; *see also* RT2414 (Arnold). Similarly, Fuller’s testimony about “quarter-end pressure” relates exclusively to her experience with Arnold in Portland, and sheds no light on how anybody in Worcester might have handled Chapman’s claim. The admission of Fuller’s testimony allowed Chapman to indict claim handlers in Worcester for the alleged behavior of a single supervisor in Portland, as seen through the eyes of a single former employee. Thus, it was inconsistent with Section 350 and 352, as well as *State Farm*.

2. *Dr. McSharry*. For the same reasons, admission of the testimony of this terminated former employee—who worked in a different type of impairment unit in a facility far from Worcester and who expressly denied having any knowledge about Chapman’s claim or the practices, procedures, personnel, or work-product of anyone in Worcester (AA1743-45)—cannot be squared with Section 350. Moreover, it hardly can be gainsaid that McSharry’s testimony about his experience at the Chattanooga facility was far more prejudicial than probative, for it was a centerpiece of Chapman’s wholesale indictment of defendants as “bad companies” (*see* RT2706-10), which in turn resulted in damage awards that the trial court found to be far out of line with the evidence (*see* AA2236-37, 2238). Hence, its admission was improper under Section 352 as well.

3. *Dr. Feist*. The defects in Feist’s testimony are most obvious. The trial court admitted his testimony about roundtable reviews even though Feist had left Provident’s employ before Provident’s parent acquired Paul Revere’s parent, and even though Feist had acknowledged that: (a) he knew nothing about roundtables at Paul Revere before the merger (RT2049); (b) he knew

nothing about roundtables at either Paul Revere or Provident after the merger (*id.*); (c) he was never involved in the handling of any claim under a Paul Revere policy (RT2042-43, 2049); (d) he never saw a claim denied because of a roundtable review while he was at Provident (RT2028); (e) the purpose of roundtables during his tenure at Provident was not to make decisions to deny claims but instead to identify the steps that should be taken in investigating them (RT2049); (f) he never knew the reasons for any claim denial while he was at Provident (RT2049); and (g) he never saw a single claim file at Provident that he believed had been mishandled (RT2038). Beyond all of that, Chapman’s star witness, Mary Fuller—whose experiences were at least less remote in time than Feist’s (RT1617, 1626-27, 1734-35)—affirmatively testified that roundtables were *not* instituted for the purpose of denying valid claims (RT1735-36). And she specifically testified that Chapman’s claim was *not* closed as a result of a roundtable review. RT1820. As the trial court recognized, Feist’s testimony not only was “out of date,” but was flatly contradicted by Fuller’s testimony about roundtables after the merger. RT1878-81.

In short, if Feist’s generalized mudslinging about Provident’s use of roundtables was properly admitted in this case, it is hard to imagine any case involving UnumProvident or any of its subsidiaries in which that testimony would not be admissible. Such a result is impossible to square with the concerns underlying *State Farm*’s nexus requirement, not to mention Sections 350 and 352.

4. *The Provident Documents.* Although Chapman argues that the Provident documents evidenced a strategy of intentionally denying valid claims in order to recoup corporate losses, the trial court expressly held that in *this* case “[t]here is no evidence of a deliberate intent to deny [a] legitimate claim.” AA2238. Thus, even if the documents could be construed to

demonstrate a concerted effort by Provident or any other defendant to deny valid claims—which they most certainly cannot—the trial court’s finding is conclusive on the question whether there was any nexus between what Chapman claims the documents showed and what actually happened here. Beyond that, there was no evidence that anybody involved in the handling or denial of Chapman’s claim ever (a) received copies of the Provident documents, (b) was aware of their existence, or (c) had heard of any of the supposed corporate policies that Chapman claims they memorialize. Hence, the documents (and the sinister spin that Chapman’s counsel placed on them) were just “bad company” attacks that were irrelevant to Chapman’s case. The admission of these documents thus violated Section 350 and *State Farm’s* nexus requirement and was an abuse of discretion under Section 352.

* * * * *

Because none of this stale, irrelevant, and prejudicial evidence should have been admitted, defendants are, at minimum, entitled to a new trial in which the jury is allowed to focus on the propriety of the handling of Chapman’s claim without the distraction of a “bad company” sideshow. As we discuss in the next two sections, however, because no reasonable jury could find that the handling of Chapman’s claim was biased or that the ultimate denial of the claim was unreasonable—whether or not the “bad company” evidence was properly admitted—defendants should receive JNOV on the bad-faith claim (and, perforce, on punitive liability).

B. When The Focus Is Placed Where It Properly Belongs—On The Handling And Denial Of Chapman’s Claim—The Evidence Is Insufficient To Support The Finding Of Bad Faith.

Once the distracting “bad company” evidence is quarantined, the bad-faith claim is readily revealed as the chimera it was. Try though he might, Chapman is unable to explain away the abundant red flags in his claim file that

would give any rational insurer strong suspicions about the *bona fides* of his claim and that compel the conclusion that the denial of the claim, even if erroneous, was not so unreasonable as to constitute bad faith. Chapman's effort to defend the trial court's three grounds for finding that the investigation was biased similarly falls far short.²

1. The handling of Chapman's claim was reasonable in light of the overwhelming number of red flags in the claim file.

As discussed in our opening brief (at 24-29), Chapman's claim file contained numerous red flags that would cause any rational person to be suspicious of the validity of his claim. And contrary to Chapman's assertion that "there is no testimony" that defendants "relied on many of these 'red flags'" (RB3), the claim file is replete with references to these indicia of a suspicious claim. *See, e.g.*, RA968-69, 1215-16, 1262, 1291-98, 1435-40. Perhaps in hindsight, defendants should have investigated those red flags further before denying the claim, but under California law that is not enough to warrant a finding of bad faith.³ Instead, the denial must be so objectively

^{2/} Chapman cites five cases that he claims found "similar" conduct to be bad faith. RB67-68. In fact, none is remotely similar. *See Fleming v. Safeco Ins. Co.* (1984) 160 Cal.App.3d 31, 36-37 (unreasonably delaying payment of valid claim was bad faith); *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 707 (failing to settle lawsuit within policy limits despite "mountain" of evidence, and concealing some of this evidence, was bad faith); *Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 277-78 (failing to conduct "any investigation into the validity of the claim" and then refusing to respond to insured's inquiries was bad faith); *Davis v. Blue Cross* (1979) 25 Cal.3d 418 (insurer waived arbitration clause because it failed to inform insureds of the clause despite good faith duty to do so); *Miller v. Nat'l Am. Life Ins. Co.* (1976) 54 Cal.App.3d 331 (fraudulently inducing purchase of policy and then denying claim pursuant to fraud was bad faith).

^{3/} It is *not* true that "[n]one of the [red flags] were ever investigated and [defendants] never asked anyone about any of these so-called facts" (RB68). Nor is it true that defendants "deliberately refused to tell [Chapman], or any of his physicians, of any of these [red flags] and thus, deliberately precluded

unreasonable as to constitute a “conscious and deliberate” “refusal to discharge contractual responsibilities.” *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395. Accordingly, Chapman strives mightily to explain away all of the red flags and thereby suggest that there was no reasonable basis for denying his claim. At the end of the day, his explanations, excuses, and apologetics—in addition to being factually inaccurate—fail to knock down any of these red flags, let alone establish that defendants’ ultimate decision to deny his claim was “inherently unreasonable” in light of the total picture presented to them. *See Congleton v. Nat’l Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59.

Chapman’s first visit to Lerchin. The claim file reflects that, although he reported suffering from anxiety his entire life (while also stating that his condition had gotten worse over time), Chapman never sought treatment—or even disclosed his condition to anyone—until *after* he had decided to stop performing surgery. AOB24. When Chapman did then consult Dr. Lerchin, he raised the question of disability benefits during his very first visit. *Id.*

Chapman asserts that defendants’ “‘interpretation’ of Lerchin’s notes was a completely erroneous assumption of facts intended to set the claim up for a denial.” RB25. But Lerchin’s notes from the initial consultation belie Chapman’s allegation, stating unambiguously: “Pt [patient] raised questions as to whether or not he is able to claim disability insurance benefits.” RA908.

[him] from pointing out their impropriety” (RB68). Defendants *did* ask why Chapman was not following treatment recommendations (RA1030), why he had stopped performing surgery without ever seeking treatment or disclosing his condition to anyone (RA922), and whether there was any additional evidence of his condition (RA1029-30)—even though Chapman made it clear from the very beginning that there were no corroborating witnesses (RA922). And in general, as noted below, most of the red-flags are based on the plain meaning of statements that Chapman made or that Lerchin included in his notes. No “investigation” was necessary when defendants were simply taking Chapman and Lerchin at their word.

Although Chapman labels this inconvenient fact “typical of [defendants’] repeated mischaracterization of the evidence” and suggests that defendants should have launched an investigation with respect to the statement (RB10 fn.13), it surely was not “inherently unreasonable” (*Congleton*, 189 Cal.App.3d at 59) for defendants to have taken Lerchin’s notes at face value.⁴

Evidence of Chapman’s condition. The only evidence of his condition that Chapman ever produced during the claim process was his self-report. AOB25. Rather than dispute this fact or point to anything in his medical records (or even anything developed in preparation for trial) that proves his condition, Chapman suggests that the absence of corroborating evidence is irrelevant because defendants, “having ‘accepted’ Lerchin’s opinions and conclusions, [had] no basis to deny the claim.” RB17. But the testimony that Chapman cites supposedly showing this “acceptance” makes clear that defendants took Lerchin’s diagnosis of specific phobia for what it was: assignment of a medical label to Chapman’s self-reported symptoms, with nothing objective or even arguably observable to support the diagnosis. *See, e.g.*, AA878 (Ursprung’s testimony that, even though Lerchin’s diagnosis was “reasonable” in light of the symptoms that Chapman reported, there was “no way of knowing if [Chapman] had tremor, because I wasn’t there, and there was no corroborative evidence, so we have his self-report”); *see generally* RA968-69 (Ursprung’s letter expressing the same skepticism).

Chapman’s assertion that Neeser, Ryan, and Carlson “conceded that [he] had a disabling Specific Phobia” (RB17 (citing AA731, 806-07, 827)) is similarly mistaken. In fact, none of them conceded anything—not that

^{4/} Although Lerchin testified at trial that the notes might not be entirely accurate (RT292-93), “the reasonableness of the insurer’s decisions and actions must be evaluated as of the time that they were made; the evaluation cannot fairly be made in the light of subsequent events that may provide evidence of the insurer’s errors” (*Chateau Chamberay Homeowners Ass’n v. Associated Int’l Ins. Co.* (2001) 90 Cal.App.4th 335, 347).

Chapman had a disabling phobia, not that he had hand tremors, and not that he was unable to perform surgery. Neeser testified that “[i]t wasn’t for me to believe if he had a specific phobia or not” and “[w]e did not determine whether he did or did not have a hand tremor, since that was information that was self-report by Doctor Chapman.” AA807. Ryan said that “I’m not qualified to make judgments on medical information,” but “our doctors felt that the information was not supportive of an impairment.” AA828-29. And Carlson stated that, although Chapman “was reporting that he had a tremor[,] * * * we hadn’t confirmed whether that tremor existed or not” because “[w]e didn’t have documentation other than his self-report that he did have the tremor.” AA731-32, 734. In other words, all three recognized that (a) because they are not doctors, it wasn’t their job to make a diagnosis; and (b) the medical professionals who were equipped to make such determinations had concluded that Chapman’s self-report was insufficient to establish that he was in fact suffering from a disabling condition.

Chapman’s decision to quit surgery. The abruptness of Chapman’s decision to stop surgery, combined with his failure to identify anyone who witnessed the many symptoms he reported experiencing, was another red flag. AOB25. Chapman suggests that there was no reason for defendants to be suspicious, because he reported that the onset of his condition was “gradual.” RB24. But from defendants’ point of view—which is the only one that is relevant here (*Chateau Chamberay*, 90 Cal.App.4th at 347)—this justification is impossible to square with the fact that Chapman’s decision to quit performing surgery was anything but “gradual”—coming without consultation with any medical professional, without warning to anyone he worked with, without any effort to ameliorate his symptoms, and without even considering, much less attempting, changes to his procedures and/or environment that might enable him to continue performing surgery safely.

Treatment alternatives. The claim file reflects that, although Dr. Lerchin proposed two possible courses of treatment, Chapman rejected one out of hand, prematurely abandoned the second, and expressed no interest in seeking any other means of controlling or curing his condition. AOB25-27.

Chapman offers four justifications for his refusal even to try Inderal, one of which he never mentioned before trial, and none of which is so compelling as to raise an inference that defendants lacked a reasonable basis for being suspicious of his motivations. First, Chapman asserts that Inderal was dangerous because of his kidney condition. RB18-19. But Lerchin prescribed the medication with knowledge of that condition (RA999), and defendants' medical consultant confirmed Lerchin's determination that Inderal was safe for Chapman (RA940). That determination was not just reasonable; it was correct: At trial Chapman's treating nephrologist, Dr. Lambert, confirmed that Inderal would not have posed any danger to Chapman's kidneys. RT563-64. Second, Chapman asserted at trial (but not during the claim process) that testing Inderal's effectiveness at controlling his tremor would require unethical "experiment[ation]" on a patient. RB19. But his own doctor saw no such ethical roadblock: Dr. Lerchin's notes reflect that the plan was to try the medication during a "*minor* surgery procedure as a test of efficacy" (RA909 (emphasis added)), which Lerchin self-evidently felt would pose no risk to patients.⁵ Third, Chapman says that he doubted Inderal's efficacy as a result of his review of the Physician's Desk Reference. RB19. But the evidence showed that Lerchin thought it might be effective—why else would he prescribe it?—and, as he testified at trial, he had successfully prescribed Inderal before. RT332-33. Furthermore, a clinical study showing successful use of Inderal by microsurgeons confirmed that Lerchin and

^{5/} Ursprung also testified that Inderal could be safely introduced through a series of gradual steps that would not expose patients to undue risk. AA891-92.

defendants' medical consultant were right to believe that Inderal might work for Chapman. RT152-54. In any event, doubts about success are not a valid reason for refusing even to *try* a treatment. Fourth, Chapman says that he was worried that Inderal would sedate him. RB19. It is self-evident, however, that he could have tested for sedation without getting anywhere near an operating room.

Chapman also complains that defendants never told him that he was required to take Inderal (RB20-21) and that they had no right to deny his claim for refusing treatment (RB21). But defendants did *not* deny Chapman's claim because he refused to take Inderal; and it was never their position that he was *required* to take any medication. Instead, they saw his refusal even to try his treating physician's recommendations, along with all the rest of the information in the file, as casting doubt on the *bona fides* of his claim. Chapman's refusal of a legitimate treatment option without adequate explanation—or with explanations that appeared contrived—was obviously relevant to defendants' assessment of an otherwise unverifiable condition.

Finally, Chapman implies that he was just following his doctors' orders when he refused to take Inderal. RB20, 22-23. In fact, when his claim was denied on September 26, 2000, Chapman had filled the Inderal prescription but was refusing to take the medication, even though Lerchin was still recommending it. RA999, 1015. It was only *after* his claim was denied that Chapman first spoke with Dr. Lambert about Inderal, soliciting a letter that "recommended strongly" against using it—without identifying any reasons for that recommendation. RA1319. And the post-denial letter that Chapman solicited from Lerchin did *not* withdraw the treatment recommendation; it merely stated the obvious fact that there is "no guarantee" that Inderal would be effective. RA1320; *see also* AOB8 fn.4. That self-evidently orchestrated, post hoc effort to validate Chapman's refusal to take Inderal does nothing to

undermine the reasonableness of defendants' conclusion that Chapman's reasons for refusing treatment were pretextual.

As justification for his termination of behavior-modification therapy after only two introductory sessions, Chapman disparagingly caricatures the discipline and expresses his belief that it was unlikely to be effective and that trying it would have been "unethical." RB45-47. Those concerns (which he never shared with Dr. Lerchin) ring hollow, however, in light of the unrefuted testimony of Drs. Lerchin, Bercun, and Maidenberg that behavior modification might well have been effective. RT347-51, 514-18, 606-09. More importantly, these rationales cannot detract from the fact that, from defendants' point of view, Chapman was neither willing to try his treating physician's two therapeutic recommendations nor interested in obtaining alternative recommendations—something that would cause any rational insurer to doubt whether a claimant was truly disabled.⁶

Chapman's GAF score. The only objective evidence that Lerchin had—the GAF score—indicated that Chapman was functioning normally. AOB28. Chapman criticizes defendants for supposedly viewing the GAF score as disproving the existence of his condition. RB37. But defendants never said that the GAF score ruled out the possibility of a specific phobia; they merely noted that it provided no affirmative support for Lerchin's diagnosis—leaving Lerchin with *no* evidence that Chapman was suffering from a specific phobia of surgery beyond Chapman's own self-report.

^{6/} As indicated in our opening brief (at 26), Chapman's statement to Lerchin that it was Bercun who had terminated behavior-modification treatment after only two sessions provided increased reason for suspicion. Although Chapman is correct that defendants did not *know* that he had lied until Bercun's testimony at trial (RB46 fn.42), they undeniably *did* know that *Lerchin* was skeptical, because his notes said so: "No further treatment recommended, *it seems*. 1) I will need to confer with Dr. Bercun." RA1256 (emphasis added). As Bercun's trial testimony confirmed, defendants were right to be suspicious. RT515-16.

Financial motive for filing a disability claim. Chapman acknowledged to defendants' field representative that "the amounts he bills and the amounts paid differ by about \$60,000 a year due to cost caps imposed by the payors [*i.e.*, his patients' health insurers]" and "expressed unhappiness about this trend." RA1031. Although Chapman quibbles with the interpretation of this statement in our opening brief (*see* RB30 fn.34), it cannot be denied that "unhappiness" about "trend[s]" in amounts health insurers are willing to pay doctors who are part of their networks is a classic reason for a doctor to get frustrated with practice and seek a way out. *See, e.g.*, Michael Quint, *Bane of Insurers: New Ailments*, N.Y. TIMES, Nov. 28, 1994, at D1 ("As more doctors see a shrinking in their autonomy, and perhaps in their earnings [because of managed care], 'the temptation is there' to file a disability insurance claim."). A statement about frustration with cost caps is reason for suspicion in any case, but is particularly so when it appears in the claim file of someone whose diagnosis is based *entirely* on his own self-report, who has refused any form of treatment, and who has taken up golf, joined a country club, and embarked upon a European vacation in the time since he filed his claim.

Not missing surgery. Still another red flag in Chapman's claim file is a statement in Lerchin's notes that "he does not miss surgical tasks." RA1003. Citing only his own trial testimony, Chapman asserts that what he meant was that he did not "miss" the anxiety he allegedly experienced as a result of performing surgery. RB15 fn.19. But even if this *post hoc* reinterpretation is a plausible one, it cannot be bad faith for defendants to have given Lerchin's language its plain meaning.

Outside interests. Dr. Lerchin's notes indicated that Chapman "has not added to work hours and instead takes time off from work" (RA908), that he was planning a "wonderful trip to Europe," and that he had "joined a country club as he has gotten more involved in golfing" (RA1259)—all indications of

possible malingering in the context of this already suspicious claim. Chapman’s only response is to describe how his income fell (RB11-12)—which is, of course, just what happens when someone forgoes work to travel and play golf.

* * * * *

Even if Chapman is right that, in retrospect, defendants should have continued paying his residual-disability benefits, their decision to the contrary was, at the very least, a reasonable one in light of the total picture that the facts in the claim file painted. “The mistaken or erroneous withholding of policy benefits, if reasonable or based on a legitimate dispute as to the insurer’s liability under California law, does not expose the insurer to bad faith liability.” *Chateau Chamberay*, 90 Cal.App.4th at 346 (internal quotation marks omitted).

2. The trial court’s bases for finding a biased investigation are insufficient to sustain the verdict.

As we explained in our opening brief (at 29-33), each of the three bases that the trial court gave for its determination that there was sufficient evidence to uphold the bad faith finding is invalid. Chapman has failed to resuscitate them.

a. *Defendants had no reason to conduct an IME.*

The trial court opined that it was “unreasonable [for defendants] to fail to conduct a psychiatric IME of plaintiff.” AA2236. But neither the court nor Chapman has identified any authority holding that insurers ever have an obligation to perform an IME. On the contrary, the U.S. District Court for the Southern District of California recently held that when, as here, “the allegedly disabling condition is based on self-reporting and no objective testing or examination is available to a medical examiner to verify the condition, it [is] certainly reasonable and within insurance industry standards to make a

determination to cease benefit payments without obtaining an independent medical examination.” *Crenshaw v. Mony Life Ins. Co.* (S.D.Cal. May 3, 2004) 2004 U.S. Dist. LEXIS 9883, at *45 (internal quotation marks omitted).

Chapman argues that defendants nonetheless were obligated to perform an IME because Ursprung had suggested one following his initial review of the claim file. RB38. But Chapman ignores the fact that, on subsequent review, Ursprung concluded that an IME was unnecessary because, by that time, defendants:

had conducted a field report and a field visit, and we had had another clinician call Dr. Lerchin for a discussion and learned that the condition was essentially unchanged. And I had access to Dr. Lerchin’s fairly comprehensive treatment notes up through August of 2000. I didn’t need more information.

RT879. There is nothing “inherently unreasonable”—the requirement for a finding of bad faith (*Congleton*, 189 Cal.App.3d at 59)—about recognizing that new information in the claim file resolves any open questions and obviates the need for a separate examination by an IME doctor.

b. *Carlson conducted a reasonable review of the denial of Chapman’s claim.*

The superior court also stated that “appeals consultant Steven Carlson[] was not qualified” and that his review was not “objective, independent and thorough.” AA2236. We submit that the Court need look no farther than Carlson’s detailed letter denying the appeal to conclude that no reasonable jury could find either that Carlson was incompetent or that his evaluation was not “objective, independent and thorough.” In that letter, Carlson carefully walked through all of the key evidence in the claim file, set forth the relevant contractual provisions, and then explained clearly why the contractual standard was not satisfied. Again, even if, in hindsight, his decision is deemed to be erroneous, that does not mean that the process by which he reached it was biased.

Putting the letter itself aside, the record simply does not support the trial court's conclusions. As Chapman implicitly concedes (RB43), the only basis for the court's conclusion that Carlson was unqualified was Fuller's *ipse dixit*: Chapman presented no evidence of industry standards for appeals consultants, and Fuller did not even explain what her personal standards were. All she said was that Carlson somehow failed to live up to them. RT1673-74. Testimony that merely cloaks the plaintiff's theories in the garb of expertise is worthy of no weight. As one federal court has bluntly put it, the notion "that courts should permit 'experts' to tender purely subjective views in the guise of expert opinions * * * would border on the absurd." *In re Rezulin Prods. Liab. Litig.* (S.D.N.Y. 2004) 309 F.Supp.2d 531, 538-39, 544. In any event, putting an employee in a position for which he is inadequately experienced is a far cry from the sort of "conscious and deliberate act[s]" that the tort of bad faith is intended to address (*Careau*, 222 Cal.App.3d at 1395)—at least in the absence of evidence (and there was none here) that the personnel decision was made for ulterior motives.

Chapman's other efforts to prop up the trial court's conclusion that the appeal process was biased and/or inadequately thorough fare no better. Chapman argues, for example, that Dr. Schwartz should have followed up on Dr. Lambert's letter recommending that Chapman not take Inderal. RB42. But Schwartz examined Lambert's letter and determined that it "does not provide a rationale for advising the claimant not to take the Inderal to alleviate the alleged tremor." RA1349. That determination turned out to be exactly right. RT563-64. Accordingly, there was no basis for Schwartz to renounce his earlier determination that Inderal was safe for Chapman, especially in light of Dr. Lerchin's continuing recommendation that Chapman try it. *See* pages 14-15, *supra*.

Chapman's criticism of Carlson's supposed failure to give weight to the

opinion of his treating physician in favor of “simply accepting the opinions of [defendants’] in-house consultants” (RB43-44) similarly misses the mark. Dr. Lerchin’s diagnosis was based on one thing and one thing only—Chapman’s say-so. It was not unreasonable, much less evidence of “bias,” for Carlson to conclude that Lerchin’s unsubstantiated opinion was inadequate to overcome all of the other evidence in the file suggesting that, whether or not Chapman was suffering from an emotional condition, it was not disabling. *Cf. Black & Decker Disability Plan v. Nord* (2003) 538 U.S. 822, 825 (rejecting rule requiring “special deference to the opinions of treating physicians” in the ERISA context); *id* at 832 (discussing reasons that opinions of treating physicians are not necessarily more reliable).

And Chapman’s complaint that defendants did not consider his tax returns as part of the in-house appeal (RB41-42) is a red herring: Because his claim was denied for insufficient evidence of a disabling condition and not for inadequate financial data, the tax information had become immaterial by the time he finally got around to providing it. The rest of Chapman’s allegations—that Carlson upheld the denial of the claim despite “knowing” that it was valid and that he included information in his letter denying the appeal that he “knew” to be false (RB43-47)—are simply misrepresentations of the record. *See* pages 41-44, *infra*.

In sum, Carlson did exactly what he was supposed to do: He reviewed the decision on Chapman’s claim for obvious errors, omissions, and inconsistencies; looked to see whether any newly-obtained information warranted reconsideration of the claim; and followed up on Chapman’s complaints about the original denial. Upon doing so, he reasonably concluded that the original denial was correct (*see* Section I.B.1, *supra*) and provided Chapman with a detailed letter explaining his reasoning. Thus, even if the end result was wrong, there was no basis for finding that Carlson’s review of the

claim was intentionally biased.

c. *Defendants did not give the contract the artificially narrow interpretation that the trial court apparently thought they did.*

The superior court’s final ground for finding sufficient evidence of a biased investigation was its belief that “defendants applied an unreasonably restrictive interpretation of the policy language when they concluded that [Chapman] was not performing his occupation as an eye surgeon immediately prior to the onset of his disability.” AA2236. As Chapman himself acknowledges, however, defendants based their analysis of his occupational duties on information spanning the years 1998, 1999, and 2000 (RB31-32), which translates into 18 months pre-disability and 18 months post-disability (*see* RA1436).⁷ The trial court simply got the underlying evidence wrong when it reasoned that defendants looked at too narrow a slice of time when determining Chapman’s occupation.

C. The “Bad Company” Evidence Did Not Establish That Chapman’s Claim Was Handled And/Or Denied In Bad Faith.

Even if the trial court did not abuse its discretion by admitting the “bad company” evidence, the lack of a material connection to Chapman’s own claim—in addition to the innocuous nature of the evidence—makes the evidence insufficient to support the verdict under California bad-faith law. That conclusion follows inexorably from a review of Chapman’s principal

⁷ Chapman’s suggestion that defendants’ opening brief “repeats [their] claim below that denial was proper because [Chapman] ceased performing surgeries ‘immediately’ prior to the reported onset of his disability[.]” (RB72-73) is simply false. In our opening brief, we emphasized that Chapman’s pre-disability job duties were analyzed by looking at an 18-month period, and then said that, “*even if*” defendants had looked at the period “immediately” prior to disability, that would have been consistent with extant case law. AOB31-32 (emphasis added).

bad-company allegations.

1. *Aggressive Marketing.* Chapman criticizes defendants for “aggressive marketing” of own-occupation disability policies, suggesting that there was something unseemly about defendants’ expectation of making money on those lines of business. RB47-48. The law is clear in California (as elsewhere), however, that “precontract conduct * * * is not conduct that will support a cause of action for bad faith.” *Hess v. Transamerica Occidental Health Ins. Co.* (1987) 190 Cal.App.3d 941, 945; *see also, e.g., Hays v. Jackson Nat’l Life Ins. Co.* (10th Cir. 1997) 105 F.3d 583, 590 (“The tort of bad faith breach of an insurance contract must be based upon an insurer’s wrongful denial of a claim; it cannot be based upon the conduct of the insurer in selling and issuing the policy.”). Hence, Chapman’s rhetoric about defendants’ marketing of individual disability policies is an irrelevancy that may well have incited the jury, but in no way supports his bad-faith claim.

2. *Provident Documents.* Based principally on Provident documents from before Provident’s parent acquired Paul Revere’s parent, and thus before the companies conducted a “best practices” review and reworked their claim-handling procedures, Chapman argues that Provident “embark[ed] on a concerted effort to reverse its staggering financial losses in [its] disability portfolio by denying more claims.” RB48-53. But here again, the trial court’s finding that “[t]here is no evidence of a deliberate intent to deny plaintiff’s legitimate claim” (AA2238) is dispositive. Thus, even if the trial court did not err in admitting the documents, they still do not support a finding that defendants denied Chapman’s claim in bad faith. As one federal court confronted with the same pre-packaged institutional-bad-faith case recently explained:

Even if this Court accepted Plaintiff’s evidence, Plaintiff fails to establish any link between Provident’s actions with respect to this specific claim and the alleged plan attributed to Provident.

For example, Plaintiff fails to show how the “practice” of denying claims affected and influenced the denial of his specific claim in particular. * * * Plaintiff’s claim was individually examined, and Plaintiff’s proffered evidence of a change in Provident’s “goals” does not create a genuine issue for trial.

Cardiner v. Provident Life & Accident Ins. Co. (C.D.Cal. 2001) 158 F.Supp.2d 1088, 1106. Because the evidence does not as a matter of law create a triable issue unless it has been tied to the individual plaintiff’s claim, it must necessarily also be insufficient to support a bad faith verdict without such a connection.

3. *Roundtable Reviews.* Based principally on Feist’s deposition testimony, Chapman asserts that roundtable reviews were “an important part of [defendants’] ‘sharpen legal defense’ objective in bad faith states”; that defendants improperly destroyed documentation from roundtables; and that the objective of roundtables was to find ways to terminate claims. RB53-54. This contention once again runs headlong into the trial court’s finding that there was no evidence of a deliberate intent to deny Chapman’s claim. AA2238. Beyond that, these sorts of nebulous accusations are simply too stale and unconnected to the Worcester facility to be the basis for a finding that Chapman’s claim was denied in bad faith. Three years ago, a federal district court reached that very conclusion in rejecting another insured’s reliance on the same basic testimony. *See Yumukoglu v. Provident Life & Accident Ins. Co.* (D.N.M. 2001) 131 F.Supp.2d 1215, 1227-28, *affd.* (10th Cir. 2002) 36 Fed.Appx. 378. But the inadequacy of Feist’s testimony is even more obvious here: Chapman’s star witness, Mary Fuller, testified that defendants did *not* use the roundtable process to deny Chapman’s claim. RT1820.

Although the Ninth Circuit recently cited Feist’s testimony in holding that another Paul Revere insured had “offered evidence that Defendants had developed *and applied to her case file* a comprehensive system for targeting

and terminating expensive claims” (*Hangarter v. Provident Life & Accident Ins. Co.* (9th Cir. 2004) 373 F.3d 998, 1011 (emphasis added)), that ruling—which is not binding on this Court—is unpersuasive both in general and as applied to this case. First of all, the Ninth Circuit mischaracterized Feist’s testimony, stating that “Feist testified that Defendants in the mid-to-late 1990s had instituted ‘unethical’ policies such as ‘round table claim reviews.’” *Id.* Feist’s actual testimony was that all he knew about any supposedly-improper practice was what he experienced at pre-merger Provident before he left that company in 1996 and that he had no knowledge whatsoever about any practice after that date. RT2049. Especially in light of Fuller’s testimony about the actual use to which the roundtable was put here, *Yumukoglu* is the more relevant and persuasive authority. And *Cardiner*’s refusal to countenance generic “bad company” evidence without proof of a nexus to the particular claim (158 F.Supp.2d at 1106)—a requirement that the *Hangarter* court did not mention—only underscores why Feist’s testimony offered nothing relevant or probative here. But at a more fundamental level, the *Hangarter* court’s approach would allow any plaintiff to grab a pre-packaged “bad company case” off the shelf and use it to turn a mundane contract dispute into an epic theatrical revue potentially generating a multi-million dollar profit at every showing. This Court should drop the curtain on this now-stale routine and declare that the courts of this state will no longer host encore performances where the evidence is disconnected from the plot of the case at bar.

4. *Financial pressure to deny claims.* Based principally on Fuller’s testimony and documents that defendants prepared to track financial data, Chapman argues that defendants “create[d] intense pressure to deny claims in order to meet quarterly and yearly targets.” RB54-56. But Fuller specifically stated that the claim-handling procedures implemented company-wide—and therefore presumably applicable to Chapman’s claim—were *not* established

for the purpose of denying claims intentionally; and Chapman offered nothing at all to refute that testimony. RT1735-36. Fuller also specifically stated that there is nothing wrong with an insurer keeping track of claims-department financial data—both because “[i]nsurance companies are financial institutions that have to track numbers as would any large business” and because preparing such statistical data is necessary under state insurance departments’ reporting requirements. RT1736-37.

Seeking to make this innocent metric-monitoring appear sinister, Chapman asserts that “Tim Arnold * * * admitted to instructing claims personnel to go back and find more claims to close (he preferred the word ‘recover’) when actual terminations did not meet expectations.” RB57. That statement is false and misleading in several respects. First, saying that Arnold “preferred the word ‘recover,’” as if that term was merely a euphemism for denying valid claims, ignores the testimony of Chapman’s own witness, Mary Fuller, who explained that “recoveries are those claims that have been closed due to an intervention on the part of a Customer Care Specialist. It could be a denial. It could be a return to work. It could be a not eligible under the contract.” RT1649-50. Fuller’s definition, which accords precisely with the one Arnold gave (*see* RT2453), belies Chapman’s insinuation that the term “recovery” was used as a code-word to cover up an illicit plan to deny valid claims.

Second, the meetings at which Arnold discussed recovery rates did not include any “claims personnel”; they were limited to the heads of the Portland facility’s impairment units—*i.e.*, managers who had unit-wide financial-reporting responsibilities and were several steps removed from the actual handling of claims. RT1628, 1634. And, as discussed more fully below, there was no evidence that the Portland impairment heads ever told Portland claim handlers—much less ones in Worcester—to deny claims in order to “meet

expectations.” See page 26, *infra*.

Third, Arnold simply did not say that he “instructed claims personnel to go back and find more claims to close.” On the contrary, he repeatedly rejected Chapman’s attempts to put those words into his mouth:

Q: All right. If somebody came in to you and said—I think you described when Mary Fuller came to you and said she might not meet the projections, right. You said to go back and see whether there might be some other claims that we could close; isn’t that right?

A: That’s not correct.

Q: Well, you said: Well, maybe there’s some other claim we can get to close so we can meet the numbers. Isn’t that right?

A: That’s not right.

RT2466-67.

Fourth, irrespective of what Arnold may or may not have said, Fuller explained what actually occurred at the level of handling actual claims: If recovery rates seemed low in relation to past experience, she would ask the claim handlers in her unit “to look to see whether there were other claims that they could close, and the claims examiners would do everything possible to try and expedite a return to work or find a claim that they were working on that maybe they had thought they could close at a later time period and try and get it to close sooner so that they could hit the number for this particular month.” RT1717. But she never “ask[ed] them to deny legitimate claims.” *Id.* In short, Arnold did not say what Chapman claims, and his subordinates never acted on the mistaken belief that he had.

5. *The Arnold Theory.* According to Chapman, “[Arnold] feigned detailed knowledge of the ‘Arnold Theory,’ claiming that it was merely an ‘observation.’ Yet, Louann White, another unit head that [sic] reported directly to Arnold, testified that she had a clear understanding of the ‘Arnold

Theory’ number, and she explained it to the jury precisely as Mary Fuller did.” RB57-58 (citation omitted). Once again, the record is quite different from Chapman’s description of it. White’s explanation of “the Arnold Theory number” is precisely the same as Arnold’s own: The “theory” simply reflected Arnold’s observation of a historical relationship between numbers of new claims and numbers of claim determinations. RT2159. White testified that “historically what [Arnold] had seen in blocks of disability claims is that as the new claims go up, three or four months later recoveries go up. As new claims come down, three or four months later recoveries come down. And so over time we would compare our projections to what our past four month average of new claims had been.” *Id.* That only makes sense: Because some disabling conditions are of short duration and some claims are invalid for any number of legitimate reasons, a reasonably efficient claims department should be able to sort the wheat from the chaff in a few months’ time. Thus, simple logic confirms what Arnold observed: Resolution rates should lag behind the rate of new filings by a few months; and if they do not, that suggests that something may have gone awry in the claim-handling procedures. RT2159-60. There is nothing unlawful or unsavory about using such a logical quantitative approach to identify irregularities in the Portland facility’s claim-handling process.

6. *Biased Medical Consultants.* According to Chapman, McSharry testified that, “[a]s the month or quarter drew to a close, there was intense pressure on the claims units to deny claims in order to meet their targets”; that “the role of in-house medical consultants was, quite simply, to write reports in a particular manner that would permit the claims personnel to deny claims”; that “the claims personnel were considered the ‘business partners’ of the in-house claims staff [*sic*]”; and that it was the job of the in-house medical consultants “to make their ‘business partners’ happy by supporting denials and

enabling them to meet their target numbers.” RB56. The only mention of month-end “pressure” in McSharry’s testimony, however, related to the pressure he felt to work more hours during the week or to come into the office on Saturdays. *See* AA1534-35. Similarly, because claim handlers worked longer hours at the end of the month, what it meant for the medical staff to act as “business partners” of the claim handlers was nothing more than “to show that we work as hard as the claims people.” *Id.*

To be sure, McSharry ultimately went along with the suggestion of Chapman’s counsel that “keeping the claims people happy” meant “helping them deny claims.” AA1537. But McSharry also testified that no one had ever told him that. AA1537-38. Indeed, before Chapman’s counsel asked a sufficiently leading question to elicit the hoped-for response, he first asked McSharry what his supervisor, Dr. Vatt, had told him to do “in order to keep [his] business partner happy.” AA1537. In answer to that question, McSharry candidly reported that Vatt expected him to do a better job presenting cases during claim-review meetings, and also that Vatt was “a little upset that he [Vatt] didn’t get the opportunity for me [McSharry] initially to look at these files [before presenting cases].” AA1536-37. In other words, McSharry’s uncued testimony was that making his “business partners” happy meant preparing adequately for meetings with them and then communicating with them in an intelligible manner. *Id.* That testimony was corroborated by that of Dr. Kertay, a physician in the same unit at the Chattanooga facility as McSharry, who testified that being the claim handlers’ business partner meant that he was “a consultant on medical information to people who make business decisions about claims” and was expected to “giv[e] them the very best information that I can about [an insured’s medical condition]—and the very best analysis of the information that’s available to me.” RT2075.

7. *Quarter-End Rush*. Finally, Chapman says that, because McSharry and Kertay noted “a hurry up pace within the claims department” at quarters’ end in Chattanooga and Fuller described a quarter-end pressure to “boost terminations” in Portland, the supposed back-dating of Chapman’s denial letter is evidence of an improper “quarter end close.” RB58-59. As just discussed, Chapman mis-states McSharry’s and Kertay’s testimony. *See* pages 27-28, *supra*. Moreover, Fuller dispelled the idea that increased activity at the end of a month or quarter is evidence of bad faith, explaining that “[a]t the end of a month * * * very much in the same way that * * * a store owner might take inventory at the end of the month, there’s an accounting for how many files have outstanding issues, where people are in terms of meeting ERISA guidelines, those kinds of circumstances. * * * So it’s a matter of tying up unfinished or nearly completed files.” RT2077-78. She also observed that “there tended to be more pressure at the end of the quarter because that’s when the financial reporting went out to the financial areas and to the stock market.” RT1665. In other words, any quarter-end pressure was a normal and appropriate response to a publicly-traded company’s need to have its financial data in order before presenting it to the market.

In any event, there was no evidence that Chapman’s claim was mishandled or wrongly terminated as a result of supposed quarter-end pressure. Fuller acknowledged that the pace with which Chapman’s claim was resolved was consistent with the fact that Chapman’s lawyer was pushing for a response, irrespective of where in the financial reporting cycle defendants happened to be at that time. RA1199-1205; *see also* RT1821-24. And Chapman’s allegation that his denial letter was back-dated is a complete fabrication. The record is clear that on September 26, 2000, defendants informed Chapman’s attorney by telephone that the claim had been denied. RA1267-68; *see also* RT1476. The letter sent two weeks later to memorialize

the final decision accurately states the date on which the claim was denied and Chapman was notified. RA1291-98.

II. DEFENDANTS ARE ENTITLED TO JNOV OR, AT MINIMUM, A NEW TRIAL ON CHAPMAN'S CLAIM FOR FUTURE BENEFITS.

In our opening brief, we explained why the superior court was mistaken in believing that *Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809 required submission of the issue of future benefits to the jury. Ignoring the substance of our argument entirely, Chapman claims that we waived the issue by not objecting to the instruction that submitted the claim to the jury and baldly asserts that *Egan* creates an across-the-board rule that juries may award future benefits whenever they find that past benefits were denied in bad faith.

Chapman's charge of waiver (RB74) is baseless. To begin with, defendants moved *in limine* to exclude all evidence of future disability benefits on the ground that such benefits could not be awarded under the facts of this case. AA592-96. The trial court denied that motion, concluding that under *Egan* an award of future benefits was permissible upon a finding of bad faith. RT27-29 (Oct. 16, 2002). Once the court made that ruling, it became "fruitless" to object to the instruction submitting the claim to the jury. *See, e.g., People v. Hopkins* (1992) 10 Cal.App.4th 1699, 1702 (after adverse ruling on issue "counsel could assume that further objections * * * would be fruitless"). In any event, "[i]t is settled that the giving of an [erroneous] instruction shall be deemed excepted to, even though the party complaining on appeal made no objection thereto in the trial court." *Enis v. Specialty Auto Sales* (1978) 83 Cal.App.3d 928, 940; *see also Lund v. San Joaquin Valley R.R.* (2003) 31 Cal.4th 1, 7 ("A party may, however, challenge on appeal an erroneous instruction without objecting at trial."). Thus, even had they not affirmatively preserved this issue through their motion *in limine*, defendants were not required to object to the jury instruction.

Chapman is equally mistaken in contending that *Egan* is dispositive here. RB74-75. As discussed in our opening brief (at 33-34), in *Egan* the California Supreme Court observed nothing more than that, because insurance bad faith is a cause of action sounding in tort, claims for future benefits must be adjudicated under “the general rules for fixing tort damages (CIV. CODE §, 3333).” 24 Cal.3d at 824 fn.7. According to those “general rules for fixing tort damages,” a plaintiff is entitled to recover damages for future harms only if those harms are both the proximate result of the tort at issue (CIV. CODE § 3333; *Lemere v. Safeway Stores, Inc.* (1951) 102 Cal.App.2d 712, 722) and “reasonably certain” to occur (*Roedder v. Rowley* (1946) 28 Cal.2d 820, 822).

Although the Ninth Circuit recently agreed with Chapman’s broad reading of *Egan*, its opinion merely highlights the problems with that interpretation. The court reasoned:

Though Defendants espouse a theory of tort law, nowhere mentioned within *Egan*, that would limit the application of tort damages in this case to present and past harms, the California Supreme Court in *Egan* was quite clear in emphasizing that it had “*never held . . . that future policy benefits may not be recovered in a valid tort cause of action for breach of the implied covenant of good faith and fair dealing*” and that when applying the “general rule for fixing tort damages . . . the jury may include in the compensatory damage award future policy benefits.”

Hangarter, 373 F.3d at 1012 (omissions and emphasis in original). In electing to use an ellipsis in the second quotation, however, the Ninth Circuit elided *Egan*’s citation of CIV. CODE § 3333. That statute, which explicitly limits tort damages to those harms proximately caused by the conduct at issue, undeniably is a rule of tort law “mentioned within *Egan*.” And although *Egan* does not expressly reiterate the additional principle that damages are recoverable only insofar as they are reasonably certain to occur, it in no way

suggests that bad-faith cases are exempt from this general rule. In sum, the Ninth Circuit's reading of *Egan* suffers from the same flaws as the superior court's.

This case well illustrates why the superior court's (and Ninth Circuit's) broad reading of *Egan* clashes irreconcilably with the principles and policies that have long underlain California's law of remedies. To begin with, as discussed in our opening brief (at 34-36), any denial of benefits in the future would be the result of a new claim decision, not the claim-handling conduct in 1999-2001 for which defendants were held liable. Chapman does not contend otherwise.

Beyond that, awarding Chapman the present value of future benefits cannot be squared with California's limitation of damages to those that are "reasonably certain" to occur.⁸ It is important to recall in this respect that the trial court limited Chapman's recovery to residual-disability benefits (AA2234), which are available under Chapman's policies only if his income in any given month falls below 80% of his pre-disability income. RA571, 593. Moreover, even when that condition is satisfied, the size of the monthly benefit depends upon the differential between Chapman's income for the month and his pre-disability earnings. RA572, 594. Thus, in order to be entitled to

^{8/} Chapman's assertion that defendants "stipulated to the proper amount" of future benefits, thereby "preclud[ing]" our arguments on appeal (RB74) is misguided. Chapman relies for this assertion on statements made by counsel for defendants during the hearing on the post-trial motion and in a letter to the court subsequent to the hearing. In neither instance did we concede that Chapman was reasonably certain to incur any amount of future benefits, much less the highly speculative amount posited by Chapman's expert. Instead, we merely accepted that amount for purposes of implementing the court's tentative ruling that the future damages had to be reduced to reflect the court's conclusion that Chapman was not totally disabled. Indeed, the letter expressly states that the figures were being provided to the court "[a]ssuming that the court does not alter its tentative ruling concerning defendants' underlying liability for future residual disability benefits." RA493.

recover future benefits under California law, Chapman was required to prove that it was “reasonably certain” that, each and every month, for the remainder of the term of his policies, his income would fall below 80% of his pre-disability income—an impossibility for anyone lacking a time machine.

Indeed, not only did Chapman fail to present sufficient evidence that his income would remain below the 80% level each and every month until he turns 65, but the evidence in the record strongly suggests the contrary. Because the basis for Chapman’s disability claim was a “specific phobia” that inhibited his performance of eye surgery but had no adverse impact on his ability to perform the other important duties of his occupation and did not affect any other aspect of his professional or personal life, it is undisputed that he remains fully capable of doing any job that does not involve eye surgery. Given Chapman’s high level of education generally, his medical training, his expertise in disorders of the eye, and the rest of his marketable skills, that means that he can (and in fact does) continue to engage in the non-surgical portions of the practice of ophthalmology. RT93. In addition, nothing would stop him from working as a medical or legal consultant in eye disorders, switching to a different form of non-surgical medical practice, teaching medicine, or doing any number of other remunerative occupations. Indeed, because the only thing limiting Chapman’s ability to work is his fear of performing eye surgery, and because there is no evidence and no reason to assume that he will squander his education and training by ceasing to work while at the pinnacle of his earning potential, it seems not just possible but highly probable that he will find a job that replaces most if not all of the income he has foregone by discontinuing surgery. Surely, Chapman did not meet his burden to prove otherwise.

Relatedly, even if Chapman’s post-disability income would turn out never to cross the 80% threshold, the size of each month’s benefit would nonetheless depend entirely on his actual earnings for that month. Thus, using

the 2004 schedule, his combined benefits under the policies could be \$1,541 one month (if he were to just barely satisfy the 20%-income-loss threshold and therefore be entitled to 20% of full benefits) and \$7,706 another month (if he were to have no income at all and therefore be entitled to the maximum benefits available under the policies). There is, in other words, no way to guess *ex ante* (and with no evidence in the record) what Chapman is likely to be doing or how much he is likely to be making next month, next year, or when he is nearing the expiration date of the policies in 2013. Thus, there is no evidentiary basis for setting future benefits with “reasonable certainty.”⁹

That the “reasonable certainty” requirement would foreclose an award of future benefits in cases like this one should be no reason for concern. As pointed out in our opening brief (at 36-37), once there is a final judicial determination that an insured suffers from a disabling condition, there is no reason to suppose that the insurer will wrongfully refuse to pay benefits as they become due in the future (at least in the absence of evidence that the insurer has defied judicial determinations in the past). That is because *any* future denial of benefits would likely generate another lawsuit, and any hint of conduct that was not entirely fair, reasonable, and above-board would likely result in a finding of bad faith and punitive damages in that new action. As the Illinois Appellate Court recently observed in rejecting the argument that future benefits are awardable under Illinois law:

We hasten to add that our conclusion does not leave Dr. Busse without a means of redress. Upon the trial of this case, should the jury determine that Dr. Busse is in fact permanently

^{9/} For this reason, *Pistorius v. Prudential Insurance Co.* (1981) 123 Cal.App.3d 541 is distinguishable from the present case. Unlike Chapman, the plaintiff in *Pistorius* “was totally disabled within the meaning of the policy as of the date of trial and [his] disability was permanent.” *Id.* at 551 fn.7. Accordingly, it was “reasonably certain” that he would suffer the loss of total-disability benefits for the balance of the life of his policy. The same is true of *Egan* itself. See AOB39.

disabled, that issue will then be *res judicata*. There is no reason why that jury verdict should not be given effect into the future, and we are confident that noncompliance on the part of the companies with the terms of such a judgment would be met with an appropriate equitable remedy.

Busse v. Paul Revere Life Ins. Co. (Ill. App. Ct. 2003) 793 N.E.2d 779, 787. Thus, even if defendants were the hard-nosed, profit-maximizers that Chapman makes them out to be, they would not be so pound-foolish as to deny a valid (or even minimally plausible) claim when they would know that they had no serious hope of profiting from doing so but instead would face, to a virtual certainty, high litigation expenses and substantial damages. And here, where the trial court expressly found that “[t]here is no evidence of a deliberate intent to deny [Chapman’s] legitimate claim” (AA2238), there is still less reason to presume that defendants would wrongly deny his claim in the future.¹⁰ Indeed, with the verdict here providing overwhelming incentives for defendants to deal generously with Chapman, the real danger is that an award of future benefits will produce an improper windfall for Chapman by allowing him to collect substantial and unrecoupable benefits under the policy now, and then go out and earn at a rate that would otherwise have rendered him ineligible to receive those sums.

In short, faithful adherence to longstanding “general rules for fixing tort damages” requires that defendants receive JNOV with respect to the award of future benefits. At minimum, they should receive a new trial in which the jury is properly instructed on those principles.

^{10/} Citing testimony of Carlson and Ursprung that they continue to believe that they handled his claim correctly (RT733-734, 1853), Chapman asserts that there was “ample evidence” that defendants would deny his claim again if “given the opportunity.” RB75. That is a non sequitur. Neither Carlson nor Ursprung nor anyone else testified that defendants would decline to pay Chapman’s claim *in the face of a judicial determination* that he is disabled.

III. DEFENDANTS ARE ENTITLED TO JNOV ON PUNITIVE LIABILITY.

The jury found two statutory bases for imposing punitive liability—malice and fraud. In denying defendants’ motion for JNOV on punitive liability, the trial court found that defendants’ conduct “qualifies as malice” for two reasons. AA2238. First, the court stated that “[e]vidence was submitted showing that defendants’ decision to deny the claim was based on their unreasonably restrictive interpretation of the policy language of plaintiff’s occupational duties.” AA2237-38. Second, the court stated that there was evidence of “the creation of a claims handling procedure that appears designed to avoid performing a thorough, competent, and objective investigation of plaintiff’s claim, and which procedures were intended to place defendants’ financial interest ahead of, rather than equal to, plaintiff’s contractual interests.” AA2238.

Chapman makes little attempt to defend the trial court’s bases for upholding the punitive liability finding—for good reason. The court’s first ground is based on a manifest misperception of fact. As discussed below (at pages 40-41, 43), defendants denied Chapman’s claim because they concluded that his condition did not preclude him from performing either surgery or any of his other important job duties (RA1298, 1353, 1440), *not* because they had construed the policies to allow them to ignore surgery in determining whether he was unable to perform his important duties.

The superior court’s second basis for finding sufficient evidence of “malice” fails to come to grips with California’s restrictive standards for imposing punitive liability. Under established California law, punitive damages may be imposed only for conduct that is “so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.” *Tomaselli v. Transamerica Ins. Co.*

(1994) 25 Cal.App.4th 1269, 1286-87 (internal quotation marks omitted). What that means is that “[p]unitive damages should not be allowable upon evidence that is *merely consistent* with the hypothesis of malice * * *.” *Id.* at 1288 fn.14 (emphasis added). Instead, the evidence must *clearly and convincingly* exclude the possibility that “the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such non-iniquitous human failing.” *Id.* (internal quotation marks omitted).

Even accepting for present purposes that Chapman’s “bad company” evidence was properly admitted and that it supports a finding of bad faith, no reasonable jury could conclude that it clearly and convincingly excludes the possibility that any errors in the handling of Chapman’s claim were the product of “non-iniquitous human failing[s].” *Id.*; see also *Itella Foods, Inc. v. Zurich Ins. Co.* (9th Cir. 2004) 98 Fed.Appx. 689, 691 (even though “[r]easonable people could conclude that the insurance company was trying to chisel [plaintiff],” the evidence was not “so one-sided as to meet the clear and convincing standard for the sort of conduct to which the California punitive damages standard is limited”). To reiterate, there was *no* evidence that anyone involved in the handling of Chapman’s claim was aware of any of the metrics discussed in the Provident documents, had ever heard of the so-called “Arnold theory,” or had ever felt pressure to deny Chapman’s claim (or anyone else’s for that matter). Nor was there any evidence that, in assigning Carlson to handle appeals, defendants believed that he was too inexperienced for the job and that, as a result of that inexperience, he would deny claims without a valid basis. The highly speculative, attenuated inferences that Chapman sought to draw from the “bad company” evidence might make for a good Grisham novel, but they simply do not satisfy California’s high standard for punitive liability.

Finally, even if there had been sufficient evidence that defendants had

consciously instituted claim-handling practices with the intention of putting their own interests ahead of those of their insureds, Chapman never succeeded in linking any such practices to the handling of his claim, much less by clear and convincing evidence. Because the purpose of punitive damages in California is solely to punish and deter the tort committed against the plaintiff (*Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 68)—not to usurp the regulatory prerogatives of the Insurance Commissioner—the trial court’s belief that there was evidence, in the abstract, that defendant’s claim-handling procedures were designed to put defendants’ interests above those of their insureds is beside the point.

Instead of attempting to defend the trial court’s untenable holding that there was clear and convincing evidence of malice, Chapman contends that there was “strong evidence” to support the jury’s finding of fraud. RB78. He can do so only by ignoring the statutory definition of “fraud” and the trial court’s finding that “[t]here is no evidence of a deliberate intent to deny plaintiff’s legitimate claim” (AA2238).

For purposes of imposing punitive damages, California defines “fraud” as the “intentional misrepresentation, deceit, or concealment of a material fact known to the defendant[s] with the intention on the part of the defendant[s] of thereby depriving [plaintiff] of property or legal rights or otherwise causing injury.” CIV. CODE § 3294(c)(3). Because fraud entails an affirmative intention to deceive and thereby to deprive the victim of his property or otherwise injure him, “[p]unitive damages for failure to pay or properly administer an insurance claim are ordinarily * * * based on ‘malice’ or ‘oppression,’ rather than on the third possible ground for the award, ‘fraud.’” *Tomaselli*, 25 Cal.App.4th at 1286.¹¹

^{11/} Chapman cites two cases (RB78) that found fraudulent conduct by an insurer—but both involved fraud in the inducement to purchase insurance and thus are inapposite here. In the first case, an insurer instructed its salespeople

The present case is no exception: The trial court expressly held that “[t]here is no evidence of a deliberate intent to deny [Chapman’s] legitimate claim” (AA2238), which necessarily means that there also was no evidence of an “intentional misrepresentation” made “with the intention [of] * * * causing injury” (CIV. CODE § 3294(c)(3)).

Ignoring the trial court’s finding, Chapman contends that defendants’ conduct was fraudulent in three respects. His efforts to force his evidence into the “fraud” mold are worthy of Procrustes, but transparently inadequate to salvage the fraud finding.

Chapman first asserts that “[defendants] specifically induced [him] to purchase the policy based on a specialty letter assuring him that he was entitled to total disability benefits if he could not be a surgeon.” RB78. To begin with, Chapman’s cause of action was for wrongful denial of an insurance claim, not for fraudulent inducement to purchase a policy that was less valuable than it was represented to be. The law is clear in California that punitive damages “must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case.*” *Medo*, 205 Cal.App.3d at 68 (emphasis added). Accordingly, whether or not there was fraud in the inducement, that is not a valid basis for finding that the *denial* of the claim—the exclusive focus of Chapman’s cause of action—was attended by fraud.

In any event, there was no allegation, much less evidence, that any of the defendants misrepresented any aspect of Chapman’s policies—whether through the Paul Revere specialty letter or otherwise—at the time that Chapman purchased them. Indeed, Chapman’s suggestion on appeal that he

to conceal internal policies when marketing its products. *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 946. In the second, an insurer demonstrated an intent to dishonor the insurance contracts when it sold them by adopting a policy of misinterpreting an intentionally ambiguous claim form. *Miller v. Nat’l Am. Life Ins. Co.* (1976) 54 Cal.App.3d 331, 338-39.

was fraudulently induced to purchase his policies in the 1980s is irreconcilable with his theory at trial that defendants first discovered that these kinds of policies were unprofitable *years after selling them*, and thereafter set out to cut their losses by denying valid claims. *See* RB47-50. In short, even if Chapman’s evidence at trial proved what he said it did, that would conclusively refute his *post hoc* claim that defendants made deliberate misrepresentations to him when he purchased his policies.

Chapman next asserts that defendants “undertook deliberate actions designed to deny his claim based on the false contention that he was not a surgeon.” RB78. As discussed above, however, defendants denied Chapman’s claim on the ground that he was not disabled from surgery—not on the ground that he was not a surgeon.¹² *See* RA1298, 1440.

Finally, Chapman asserts that claim-handler Christopher Ryan and appeal consultant Steven Carlson “knew that the bases set forth in the denial letters were improper” (RB78), making the letters fraudulent. The evidence does not bear out his contention.

For instance, Chapman says that Ryan “*knew* that the letter *falsely* claimed * * * that ‘surgery was not [a] substantial, material and/or important [duty of Chapman’s occupation].’” RB41. Although Ryan did disagree with a statement in the denial letter (which was written and signed by someone else) that surgery was not one of Chapman’s substantial duties, the claim was not denied on that basis. *See* AA812-14 (Neeser’s explanation of statement in denial letter). Instead, the letter made clear that the decision to deny the claim was “based on the available evidence that there is no support for restrictions

^{12/} Because defendants did not deny Chapman’s claim on the ground that he was not a surgeon, Chapman’s assertion that defendants adopted a “misleading” interpretation of the Paul Revere specialty letter (RB28 fn.30) similarly gets him nowhere. In any case, Chapman’s argument appears to be that defendants breached a promise made in the specialty letter, not that they committed fraud.

or limitations in occupational functioning due to a psychological disorder.” RA1298. Ryan testified that he “agreed with the decision to deny the claim.” AA846-47. Because Ryan concluded that Chapman was not entitled to any benefits under his policies, his failure to secure deletion of the statement that surgery was not an important pre-disability duty cannot possibly rise to the level of a deliberate misrepresentation made with the intention to deprive Chapman of property to which he otherwise was entitled. Moreover, the error was rectified during the appeal process: Carlson’s letter affirming the denial of benefits accepted that surgery was an important duty, but concluded (like the original letter) that Chapman was not disabled from performing that duty. RA1437, 1440.

Chapman also asserts that Ryan knew that, “contrary to what the letter said, [Chapman’s] failure to take Inderal could not serve as a basis to deny the claim.” RB41. But the letter did not say that the claim was being denied because of Chapman’s refusal to take Inderal: Rather, in the course of discussing the claim history, the letter simply repeated Ursprung’s opinion that Chapman “was not fully engaged in treatment, by refusing a reasonable psychopharmacological approach” (RA1295)—a reason to question whether Chapman was truly suffering from a disabling condition, but not an independent ground for denying the claim. Accordingly, Ryan’s testimony that taking Inderal was “not a policy stipulation” is fully consistent with the letter’s reference to Ursprung’s suspicion and is in no way an admission that the letter’s reference to Inderal was fraudulent.

As for Chapman’s assertion that “Carlson knew at the time he denied the claim that [Chapman] could not perform surgery” (RB44), the evidence upon which he relies turns out to be nothing more than his own attorney’s attempts to put those words into Carlson’s mouth—and Carlson’s steadfast

refusal to be manipulated in that way. *See* AA734-38.¹³

The same is true of Chapman's assertion that "Carlson conceded that he knew when he denied the appeal that at least residual disability benefits were owed [and that] it was 'inappropriate' to deny [Chapman's] residual disability claim." RB44. As the transcript reveals, Carlson merely agreed with Chapman's counsel that such benefits *might* have turned out to be warranted *if* certain hypothetical conditions had been met, all the while underscoring at least one reason that counsel's hypothetical was inapposite.¹⁴

^{13/} Q: Well, we just established that you knew he could not perform surgery without taking Inderal, didn't we?

A: No, we did not.

* * *

Q: * * * Did you have an understanding on April 20, 2001, that Dr. Chapman had a restriction and limitation with regard to his ability to do surgery * * * ?

A: I did not know that, no.

* * *

Q: So in light of the fact that he was not taking Inderal, you knew that he couldn't perform surgery. Is that right?

A: Again, and I've already answered this question like five times, I did not know that, no.

AA734-38.

^{14/} Q: [I]f you accept the three things that we've agreed upon, that he had a specific phobia, that he had a tremor and that he wasn't taking any medication, we've accepted all three of those. Right?

A: If we accept those.

Q: Then he was entitled to disability benefits. Right?

A: Again, if we accept all those, he may have been entitled to residual disability consideration. However, his own physicians had made what appeared to be reasonable recommendations to him and he hadn't attempted those, so we don't know whether he would have been capable of going back to do surgery or not.

And Carlson elsewhere specifically and repeatedly stated that he did *not* believe that Chapman was entitled to residual-disability benefits. AA732, 733, 738.

Chapman also asserts that “Carlson claimed that surgery was ‘minimal’ to [Chapman’s] prior occupation even though he * * * knew that it was a substantial and material duty.” RB45. But Carlson expressly stated in the denial letter that, “in evaluating whether Dr. Chapman satisfies the requirements of Total Disability or Residual Disability as contained in his policies, we have considered Dr. Chapman’s ability or inability to continue performing the nonsurgical procedures, *as well as* the surgical procedures.” RA1437 (emphasis added). And the reason Carlson gave for denying the appeal was that “there appears to be no medical basis, other than Dr. Chapman’s subjective reports, supporting an inability to perform any of the duties of his occupation; either his claimed occupation of Ophthalmic Surgeon or his occupation of Ophthalmologist * * *.” RA1440. In other words, Carlson treated surgery as an important duty even though the data suggested that it was not. Accordingly, because Carlson’s opinions about the extent of Chapman’s surgical duties played no role in the claim decision, Carlson’s statement that “it appears that Dr. Chapman’s surgical procedures were minimal in the operation of his office” (RA1437) could not have been intended to deprive Chapman of property or otherwise injure him.

Chapman’s final allegation of a misrepresentation in the appeal-denial letter is that Carlson “claimed that [Chapman] should have undergone * * * behavior modification,” knowing that the failure to do so was “an improper basis to deny the claim.” RB45. The Court will search the letter in vain, however, for any representation that the claim was denied for refusal to undergo behavior modification therapy. The letter’s only references to

AA739.

behavior modification are quotations from two sets of written comments by Ursprung, the first noting that Chapman “may be ‘considering’ a behavioral approach,” but as yet was “not engaged in aggressive treatment directed at his primary symptom,” and the second observing that Chapman “reportedly visited a psychologist twice, but we have no treatment notes to verify this.” RA1439. Each of those statements was undeniably true.

In sum, the jury found that there was no oppression; the trial court’s finding of sufficient evidence of malice—which Chapman does not even attempt to defend—was unfounded; and Chapman’s supposed evidence of fraud consists of misrepresentations of the record that, even if true, would not satisfy the statutory definition. Accordingly, defendants are entitled to JNOV on punitive liability.

IV. THE TRIAL COURT’S ERRONEOUS INSTRUCTIONS AND CHAPMAN’S IMPROPER CLOSING ARGUMENTS NECESSITATE A NEW TRIAL ON PUNITIVE DAMAGES.

As the trial court’s post-trial order effectively acknowledges, the punitive verdict was the product of passion and prejudice—the result of a misinstructed jury swayed by improper exhortations. For as the court below explained, “[t]he award of \$30 million does not bear a reasonable relationship to the reprehensibility of defendants’ conduct in view of the entire record and the jury should clearly have reached a different result.” AA2238. But although the remittitur that the court ordered was a step in the right direction, it was not only insufficient to bring the award within constitutional limits—a point to which we will return in Section V below—but also inadequate to remedy the underlying instructional errors and grossly improper arguments of Chapman’s counsel.

A. The Instructional Errors Warrant A New Trial On Punitive Damages Or Else A Remittitur Of An Entirely Different Character.

1. The trial court erred in refusing to instruct the jury not to punish defendants for alleged harms to non-parties.

The Supreme Court made clear in *State Farm* that “[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant * * *.” 538 U.S. at 423. It follows inexorably that, insofar as evidence of general corporate practices or conduct directed at non-parties is admitted at all, courts must instruct juries not to impose punishment for that conduct.¹⁵ In refusing defendants’ request for such an instruction here, the trial court left the jury free to fold into the verdict an extra measure of punitive damages to punish defendants for their conduct toward non-parties and for any injuries—real or imagined—that those individuals may have suffered.¹⁶

Chapman’s assertion that the Supreme Court has endorsed consideration of conduct directed at non-parties in setting the amount of

^{15/} See, e.g., *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 753 fn.7 (“the instructions must not invite the jury to impose damages sufficient to punish and deter all conduct of the *type* directed toward these plaintiffs”); *State Farm*, 538 U.S. at 418 (“Vague instructions * * * do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.”).

^{16/} Contrary to Chapman’s assertion (RB80), it was the trial judge—not defendants—who thought that the requested limiting instruction was duplicative of other instructions. RT2878. In the colloquy that Chapman cites, defendants merely acknowledged that those other instructions (which dealt with unrelated issues and hence could not serve the requisite purpose) had in fact been given. RT2877-78. Defendants never abandoned their request for the instruction that *State Farm* and *Romo* require.

punitive damages (RB80-81) is misguided. To be sure, the Court has said that such evidence “may be probative when it demonstrates the deliberateness and culpability of the defendant’s action[s]” (538 U.S. at 422), but that is the *only* valid use to which such evidence may be put. Indeed, it is precisely when evidence of conduct toward non-parties is admitted for this limited purpose that an instruction forbidding the jury to punish for conduct directed at, or harms suffered by, non-parties is necessary.¹⁷ As the Third District recently explained, “to include speculative damages suffered by other potential plaintiffs in the [punitive damage] calculus would run directly contrary to the Supreme Court’s admonition in *Campbell*.” *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 23 (July 6, 2004) review filed.¹⁸

^{17/} Chapman also cites *Henley v. Philip Morris Inc.* (2004) 9 Cal.Rptr.3d 29, previously published at 114 Cal.App.4th 1429. Because the California Supreme Court has granted review in that case, thereby rendering this Court’s opinion non-citable, we will not burden the Court with an explanation of why *Henley* does not support the proposition for which Chapman cites it.

^{18/} See also *Williams v. ConAgra Poultry Co.* (8th Cir. Aug. 6, 2004) 2004 WL 1752583, at *5 (“If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative award.”); *Romo*, 113 Cal.App.4th at 749-50 (“As we read *State Farm*, * * * the legitimate state goal that punitive damages may seek to achieve is the ‘condemnation of such conduct’ as has resulted in ‘outrage and humiliation’ to the plaintiffs before the court; it is not a permissible goal to punish a defendant for everything else it may have done wrong.”) (citation omitted); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1053-54 (“we reject [the] contention that reprehensibility should be measured by [the defendant’s] conduct toward the world at large, rather than as directed at [the plaintiff] alone. * * * *Campbell* makes clear such matters cannot provide a legitimate basis for the plaintiff’s punitive damages award.”).

2. The trial court erred in refusing to instruct the jury that it could not punish defendants more severely based upon their wealth.

Chapman defends the trial court's failure to limit the jury's consideration of defendants' wealth by claiming that basing punitive damages on wealth is permissible under *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 and required under *Adams v. Murakami* (1991) 54 Cal.3d 105. RB83. But the *TXO* plurality expressly declined to reach the argument that it was improper to instruct the jury that it could consider the defendant's wealth in setting the punitive damages, holding that the issue had not been preserved below. 509 U.S. at 464. To be sure, the plurality rejected the argument that it was unconstitutional to admit evidence of the defendant's wealth (*id.* at 463 fn.28), but to say that such evidence is not categorically inadmissible is not to say that, once it is admitted, there are no limitations on its use. Indeed, before holding that the instructional issue had not been preserved, the plurality noted that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *Id.* at 464. In any event, to the extent the plurality opinion in *TXO* could be construed as holding that it is constitutionally permissible to peg punitive damages to the defendant's wealth, it has been overtaken by the Supreme Court's subsequent decision in *State Farm*. And as for *Adams*, it should go without saying that California law cannot require what the U.S. Constitution forbids. U.S. CONST. art. VI, cl. 2.

Thus, the Fifth District has already recognized that California's traditional practice of instructing the jury to consider the defendant's wealth in setting punitive damages cannot survive *State Farm*. *Romo*, 113 Cal.App.4th at 753 ("[U]nder BAJI No. 14.71, the jury in this case was instructed that * * * it should consider in arriving at an award of punitive

damages * * * defendant's financial condition. As we have discussed above, this view * * * fails to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs, as apparently required by federal due process.") (internal quotation marks omitted) (citing *State Farm*).

And in the wake of *State Farm* and *Romo*, California's Advisory Committee on Civil Jury Instructions has recommended instructing jurors: "You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources." Judicial Council of California, CIVIL JURY INSTRUCTIONS: REVISIONS CIRCULATED FOR PUBLIC COMMENT (June 2004) 114-15. That suggested instruction is materially identical to the one defendants proposed and the superior court refused to give.

The Committee on Standard Jury Instructions has likewise recognized that *State Farm* invalidates California's prior approach to setting punitive damages. See BAJI No. 14.71 cmt. (2004) (in light of *State Farm*, "the portion of this instruction that [directs the jury to consider the defendant's financial condition] is likely to be irrelevant in many situations").¹⁹ Finally, Chapman's own lead trial counsel has himself acknowledged that, in identifying the permissible considerations for determining punitive damages, *State Farm* "deliberately leaves out" what counsel personally would treat as "the most important factor, i.e. the wealth of the defendant": for, "in defining the guideposts for federal standards of punitive awards, the wealth of the

^{19/} As we explained in our opening brief (at 45 fn.22), the only role for wealth evidence after *State Farm* is as an additional limitation on punitive damages assessed against comparatively impecunious defendants; but when a defendant can afford to pay an award within the constitutionally-permissible range without catastrophic consequences, wealth becomes, as the Committee recognizes, "irrelevant." This potentially valid basis for considering wealth evidence was not an issue in the present case (and would not, in any event, have been foreclosed by our proposed instruction or by that of the Judicial Council).

defendant is nowhere to be found.” Arnold Levinson, *The Supreme Court’s Shameful Descent into Disrepute*, MEALEY’S LITIG. REP’T: INS. BAD FAITH (April 2003) 11. Although Chapman and his counsel preferred the free-wheeling pre-*State Farm* approach, that old regime has toppled. As things now stand, there is no doubt that it was reversible error for the trial court to have denied defendants’ request for a jury instruction barring the enhancement of punitive damages based on their wealth.

3. The instructional errors were prejudicial, and the trial court’s remittitur was an inadequate remedy.

Chapman claims that we have failed to demonstrate that the trial court’s refusal to give our proposed instructions was prejudicial. RB82. But the prejudice is obvious from the size of the jury’s \$30,000,000 award. And if that is not enough, then the trial court’s determination that the verdict was “clearly” wrong (AA2238) surely should be. The court’s failure to constrain the jury’s deliberations—accompanied by Chapman’s exploitation of the resulting lack of guidance (*see* RT2882-91 (repeatedly exhorting jury to punish defendants for their overall corporate practices and suggesting a punitive award of 10% of defendants’ net worth))—clearly resulted in a much larger verdict than could have been awarded by a properly-instructed jury.

Chapman is also wrong that the trial court’s remittitur is an adequate remedy for the instructional errors. RB81-82, 84. Although the Fifth District has held that appellate courts may remedy such errors by reducing the punitive damages to an amount “below which [they] believe no properly instructed jury [would be] reasonably likely to go” (*Romo*, 113 Cal.App.4th at 754), the superior court’s remittitur did not purport to be a means of “remov[ing] any prejudice accruing to the defendant[s] as a result of misinstruction concerning the amount of [punitive damages]” (*id.*). To the contrary, the superior court believed its instructions to be correct, and ordered a remittitur solely because

it had concluded that the punitive damages were “excessive in light of the entire record.” AA2238.

Accordingly, there is no basis for assuming that, in ordering a remittitur to \$5,000,000, the trial court was doing anything more than “lopping off the excrescence” (*Dimick v. Schiedt* (1935) 293 U.S. 474, 486)—*i.e.*, reducing the punitive damages to the **largest** amount the jury could have imposed based on the evidence. Because it is impossible to know whether a properly-instructed jury would have imposed the largest amount possible, however, such a remittitur not only fails to cure the instructional error (*Romo*, 113 Cal.App.4th at 754), but also deprives defendants of their right to jury trial under Article 1, Section 16 of the California Constitution. Accordingly, this Court must either grant an unconditional new trial or order a remittitur to the **least** amount a properly instructed jury could have imposed (*Romo*, 113 Cal.App.4th at 754), which, given the trial court’s findings that there was no “deliberate intent to deny plaintiff’s legitimate claim” and “no evidence of oppression or equally reprehensible conduct” (AA2238), must necessarily be far below \$5,000,000.

B. Chapman’s Inflammatory Closing Arguments Necessitate A New Trial.

Chapman tries to escape the bed he made for himself through his inflammatory jury arguments in three ways—claiming that our objections were not adequately preserved, that his arguments were fair comment on the evidence, and that, in any event, they were not prejudicial. None suffices to salvage the verdict from his own misconduct.

1. Defendants fully preserved their objections.

Chapman’s claim that defendants failed to preserve their objections (RB85-86) is baseless. As indicated in our opening brief (at 46), the trial court admonished the parties not to interrupt each other during closing arguments. RT2677. Defendants accordingly filed motions *in limine* asking the court to

prohibit in advance precisely the categories of improper statements that are now at issue. *See* AA1677-89, 1819-27. Accordingly, defendants did all that they could reasonably be expected to do—and all that California law required them to do—in order to preserve their objections. *See Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1184 (motion *in limine* “is normally sufficient to preserve an issue for review”) (citing *People v. Morris* (1991) 53 Cal.3d 152, 190).

2. The closing arguments were grossly improper.

a. *Counsel’s attacks on defendants’ out-of-state residence and corporate status.*

Chapman says that it is “ridiculous” for defendants to complain that he attacked them for being big corporations from “back east” and that it is “neither fair nor accurate” to say that he compared defendants to Nazis. RB87-88. But his jury arguments speak for themselves. *See, e.g.,* RT2678, 2717, 2764, 2885, 2889-90. By repeatedly decrying defendants as huge corporations from out of state whose “corporate greed” drove them to perpetrate “more subtle” versions of Nazi “evil,” Chapman knew that he was infecting the jury with irrelevant, highly prejudicial considerations and distracting it from its proper focus on defendants’ conduct toward Chapman himself. Why else would he have made those comments?

The only aspect of these arguments for which Chapman offers any affirmative defense is his repeated reference to defendants’ alleged “corporate greed.” RB87. But the suggestion that defendants should be punished for their supposed “corporate greed,” rather than simply for the handling and denial of Chapman’s claim, is precisely what *State Farm* forbids. *See* 538 U.S. at 423 (“A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory * * * business.”).

If blatant attempts to fan the flames of anti-corporate and regional bias

have no repercussions, those who would cash in on such techniques will only be emboldened; and the jury-baiting that *State Farm* decries will continue to overwhelm rational deliberation. In the face of the Supreme Court’s clear directive that punitive damages must be subjected to “[e]xacting appellate review” in order to guard against “the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences” (*State Farm*, 538 U.S. at 417 (internal quotation marks omitted)), this Court should vindicate the fundamental right to a fair trial by granting defendants a new trial in which these kinds of improper arguments are forbidden.

b. *Counsel’s request for excessive punitive damages based on defendants’ wealth.*

If “[t]he presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses” (*State Farm*, 538 U.S. at 417 (internal quotation marks omitted)), the danger is all the greater when the plaintiff is permitted to exhort the jury to do just that. That is precisely what happened here: After the trial court denied defendants’ motion *in limine* on this issue, Chapman’s counsel suggested a range of punishments from 10% of defendants’ net worth—\$670,000,000—down to 2.5%—\$167,000,000—a figure that would, counsel assured the jury, be “insufficient” to punish defendants adequately. RT2888-89.

This wealth-based argument was improper in two respects. First, the suggested range of \$167,000,000 to \$670,000,000 was untethered to “the facts and circumstances of the defendants’ conduct and the harm to the plaintiff,” thus flying in the face of due process. *State Farm*, 538 U.S. at 425. Second, by establishing a scale of supposedly-reasonable awards that was so far outside constitutionally-permissible bounds, Chapman’s wealth-based argument

distorted the jury’s frame of reference, making \$30,000,000 appear like a mild slap on the wrist rather than the kind of extraordinary sanction typically reserved for the most vile and contemptible of conduct. *Cf. Rufo v. Simpson* (2001) 86 Cal.App.4th 573 (upholding \$25,000,000 in punitive damages for brutal murders of two people).

Chapman’s assertion that “there was nothing wrong with referring to [defendants’] size” (RB86-87) both ignores *State Farm* and grossly understates the nature of his use of defendants’ wealth. He did not merely “refer” to it; he offered it as the sole basis for establishing a range of punishments that exceeded, by orders of magnitude, any amount that the jury could constitutionally have imposed. RT2882-91. Thus, he telegraphed both that wealth was *the* critical variable and that these defendants’ wealth required an off-the-charts sanction.

It is no answer to say that the jurors were “already aware of UNUM’s size” and that it is “not misconduct for counsel to ‘comment on the state of the evidence’” (RB86-87) because Chapman’s counsel did far more than merely suggest that the jury should consider defendants’ wealth in determining the amount of punitive damages (though, in our view, even that kind of comment cannot be squared with *State Farm*). Instead, he used evidence of defendants’ collective net worth as a basis for suggesting an amount of punitive damages that, if actually awarded, undeniably would have been unconstitutionally excessive in order to induce the jury to return an award that was higher than the evidence warranted (*see* AA2238) and higher than it otherwise would have returned (*see* AOB50-52). Because that kind of argument—even if based on evidence in the record—amounts to asking the jury to decide the case on an unlawful basis, it is manifestly improper. *See People v. Bell* (1989) 49 Cal.3d 502, 538 (“[a]lthough counsel have broad discretion in discussing the legal and factual merits of a case, it is improper to misstate the law”) (citations omitted).

3. The improper jury arguments were manifestly prejudicial.

Chapman's assertion that we have failed to demonstrate that his closing arguments were prejudicial (RB88) is baseless. The trial court itself determined that the jury's \$30,000,000 punitive award "[did] not bear a reasonable relationship to the reprehensibility of defendants' conduct, in view of the entire record" and that "the jury should clearly have reached a different result." AA2238. What more could possibly be necessary to show that there is a "reasonable chance" that "a result more favorable to [defendants] would have been reached in the absence of the error"? *Cassim v. Allstate Ins. Co.* (Cal. July 29, 2004) 2004 WL 1687866, at *11. Defendants should be granted a new trial on punitive damages, free from such prejudicial arguments.

V. THE REMITTED PUNITIVE DAMAGES REMAIN UNCONSTITUTIONALLY EXCESSIVE.

Although the superior court ordered a remittitur of the punitive damages on grounds of excessiveness, it did not have the benefit of the Supreme Court's subsequent decision in *State Farm* when it did so. Thus, not only must this Court review the trial court's ruling *de novo* (see *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424), but in doing so it must apply for the first time in this case the guidance provided in *State Farm*. That guidance plainly requires further reduction of the award. See *Romo*, 113 Cal.App.4th at 749 ("*State Farm* went beyond the 'guideposts' established in *Gore* and articulated a constitutional due process limitation on both the goal and the measure of punitive damages"). Indeed, in light of *Romo*'s holding that a punishment of \$5,000,000 per decedent was "constitutionally reasonable" for "malicious conduct resulting in death" (*id.* at 763), it is manifest that a punishment of \$5,000,000 cannot be "constitutionally reasonable" in a case in which the trial court has determined that "there was no physical injury caused by defendants' actions," "no evidence of a deliberate

intent to deny plaintiff’s legitimate claim,” and “no evidence of oppression or equally reprehensible conduct” (AA2238). Any other conclusion would fly in the face of “the uniform general treatment of similarly situated persons that is the essence of law itself” (*BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 587 (Breyer, J., concurring))—and its corollary that differently situated persons should be treated differently. Chapman’s effort to show otherwise falls far short.

A. Reprehensibility.

State Farm identified five criteria for assessing the degree of reprehensibility of punishable conduct. 538 U.S. at 419. Consideration of these criteria establishes that defendants’ denial of Chapman’s claim falls at the extreme low end of the reprehensibility spectrum—and certainly much lower than in *State Farm* itself.

1. Was the harm physical or merely economic? *See id.* The trial court correctly held that, “[h]ere, there was no physical injury caused by defendants actions.” AA2238. Chapman does not contest this obvious fact. RB91.

2. Did “the tortious conduct evince[] an indifference to or a reckless disregard of the health or safety of others”? *State Farm*, 538 U.S. at 419. Those concerns are inapplicable to the denial of a claim for insurance benefits. Chapman does not suggest otherwise. *See* RB91.

3. Did “the target of the conduct ha[ve] financial vulnerability”? *State Farm*, 538 U.S. at 419. As the trial court held, “there is no evidence of oppression or equally reprehensible conduct inflicted upon a sick, old, destitute or an otherwise particularly vulnerable plaintiff.” AA2238 (emphasis added). Chapman’s suggestion that he was financially vulnerable because he “hung his head and shook it” and “[t]ears appeared in his eyes” when asked about money (RB30-31) is belied by the fact that this emotional reaction was in response to

a question whether he could “get by” on disability benefits of \$11,000 per month (RA1031). And his argument (RB30 fn.34, 91) that he was financially vulnerable because his income dropped by 50%, both misrepresents the record and is untenable as a legal matter. First, the record reflects that Chapman’s practice brought in 33% less in 2000 than in 1999—\$266,764 as opposed to \$400,512 (RA1323, 1334)—not 50% less. Moreover, it contains no evidence whatever of Chapman’s personal (as opposed to business) income.²⁰ Finally, questions of mathematics and accounting aside, to reverse the trial court’s factual finding and label as “financially vulnerable” someone who lives in “an exclusive area” (RA1031), and whose annual income, whatever its precise amount, enables him to play golf, join a country club, and travel abroad (RA1259), would be to make this factor useless as a means of distinguishing between the highly reprehensible act of preying on those who are least able to defend themselves and run-of-the-mine tortious conduct.

4. Did “the conduct involve[] repeated actions or was it an isolated incident”? *State Farm*, 538 U.S. at 419. Chapman argues that his “bad company” evidence shows that defendants were “repeat offender[s].” RB91. But *State Farm* made it crystal clear that, although “a recidivist may be punished more severely than a first offender[,] * * * courts must ensure the conduct in question replicates the prior transgressions.” 538 U.S. at 423; *see also Williams v. ConAgra Poultry Co.* (8th Cir. Aug. 6, 2004) 2004 WL 1752583, at *6 (under *State Farm*, “relevant behavior must be defined at a low level of generality” and must be “factually as well as legally similar”). Here, although Chapman and his witnesses leveled some general accusations of improper claim handling, they adduced no evidence that the alleged

^{20/} Chapman’s representation may be based on the amount that he chose to pay himself out of his practice (RA1323, 1334), which of course does not represent his personal income from all sources or account for amounts he chose to reinvest in his practice.

improprieties in the handling of Chapman’s claim “replicate[d]” anything that happened to any other insured. Indeed, Feist acknowledged that he had never witnessed the wrongful denial of any claim during his time at Provident. RT2038. Accordingly, “because [Chapman has] shown no conduct by [defendants] similar to that which harmed [him], the conduct that harmed [him] is the *only* conduct relevant to the reprehensibility analysis.” *State Farm*, 538 U.S. at 424 (emphasis added).

5. Was “the harm * * * the result of intentional malice, trickery, or deceit, or mere accident”? *State Farm*, 538 U.S. at 419. Again, the trial court’s ruling is the beginning and end of the inquiry: Although upholding the finding of punitive liability, the court nonetheless determined that “there is no evidence of a deliberate intent to deny plaintiff’s legitimate claim * * *.” AA2238. Chapman’s assertion that “there is strong evidence [that defendants] engaged in intentional malice, trickery or deceit” (RB91)—which he bases on a series of distortions of the record (*see* pages 38-44, *supra*)—cannot be squared with the court’s finding. In any event, to the extent his evidence could support a finding of “fraud,” that fraud pales in comparison to the one in *State Farm*, which involved “alter[ing] the company’s records to make [the insured] appear less culpable” and falsely representing to the insured and his wife that “their assets were safe, that they had no liability for the accident, that State Farm would represent their interests, and that they did not need to procure separate counsel” (538 U.S. at 413, 419 (internal quotation marks and alteration omitted)).

In sum, only the last of the five *State Farm* factors is even arguably present here, and the case for that one is flimsy. As the Supreme Court explained in *State Farm*, “[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” 538 U.S.

at 419. In this case, analysis of the reprehensibility factors necessarily raises the question whether the evidence is “sufficient to sustain a punitive damages award” of any sort (*State Farm*, 538 U.S. at 419); it surely does not support a conclusion that defendants’ conduct “was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty” (*BMW*, 517 U.S. at 585 (holding \$2,000,000 punitive award to be grossly excessive)).

B. Ratio Of Punitive To Compensatory Damages.

In light of post-*State Farm* developments in California law, this Court must address two aspects of the ratio guidepost in this case. First, recent Court of Appeal decisions hold that punitive damages must bear a reasonable relationship to the compensatory damages for the tort claim only, not the total compensatory award. Thus, the denominator of the punitive/compensatory ratio here is the bad-faith component of the verdict only, and does not include the past-benefits awarded on the contract cause of action. Second, this Court must determine a reasonable ratio for this case in light of the guidance provided in *State Farm* and cases applying it. Application of that guidance compels the conclusion that the ratio in this case (whatever the denominator) is excessive.

1. The denominator.

Just a few months ago, the Fourth District held as a matter of law that “the proportionality of the punitive damages to compensatory damages must focus on the amount awarded for breach of the implied covenant of good faith and fair dealing and for fraud * * * **excluding** the sum plaintiff recovered on the **contract claim.**” *Textron Fin. Corp. v. Nat’l Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1084 (emphasis added); accord *Diamond Woodworks*, 109 Cal.App.4th at 1056 fn.35. The *Textron* court reasoned that, because punitive damages cannot be awarded for a breach of contract (*see* CIVIL CODE § 3294), contract damages are irrelevant to, and must be excluded from,

the analysis of the ratio guidepost.²¹

The rationale for this rule is readily apparent in this case. Here, the breach-of-contract cause of action was adjudicated in the first phase of the trial. After modification on post-trial motions, Chapman received \$247,657—the sum-total of past residual-disability benefits due under his policies. The jury’s verdict and the contractual damages in Phase I, however, were legally inadequate to support a punitive award. *See* CIVIL CODE § 3294. It was only when the case proceeded to Phase II, and the jury separately found that defendants had committed bad faith, and therefore awarded damages in tort, that punitive damages became possible. Thus, as in *Textron* and *Diamond Woodworks*, the punitive damages should bear a reasonable relationship to the tort damages alone, rather than the total amount of compensatory damages. Accordingly, the denominator for the ratio analysis is either \$15,000 if the Court reverses the award of future benefits, or \$879,748 if it does not.

2. Permissible ratio.

Although the Supreme Court observed in *State Farm* that the “precise award in any case * * * must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff,” it also established concrete guidelines for determining the ratios of punitive to compensatory damages that due process will allow in light of those facts and circumstances. 538 U.S. at 425-26. Most notably, the Court held that a ratio of 3:1 or perhaps 4:1 will often mark the outer edge of permissible punishment, but that, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process

^{21/} This approach is also the logical one under *State Farm*, which similarly focused on the proportionality between punitive damages and the harm suffered by the plaintiff as a result of the defendant’s tortious conduct. 538 U.S. 424-28.

guarantee.”²² *Id.* Although Chapman emphasizes that the Court declined to establish a “bright line rule” for *all* cases, he offers no persuasive reason to ignore the guidelines established in *State Farm* in *this* case, in which the tort damages are similar to those in *State Farm* and the defendants’ conduct is materially less reprehensible. *See Williams*, 2004 WL 1752583, at *7 (admonishing that “one should not overstate the extent of the Court’s aversion to ratios”).

Every case Chapman cites in support of his contention that a 4.4:1 ratio “fully complies with [*State Farm*]” (RB95-96) involved damages that were materially smaller than those here, conduct that was materially more reprehensible than that here, or both. For example, in *Diamond Woodworks*, an insurance bad-faith case, the Court of Appeal held that the record contained four out of the five reprehensibility factors identified in *State Farm*, yet still reduced the punitive damages to less than four times the \$258,570 compensatory award. 109 Cal.App.4th at 1054-57. Needless to say, the resulting \$1,000,000 punitive award is no support for the \$5,000,000 exaction in this case involving materially less reprehensible conduct. Similarly, *Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F.3d 1020, *cert. den.* (2004) 124 S.Ct. 1602 involved “highly reprehensible” conduct in the form of intentional racial bias that was “a serious affront to personal liberty” and over which this country “fought the bloodiest war in its history” (*id.* at 1043-44).

^{22/} This framework was anticipated almost precisely by two members of the California Supreme Court. *See Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 423 (Brown, J., joined by Chin, J., concurring) (“In the case of large awards, punitive damages should rarely exceed compensatory damages by more than a factor of three, and then only in the most egregious circumstances clearly evident in the record. In arguing for this standard, I do not mean to suggest that three times compensatory damages is a benchmark measure of punitive damages. Far from it. The standard is an uppermost limit, and most punitive damage awards should fall well below that limit.”) (citation omitted).

Accordingly, the Ninth Circuit’s affirmance of a \$2,600,000 punitive award that was just over seven times the \$360,000 compensatory award in no way supports upholding a punishment of close to twice that amount in a case in which there was no intentional misconduct at all, much less intentional racial discrimination.²³

^{23/} Among the 21 cases string-cited by Chapman in a footnote, the following seven involved conduct that was materially more reprehensible than the conduct involved here: *Bogle v. McClure* (11th Cir. 2003) 332 F.3d 1347, 1361-62 (conduct involved intentional racial discrimination and “trickery and deceit to cover it up”); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.* (Fed. Cir. 2003) 345 F.3d 1366, 1371-72 (“egregious” fraudulent conduct resulted in plaintiff’s “complete surrender” of exclusive rights to valuable technologies), *cert. den.* (2004) 124 S.Ct. 1423; *In re Exxon Valdez* (D.Alaska 2004) 296 F.Supp.2d 1071, 1097 (court deemed conduct, which resulted in devastation of an entire ecosystem, to be “in an entirely different galaxy” of reprehensibility); *Eden Elec. Ltd. v. Amana Co.* (N.D.Iowa 2003) 258 F.Supp.2d 958, 973-74 (court said that it “can hardly think of a more reprehensible case of business fraud”) *affd.* (8th Cir. 2004) 370 F.3d 824; *Smith v. Fairfax Realty, Inc.* (Utah 2003) 82 P.3d 1064, 1071-73 (intentional conduct involving “deliberate misrepresentation and disregard of the rights of [plaintiff]”; federal constitutional challenge was not preserved), *cert. den.* (2004) 124 S.Ct. 1716; *Bocci v. Key Pharms., Inc.* (Or. Ct. App. 2003) 76 P.3d 669, 674-76 (conduct satisfied four out of five reprehensibility factors); *Advocat, Inc. v. Sauer* (Ark. 2003) 111 S.W.3d 346, 361 (defendants’ conduct resulted in death of nursing home resident and satisfied all five reprehensibility factors), *cert. den.* (2003) 124 S.Ct. 532. The following five involved compensatory awards that were materially lower than the \$879,748 tort award here: *Smoot v. United Transp. Union* (6th Cir. 2003) 67 Fed.Appx. 328 (\$20,000 compensatory award); *Parrish v. Sollecito* (S.D.N.Y. 2003) 257 F.Supp.2d 700, 701 (\$15,000 compensatory award); *Bunton v. Bentley* (Tex. Ct. App. Aug. 7, 2003) 2003 Tex.App.LEXIS 6835 (\$300,000 remitted compensatory award); *Borne v. Haverhill Golf & Country Club, Inc.* (Mass. Ct. App.) 791 N.E.2d 903 (compensatory awards ranged from \$16,000 to \$80,000), *review den.* (Mass. 2003) 795 N.E.2d 573; *Hudson v. Cook* (Ark. Ct. App. 2003) 105 S.W.3d 821, 832 (\$35,000 compensatory award). The remaining nine cases are distinguishable on both grounds: *Mathias v. Accor Econ. Lodging, Inc.* (7th Cir. 2003) 347 F.3d 672, 677-78 (two \$5,000 compensatory awards; “outrageous” conduct involved fraud and deliberately exposing customers to physical injury); *Lampley v. Onyx Acceptance Corp.*

Chapman’s effort to distinguish *State Farm* on the ground that “the damages awarded [here] were simply the disability benefits which [defendants] owed and therefore had no punitive component” (RB97) is equally misguided. Not only do emotional distress damages invariably have a punitive component (*see State Farm*, 538 U.S. at 426), but the award of future benefits, if allowed to stand, also is punitive in nature: It is not an award of contract damages because Chapman has no contractual right to receive a lump-sum payment of all future benefits under the contract (*see Erreca v. Western States Life Ins. Co.* (1942) 19 Cal.2d 388, 402 (only accrued benefits are available for a breach of the insurance contract)); and it is not compensatory because it was awarded based on the supposed tortious character of defendants’ conduct rather than on any assessment of the actual injuries that Chapman has suffered or will suffer

340 F.3d 478, 486 (7th Cir. 2003) (\$75,000 compensatory award; conduct involved “flagrant” sexual discrimination and cover-up), *cert. den.* (2004) 124 S.Ct. 1421; *S. Union Co. v. S.W. Gas Corp.* (D.Ariz. 2003) 281 F.Supp.2d 1090, 1095, 1099-1100 (\$390,072.58 compensatory award; “intentional conduct” involved “the unique harm inflicted by a breach of the public trust” and “accomplished with an evil mind, manifested by deception and trickery”); *McLain v. Metabolife Int’l, Inc.* (N.D.Ala. 2003) 259 F.Supp.2d 1225, 1231-32 (compensatory awards ranging from \$1,000 to \$500,000; conduct involved fraud that “deliberately [subjected] the consuming public to the risk of suffering a stroke”); *Gibson v. Overnite Transp. Co.* (Wis. Ct. App. 2003) 671 N.W.2d 388, 394 (\$33,000 compensatory award; conduct involved “grievous” actions evidencing “express malice”); *Haggar Clothing Co. v. Hernandez* (Tex. Ct. App. Aug. 21, 2003) 2003 Tex.App.LEXIS 7117, at *20-*21 (\$210,000 compensatory award; fraudulent conduct satisfied all five reprehensibility factors); *Trinity Evangelical Lutheran Church & Sch. v. Tower Ins. Co.* (Wis.) 661 N.W.2d 789, 802-03 (\$490,000 in potential harm; conduct involved “a continuing, egregious, and flagrant pattern of disregard” in the face of previous judicial rulings), *cert. den.* (2003) 124 S.Ct. 925; *Phelps v. Louisville Water Co.* (Ky. 2003) 103 S.W.3d 46, 54-56 (\$176,361.64 compensatory award; conduct resulted in wrongful death of two teenage boys); *Collins Entm’t Corp. v. Coats & Coats Rental Amusement* (S.C. Ct. App. 2003) 584 S.E.2d 120, 130 (\$157,449.66 compensatory award; conduct involved intentional and “calculated” interference with contract).

in the future as the direct and proximate result of defendants' past conduct. Indeed, like punitive damages, the award of future benefits could well result in a windfall if Chapman is able to either resume practicing surgery or earn 80% or more of his pre-disability income in other ways. *See* Section II, *supra*.

Finally, Chapman's assertion that this Court must permit a larger award—one *disproportionate* to his compensatory damages—because otherwise “[p]unitive damages would become just another cost of doing business” and would not compel defendants to change their national claims practices (RB97-98) runs headlong into *State Farm*. The Court there expressly observed: “[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior.” 538 U.S. at 417-18 (quoting *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 59 (O'Connor, J., dissenting)).

As the Fifth District observed in *Romo*, after *State Farm*, “it is not a permissible goal to punish a defendant for everything else [other than harming the plaintiff] it may have done wrong.” 113 Cal.App.4th at 750. Punitive damages must be set at a level that is “appropriate punishment for the present malicious conduct,” and not at a level designed to “impos[e] a penalty that will actually deter the entire type or course of conduct that affected these plaintiffs.” *Id.* at 753 fn.7.

In short, *State Farm* “articulated a constitutional due process limitation on both the goal and the measure of punitive damages,” requiring “a punitive damages analysis that focuses primarily on what [the] defendant did to the present plaintiff, rather than the defendant's wealth or general incorrigibility.” *Id.* at 749. It did so for the very purpose of preventing the type of arbitrary punitive award that Chapman insists he should have.

Moreover, acceptance of Chapman's argument would be bad policy, as

well as bad law. While a rogue insurer would certainly think twice before risking sky's-the-limit liability by denying a claim, so too would an honest, fair, and forthright insurer; and the resulting overdeterrence means that all insurance companies would have to raise premiums on honest insureds in order to cover the cost of paying invalid claims—a result that undermines the very idea of risk-spreading. Put differently, rational deterrence cannot be achieved with irrational deterrents; there is no more social utility to a system of arbitrary punitive damages than there is to arbitrary punishments under the criminal law; and due process does not countenance such a system. *See State Farm*, 538 U.S. at 416-18.

* * * * *

Application of the guidance provided by the Supreme Court in *State Farm* and by this Court's sister courts in *Diamond Woodworks*, *Romo*, and *Textron* suggests the following: First, if, notwithstanding our arguments, this Court upholds the award of future benefits and either includes the contract damages in the denominator of the punitive/compensatory ratio—yielding a denominator of \$1,127,405—or excludes those damages—yielding a denominator of \$879,748—the maximum constitutionally permissible ratio is 1:1. *See State Farm*, 538 U.S. at 425-26; *Williams*, 2004 WL 1752583, at *8 (reducing \$6,063,750 punitive award to \$600,000—a 1:1 ratio to compensatory damages—because the racial harassment suffered by the plaintiff was not “so especially reprehensible that it justifies an unusually large [punitive] award” and the “large compensatory award also militates against departing from the heartland of permissible exemplary damages”).²⁴ Second,

^{24/} Although in *Hangarter* the Ninth Circuit affirmed a punitive award of \$5,000,000 for insurance bad faith (373 F.3d at 1014-15), the ratio of punitive to compensatory damages was lower than here: 2.6:1 as opposed to 4.4:1. In addition, although we in no way acquiesce in the court's conclusions, the Ninth Circuit found several indicia of reprehensibility in *Hangarter* that are plainly absent here. Specifically, the court noted that *Hangarter* was financially

if the Court reverses the award of future benefits but decides to include the contract damages in the denominator—yielding a denominator of \$262,657—the maximum permissible ratio is somewhere less than 4:1. *See Textron*, 118 Cal.App.4th at 1084 (in “a case in which the compensatory damages are neither exceptionally high nor low [here \$89,744], and in which the defendant’s conduct is neither exceptionally extreme nor trivial, the outer constitutional limit on the amount of punitive damages is approximately four times the amount of compensatory damages”) (internal quotation marks omitted); *Diamond Woodworks*, 109 Cal.App.4th at 1055 (for compensatory award of \$258,570, “we have no doubt that anything exceeding four to one would not comport with due process under *Campbell*”); *Romo*, 113 Cal.App.4th. at 763 (declaring 3:1 ratio to be “constitutionally reasonable” where aggregate compensatory damages of three survivors of an automobile accident that resulted in deaths of three other family members were \$4,574,429 and, unlike here, court was convinced of “the extreme reprehensibility of defendant’s actions”). Finally, if the Court both concludes that the future benefits award is unsustainable and that the contract damages must be excluded from the denominator—yielding a denominator of \$15,000—a ratio

vulnerable (*id.* at 1014)—the evidence having been that the unavailability of benefits caused her to lose her home and have to go on food stamps—whereas here Chapman continued to run a lucrative ophthalmology practice and the trial court expressly found that he was not financially vulnerable. The Ninth Circuit also believed that the defendants in *Hangarter* had been deceitful (*id.*)—crediting testimony that the plaintiff was sent for an IME with a biased physician—whereas here the trial court found that “[t]here is no evidence of a deliberate intent to deny plaintiff’s legitimate claim” (AA2238), thus foreclosing any finding of intentional deceit. Finally, although the Ninth Circuit rejected the contention that a ratio of 1:1 is the constitutional maximum when the compensatory damages are substantial and the conduct is equivalent to or less egregious than the conduct in *State Farm* (373 F.3d at 1014-15), that holding is impossible to square with *State Farm* itself. *See* 589 U.S. at 426. Accordingly, this Court need not and should not follow it.

toward the high end of the single-digit range would be constitutionally permissible. *Cf. State Farm*, 538 U.S. at 425 (ratio in excess of single digits might be permissible “where *a particularly egregious act* has resulted in only a small amount of economic damages”) (emphasis added; internal quotation marks omitted).

C. Penalties For Comparable Misconduct.

Chapman argues that a comparison to “the civil or criminal penalties that could be imposed for comparable misconduct” (*BMW*, 517 U.S. at 583) does not aid in the excessiveness inquiry in this case because “the jury found [defendants were] guilty of fraud,” and therefore defendants could have gone to jail, lost their business license, or been mulcted with treble damages for denying his claim. RB99-100.

The Supreme Court rejected that precise argument in *State Farm*, refusing to give any weight to the Utah Supreme Court’s speculation about the possible “loss of State Farm’s business license, the disgorgement of profits, and possible imprisonment” and holding instead that “[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a \$10,000 fine.” 538 U.S. at 428. Chapman offers no basis for ignoring *State Farm*. And there is none.

Moreover, unlike in *State Farm* itself, the jury in this case did *not* find defendants guilty of fraud—a separate tort that was neither pled nor proven. Instead, the jury made a legally unsupportable finding that the “fraud” element of Civ. Code § 3294 was satisfied. *See* Section III, *supra*. But even if common-law fraud *had* been pled and proven—as it was in *State Farm*—this would still be a civil case, under a civil burden of proof, and hence the suggestion that defendants were facing jail-time is ludicrous. *See State Farm*, 538 U.S. at 428 (“[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened

protections of a criminal trial”).

Finally, Chapman grasps at straws in invoking the statutory treble-damages provisions for “injury to senior citizens” or “eviction based on fraudulent intent to occupy.” RB99-100. The conduct in this case self-evidently is nothing like the conduct to which these treble-damage provisions apply. But even accepting these remedies as a useful benchmark, that would justify a punitive award of no more than twice the compensatory damages (because one-third of any treble-damages award is comprised of the plaintiff’s actual damages). In short, these treble-damages statutes serve only to confirm that the \$5,000,000 punitive award—which is more than four times the total compensatory damages, almost six times the tort damages awarded by the jury, and more than 300 times the tort damages for mental distress—remains unconstitutionally excessive.

CROSS-RESPONDENTS’ BRIEF

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT A FINDING OF TOTAL DISABILITY.

The trial court held that “the evidence is insufficient to justify the verdict awarding plaintiff total disability damages” and therefore ordered a new trial unless Chapman consented to a remittitur of the contract damages to the amount of residual-disability benefits owed. AA2234-35. Although that ruling was manifestly correct, this Court need only decide whether it was an abuse of discretion. *See, e.g., Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 738-39 (“an appellate court may reverse an order granting a new trial for excessive damages only when the reasons given by the trial court reflect a manifest and unmistakable abuse of discretion”). It was not: Only by rewriting the record and twisting the words in his policies can Chapman suggest that he is totally disabled simply because he cannot perform eye surgery. It surely was no abuse of discretion for the trial court to

determine—after hearing all the evidence at trial—that the jury’s total-disability finding was against the weight of the evidence.

There is no dispute that Chapman remains capable of performing all of the important duties of his occupation except eye surgery. RA956, 1437; RT120-21. Indeed, not only is Chapman *able* to perform non-surgical procedures and the rest of the important duties of his pre-disability occupation, but his own testimony and the rest of the evidence in the record conclusively establishes that he has in fact continued to do so:

Q: Now, you mentioned that prior to the time that you filed your claim for benefits that you performed ophthalmic surgery, and you performed ophthalmic eye care, correct?

A: Yes.

Q: After you filed your claim you performed ophthalmic eye care, but you no longer performed surgery; is that correct?

A: Yes.

Q: So even under your formulation of your condition wouldn’t it be true that at best you were residually disabled but not totally disabled?

A: You could say that.

RT120-21; *see also* RA1437 (providing six examples of procedures that Chapman’s records indicate he performed both before and after his disability); RT1231 (statement of Chapman’s counsel during closing arguments that “if it were me, I would probably go residual disability because that seems the most fair to me.”). Chapman’s acknowledgment—and the supporting evidence—is decisive under the terms of his policies, which provide total-disability benefits only if he is unable to perform all of the “important” or “substantial and material” duties that he was performing pre-disability. RA568, 592. Certainly, it was not an abuse of discretion for the superior court to so conclude.

Chapman suggests, however, that the specialty letter he received from

Paul Revere somehow changed his Paul Revere policy—or both of his policies (his exact claim is unclear)—so that he qualifies as totally disabled simply by virtue of being unable to perform eye surgery. RB102. To put it bluntly, the letter does nothing of the sort. The pertinent part of the letter states:

Your policy, which includes coverage for “Total Disability In Your Occupation,” provides that you would be considered Totally Disabled if, because of injury or sickness, you were unable to perform the important duties of Your Occupation.

By “Your Occupation,” we mean that occupation in which you are regularly engaged at the time disability begins. We understand your current occupation to be that of an ophthalmic surgeon.

If you were performing the important duties of an ophthalmic surgeon immediately prior to the time disability begins, and then were unable to perform those duties, you would be considered unable to perform the important duties of Your Occupation. The fact that you could be working in some other occupation or specialty would not preclude the payment of Total Disability benefits.

The actual payment of benefits, of course, would be determined in accordance with the provisions of your policy.

RA615. In other words, the letter—just like the policies themselves—states in no uncertain terms that the disability determination turns on Chapman’s ability or inability to perform the important duties of his occupation as an ophthalmic surgeon. It does not, as Chapman implies (RB102), specify that the only important duty of an ophthalmic surgeon is surgery.²⁵

^{25/} During the second phase of the trial (after the jury had already found that Chapman was entitled to total-disability benefits), Fuller testified that the specialty letter amended the policy to provide for total-disability benefits so long as Chapman could not perform surgery. Not only does that testimony conflict with her deposition testimony that “[i]t was clear to me that it was a residual claim” (RT1754), but, more importantly, because this testimony was not before the jury in Phase I, it cannot be invoked to challenge the superior court’s determination that the jury’s verdict was against the weight of the

Chapman gains no traction in quoting and italicizing the specialty letter's statement that "[t]he fact that you could be working in some other occupation or specialty would not preclude the payment of Total Disability benefits." RB102. That statement does nothing more than clarify that the Paul Revere policy is an "own-occupation" policy under which the insured is entitled to recover benefits if he is unable to perform the important duties of his occupation, even if he is able to perform the duties of another occupation.

Because Chapman conceded that he could perform all but one of his occupational duties, and because the evidence corroborates his concession, the superior court manifestly was within its discretion in determining that the jury's total-disability finding was unsupported by the evidence and in granting a conditional new trial.

II. THE \$30,000,000 PUNITIVE AWARD WAS UNCONSTITUTIONALLY EXCESSIVE.

Chapman contends that \$30,000,000 was the "perfect" amount to punish defendants for their decision to deny his claim and, therefore, that the jury's punitive award in that amount should be reinstated. RB112. But to recap: Chapman requested disability benefits because of an alleged condition that was objectively unverifiable, uncorroborated by any witness, and accompanied by a host of suspicious facts and circumstances; hence, defendants denied his claim because, in their opinion, the evidence was insufficient to support Chapman's assertion that he was disabled from performing surgery. Even if it turns out that defendants made an incorrect decision or a mistake of some sort in the handling of the claim, there was "no evidence of a deliberate intent to deny [Chapman's] legitimate claim" and "no evidence of oppression or equally reprehensible conduct." AA2238. And even if, despite all of this, defendants' conduct somehow amounted to bad

evidence.

faith, and, over and above that, was “so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people,” thus justifying punitive damages (*Tomaselli*, 25 Cal.App.4th at 1286-87), it obviously was not so far off the charts of reprehensibility that it justified an award of 26.6 times the “substantial” compensatory damages (*State Farm*, 538 U.S. at 425) of \$1,127,405. On the contrary, the jury verdict was grossly excessive under each of the *BMW* guideposts even before the Supreme Court further refined the excessiveness inquiry in *State Farm*; and the superior court’s error under *State Farm* was not that it improperly remitted the award, but that it failed to go far enough to satisfy due process.

A. Reprehensibility.

1. *Physical injury and disregard for health and safety.* Chapman concedes that defendants did not cause him any physical injuries or disregard his health and safety (RB105)—the first two of *State Farm*’s five reprehensibility factors.

2. *Financial vulnerability.* Chapman’s contention that he was financially vulnerable (RB106) despite living in “an exclusive area,” playing golf regularly, joining a country club, and vacationing in Europe, is transparently implausible. *See* pages 55-56, *supra*. And his suggestion that he should be considered financially vulnerable because he is an individual and defendants are corporations (RB106-07) perverts *State Farm* by making every instance of tortious conduct by a corporation automatically reprehensible, no matter what the facts of the case might be. Finally, any insinuation that defendants somehow targeted Chapman because he was unable to defend himself is belied by his retention of legal counsel long before defendants made their claim determination. RA910, 1028-29, 1183-87. In short, the trial court was plainly correct that there was “no evidence of oppression or equally

reprehensible conduct inflicted upon a sick, old, destitute or an otherwise particularly vulnerable plaintiff.” AA2238. Certainly, that finding was not “clearly erroneous.” *See Cooper Indus.*, 532 U.S. at 440 fn.14 (although the trial court’s application of the *BMW* guideposts is subject to *de novo* review, “the Court of Appeals should defer to the District Court’s findings of fact unless they are clearly erroneous”).

3. *Intentional malice, trickery or deceit.* The trial court held that “[t]here is no evidence of a deliberate intent to deny plaintiff’s legitimate claim” (AA2238), *not*, as Chapman contends, that there was no “direct” evidence (RB105-06). And Chapman provides no reason to overturn that finding; instead, he simply repeats his earlier mischaracterizations of the record—to which our responses are similarly unchanged: Defendants did not concede that “there was evidence that [their] procedures were designed to put pressure on [their] personnel to deny valid claims.” *See*, pages 3-4, *supra*. Neither was there any evidence—let alone “overwhelming” evidence—that “each of the claimspersons involved in [Chapman’s] file deliberately sought ways to deny his claim.” *See* pages 40-44, *supra*. And neither Ryan nor Carlson “admitted that they denied the claim knowing that the bases set forth in the denial letters were false.” *See* pages 40-44, *supra*. Finally, Carlson did not “admit[] that he knew that [Chapman] was entitled to benefits.” *See* pages 42-43, *supra*. Chapman’s mischaracterizations can provide no reason to doubt the trial court’s assessment of the evidence: Defendants did not deny his claim with knowledge that it was valid; nor did they give knowingly false (*i.e.*, pretextual) reasons for the denial.

4. *Recidivism.* Although *State Farm* permits more severe punishment of recidivists than of first-time offenders, that is so only when “the conduct in question replicates the prior transgressions.” 538 U.S. at 423. As we have already explained (at pages 56-57, *supra*), Chapman presented no evidence

that the denial of his claim “replicates” even a single other wrongful denial. The “bad company” evidence to which he points—even if properly admitted—was at too high a level of generality to satisfy this standard; indeed, reliance on that kind of generalized critique flies in the face of the Supreme Court’s holding that “[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory * * * business” (*State Farm*, 538 U.S. at 423). As the Eighth Circuit recently explained when confronted with an argument similar to Chapman’s: “In determining what constitutes a previous example of the same conduct, * * * we must be careful not to let the exception swallow the rule. By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism * * * The Supreme Court has therefore emphasized that the relevant behavior must be defined at a low level of generality.” *Williams*, 2004 WL 1752583, at *6 (holding that “the district court improperly relied on evidence of harassment not suffered by [plaintiff] that was insufficiently similar to his experiences to be evidence of recidivism under the narrow exception set forth in *State Farm*”).

Moreover, Chapman’s assertion that recidivism is “the most important consideration” in setting punitive damages (RB107) is wrong. On the contrary, it is arguably the least important—and certainly the one that requires the most circumspection by courts conducting the required “[e]xacting appellate review” for excessiveness. *State Farm*, 538 U.S. at 418. That is because there is an obvious tension between enhanced punishment for repeat offenses and *State Farm*’s insistence that punitive awards must focus on the defendant’s conduct toward the plaintiff. *Id.* at 423. Thus, courts must cabin their reliance on recidivism to ensure that they are not “adjudicat[ing] the merits of other parties’ hypothetical claims” and, in effect, allowing punishment for that other conduct “under the guise of the reprehensibility analysis.” *Id.*; see also

Williams, 2004 WL 1752583, at *5 (“[I]t is crucial that a court focus on the conduct related to the plaintiff’s claim rather than the conduct of the defendants in general. In *State Farm* * * * the Supreme Court emphasized that courts cannot award punitive damages to plaintiffs for wrongful behavior that they did not themselves suffer. Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct * * *.”).

B. Ratio Of Punitive To Compensatory Damages.

Chapman cites snippets from *State Farm* recognizing that there is no “rigid” “bright-line ratio” governing punitive awards. RB108-09. But he conveniently ignores the balance of the Supreme Court’s discussion of the ratio guidepost. Specifically, Chapman fails to acknowledge the Court’s declaration that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety,” or its explanation that the historical use of “double [1:1], treble [2:1], or quadruple [3:1] damages” is “instructive,” even if “not binding.” *State Farm*, 538 U.S. at 425. And, of course, Chapman doesn’t mention the Court’s observation that, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.*

What is more, the Supreme Court has been moving steadily toward tighter restrictions on punitive awards that ensure proportionality, predictability, and fundamental fairness, with a clear progression from *TXO* to *BMW* to *Cooper Industries* and now to *State Farm*. Yet Chapman relies virtually exclusively on *TXO* in arguing that the 26.6:1 ratio between the original \$30,000,000 punitive award and the remitted \$1,127,405

compensatory award is not excessive. RB108-10.²⁶ *TXO* cannot, of course, trump the Supreme Court’s more recent pronouncements that double-digit ratios are presumptively unconstitutional; double, treble, and quadruple damages are “instructive”; and a 1:1 ratio may be the constitutional maximum when, as here, compensatory damages are substantial. *State Farm*, 538 U.S. at 425, 429.

Chapman’s arguments also are irreconcilable with the post-*State Farm* case law in California, which underscores that any punitive award greater than four times the compensatory damages would violate due process even when those damages are materially smaller than the compensatory award here. *See, e.g., Textron*, 118 Cal.App.4th at 1084 (4:1 is “the outer constitutional limit” when defendant’s conduct is “neither exceptionally extreme nor trivial” and compensatory damages are \$89,744); *Diamond Woodworks*, 109 Cal.App.4th at 1055 (same for compensatory award of \$258,570).

Finally, Chapman suggests that “awards in excess of 10 to 1 are perfectly appropriate for those cases where at least some, if not all[,] of the reprehensibility sub-factors are present.” RB111. But that contention cannot be squared with *State Farm*’s holding that “[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain [any] punitive award.” 538 U.S. at 419. If, as a matter of due process, the presence of one factor may not be enough to justify *any* punitive award at all, it

^{26/} Chapman also invokes a recent opinion of the Seventh Circuit stating that *State Farm* did not create an absolute restriction against exceeding a 4:1 or single-digit ratio. RB109 (citing *Mathias*, 347 F.3d at 676). In that case, the compensatory damages were \$5,000 per plaintiff and the conduct was deemed by the court to be “outrageous.” 347 F.3d at 677. The Seventh Circuit’s statement, therefore, was nothing more than a straightforward application of the Supreme Court’s proviso that a higher ratio “may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages” (*State Farm*, 538 U.S. at 425 (internal quotation marks omitted)).

necessarily follows that the presence of two or three of the five factors would be in the heartland of cases and would hardly justify departing from *Textron's* and *Diamond Woodwork's* uppermost limit of a 4:1 ratio—much less skyrocketing into double-digit ratios.

C. Penalties For Comparable Misconduct.

In California, as in Utah (*see State Farm*, 538 U.S. at 428), the most analogous civil penalty for the conduct in this case would be a fine of \$10,000. *See* INS. CODE § 790.03(h)(1), (5). Although Chapman suggests that defendants could have faced “significant penalties” beyond that sanction for denying his claim (RB113), the Supreme Court rejected just that sort of speculation in *State Farm*. *See* 538 U.S. at 428 (Utah Supreme Court’s “speculat[ion] about the loss of State Farm’s business license, the disgorgement of profits, and possible imprisonment,” “was insufficient to justify the award”).

* * * * *

In sum, reinstating any part of the remitted punitive award would fly in the face of *State Farm* and the decisions of the appellate courts of California applying it.

CONCLUSION

The Court should grant defendants JNOV on the bad faith and punitive damages claims. Alternatively, it should grant defendants an unconditional new trial on bad faith and punitive damages. Barring that, it should further remit the punitive damages to a nominal sum or, in all events, no more than \$1,000,000.

The Court should also grant defendants JNOV or, alternatively, an unconditional new trial on the future benefits claim.

Finally, the Court should affirm the trial court's grant of a conditional new trial with respect to both total disability benefits and punitive damages.

Respectfully submitted,

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FACTUAL APPENDIX

Page	Chapman’s Statement	What The Record Shows
1 & n.3	It was “outright invention” for defendants to “claim that Plaintiff had a ‘career-long phobia’ when in fact [they] well knew the true facts were only that Plaintiff had always had a mild, generalized, social anxiety.”	Lerchin described a “[p]rogressive and cumulative experience of anxiety and it[s] physical manifestations as [Chapman] pursued a surgical role as part of his ophthalmology practice” and said that Chapman’s “condition has deteriorated in terms of his phobia, gradually.” RA955. Lerchin also said that “the insured has been dealing with his symptoms for many years.” RA920. Chapman told defendants that “[h]e has always been an anxious person, and would worry before undertaking eye surgeries. He coped in the past with this worry adequately, but has found that his hands began to shake in the past couple of years.” RA1030.

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1 & n.3	It was "outright invention" to "claim that * * * McSharry was fired for poor performance."	McSharry conceded that he was "fired at UnumProvident" (AA1728, <i>see also</i> AA1699, 1735), that he "didn't last anywhere [including UnumProvident] too long" because he "didn't fit in" (1726), that he was criticized because "I couldn't be clear" (AA1715), that he received poor performance reviews (AA1718), that he had "performance improvement" problems with his supervisor (AA1731-32), and that he received verbal warnings (AA1732-33).
2 n.4	"[T]he claim was not paid 'in full for much of' the claim period."	Chapman's claim was filed on August 31, 1999 (RA1306) and denied on September 26, 2000 (RA1310). He was paid full benefits from October 9, 1999 (RA918) to March 3, 2000 (RA988, 1306-07).
7	"The vast majority of [Chapman's] practice and 75% of his time was devoted to surgery and surgery-related care."	This statistic—self-reported by Chapman—does not accurately represent the extent to which his alleged disability affected his pre-disability duties. Whether or not Chapman devoted 75% of his time to "surgery-related" duties, the fact is that he continued to perform many of those duties after his disability. <i>See</i> , page 68, <i>supra</i> .

Page	Chapman's Statement	What The Record Shows
8	"In 1997 and 1998, [Chapman's] complication rate rose dramatically."	There is no evidence regarding Chapman's complication rate anywhere in the claim file.
9 n.10	"UNUM claims as a 'red flag' the fact that Lerchin had been Plaintiff's 'med-school classmate.' As with many of these so-called 'red-flags' UNUM cites no testimony (1) that any of UNUM's witnesses were aware of this fact during the claims process or (2) that this fact was, in any way, relevant to its evaluation of the claim."	The very first entry in Lerchin's notes says "pt [patient] knew me in medical school." RA908. The fact that Chapman sought out a physician with whom he had a personal connection heightens the suspicion arising from the fact that Chapman inquired about disability benefits during his first appointment.
10 n.14	"UNUM * * * argues as a 'red flag' the fact that [Chapman's] failure to tell anyone [about his condition] prior to submitting a claim suggests the condition did not exist until a claim was pursued. * * * UNUM does not cite to <i>any testimony regarding the matter in which UNUM evaluated or considered this fact during the claims process.</i> "	Ursprung noted: "The Insured's claim is based entirely on self-report. Furthermore, [Chapman] appears highly concerned with confidentiality and does not want his office staff or colleagues to know of his condition. This of course will make it difficult to confirm by third party observation that there could be, in fact, a valid difficulty with tremors during surgery." RA969.
11 n.15	Chapman complains of "UNUM's repeated and erroneous claim that [Chapman's] income remained level after he stopped performing surgery."	On April 25, 2000, over a year after Chapman stopped performing surgery, his attorney told defendants that, "as of this time, [Chapman has] managed to keep his net income the same." RA1028-29.

Page	Chapman's Statement	What The Record Shows
13-14	<p>“[N]ot a single claims representative who handled Plaintiff's claim had any training in psychiatry, any familiarity with the nature of Plaintiff's condition, or made any effort to inform themselves of the nature of his disability. (AA727, 826, 829, 831.)”</p>	<p>The claim representatives explained that, although they are not medical professionals, they rely on <i>medical consultants</i>, who do have medical training. AA728, 826.</p>
15 n.18	<p>“UNUM claims it was entitled to ignore Lerchin's [statement in a telephone conversation that “hands down' it's not a matter of choice”] because, it claims, Lerchin also made the statement that Plaintiff had no ‘compelling reason to resume his surgical practice,’ * * *. (AOB7.) In fact, Lerchin wrote that Plaintiff ‘has no compelling reason to resume his surgical practice <i>beyond his obvious loss of professional status and partial loss of income.</i>’”</p>	<p>Defendants never said that they ignored Lerchin's statement, let alone were “entitled to ignore” it. AOB7. And the omission from the quoted passage is Chapman's: Defendants' brief includes the full statement. <i>Id.</i></p>
15	<p>“At the end of her interview with Lerchin, Merritt told Lerchin that she would not want Plaintiff to operate on her eyes.”</p>	<p>This statement is not reflected in either Merritt's summary of that interview (RA922) or Lerchin's revisions to it (RA965). Even if Merritt made this off-the-cuff comment, it would have been based solely on Chapman's self-report and would not have been a determination that he, in fact, was disabled.</p>

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16 n.21	"UNUM dropped the idea of getting Bercun's records in order to have the claim denied to help meet third quarter claim termination goals."	There was no evidence that defendants ceased efforts to obtain Bercun's records in order to deny Chapman's claim sooner. Chapman's citations show only that the records were not obtained.
17	"UNUM knew that [Chapman] was disabled because, <i>by definition</i> , one who is diagnosed with a Specific Phobia is disabled."	Setting aside the lack of evidence to support Chapman's self-report, a diagnosis of specific phobia does <i>not</i> equate with disability. As Ursprung noted: "Functional capacity or incapacity doesn't follow from a diagnosis; it follows from symptoms. * * * So, there's really no correlation between diagnosis and vocational outcome." AA877. Even if there are symptoms, "[i]n regard to exposure to surgical procedures reigniting a phobic response, the issue * * * from my perspective is not whether a phobic response would occur, but whether it would prevent one from carrying out occupational functions; and if it would to what extent, and is it a treatable condition such that it could be modified." AA901.

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18	Chapman was justified in refusing Inderal because "[h]is mother died from kidney disease."	Dr. Schwartz concluded that Chapman could safely take Inderal, explaining that "the claimant's mother's renal failure was secondary to scleroderma, a condition which has not been diagnosed in the claimant and which is generally not considered hereditary but rather idiopathic in etiology." RA1171.
19 n.22	"UNUM incorrectly claims that Inderal was shown in clinical trials to be effective in controlling hand tremors in surgeons. (AOB7-8.) In fact, [the study] had no relevance to [Chapman's] situation, as it was applied only to young residents who had an attending physician present and ready to take over the surgery should symptoms occur."	The study found Inderal to be safe and effective in aiding micro-surgeons. The presence of another doctor during the trial as a precaution does not affect the study's conclusion.
20 n.24	"[W]hile UNUM protests that neither [Chapman], Lerchin, nor Lambert advised them of the various reasons why * * * Inderal was not appropriate until February 2001, neither Plaintiff nor his physicians were ever aware of UNUM's need or desire for this information until receiving the denial letter."	Defendants did not complain that Chapman never "advised them of the various reasons"; our point was that the reasons he gave were either medically specious or appeared to be pretextual. See pages 12-15, <i>supra</i> . Furthermore, defendants <i>did</i> discuss Chapman's refusal to take Inderal with both Lerchin (RA965) and Chapman (RA1030).

Page	Chapman's Statement	What The Record Shows
22	<p>“Schwartz * * * did not bother to investigate [the other reasons that Chapman gave for refusing Inderal] or to assess whether [Chapman] could safely perform delicate eye surgery while medicated.”</p>	<p>Schwartz, an internist, was asked only to comment on Chapman's claim that Inderal was dangerous to his kidneys. RA939-40. Ursprung, a behavioral psychologist, was in a better position to address Chapman's other reasons for refusing treatment. He concluded that Lerchin's prescription was “reasonable” despite these concerns. <i>See</i> RA968-69.</p>
22-23	<p>“Carlson conceded that it was perfectly reasonable for [Chapman] to have accepted the recommendation of his physician not to take Inderal (RT806-807; AA741-2), that UNUM had no right to dictate his medical treatment (AA735) and that UNUM had no right to deny a claim where the insured was reasonable in following his doctors' recommendation not to take medication (AA742-3).”</p>	<p>These supposed concessions—which are distortions of what Carlson actually said—are irrelevant because defendants did not deny Chapman's claim on the ground that he had refused to take Inderal. <i>See</i> pages 40-41, <i>supra</i>.</p>
24	<p>“Ursprung conceded that he knew of no evidence nor did he investigate the possibility that [Chapman] had any psychiatric anxiety disorder prior to stopping surgery. (RT895).”</p>	<p>Ursprung conceded that there was no prior diagnosis (RT895); but that is irrelevant in light of the abundant evidence that Chapman reported suffering from <i>lifelong</i> anxiety symptoms—which is what Ursprung relied upon in his evaluation (<i>see</i> page 78-a, <i>supra</i>).</p>

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24	<p>“Ursprung * * * conceded that it was reasonable for [Chapman] to start seeking treatment only when the symptoms of his phobia ‘started interfering with his occupational functioning,’ which is precisely what [he] did.”</p>	<p>Ursprung said that a typical patient “should have started treatment when the symptoms started interfering with his occupational functioning” (RT925-26), but according to Chapman’s own account, he had <i>not</i> done this; instead Chapman claimed that he waited for years—until he was completely unable to perform surgery—before he sought help or even disclosed these symptoms to anyone (<i>id.</i>; <i>see also</i> pages 12, 78-a, <i>supra</i>).</p>
25	<p>“Ursprung conceded that he was simply wrong with regard to the [fact that Chapman had sought] legal consultations [before filing his claim].”</p>	<p>Ursprung did <i>not</i> concede this. Indeed, it was Chapman’s counsel who was forced to tell Ursprung, “maybe you’re right” about Chapman having consulted a lawyer before filing his claim. RT898-99; <i>see also</i> RA910.</p>
26	<p>“Ursprung claimed that [Chapman’s] only disabling symptom was his tremor. (RA969.) Again, Ursprung conceded that he knew this was wrong and that the tremor was only one of <i>many</i> symptoms impairing plaintiff. (RT910-913.)”</p>	<p>Ursprung never denied that Chapman reported other symptoms; he stated that the tremors were “the only symptom reported <i>to impair</i> the insured.” Chapman has never claimed otherwise.</p>

Page	Chapman's Statement	What The Record Shows
27	<p>“Ursprung conceded that there was much evidence which suggested the validity of [Chapman's] claim. (RT927-931.) Yet, Ursprung listed none of this evidence in his memo.”</p>	<p>Ursprung did not concede that there was “much” evidence. He merely acknowledged that Chapman's self-reported symptoms were consistent with Lerchin's diagnosis. RT927-31. Moreover, Ursprung's memo (RA968-69) was meant only to identify concerns with the claim, not to make an ultimate determination on disability. As Ursprung explained, “I just listed a number of concerns I had about the file. I did not say at this point that this was an invalid claim or it wasn't supported.” RT928. It was only after additional investigation that Ursprung concluded that the evidence did not support an impairment. RA1264.</p>
27	<p>“By the time of [Chapman's] January 20, 2000 letter, UNUM had been told by Ursprung that it was unlikely [Chapman] would ever return to surgery. (RA969.)”</p>	<p>Although stating that Chapman was not motivated to return to work, Ursprung emphasized that “[t]he prognosis in a case such as this should be good” because “[t]here is broad outcome research indicating the efficacy of both cognitive behavioral psychotherapy and psychopharmacology in the treatment of anxiety disorders.” RA969.</p>

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29 n.32	<p>“UNUM ignores this evidence [of financial records that Chapman did provide] when it asserts incorrectly that [Chapman] ‘knowingly failed to provide’ certain financial information requested by UNUM. (AOB11).”</p>	<p>Chapman does not deny that he failed to produce requested financial information, stating only that he “produced the financial information he had” (RB29) and admitting that he did not produce at least two requested pieces of information (RB31).</p>
29 n.33	<p>“[I]f the field [representative’s] trip was because of these ‘red flags,’ then UNUM clearly lied to [Chapman] in order to hide these ‘red flags’ from him, when it told him that this field trip was ‘standard practice.’ Worse yet, if the representative was sent because of ‘red flags,’ his report confirms that he never advised [Chapman] of these ‘red flags,’ in contravention of fair claims handling practices.”</p>	<p>First, there is nothing inconsistent with the field visit being “standard practice” and one of its purposes being to investigate red flags. Second, Chapman obviously was aware that one purpose of the field visit was to address questions about his claim because he brought his attorney. RA1028. Finally, the field representative <i>did</i> discuss many of the red-flags with Chapman and his attorney. RA1029-31; <i>see also</i> RB30.</p>

Page	Chapman's Statement	What The Record Shows
31 n.35 45	<p>“The CPT code simply reports a date and a procedure number, which corresponds to a type of service * * * but it does not indicate the nature of the patient's condition and thus is minimally informative on its own. The diagnosis codes reflect the patients' conditions. * * * UNUM, however, ignored the diagnosis codes and evaluated only the CPT procedure codes.”</p> <p>“[Carlson] attempted to use the deceptive O'Hara procedure code statistics even though he had no idea what the procedure codes meant (RT759-62, RA1437.)”</p>	<p>Defendants' review of the CPT codes revealed that Chapman was still performing many of the same procedures he had performed pre-disability. RA1437. For this purpose, it did not matter whether or not the patients on whom he performed them required surgery; the salient fact was that he was still able to, and actively did, perform many of the same occupational duties.</p>
31- 32	<p>Chapman suggests that O'Hara committed several errors in her CPT code analysis and that her report was prepared “for the obvious purpose of supporting a claim that [Chapman] was not a surgeon.”</p>	<p>Whether or not O'Hara made any errors in her data analysis is beside the point because her report was not a basis for the denial. <i>See</i>, pages 40-41, <i>supra</i>.</p>
33	<p>Chapman complains that Ghiz expressed an opinion that was skeptical of Chapman's claim “[w]ithout ever seeing or speaking to [Chapman] or Lerchin, and without any basis for so concluding.”</p>	<p>Ghiz's opinion was merely an initial assessment of the claim documents that Chapman submitted, not a final determination. <i>See</i> RA1215.</p>

Page	Chapman's Statement	What The Record Shows
34	<p>“Ghiz * * * deliberately misinterpreted Lerchin’s statement to mean that there had been ‘no changes’ in [Chapman’s] current symptoms and thus his condition had ‘improved’ such that he could return to surgery. (RA1217, 1262.)”</p>	<p>Ghiz did <i>not</i> interpret Lerchin’s statement to mean that Chapman had been disabled but was now “improved” and could return to surgery. Instead, because Ghiz believed that Chapman’s condition had not been disabling in the past, she construed the lack of change to mean that it was not disabling then either. <i>See</i> RA1262 (“the newly obtained information serves to further support the lack of impairing symptoms”).</p>
34-35	<p>Ghiz suggested obtaining treatment notes from Lerchin and Bercun but “<i>before she had even seen the records</i>, she had already determined that ‘this information would not change my opinion’ but could only ‘serve to provide further evidence that the insured does not appear to be impaired currently.’ (RA1216.)”</p>	<p>Chapman omits a critical proviso from Ghiz’s memo—that the new information would not change her mind “unless there is a drastic change in the insured’s functioning.” RA1216.</p>
35	<p>“Ghiz then referred the file to Ursprung for an additional review with her recommendation that [Chapman] was not disabled. (RA1263.)”</p>	<p>The referral did <i>not</i> state any “recommendation” one way or the other. RA1263.</p>

Page	Chapman's Statement	What The Record Shows
37	Chapman says that Ursprung's testimony that he makes assumptions as part of his job is evidence that he was "a biased consultant."	Ursprung made this comment in response to the accusation of Chapman's counsel that he had made a "wild assumption" that Chapman was enjoying foreign travel because Lerchin's notes said that Chapman "described a wonderful trip to Europe earlier this summer" (RA1259). AA0904. If drawing commonsense inferences from unambiguous statements in the claim file is evidence of "bias," no insurer could ever deny a claim without being charged with bias.
40	"Neeser signed the denial letter. (RA1298.) She admitted she had insufficient information but that 'it was up to <i>Plaintiff</i> to provide us with the information that he feels is relevant for <i>us</i> to gather.' (AA806-10; emphasis added.)"	Neeser said that the claim was denied because there was insufficient evidence of Chapman's condition, <i>not</i> that she had insufficient information to deny the claim. AA806-10. And she testified: "It's hard for us to say, well, we need this document, we need that document. It's up to the insured to provide us documentation that an actual [disability] situation is occurring by whatever means." AA808. In other words, because there are numerous ways to establish that the insured has a disabling condition, the insurer cannot tell the insured what kind of evidence he must provide.

Page	Chapman's Statement	What The Record Shows
45	<p>“[Carlson] also admitted that he verified false discovery responses stating that UNUM did not even consider [Chapman's] claim in the context of residual disability benefits. (RT819-821; RA640-65.)”</p>	<p>Carlson admitted that when answering the interrogatory he failed to recall that defendants denied the residual-disability claim because there was insufficient evidence of a disabling condition, not because of Chapman's failure to supply necessary financial information. RT820.</p>
<p>49</p> <p>51</p> <p>52 n.4</p>	<p>“Provident then undertook a deliberate and intentional plan to lower its claim payments through the simple device of denying more claims.”</p> <p>“Mohney sought to increase the net termination ratio * * * [t]hus, Mohney's response to the increased volume of new claims was simple — deny more claims.”</p> <p>“Mohney changed from using the phrase ‘terminations’ and began using the more palatable-sounding term, ‘resolutions.’ They mean the same thing. (RT2368, AA1156.)”</p>	<p>First, “terminations” and “resolutions” <i>do</i> mean the same thing, namely: “claims that closed for any reason, the largest single reason of which is voluntary return to work.” RT2367. Neither term means “denials,” let alone “wrongful denials” See RT2284-85, 2347 (only one out of ten terminations is a denial). Second, Mohney testified without contradiction that his expectation that the net termination ratio would go up was based on claim-handling initiatives that were designed to increase efficiency and facilitate voluntary returns to work, <i>not</i> result in more claims being denied. RT2284-88, 2292-95, 2346-47, 2350.</p>

Page	Chapman's Statement	What The Record Shows
53-54	<p>“Mohney’s team implemented the policy that what transpired during a Roundtable review would specifically not be documented in the claim file. (RT1630-1632, 1635-1636.) Tim Arnold, the new head of claims, admitted that the procedure now in place is that documents generated in advance of and during the roundtables are destroyed, for the obvious purpose of preventing any paper trail of what transpires during these meetings. (RT2456-2457; 2460-2461.)”</p>	<p>Arnold testified: “Under the normal course of business it wouldn’t necessarily be appropriate for that document [prepared before the roundtable] to be in the file because the person that wrote the document and wrote the issues that they thought were appropriate for discussion wrote it without the benefit of the discussion. * * * [But] the agreed upon actions that came from the round table <i>would be</i> documented in the action plan.” RT2461 (emphasis added).</p>
54	<p>“No records are kept even of who was present or what was discussed. This is in direct violation of California law. (10 CCR §2695.3.)”</p>	<p>The cited regulation requires that “files shall contain all documents, notes and work papers * * * in such detail that pertinent events and the dates of the events can be reconstructed and the [insurer’s] actions pertaining to the claim can be determined.” 10 CCR § 2695.3. Defendants’ recordation of the recommendations coming out of a roundtable fully satisfies this regulatory requirement.</p>
54	<p>“The Company thus doctors files.”</p>	<p>Chapman’s complaint is that defendants did not keep exhaustive records. There is no evidence that they inserted false information or otherwise “doctored” any claim file, including Chapman’s.</p>

Page	Chapman's Statement	What The Record Shows
69	"[Chapman] specifically identified his wife as a witness. (RA965)."	The cited page memorializes Lerchin's comment that Chapman's wife was "the only other person who [was] aware of Dr. Chapman's disability." RA965. It does <i>not</i> say that she witnessed his alleged symptoms or could corroborate Chapman's self-report. Indeed, Chapman never offered her as a corroborating witness, even after his claim was denied for lack of evidence; and she did not testify at trial.
71	"UNUM's claim that Ms. Fuller did not reference any standards or criteria (AOB19) is simply wrong. (RT1630-79; RA853-65.)"	Although Fuller discussed how things "seemed" to her in her "experience," she never cited any objective source or documented industry standard to support her opinions.
87-88	"Since the evidence did reveal * * * that UNUM did have an incentive program based on denial of claims, these arguments [to the jury] were fair advocacy."	As Chapman's failure to cite the record suggests, there is no evidence that defendants had rewarded their personnel for denying claims.
102	"[T]he trial court recognized" that "there is substantial if not overwhelming and uncontroverted evidence that [Chapman] could no longer perform surgery."	The trial court did not recognize that there was "overwhelming" or "uncontroverted" evidence: It held that there was "substantial evidence" (<i>i.e.</i> , enough to withstand a motion for JNOV or new trial). AA2235.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

In compliance with California Rules of Court Rule 14(c), the word processing program (Corel WordPerfect 11) used to prepare the Appellants' Reply Brief and Cross-Respondents' Brief reported a word count of 24,378 words for the briefs and 3,535 words for the Factual Appendix attached to the briefs. The total for the briefs and the appendix is 27,913.

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