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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LINDSAY MARCISZ et al.

Plaintiffs and Appellants,

v.

MOVIE THEATRE
ENTERTAINMENT GROUP, INC.,

Defendant and Respondent,

D047009

(Super. Ct. No. GIC820896)

APPEAL from an order of the Superior Court of San Diego County, John S. Meyer, Judge. Order affirmed in part, reversed in part and matter remanded.

Lindsay Marcisz, Maureen Hora, and sisters Jessica Pollastrini (Jessica) and Blair Pollastrini (Blair, collectively Plaintiffs) appeal from an order granting a new trial in favor of their former employer, Movie Theatre Entertainment Group, Inc. dba UltraStar Cinemas (UltraStar), on the ground the jury awarded excessive compensatory and punitive damages awards. Plaintiffs assert that the jury's verdict should be reinstated because the trial court (1) lacked jurisdiction to rule on the new trial motion and (2) gave an insufficient statement of

reasons in its order. In the alternative, Plaintiffs assert that the trial court erred in granting the motion because it applied the wrong legal standard to evaluate their compensatory damage awards and failed to conduct an appropriate analysis to evaluate their punitive damage awards. Plaintiffs also contend the trial court made numerous evidentiary errors during trial that resulted in a prejudicially incomplete record in deciding UltraStar's new trial motion.

We reject Plaintiffs' procedural arguments but conclude that the trial court erred when it granted a new trial on the compensatory damage awards because it used an improper standard. The trial court, however, did not abuse its discretion in granting a new trial on the punitive damage awards because they were excessive based on the evidence presented. Finally, we decline to rule on Plaintiffs' evidentiary arguments because they are moot or improperly seek advisory rulings on issues that are more appropriately addressed to the trial court on retrial.

FACTUAL AND PROCEDURAL BACKGROUND

When they were between 16- to 17-years old, Plaintiffs began working at a movie theater operated by UltraStar, located in Poway, California. Other than the Pollastrini sisters, who previously worked at a car wash for one day, this was Plaintiffs' first job. Plaintiffs worked at the theater for a time period ranging between six and ten months, until each voluntarily resigned. During Plaintiffs' employment, Daniel Wooten was the theater manager and Adam Gustafson was the assistant manager.

In November 2003, Plaintiffs filed this action against Wooten, Gustafson and UltraStar alleging that the individual defendants engaged in conduct that created a hostile

work environment and discriminated against them based on their gender and that UltraStar failed to take reasonable steps to prevent the harassment. Plaintiffs dismissed the individual defendants with prejudice before trial and the trial court later bifurcated the trial against UltraStar on the punitive damages issue.

At the end of the first phase, the jury rendered verdicts in Plaintiffs' favor, concluding they suffered unwanted harassing conduct because of sex or gender that was so severe, widespread or persistent that a reasonable woman in their circumstances would have considered the work environment to be hostile or abusive, that each of the Plaintiffs considered the work environment to be hostile or abusive, that the harassing conduct was a substantial factor in causing their harm and that UltraStar failed to take all reasonable steps to prevent the harassment from occurring.

The jury awarded Plaintiffs emotional distress damages totaling \$850,000, \$300,000 each to Hora and Marcisz and \$125,000 each to Jessica and Blair. The jury also determined that UltraStar acted with malice or oppression because it either ratified the individual defendants' misconduct or had advance knowledge of their unfitness and employed them with a conscious disregard of the rights and safety of others.

UltraStar filed for bankruptcy protection during the punitive damages phase of the trial, but Plaintiffs obtained relief from the automatic stay and the jury ultimately awarded *each* plaintiff \$1.5 million in punitive damages. The trial court granted UltraStar's motion for a new trial on the ground that the amounts of compensatory and punitive damages the jury awarded were excessive in light of the evidence presented at trial. Plaintiffs appealed

from the order granting the new trial motion and UltraStar filed a protective cross-appeal, which it later dismissed.

DISCUSSION

I. *Procedural Issues*

A. Plaintiffs' Request for Judicial Notice

Plaintiffs seek judicial notice of certain documents filed in UltraStar's bankruptcy proceeding and with the California Department of Fair Employment and Housing. The request is denied because Plaintiffs have not shown that the documents were presented to the trial court or are relevant to the resolution of this appeal. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [only relevant matters may be judicially noticed; although "courts may notice official acts and public records, they do not take judicial notice of the truth of all matters stated therein"], overruled on another point in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

B. The Trial Court Had Jurisdiction to Rule on the New Trial Motion

1. Facts

UltraStar filed for bankruptcy protection during the punitive damages phase of the trial and obtained an automatic stay of the matter under federal bankruptcy law. (11 U.S.C. § 362.) After Plaintiffs obtained relief from the stay to complete the trial, the jury reached its verdicts on punitive damages and the trial court entered judgments for the Plaintiffs. On June 1, 2005, UltraStar filed a notice of intent to move for new trial and nine days later the bankruptcy court issued an order lifting the stay to enable the parties to prosecute posttrial motions, appeals, and cross-appeals.

The bankruptcy court's order indicated that it granted UltraStar relief from the stay, effective the date of its order, to bring any posttrial motions or appeals, that any time periods for filing same were tolled and would commence to run from the date of its order and that "[a]ny posttrial motions filed in the State Court Action by the Debtor prior to the effective date of this Order [were] null and void. . . .[¶] Alternatively, if Debtor schedules a hearing on any posttrial motions in the State Court Action on or after July 15, 2005, then relief from the automatic [stay] shall be granted retroactively to June 1, 2005."

Plaintiffs objected to the new trial notice claiming it was void because UltraStar filed it while the bankruptcy stay was still in effect. The trial court presumably rejected Plaintiffs argument as it later ruled on the merits of UltraStar's motion.

2. Analysis

Relying on the former portion of the order, Plaintiffs claim that UltraStar's June 1, 2005 notice of intent to move for new trial was "null and void" and that the trial court lacked jurisdiction to rule on UltraStar's new trial motion because it never refiled its notice of intent after the bankruptcy court issued relief from the stay. Plaintiffs' argument, however, ignores the latter portion of the order granting UltraStar retroactive relief based on certain filing and hearing dates.

Although the order is not a model of clarity, its purpose was to allow the trial court to decide UltraStar's posttrial motions. Notably, UltraStar filed its notice of intent to move for new trial on June 1, 2005 and the motion was set for hearing, and ultimately heard, on July 15, 2005, the precise dates referenced in the bankruptcy court's order. Thus, we interpret the

order as granting UltraStar retroactive relief from the stay, thereby giving the trial court jurisdiction to rule on the motions.

C. The New Trial Order Adequately Specified the Trial Court's Reasons

Plaintiffs contend that the order is defective because the trial court failed to adequately state its reasons for granting the motion. Specifically, Plaintiffs note that the trial court failed to provide any discussion regarding the facts and evidence which led it to find that the damages awarded were excessive.

A trial court is required to specify the ground upon which it is granting a new trial and its "reason or reasons for granting the new trial upon each ground stated." (Code Civ. Proc., § 657.) The statement of reasons must be "specific enough to facilitate appellate review and avoid any need for the appellate court to rely on inference or speculation." (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 634.) While it is improper for the trial court to provide a specification of reasons that simply states the ultimate facts of the case, "the trial judge is not necessarily required to cite page and line of the record, or discuss the testimony of particular witnesses,' nor need he undertake 'a discussion of the weight to be given, and the inferences to be drawn from each item of evidence supporting, or impeaching, the judgment.'" (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 370.) The failure to provide an adequate specification of reasons renders the new trial order defective, not void. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 896, 900.)

Here, the trial court explained that the compensatory damages awarded were excessive because the record lacked evidence of "severe, substantial and enduring emotional distress" and "[t]here was no evidence that [P]laintiffs suffered any physical manifestations

of emotional distress; [P]laintiffs did not seek medical or psychological assistance due to the emotional distress; there was no evidence that their lives were significantly disrupted, or that they were unable to work, attend school, or participate in their other everyday activities."

This is a sufficient statement of reasons as the trial court provided a factual basis for its conclusion thereby allowing Plaintiffs to address the asserted deficiencies and this court to provide meaningful appellate review. (See e.g., *Romero v. Riggs* (1994) 24 Cal.App.4th 117, 121, 124 [statement that overwhelming evidence established defendant's failure to diagnose and treat glaucoma caused plaintiff's vision loss was an adequate statement of reasons].)

The trial court concluded that the evidence presented at trial did not support the punitive damages awards and that the awards were excessive as a matter of law and improper because the record contained "no definitive evidence" of UltraStar's net worth. The trial court also cited the requirement that the ratio of punitive damages to compensatory damages comply with due process principles and that the record contained no "special justification" for the high ratios awarded. This statement of reasons is similarly specific enough to facilitate appellate review.

II. *New Trial Order*

A. Compensatory Damages

1. Standard of Review

A trial court has the discretion to order a new trial on the ground of excessive damages if the jury clearly should have reached a different verdict. (Code Civ. Proc., § 657; *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412 (*Lane*).) Any time a new trial is granted for excessive damages, the court in effect is finding the evidence to have been

insufficient to support the jury's award. (*Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 549.) In deciding a new trial motion, the trial court acts as an independent trier of fact and can disbelieve witnesses, reweigh evidence and make reasonable inferences contrary to those made by the jury. (*Lane, supra*, 22 Cal.4th at p. 412.) As such, any factual determinations made by the trial court are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations and "[t]he presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the new trial order[.]" (*Ibid.*) The trial court, however, may not disregard the verdict or decide what result should have been reached if the case had been tried without a jury. (*Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 215-216.) Stated differently, the court may not grant a new trial simply because it disagrees with the jury's verdict; rather, its only role is to determine whether there is sufficient credible evidence to support the verdict. (*Ibid.*)

We review the trial court's ruling for an abuse of discretion (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872); however, an order granting a new trial will be reversed if it appears that the trial court based its order on an erroneous concept of legal principles applicable to the cause. (*Conner v. Southern Pacific Co.* (1952) 38 Cal.2d 633, 637.)

2. Sexual Harassment and the Law Regarding Emotional Distress Damages

Sexual harassment in the workplace is prohibited (Gov. Code, § 12940, subd. (j)(1)) and "'harassment' because of sex" includes sexual harassment and gender harassment. (Gov. Code, § 12940, subd. (j)(4)(C).) The prohibition includes protection from a broad range of

conduct that is hostile or abusive (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 461), including verbal harassment (epithets, derogatory comments or slurs), physical harassment (assault, impeding or blocking movement, or any physical interference with normal work or movement) and visual harassment (derogatory posters, cartoons, or drawings). (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(A), (B) & (C).)

An injured employee who successfully asserts a sexual harassment claim can recover compensatory damages, including damages for emotional distress. (*Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 48 (*Peralta*.) A showing of physical harm is not required; all that is needed is some guarantee of genuineness in the circumstances of the case, such as an independent cause of action apart from the distress claim. (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928, 930.) Stated differently, "where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant's intentional misconduct fell short of producing some physical injury." (*State Rubbish etc. Assn. v. Siliznoff* (1952) 38 Cal.2d 330, 338.) Compensable emotional distress includes "the full gamut of intangible mental suffering," such as physical pain, fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. (*Peralta, supra*, 52 Cal.3d at p. 48 & fn. 4.) Although these terms refer to subjective states that are difficult to translate into monetary loss, the detriment suffered is genuine and compensable. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 893.)

"[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress.' [Citations.]" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1068, fn.

17.) "That the award in the instant case may be larger than in similar cases does not provide as a matter of law a basis for overturning it. [Citation.]" (*Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1294.) A verdict is against the law if it is not supported by substantial evidence and "a damage award is not supported by substantial evidence if it is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." (*Don v. Cruz* (1982) 131 Cal.App.3d 695, 707.) "In making this assessment, the court may consider, in addition to the amount of the award, indications in the record that the fact finder was influenced by improper considerations. [Citations.]" (*Ibid.*)

3. Analysis

It is conclusively presumed that a new trial order is made only for the reasons specified in the order (Code Civ. Proc., § 657); accordingly, we focus our attention on the trial court's reasons for granting a new trial on the compensatory damages awarded by the jury. We do not address the jury's liability findings as those findings are not at issue in this appeal.

In its motion UltraStar argued, among other things, that the misconduct of Plaintiffs' counsel necessitated a new trial, but the trial court rejected this argument by not granting a new trial on this ground and it noted at oral argument that this, and the other grounds argued by UltraStar as a basis for a new trial, were not meritorious. The trial court found that, although the evidence was sufficient to establish liability, it was insufficient "as a matter of law" to support the compensatory damages awarded to each of the Plaintiffs. In reaching this conclusion, the trial court did not discuss, analyze or weigh the evidence; rather, it concluded that the verdicts were improper and that the jury should have reached a different

result because the record lacked evidence of "severe, substantial and enduring emotional distress," finding that the distress suffered by Plaintiffs was "short in duration and, overall, relatively mild." Specifically, the trial court stated there was no evidence in the record showing that Plaintiffs: (1) suffered any physical manifestations of emotional distress; (2) sought medical or psychological assistance due to the emotional distress; or (3) suffered disruption of their everyday activities. The court also noted that the jury might have erroneously awarded compensatory damages for conduct that was not sexual harassment, to punish UltraStar or based on the overall conduct of Plaintiffs' counsel. Plaintiffs argue that the trial court erred because it used the wrong legal standard in evaluating the emotional distress damages. We agree.

As a threshold matter, the parties presented no juror declarations and the trial court cited no evidence to support its statements that the jury may have improperly awarded compensatory damages based on the conduct of Plaintiffs' counsel, for conduct that was not sexual harassment or to punish UltraStar. The trial court's statements amount to improper speculation regarding the subjective reasoning processes of the jury. (See Evid. Code, § 1150 [evidence concerning the mental processes of the jury is inadmissible].) Moreover, "[a]bsent some contrary indication in the record, we presume the jury follows its instructions [citations] 'and that its verdict reflects the legal limitations those instructions imposed.' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803-804.)

Plaintiffs sought emotional distress damages as an element of compensatory damages. (Civ. Code, § 3333.) Accordingly, the trial court instructed the jury that the amount of any damage award should reasonably compensate Plaintiffs for any harm they suffered, including

fears, anxiety and other emotional distress, caused by UltraStar's conduct. (BAJI No. 12.88)

The trial court defined the term "emotional distress" to mean "mental distress, mental suffering or mental anguish" including "all highly unpleasant mental reactions, such as fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain." (BAJI No. 12.72.) The trial court also instructed the jury that there was no standard by which to fix reasonable compensation for emotional distress, that no witnesses needed to opine as to the amount of such reasonable compensation, that the argument of counsel was not evidence of reasonable compensation, that jurors must exercise their "authority with calm and reasonable judgment" and damages must be "just and reasonable in the light of the evidence." (BAJI No. 12.88.)

The parties agreed on the instructions regarding emotional distress damages and there is no argument on appeal that the instructions were inaccurate or incomplete. Nonetheless, the trial court granted the new trial motion because the evidence Plaintiffs presented did not meet the threshold for recovery in that it was not "severe, substantial and enduring." The trial court, however, did not instruct the jury that in order to be compensable, the emotional distress Plaintiffs suffered had to reach a particular threshold. Moreover, while a plaintiff subjected to sexual harassment might suffer physical manifestations of emotional distress, seek medical or psychological help or suffer a disruption of her everyday activities, there is no authority to support the trial court's apparent conclusion that such evidence is required to support an emotional distress claim. Because the trial court relied on an erroneous legal principle, that portion of the order granting UltraStar a new trial on compensatory damages is

reversed and the jury's awards as to each plaintiff are reinstated. (*Conner v. Southern Pacific Co.*, *supra*, 38 Cal.2d at p. 637.)

(Sexual harassment is considered to be "outrageous conduct" sufficient to constitute the outrageous behavior element of a cause of action for intentional infliction of emotional distress (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 618) and an essential element of such a claim is "severe" emotional distress suffered by the plaintiff (BAJI No. 12.70), with "severe" defined as "substantial or enduring as distinguished from trivial or transitory." (BAJI No. 12.73.) Plaintiffs, however, did not plead such a claim, nor was the jury so instructed.)

Although we need not reach the issue, we note that even if the trial court had used the correct standard, we cannot state as a matter of law that the evidence does not support the damages awarded. Marcisz testified that Gustafson would "brandish [a knife at her] or any other girls" and he once grabbed her arm and placed a three or four inch knife blade against her throat for about 30 seconds. Marcisz was so scared by the incident that she could not move. Gustafson waived a knife in Hora's face, used it to clean his fingernails and stab the counters. He also scared Hora by holding a knife blade to her throat and telling her that he could kill her. Although Jessica and Blair did not have a knife placed against their throats, Jessica testified that Gustafson frightened her by playing with a knife, jabbing at the counters and pointing it at people and Blair testified that Wooten and Gustafson scared and intimidated her by pointing at things with a knife.

Gustafson also subjected all Plaintiffs to "restraint holds" where he would come up behind them, grab one of their arms, twist it behind their backs, forcing them to bend over to

avoid the pain and press his hips into their rear ends. Although he did not do this often to Marcisz because she yelled at him, he did it "pretty frequent[ly]" to Hora and Blair stated that Gustafson placed "all the girls" working in the theater in restraint holds. Despite knowing that Marcisz had suffered an earlier shoulder injury, Gustafson dislocated her shoulder when he placed her in a restraint hold, causing her to experience "excruciating pain," fall off her stool and cry hysterically. Her mother took her to the emergency room and she ultimately required shoulder surgery.

Plaintiffs variously stated that the restraint holds were "shocking," "very scary," "terrifying," "intimidating," "embarrassing," and "humiliating." Jessica was very nervous working with Gustafson after he starting doing this and it was "really hard" to observe the other girls being treated this way.

Gustafson also liked to tilt Marcisz, Jessica and Blair backwards as they sat in tall stools in the box office, threatening to drop them and forcing their bodies against his chest. He did this so frequently that Marcisz described the conduct as "a normal thing." Jessica described feeling frightened and unsafe, experiencing knots in her stomach and feeling as if Gustafson was trying to intimidate her by showing her that he had power over her and could hurt her any second. Gustafson also hit Jessica in the face three or four times with a money bag filled with money as she screamed at him to stop. Jessica went home crying after this occurrence and quit a week later because she felt unsafe knowing that Gustafson could hit her in front of Wooten and Wooten did nothing to stop the conduct.

Wooten told sexual jokes to Plaintiffs, causing them to feel insulted, humiliated, embarrassed or disgusted. Gustafson bragged to Jessica and Blair that he liked to make all

the girls that worked at the theater cry. Blair recalled a specific instance where Gustafson repeatedly hit another female employee in the face until she cried. Wooten and Gustafson used profanity to communicate, including such words such as "fuck," "cunt," "bitch," and "pussy." They also humiliated Marcisz by making her wear a name tag saying "ditz." Gustafson threatened to fire Marcisz if she did not wear the name tag and she was embarrassed when coworkers, customers and one of her teachers commented on the name tag. Similarly, Gustafson required Hora to wear a name tag saying "jar head." When she complained about this name tag, Wooten gave her another one saying "princess."

In all, Plaintiffs suffered from frequent conduct that could be described as outrageous at best and criminal and terrorizing at worst. The jury could reasonably conclude that the individual defendants subjected Plaintiffs to this conduct, including the knife displays and restraint holds, because they were women. Compensable sexual harassment includes physical harassment (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(B)) and the trial court cited no evidence to support its conclusion that Marcisz's shoulder injury and the emotional distress resulting from the knife displays were not compensable or that the jury reached the damage awards based on passion or prejudice. Although reasonable minds could certainly differ on the propriety of the compensatory damage awards, the record does not support the trial court's conclusion that different compensatory damages awards "clearly" should have been reached. (Code Civ. Proc., § 657.)

B. Punitive Damages

1. Principles Regarding Punitive Damage Awards

The purpose of a punitive damages award is to punish the defendant and deter the commission of similar acts. (Civ. Code, § 3294, subd. (a); *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 (*Neal*.) Under California law, three factors are considered in reviewing whether a punitive damages award is excessive: (1) the reprehensibility of the defendant's conduct; (2) the injury suffered by the victims; and (3) the wealth of the defendant. (*Neal* at pp. 928-929.) "Because the important question is whether the punitive damages will have the deterrent effect without being excessive, an award that is reasonable in light of the first two factors ... may nevertheless 'be so disproportionate to the defendant's ability to pay that the award is excessive' for that reason alone. [Citation.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 620.)

The plaintiff bears the burden of producing "meaningful evidence" of a defendant's financial condition as a prerequisite for awarding punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109, 123.) Ability to pay is the critical factor and "evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680.) Ability to pay is usually proved by net worth, but a jury may consider other factors (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 583) and the relevant time period for accessing the defendant's financial condition is the time of trial, not the time of the injury. (*Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1267.)

Under California law, a trial court can grant a new trial motion on the ground of excessive damages (Code Civ. Proc., § 657) and it reviews a motion challenging the excessiveness of a punitive damages award similar to other motions for new trial. (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1689; *supra*, section II, A, 1.) A punitive damage award can also be challenged on federal due process grounds as being constitutionally excessive, an issue that appellate courts determine independently. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1187.)

2. Analysis

As a preliminary matter, we reject Plaintiffs' assertion that the trial court based its ruling solely on constitutional excessiveness grounds and not on their failure to prove UltraStar's financial condition. The trial court found that the punitive damage awards were excessive in light of the evidence presented at trial, noting that the awards raised constitutional concerns and there was no special justification for the high ratios or "definitive evidence" of UltraStar's net worth and that the jury might have acted to punish UltraStar for changing its corporate structure and filing for bankruptcy. The trial court's statement that the awards were excessive in light of the evidence presented at trial was, in effect, a finding that the evidence of UltraStar's financial condition was insufficient to support the awards. (See *Dell'Oca v. Bank of New York Trust Co., N.A.*, *supra*, 159 Cal.App.4th at p. 549.) We also reject Plaintiffs' contention that UltraStar waived any argument regarding the insufficiency of the financial condition evidence when it did not respond to their valid discovery requests because this contention is not supported by any references to the record showing that UltraStar failed to respond to a valid court order to produce financial records. (Compare,

Mike Davidov Co. v. Issod (2000) 78 Cal.App.4th 597, 608-609 ["by failing to bring in any records which would reflect his financial condition, despite being ordered to do so, and by failing to challenge that ruling on appeal, defendant has waived any right to complain of the lack of such evidence"].)

Turning to the trial court's rulings under state law, we conclude that the trial court did not abuse its discretion in granting a new trial on the ground that the punitive damages awards were excessive based on the evidence presented at trial.

Plaintiffs' point out that UltraStar generated yearly revenues of over \$20 million dollars over the five years prior to trial, but ignore other evidence regarding UltraStar's overall financial condition. Roberta Jean Spoon, a certified public accountant, reviewed the financial statements for UltraStar for a four-year period, bank statements from January 2004 to February 2005, income tax returns for four years, the financial ledgers for each of the nine theaters for 2004 and a business evaluation conducted in November 2004. Spoon did a gross profit analysis and concluded that from 2000 to the end of November 2004, UltraStar's nine theaters generated \$87.7 million in revenue and had a gross profit of about \$50 million, but that was only one-half of the equation. She explained that the other half of the equation was the cost to operate the company and that operating expenses of the company were larger than its gross profits. Spoon testified that the business posted a net loss of income each year, but that it was able to stay in business and still post a loss because some of its expenses were noncash expenses. As of the November 2004 appraisal, the company had a negative net worth of about \$300,000.

Spoon also reviewed the February 2005 sale of asset documents from Movie Theatre Entertainment Group, Inc. dba UltraStar Cinemas to UltraStar Cinemas, Inc. She could not come to a conclusion as to the current value of UltraStar based on the documents she reviewed because she did not review any documents after the sale. Spoon had no conclusion regarding the financial condition of UltraStar and did not expect the jury to come to any conclusion.

Based on this evidence, the \$6 million punitive damages total far exceeded UltraStar's ability to pay and the jury clearly should have reached a different verdict. (Code Civ. Proc., § 657.) Accordingly, the trial court did not abuse its discretion when it granted a new trial on the ground that the punitive damages awards were excessive. This conclusion moots Plaintiffs' remaining arguments regarding the propriety of the punitive damages awards under federal constitutional law.

III. *Evidentiary Issues*

Plaintiffs contend that the trial court made numerous evidentiary errors during trial that resulted in a prejudicially incomplete record in deciding UltraStar's new trial motion, that the erroneous rulings should be reversed and the matter remanded for a new trial with instructions regarding the admission of certain evidence. To the extent Plaintiffs' arguments pertain to evidence relevant to the jury's liability findings and the compensatory damages awards, they are moot. Assuming, without deciding, that the trial court prejudicially admitted or excluded certain evidence at trial so as to render the record incomplete on the punitive damages issue, the proper result would be to retry this issue, something that will already be done. We decline to provide an advisory opinion on these evidentiary matters.

DISPOSITION

That portion of the new trial order granting a new trial on the amount of compensatory damages is reversed and the original compensatory damage awards are reinstated. That portion of the new trial order granting a new trial on punitive damages is affirmed and the matter is remanded for a new trial on punitive damages. Plaintiffs are entitled to their costs on appeal.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P.J.

HUFFMAN, J.