

*Nos. 07-15326, 07-15356, 07-15541*

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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AMERICAN COLOR GRAPHICS, INC.,

*Plaintiff-Appellee-Cross-Appellant,*

vs.

TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY,

*Defendant-Appellant-Cross-Appellee.*

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On Appeal from the United States District Court  
for the Northern District of California, Oakland Division  
Case No. CV-04-03518-SBA  
Hon. Sandra Brown Armstrong, Presiding

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**RESPONSE AND REPLY BRIEF OF APPELLANT**

**TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA**

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David C. Capell, No. 114691  
Angie M. Bickel, No. 220065  
GORDON & REES LLP  
275 Battery Street, Suite 2000  
San Francisco, CA 94111  
Telephone: (415) 986-5900  
Facsimile: (415) 986-8054

Paul E. B. Glad, No. 79045  
Sean McEneaney, No. 169105  
SONNENSCHN NATH &  
ROSENTHAL LLP  
525 Market Street, 26th Floor  
San Francisco, CA 94105  
Telephone: (415) 882-5000  
Facsimile: (415) 882-0300

Attorneys for Appellant  
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

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## I. INTRODUCTION

ACG's opening and answering brief ("AAB") avoids directly addressing issues raised by Travelers. As a result, the parties' arguments do not cross as typically occurs on appeal. Nevertheless, the record here raises and resolves a number of focused issues:

- 1) Are nominal damages the correct measure of damage for this breach of contract? *Yes, the parties agree it is.*
- 2) Can a breach of the duty to investigate, without denial of payment due for defense or indemnity, form the basis for a bad faith claim? *No, it cannot.*
- 3) Is \$140,000 supported by the record? *No, it is not.*
- 4) Does the record show evidence of harm caused by Travelers' purported breach of its duty to investigate the Custodio claim? *No.*
- 5) Is ACG entitled to punitive damages? *No.*
- 6) *If ACG is entitled to punitive damages, what is the correct ratio? 1:1, and it does not include any fees or costs awarded to ACG as costs.*
- 7) Can ACG, which withheld evidence of its fees until after trial, recover attorneys' fees under *Brandt v. Superior Court*, 37 Cal. 3d 813 (1985)? *No.*
- 8) Can ACG rely on California Civil Code section 1717 and the fees provision in the 2005-2006 finance agreement to obtain its fees incurred to enforce the 2002-2003 Policy? *No.*

Only two issues involve factual disputes, issues 3) and 4). Regarding issue 3), ACG's CFO's bald assertion that ACG paid "approximately \$140,000" is without foundation, and the numbers ACG refers to do not add up to \$140,000. Regarding issue 4), the evidence demonstrates the amounts shown at trial, such as the cost of Custodio's AOE/COE examination and the settlement of her WCAB proceeding were not caused by a breach of the duty to investigate, and there is no

evidence ACG reimbursed Travelers for any amount.

The other issues all turn on questions of law. Yet, ACG's brief is light on the law, instead relying on statements as facts which either have no reference to the excerpts of the record or misrepresent the evidence. Factual accuracy is foundational. Much of ACG's foundation is nonexistent or contrary to ACG's assertions.

## **II. ACG PRESENTS A SMOKE SCREEN AND IGNORES FACTS**

ACG misrepresents and ignores material facts in its brief and fails to support many of its factual contentions with citations. "Every assertion in briefs regarding matters in the record shall be supported by a reference to the location, if any, in the excerpts of record where the matter is to be found." Circuit Rule 28-2.8; *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146-1147 (9th Cir. 1997). Many of ACG's factual contentions, with or without citations, are not supported by the record. ACG's factual statements, where not supported by references or inaccurate, should be disregarded. Travelers urges that the basis for each statement be carefully examined.<sup>1</sup>

For example, an essential element of ACG's breach claim is that if Travelers had denied Custodio's claim, ACG would not have made any payments. Specifically, *ACG argues Travelers' purported breach of the duty to investigate caused the harm proven at trial because, had Travelers denied the claim, Custodio would have dismissed her WCAB proceeding.* AAB 40. This is a fabrication. ACG can cite no testimony of Custodio or any witness to support ACG's assertion of what Custodio would have done had Travelers denied her claim. In fact, ACG ignores three contrary facts: 1) Custodio retained an attorney to represent her in the

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<sup>1</sup> Travelers' anticipates filing a motion to strike ACG's factual inaccuracies.

WCAB proceeding before Travelers accepted the claim (RT 591:17-20/ER01691); 2) Urban accepted the claim based on Dr. Leonard's "YES" and "NO" finding and "Trier of fact" conclusion (RT 405:2-9/ER01667; ER 01584); and 3) Custodio filed an "Application for Adjudication of Claim" after Travelers accepted the claim (ER01593). *See* Travelers' Opening Brief ("AOB") 6-8; Section VI.C., *infra*. ACG also ignores Dr. Bernhoft's and Dr. Cremata's opinions finding industrial causation after ACG filed suit against Travelers and before ACG authorized the settlement of the WCAB claim for \$35,000. RT 1236:23-1237:21, 1049:12-1050:20/ER01735-36, 1762-63; ER01510-16, 1621-22, 1623-38. No doctor opined that Custodio lacked a valid claim.

Similarly, ACG must prove its damages are not speculative and the amount of damages. To support the \$140,000 award, *ACG argues*, "*While Mr. Kellick testified that he did not know to whom Travelers paid all \$140,000.00, those payments are found within the claim history exhibit introduced by Travelers at trial.*" AAB 25. This is simply not true. AOB 33-34; Section VI.A., *infra*. ACG does not cite amounts totaling \$140,000 and ignores the district court's conclusion that "American's evidence of damages is skimpy." AAB 34-39; RT 1596:3-16/ER00106.

ACG also must prove malice, oppression or fraud to be entitled to punitive damages. *ACG attempts to prove malice by claiming that Chris Nelson, a Field Services Director for Travelers, "admitted that he secretly removed a copy of a report questioning the validity of the Custodio claim from the claim file" before it was produced to Travelers.* AAB 23. There is no evidence Nelson or anyone else at Travelers "secretly" or wrongfully withheld any documents from the claim file. Travelers merely withheld the Camp Investigations report, which confirmed there was "some handling of empty pallets" and at least one woman at ACG lifted

pallets, at the direction of its lawyer. RT 1162:16-1164:15, 1166:14-23 and 1167:14-15/TSER00048-52. Nelson testified the file was reviewed by Travelers' lawyers, and then he was given two packages, one to send to ACG and one not to; he testified he does not know what was withheld. RT 1171:10-22/ER01740.

*ACG attempts to show oppression by claiming it continues to be insured by Travelers only because it "is not financially able" to post additional letters of credit with a new carrier.* AAB 24. ACG could afford to switch carriers and "consider[ed] switching workers' compensation insurers," but chose to stay with Travelers. RT 1254:16-1255:1/ER01767-68. ACG received a quote from Hartford requiring letters of credit "within the available balance of [ACG's] revolving line of credit." RT 1293:6-14, 1341:3-13/TSER00068, ER01774. While the letters of credit "count against [ACG's] revolving line of credit," they "do not show up as a liability on [its] accounts." RT 1340:5-18/ER01773.

Finally, ACG cannot legally recover its fees under section 1717 unless a contract with an applicable fees provision was before the trial court. To that end, *ACG falsely claims the "relevant pages of the 2002-2003 Agreement were attached to Mr. Kellick's declaration."* AAB 62. However, ACG does not reference which pages are the "relevant pages." More importantly, a review of the declaration shows pages from a 2002-2003 agreement are *not* before this Court as claimed! ER00383-931. There is no record an agreement in effect in 2002-2003 with a fees provision was introduced into evidence. *See* Section X.A., *infra*.

### **III. TRAVELERS ACKNOWLEDGES AN IMPLIED DUTY TO INVESTIGATE**

Travelers acknowledges that while the Policy does not state a duty to investigate, "this duty is an implied duty." AOB 5. Yet, ACG argues the point: "Travelers first contends that it did not have a contractual duty to investigate workers' compensation claims, or such duty, if it existed, was only implied." AAB

28. Because both parties agree Travelers has this duty and neither party argues Travelers' obligations are any different here because it is implied, Travelers next explains that ACG cited no authority allowing tort remedies here.

#### **IV. ACG FAILS TO JUSTIFY IMPOSITION OF TORT REMEDIES**

One focus of Travelers' appeal is the inappropriateness of allowing tort remedies for ACG's claim for breach of the implied covenant of good faith and fair dealing. Travelers identified this error, explaining that while an implied covenant of good faith and fair dealing is inherent in every contract, absent breach of the protected promises underlying the "insurance exception," specifically a failure to defend or indemnify, the remedy for a breach of a contract's implied covenants is the same as the remedy for a breach of its express terms: contract damages.

*Jonathan Neil & Associates v. Jones*, 33 Cal. 4<sup>th</sup> 917, 923, 941 (2004); AOB 17-29.

Travelers' Opening Brief then detailed why ACG's claim here fails to support imposition of tort remedies based on the "insurance exception" which was created to protect the insured from the "economic dilemma" resulting from a failure to defend or indemnify. AOB 17-24. ACG leaves undisputed that this "economic dilemma" is not present here. ACG's brief reference to Travelers' cited authorities at AAB 33-34 as "irrelevant" in no way responds to or distinguishes the principles thoroughly explained by the California Supreme Court and supporting decisions of the California Courts of Appeal noted by Travelers. AOB 20-24. What is more, ACG fails to explain how its few authorities override this horn book California law or are even applicable here.

ACG cites only *Schwartz v. State Farm Fire and Cas. Co.*, 88 Cal. App. 4<sup>th</sup> 1329, 1336 (2001), regarding the "insurance exception." ACG claims *Schwartz* holds an insurer can be liable in bad faith if it fully pays a claim, provided doing so

injures the right of its insured. AAB 33. Instead, *Schwartz* affirms all of the principles explained by Travelers.

In *Schwartz*, the Weinsteins and the Schwartzes, insured under the same underinsured motorist coverages, were in an accident serious enough to present competing claims that could exceed all available limits. *Id.* at 1332. Because their claims were handled separately, insurance “paid full benefits to the Weinsteins without regard for the interests of [the] other insured, the Schwartzes, in the same pool of benefits.” *Id.* at 1336. The Schwartzes were then paid the remaining limits, not the full amount due. *Id.* at 1334.

*Schwartz* concerns an insurer’s obligation to address competing claims from distinct insureds, not an issue here as only one insured, ACG, is involved. The holding in *Schwartz* applicable here is an insurer could be sued for bad faith for not paying the indemnity owed to the Schwartzes, i.e., creating the “economic dilemma” of not paying indemnity. If both the Schwartzes and the Weinsteins had been fully paid or if the insurer had interplead the limits so a court could determine apportionment, there would have been no denial of indemnity due. *Id.* at 1341.

ACG’s reliance on *Tensfeldt v Workers Compensation Appeals Board*, 66 Cal. App. 4<sup>th</sup> 116 (1998), is equally misplaced. AAB 31. First, *Tensfeldt* does not address bad faith law. Second, the worker there had been *convicted of the crime* of insurance fraud, and the court held that such a conviction “may” be a basis for denying workers compensation benefits. *Id.* at 119. There is no criminal conviction in this record.

Because there is no evidence Travelers failed to defend or indemnify, the “insurance exception” created to protect the insured from that specific “economic dilemma” is not present here. AOB 21-24. The only other case law permitting tort remedies is *Security Officers Service, Inc. v. State Compensation Ins. Fund*, 17

Cal. App. 4th 887, 899 (1993), and the related cases, but none of those cases apply here either.

ACG does not dispute that this case involves none of the facts present in the *Security Officers* cases cited at AAB 28-29 and again at AAB 32, fn.16. ACG offers no reason why the district court's decision to allow ACG to proceed in tort, based in part on the *Security Officers* cases, should not be reversed. ACG merely cites the *Security Officers* cases without explaining their application.

The *Security Officers* cases all involved a pattern of claims mishandling and over-reserving not present in this record. AOB 24-25. In *Security Officers*, the court noted the implied covenant was allegedly breached "by an *interwoven pattern* of failing to pay claims promptly, defend them diligently, or assign them reasonable reserves . . . ." 17 Cal. App. 4th at 893 (emphasis added). This "interwoven pattern" automatically increased the insured's future premiums. Thus, the policyholder's relief sounded in tort because this pattern of claim mishandling automatically benefited the insurer at the expense of the policyholder. *Id.*

The same is true for each case ACG cites. In *Notrica v. State Compensation Insurance Fund*, 70 Cal. App. 4th 911, 918 (1999), plaintiff alleged "case reserve and claims handling *policies and practices*" caused premium increases. The insured in *Lance Camper v. Republic Indem. Corp.* 44 Cal. App. 4th 194, 203 (1996), was "challenging *the claims handling practices*" that increased reported losses resulting "in higher premiums, higher reserves, and lower dividends." In *Tricor Calif., Inc. v. State Comp. Ins. Fund*, 30 Cal. App. 4th 230, 238 (1994), the court found evidence of claims mishandling, *if shown as a pattern*, relevant to a potential bad faith claim. And in *MacGregor Yacht Corp. v. State Compensation Insurance Fund*, 63 Cal. App. 4th 448, 451 (1998), the insurer allegedly mishandled "many" workers' compensation claims.

Here, unlike the *Security Officers* cases, the evidence adduced at trial showed that ACG's claim arose out of the handling of a *single* claim out of hundreds of total claims handled by Travelers on ACG's behalf. RT 1539:19-1540:20/ER 01793-94. The *Security Officers* cases uniformly involved an "interwoven pattern," but there is no record here of any pattern of claims mishandling. ACG also does not dispute that the insurance regime imposing the inextricable linkage relied on by the *Security Officers* cases no longer exists. AOB 25-26. In fact, ACG has no claim that it suffered increased premiums or decreased policy dividends because those expenses were "inextricably linked to mishandling of claims." *Neil*, 33 Cal. 4th at 940 (explaining limits on the *Security Officers* cases).

Thus, the decisions of the district court are inconsistent with the law and should be reversed for numerous reasons. *See* AOB 16. As a matter of law, ACG should not have been allowed to seek tort remedies or punitive damages and, as in *Neil*, should have been limited to breach of contract.

V. **STATE FUND'S AMICUS BRIEF OFFERS AN IMPORTANT PERSPECTIVE**

In its pending *amicus* filing, State Compensation Insurance Fund ("State Fund"), the defendant in *Security Officers*, explains how *Security Officers* and the cases following it each involved a pattern of improper claims handling automatically resulting in increased premiums. *See State Fund's Amicus Brief*, 22-23. Contrary to ACG's brief, State Fund's *amicus* filing provides a useful perspective on many of the issues raised by the parties, not the least of which is that State Fund was the defendant in four of the five *Security Officers* cases relied upon by ACG. State Fund's *amicus* brief highlights the unique aspects of those cases which caused the courts to break with California precedent and find "bad faith" even though claims were being defended and indemnified. The alleged

pervasive mishandling which was at the core of those decisions is not present here.

As California's largest workers' compensation insurer, State Fund also has perspective over the practical conflict caused by the imposition of punitive damages for the failure of a workers' compensation claims administrator to handle a single claim to the satisfaction of its insured.

In short, if the alleged failure to deny one out of hundreds of claims can lead to a finding of bad faith, workers' compensation insurers and claims handlers may feel compelled to resolve close questions against the employee and for the complaining employer. That is the type of bad public policy outcome illustrated by State Fund's *amicus* brief that ACG desperately wants this Court to ignore.

## **VI. THE RECORD DOES NOT SUPPORT \$140,000**

### **A. ACG Does Not Identify Payments Totaling \$140,000**

The district court concluded, "American produced no documentation clearly showing that it paid \$140,000 to Travelers in connection with the Custodio claim." ER00046 (38:22-23). The jury had to determine "all monies [ACG] paid to Travelers or Aiza Custodio in connection with the Custodio claim." ER00093. ACG ignores this instruction and, emphasizing "only that some reasonable basis of computation be used," argues, "there is ample evidence of the \$140,000 of damages in this record." AAB 35. ACG does not identify evidence of specific amounts adding up to \$140,000. Instead, ACG misrepresents the testimony and Exhibit 191.

ACG falsely states Kellick testified "American paid Travelers approximately \$140,000." AAB 35. He actually testified that he is not familiar with the "specific payees for each element of the \$140,000." RT 1250:14-18, 1335:4-10, 1347:24-1348:8/ER01764, 1772, 1776-77.

ACG also refers to Childress' testimony that Travelers charged ACG

approximately \$18,000 for the hospital bill for Custodio's hip replacement. AAB 36. Yet, no witness testified and no documents show ACG paid Travelers for the hospital bill. ACG then asserts, "Childress also referred to a pending bill for \$15,000 for Custodio's implants." AAB 36. But ACG identifies no Childress testimony, instead referring to an email from Karen Anderson at Travelers stating that "payment for the implants (\$15,745.00)" would be paid "if and when they produce the invoice." ER01620. There is no evidence Travelers received that invoice, let alone that ACG paid Travelers for it. Childress did not testify, as ACG states, regarding any amounts paid to Travelers for the Custodio claim, but merely that he is aware of the "loss conversion factor paid on each dollar of loss that [ACG] pay[s] out." AAB 25; RT 1369:25-1370:4/TSER00115, ER01779.

ACG also falsely states, "Travelers never questioned Mr. Kellick or Mr. Childress about these damages. Their testimony was unimpeached." AAB 25-26. When Travelers questioned Kellick "about these damages," Kellick testified, "Who received how much? All I know is the company's paid out roughly \$140,000." RT 1347:24-1348:3/ER01776-77. His only other testimony is that he does not know the "specific payees for each element of the \$140,000." RT 1348:4-8/ER01777. Childress did not testify "about these damages," so there was no need to question him.

ACG next argues the "most detailed evidence" is in Exhibit 191, listing the "specific payment information" in nineteen bullet points. AAB 36-38. Eight bullets fail to identify an amount of money. Nine bullets refer to reserves, which are *estimates* of the total cost of Custodio's claim and irrelevant. For example, one bullet says, "Travelers had reserved \$300,000 for the Custodio claim." AAB 37. It is undisputed \$300,000 was not paid. As ACG's CFO testified, "[T]he amount of the liability" is "the amount of the actual payment on the claim," *not* reserves.

RT 1341:22-1342:14/ER01774-75. Of the two remaining bullets, one states the Custodio claim settled for \$35,000, which is undisputed, and the other states, "By April 20, 2004, Custodio continued to receive disability payments of \$241 per week." AAB 37. ACG cites a log entry dated April 21, 2004, stating: "Applicant continues to remain off work; anticipate she will be off work for 1 year. Average Weekly Earnings according to wage history provided by Insured \$362.50. Compensation rate is \$241.67."<sup>2</sup> ER01549.

In short, Kellick testified he does not know what amounts were paid to whom, and the exhibits do not show ACG paid \$140,000. ACG does not even identify amounts, other than reserves posted by Travelers, totaling \$140,000. The record does not "clearly ascertain" the "nature and origin" of the \$140,000. Cal. Civil Code § 3301. It is "clearly not supported by the evidence." *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1435 (9<sup>th</sup> Cir. 1996). At best, it is "based only on speculation or guesswork." *Id.* The \$140,000 award must be remitted to zero due to insufficient evidence.

**B. Travelers Did Not Waive Its Right to Argue the Record Fails to Support \$140,000**

ACG argues Travelers waived its right to argue the evidence does not support \$140,000 because Travelers "stipulated" the jury could rely on Kellick's testimony. AAB 39. Travelers did not so stipulate. *See* RT 1845:4-24/TSER00120.

ACG's counsel told the jury during closing argument that all of "the components of the expenses that were paid on the claim" "is spelled out throughout

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<sup>2</sup> Even *if* there was evidence that Travelers paid Custodio \$241.67 weekly for one year and ACG reimbursed Travelers for those payments, those payments would only total \$12,566.84.

Exhibit No. 191” and “to put down \$140,000 there.” RT 1761:18-1762:6/ER01803-04. During deliberations, the jury asked to see Exhibit 191. RT 1846:7-11/TSER00121. The jury then asked the court how it could determine the amount:

THE COURT: Ladies and gentlemen, Mr. Foreperson, Mr. Stewart, the court has received two notes from you so far. The first note, which we didn't call you in on, was: “We would like to see Exhibit 191.” And I had the courtroom deputy just bring in Exhibit 191 for you.

The second note, which I -- the reason I called you in, the second note says, “How do we determine the amount of \$140,000 that was mentioned concerning this case?”

And after consulting with the lawyers, the answer is: “You may rely on the testimony of Mr. Kellick.”

The second part of your question is: “Which exhibit would show this?”

The answer is: “No one exhibit would show this. However, there are several exhibits that may contain information on payments.”

But to answer your primary question, the answer to your first question is, you may rely on the testimony of Mr. Kellick.

RT 1846:7-25/TSER00121.

The instruction allowed the jury to refer to Kellick's testimony and Exhibit 191 to “determine the amount of \$140,000.” Travelers did not stipulate to the amount paid to Travelers, which would have, of course, removed the question from the jury. Instead, the jury was instructed that it could rely on Kellick's testimony, i.e., the jury could evaluate what Kellick had said on the topic, which is nothing at

all.

C. **The Record Does Not Show Travelers' Breach of the Duty to Investigate Caused ACG Harm**

None of the monies referenced above were spent because Travelers failed to investigate the claim and accepted it. ACG does not explain how any specific amount or even type of damages, such as the settlement of the WCAB proceeding, was caused by Travelers' breach of the duty to investigate except to say Travelers *might have* discovered unidentified evidence, evidence not discovered through two investigators and Custodio's deposition, that *might have* resulted in the denial of benefits. AAB 40.

Such speculation does not satisfy ACG's burden under California Civil Code section 3300 to prove Travelers' breach of the duty to investigate was the cause of the amounts ACG paid in connection with the Custodio claim. ACG had the burden to prove that had Travelers performed as required by the Policy, ACG would not have had to pay any monies in connection with the Custodio claim. *See Postal Instant Press, Inc. v. Sealy*, 43 Cal. App. 4th 1704, 1708-1709 (1996). That is, ACG had to prove that but for some act Travelers failed to do, Custodio would have withdrawn her claim and no claim expenses would have been incurred, including an AOE/COE examination and \$35,000 to settle that claim. ACG does not address the fact that Custodio had hired a lawyer and filed a claim with the WCAB before Travelers informed Custodio it had accepted her claim.

ACG cites no law shifting its burden to prove its damages to Travelers. The jury instruction ACG agreed to imposed the burden on ACG. ER00080. The district court should not have excused ACG from satisfying its burden of proof, but did so after agreeing with ACG that what Custodio would have done requires speculation. AOB 30.

Thus, ACG used speculation as a shield before the district court, claiming it did not have to prove what would have happened following a denial. ACG continues to try to shield itself with speculation. ACG contends, without reference to facts or law, that Travelers' argument that ACG failed to satisfy its burden of proof is "fact-based conjecture that should have been presented, if at all, to the trier of fact." AAB 40. If the court and ACG are correct that one must speculate about what might have happened if Travelers had denied the Custodio claim, then ACG defeats its own claim by admitting speculation prevented it from satisfying its burden of proof. CACI No. 350 (Introduction to Contract Damages ("You must not speculate or guess in awarding damages."); *Resort Video, Ltd. v. Laser Video, Inc.*, 35 Cal. App. 4th 1679, 1698 (1995) ("improper to award damages for loss of profits because absence of income and expense experience renders anticipated profits too speculative to meet the legal standard of reasonable certainty necessary to support an award of such damage").

ACG contends Travelers' argument is conjecture because "had Travelers performed an investigation, Travelers would have learned of Custodio's numerous and material misrepresentations, which would have resulted in the denial of benefits." AAB 40. ACG does not identify any specific misrepresentations, but instead cites 84 pages of Custodio's testimony. *Id.* Travelers' subpoenaed and obtained Custodio's medical records, had Custodio examined, retained Camp Investigations to interview eight ACG employees, took Custodio's deposition, and twice sent an investigator to Tijuana (ER01540-42, 1545) before both ACG and the WCAB judge approved the \$35,000 settlement. ACG never identifies what Travelers should have done to affect the settlement or identify any evidence discovered after acceptance that might have affected the outcome of the proceeding.

Finally, ACG argues both parties' expert witnesses "testified that a claimant's credibility is the single most important factor in determining whether benefits are awarded," and the jury here determined Custodio was not credible. AAB 40. The jury was not asked to determine Custodio's credibility. ACG cites its expert's testimony that the workers' compensation judge's "responsibility is to determine the credibility of the applicant" and that the applicant's demeanor and consistency are the most important factors. RT 1353:6-1354:4/TSER00113-14. ACG also cites Travelers' expert's testimony that the court "consider[s] the credibility of the witnesses and the applicant." RT 1398:5-9/ER01789. ACG ignores that same expert's testimony that he has represented hundreds of claimants before the WCAB and only *once* has there been a finding of no industrial injury. RT 1382:13-22, 1394:2-23/ER01782, 1786.

ACG likewise ignores other workers' compensation rules addressed in Travelers' opening brief, such that workers' compensation laws are liberally construed in favor of the claimant and all reasonable doubts must be resolved in favor of the claimant. AOB 31-32. ACG also ignores the fact that workers' compensation fraud must be prosecuted by the district attorney under the strictest standard of proof. "Reporting alleged fraud to the district attorney is a function of law enforcement." *Mosby v. Liberty Mutual Ins. Co.*, 110 Cal. App. 4th 995, 1004 (2003). Expert Steve Bobus testified that "[i]n [his] experience in analyzing and packaging a cases [sic] for workers' compensation fraud prosecution," "hard evidence, not he-said-she-said kinds of stuff" is "required for [him] to actually submit the referral to the D.A.'s office." RT 1547:3-22, 1551:20-25, 1569:20-24/ER01795, 1797, 1801. Examples of "hard evidence" include a "statement under penalty of perjury that is proven false by video evidence" or "a change of a doctor's opinion after review of the video." RT 1547:25-1548:20/ER01795-96.

Bobus testified “change of date of injury and delay of reporting” are common, changes in the injury description happen “all the time,” and 60% of his cases involve an unwitnessed injury. RT 1566:13-18, 1567:3-1568:15/ER01798-1800. Williams also testified the majority of injuries are unwitnessed. RT 1396:10-1398:23/ER01787-89. Even after years of litigation here, no evidence has been uncovered warranting a fraud referral, let alone conviction.

In short, the evidence does not show either that ACG paid \$140,000 or any monies ACG might have paid were caused by Travelers’ failure to investigate the claim. The district court erred in not remitting the award to comport with the evidence.

**VII. ACG’S CHOICE OF THEORIES OF RECOVERY DID NOT CHANGE THE NATURE OF ACG’S CONTRACTUAL DAMAGES**

ACG states: “[T]he \$140,000 amount could have been applied to either American’s breach of contract or bad faith claim” “[a]s an election of remedies.” AAB 41-42, citing only *Notrica*, 70 Cal. App. 4<sup>th</sup> at 925. ACG’s only remedy, \$140,000, is a contract remedy, assuming it should have been allowed at all. “Election of remedies” is not the issue of concern. Instead, the issue is whether the award is contractual or tortious in nature.

“Election of remedies” only applies when a party has inconsistent remedial rights, the assertion of one “necessarily repugnant” to the other. *See City of Orange v. San Diego County Employees Retirement Assn.*, 103 Cal. App. 4th 45, 59 (2002); *General Ins. Co. of America v. Mammoth Vista Owners Ass’n, Inc.*, 174 Cal. App. 3d 810, 828 (1985).

ACG’s breach of contract and bad faith claims are not “necessarily repugnant,” or even at odds. “[T]he covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party’s rights to the benefits of the agreement.”

*Waller v. Truck Ins. Exch.*, 11 Cal. 4<sup>th</sup> 1, 36 (1995) (emphasis added).

ACG pursued two theories of recovery: breach of contract and bad faith. Both allow the recovery of contract damages. *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1158-1159 (2002) (allowing recovery of policy benefits under bad faith cause of action). ACG ignores Travelers' discussion of *Archdale v. American Internat. Specialty Lines Ins. Co.*, 154 Cal. App. 4th 449, 466 (2007), explaining why a deductible payment is inescapably contractual in nature regardless under which label it is sought. AOB 28-29.

*Notrica* does not support an argument that ACG was permitted to seek its contract damages under the label of bad faith to prove the tort necessary to recover punitive damages. *Notrica* simply cited *Security Officers*, 17 Cal. App. 4th at 899, for the proposition that an insured may elect to plead a cause of action in contract or tort and said nothing about damages. *Notrica*, 70 Cal. App. 4<sup>th</sup> at 925.

ACG did not have the right to "elect" that its contract damages be deemed tort damages. ACG's approach did not excuse ACG from having to obtain tort relief to recover punitive damages.

### **VIII. THE RECORD DOES NOT SUPPORT PUNITIVE DAMAGES**

Punitive damages are quasi-criminal in nature and "should be granted with the greatest of caution." *Dyna-Med, Inc. v. Fair Employment & Housing Commission*, 43 Cal. 3d 1379, 1392 (1987).

#### **A. ACG Does Not Dispute Tort Relief Is Necessary to Obtain Punitive Damages**

Travelers argues in its Opening Brief that ACG cannot recover punitive damages because ACG has no right to tort damages as required by California Civil Code section 3294(a). AOB 35-36. ACG does not dispute that "[i]n the absence of an independent tort, punitive damages may not be awarded for breach of contract even where the defendant's conduct in breaching the contract was willful,

fraudulent, or malicious.” *Cates Construction, Inc. v. Talbot Partners*, 21 Cal. 4th 28, 61 (1999) (internal quotes omitted). ACG also does not dispute the availability of punitive damages is reviewed de novo. *See* Ninth Circuit Court of Appeals, Standards of Review, September 2006, p. 339. AOB 35.

The jury awarded ACG its claimed deductible payment, which is, plain and simple, contract damages regardless of the theory of recovery. If Travelers is correct, then ACG evidently agrees it is *not* entitled to punitive damages.

**B. ACG Does Not Identify Malice, Oppression or Fraud**

To recover punitive damages, ACG had to prove Travelers’ failure to investigate was tortious *and* “by clear and convincing evidence that [Travelers] has been guilty of oppression, fraud, or malice.” Cal. Civ. Code § 3294(a). ACG was required to present evidence that was “so clear as to leave no substantial doubt [and] sufficiently strong to command the unhesitating assent of every reasonable mind” that Travelers engaged in malice, oppression or fraud in its investigation of the Custodio claim. *Christian Research Institute v. Alnor*, 148 Cal. App. 4<sup>th</sup> 71, 84 (2007).

Rather than address the definitions of and ACG’s burden to prove malice, oppression or fraud, ACG simply lists Travelers’ alleged wrongful conduct. AOB 36-38; AAB 42-46. ACG takes great liberties with the record. Travelers’ conduct actually in evidence does not constitute malice, oppression or fraud that warrants punitive damages.

**1. The Only Relevant Conduct Is the Conduct that Caused the Harm Proven at Trial**

ACG ignores Traveler’s discussion of the relevant conduct for evaluating the punitive damages award. AOB 36-38. As set forth in Travelers’ Opening Brief, the malice, oppression or fraud upon which the punitive damages award rests must be the same conduct that harmed ACG. AOB 36-37; *State Farm Mut. Auto. Ins.*

*Co. v. Campbell*, 538 U.S. 408, 423-424, 123 S.Ct. 1513, 155 L-Ed.2d 585 (2003) (“*State Farm*”). Here then, the only conduct relevant to the punitive damages award is Travelers’ alleged failure to investigate the Custodio claim and the harm shown at trial. *If* the court determines the harm at issue was caused by Travelers’ failure to investigate, the Court must then determine whether that failure was with malice, oppression or fraud.

ACG completely ignores this, referring instead to conduct unrelated to Travelers’ duty to investigate, e.g., the “secret” withholding of the Camp Investigations report and supposed threats to increase ACG’s premium if ACG did not withdraw its request for all claim files for 838 claims.<sup>3</sup> AAB 45. As discussed in Section II, there is no evidentiary basis for these assertions.

The relevant conduct is necessarily limited to that of the adjustors and to that affecting Travelers’ investigation and payment of the monies in evidence.

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<sup>3</sup> There is no evidence of a premium increase. RT 1332:18-23, 1540:5-16, 1589:24-1590:18/TSER00107, ER00099-100, 1794. The court struck testimony that “at one point in time, Travelers sent [ACG] a letter requesting a 50 percent increase in [ACG’s] premium.” RT 1221:5-15/TSER00053. ACG received a letter every year of an anticipated premium increase that ACG and Travelers then discuss. RT 1344:22-21/TSER00110. The only testimony of any “threat” is ACG’s CFO was *told* by ACG’s Assistant VP that he was *told* by ACG’s insurance broker, “Travelers was not going to be interested in renewing unless [ACG] withdrew [its] document request and these other claim files.” RT 1288:18-1290:14/TSER00064-66. This testimony was not offered for its truth. RT 1290:3-5/TSER00066. Travelers questioned continuing its relationship with ACG based on a breakdown of trust evidenced by ACG’s request for claim files for 838 claims submitted by ACG even though its allegations were limited to the Custodio claim. RT 1221:5-21, 1280:12-1282:19, 1283:14-20, 1284:20-1287:21, 1288:15-1293:14, 1335:19-1336:1, 1340:23-1341:13, 1345:6-10 and 1539:5-16/TSER00053, 56-68, ER01772, TSER00036, ER01773-74, TSER00111, ER01793.

2. **Travelers Did Not Investigate the Custodio Claim with Malice**

The purportedly wrongful conduct highlighted by ACG looks, at worst, like a showing that Travelers may have negligently mishandled a *single* claim. “Malice” requires conduct “intended” to cause injury or “despicable conduct” with “conscious disregard” of the injured party’s rights. Cal. Civ. Code § 3294(c)(1)-(2). “[T]he adjective ‘despicable’ is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’” *College Hosp. Inc. v. Sup. Ct. (Crowell)*, 8 Cal. 4th 704, 725 (1994). “Despicable conduct” is described as “having the character of outrage frequently associated with crime.” *Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269, 1287 (1994).

California courts have failed to find “malice” even where there is evidence the insurer took an affirmative, arbitrary, or wholly unreasonable position in its dealings with the insured. *See Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal. App. 3d 347, 356 (1976). Courts also routinely fail to hold claims investigations failures constitute “oppression” or “malice.” *See, e.g., Stewart v. Truck Ins. Exch.*, 17 Cal. App. 4<sup>th</sup> 468, 482-84 (1993) (unexplained delays in claims investigation); *Patrick v. Maryland Casualty Co.*, 217 Cal. App. 3d 1566, 1576 (1990) (malice and oppression not found where claims handling was “witless and infected with symptoms of bureaucratic inertia and inefficiency”); *Tomaselli*, 25 Cal. App. 4<sup>th</sup> at 1288 (while failing to follow up on information the insured provided and failing to communicate with the insured may be “negligent” or “callous,” it is not malicious or oppressive and does not support the imposition of punitive damages).

Without citing any authority applying “malice” under California law, ACG accuses Travelers of “maliciousness” for “allow[ing] an adjuster with only one year of claims experience to handle a claim with red flags” and “failing to notice that [Ms.] Custodio had changed the dates of her injury” and failing to notice that

“Ms. Custodio never lifted a pallet.” *See* AAB 43-46. These failures, if true, are characteristic of negligent, not “malicious,” behavior.

ACG also ignores the following facts showing Travelers’ conduct was far from intentional, vile, and criminal:

- 1) There is no evidence any Travelers claims handler intended to deceive or harm ACG or was aware of the parties’ financial arrangement or of ACG allegedly being “highly leveraged.” *See, e.g.*, RT 388:3-9, 1170:10-12/ER01661, 1739.
- 2) Urban may have failed to speak with Larios and Madrigal, but knew the reported injury was unwitnessed. RT 223:25-224:8, 259:19-260:7, 391:16-392:13/ER01644-45, 1647-48, 1662-63.
- 3) Urban did not ignore the findings in Dr. Leonard’s reports but relied on his “trier of fact” conclusion to accept the claim. RT 405:2-9/ER01667; ER01584.
- 4) Urban accepted the claim as a groin strain with no indication of further treatment. So while she may have only had one year of experience handling ACG’s claims, it did not violate Travelers’ guidelines for her to accept the claim without supervision.<sup>4</sup> RT 208:6-10, 386:21-387:11/TSER00001, 7-8.
- 5) Urban knew Custodio had degenerative arthritis because ACG’s company doctor, Dr. Sorenson, diagnosed Custodio with “osteoarthritis, R hip, preexisting,” on August 14, 2003, and Urban received a copy of the diagnosis. RT 381:18-382:8/TSER00005-6; TSER00122-24. A preexisting condition, such as arthritis or Custodio

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<sup>4</sup> Travelers’ guidelines do not, as ACG states, “require supervisory review of a claim prior to acceptance of the claim.” AAB 10, citing SER001-22. Assuming ACG was referring to SER012, that document states: “Depending on the claim case manager’s experience and expertise, a supervisory consult should be initiated and approval obtained when: [¶] Recommendation is made to accept policy coverage and/or compensability on cumulative/repetitive trauma losses and unwitnessed accidents . . .”

having a limp since she was 31 years old, is not grounds to deny a claim. ER 01606-1609; *Buhlert Trucking v. WCAB*, 199 Cal. App. 3d 1530, 1632 (1988).

- 6) Urban did not receive the workers' compensation form with "fractured right leg" on it. ER01581. ACG's statement is based solely on Nashban's testimony that it was her policy to "cross-reference workers' compensation claims with state disability applications." AAB 44; RT 844:9-13/TSER00043.
- 7) Nashban had been an adjustor for 26 years. RT 834:18-835:1, 881:13-15/TSER00041-42, 46.
- 8) Urban and Nashban entered misstatements into the electronic log notes, but not to deceive ACG, which never reviewed those notes. RT 721:13-22/ER01704.
- 9) Nashban did not ask Dr. Bernhoft to determine whether Custodio's injury was work-related because she had known him for years "in the capacity of a qualified medical evaluator as well as a treater" and that "he considers every patient as they are presented to him." RT 832:23-24; 875:24-876:2, 955:3-956:16/ER01717, 1720-21, 1727-28.
- 10) Travelers investigated the claim: Urban interviewed Custodio and ACG's Human Resources Director, Melanie Wallace, attempted to call Larios and Madrigal, subpoenaed and reviewed Custodio's prior medical records after receiving a completed medical release from Custodio, and scheduled an AOE/COE examination to determine whether Custodio's injury arose in the course of employment. *See* AOB 7-12.
- 11) There is no evidence that "Travelers failed to properly reserve the case." ACG only cites the fact that the reserves increased. AAB 44.
- 12) Repeating Urban's and Nashban's misstatements does not evidence an "intent to conceal." *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4<sup>th</sup> 1226, 1241 (1995) (punitive damages require intentional misrepresentations).

The Court should also consider this undisputed fact: ACG's continued

business dealings with Travelers. If Travelers' actions were truly "vile," "despicable," or "criminal," why is ACG continuing to do business with Travelers long after the case was filed, the Custodio claim was resolved, and this case was tried when it can afford to switch to another carrier? RT 1254:16-1255:1, 1292:6-16, 1341:3-13/ER01767-68, 1771, 1774. ACG never requested Urban or Nashban stop handling its claims, although it did successfully do so with claims handlers in Texas, and complimented Nashban's work while this case was pending. RT 412:19-413:4, 1233:15-20/TSER00009-10, 54; ER01639-40.

3. **There Is No "Oppression" Here Because There Is No Evidence ACG Faced a Threat to Its Existence or Financial Stability**

The "oppressive" conduct cited by ACG is not only unsupported, but is unrelated to Travelers' investigation of the Custodio claim. AAB 45. Moreover, in addition to "despicable conduct" "intended" or with "conscious disregard" of the injured party's rights, "oppression" also requires a "threat to [the insured's] existence or financial stability." Cal. Civ. Code § 3294(c)(1)-(2); *Slottow v. American Cas. Co.*, 10 F.3d 1355, 1362 (9th Cir. 1993) (applying California law). ACG faced no such threat here. Travelers paid to defend and settle the Custodio claim, which amounts were within ACG's chosen deductible.

In *Slottow*, the court held:

What we have here is a much different situation. Fidelity Federal Bank is a federally chartered savings bank and owns several financial institutions, including FNT. It has ready access to legal advice and controls substantial assets, placing it on relatively equal footing with American. Neither the bank nor American faced a threat to its existence or financial stability because of this dispute; each simply went about its business while the controversy percolated. Such rough equality of economic power and sophistication **precludes a finding**

**of oppression;** American's refusal to pay the claim simply could not have oppressed the bank.

*Id.* (emphasis added).

While one witness testified ACG was “highly leveraged,” ACG introduced no evidence of its financial condition or of the Custodio claim posing a threat to “its existence or financial stability.” The evidence shows ACG purchased a workers’ compensation policy for employees in 21 states with a \$250,000 deductible and paid “approximately \$4 million” for 838 workers’ compensation claims between 2000 and 2005. RT 1179:15-23, 1180:16-19, 1184:5-10/ER01744-45, 1747; ER01268, 1493-97. No evidence shows the Custodio claim interfered with the way ACG conducted its business. ACG’s purported payment of its deductible, while unsupported by the evidence, coupled with the dearth of evidence showing any influence on its business, positively confirms there was no oppression. ACG’s CFO testified the “letter of credit that Hartford would have requested in addition to the letters of credit that [ACG] would have had to maintain” with Travelers was “within the available balance of [ACG’s] revolving line of credit.” RT 1293:6-14, 1341:3-13/TSER00068, ER01774. There is no evidence of Travelers’ financial position. There is nothing to indicate that ACG and Travelers did anything other than go about their business while this matter has been pending.

ACG did not face the threat required by *Slottow* because it could afford to pay its deductible on the Custodio claim. There is no “oppression” here.

#### **4. There Is No Evidence of Fraud**

“Fraud” requires “an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention . . . [to] deprive[e] a person of property or legal rights or otherwise causing injury.” Cal. Civ. Code § 3294(c)(3). ACG attempts to satisfy this requirement by inaccurately

summarizing Urban's and Nashban's misstatements and Chris Nelson's repeat of those statements. AAB 45-46.

Since there is no evidence that ACG reviewed the log notes or Urban or Nashban thought ACG would review the log notes, their misstatements lack the requisite intent to harm ACG. Similarly, repeating a false statement does not evidence an "intent to conceal." *Rothwell*, 10 Cal. 4<sup>th</sup> at 1241.

ACG cites no evidence showing any Travelers employee misrepresented or concealed a material fact with the intent to harm ACG.

**C. A 10:1 Ratio Here Exceeds Constitutional Limits**

ACG contends in support of its argument that the punitive damages award is not constitutionally excessive, "A trial court's decision to order remittitur is reviewed for an abuse of discretion." AAB 46, citing *Snyder v. Freight Const., Gen. Drivers, Warehousemen and Helpers, Local No. 287*, 175 F.3d 680, 690 (9<sup>th</sup> Cir. 1999). This statement is as unmeritorious as ACG's argument. In *Snyder*, the "defendants did not specifically object to that part of the damages award on appeal." *Id.* The court merely held the trial court had discretion to reduce the punitive damages awarded to the extent the trial court recalculated the compensatory damages awards. *Id.* Whether a punitive damages award violates due process is a question of law reviewed de novo. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 440, 121 S. Ct. 1678, 1688, n.14 (2001).

ACG argues, "An even higher ratio (than 9:1) may be justified in cases of extreme reprehensibility or when damages are unusually small, hard to detect, or hard to measure." AAB 52. Yet, neither circumstance is present here.

1. **The District Court Correctly Found a “Low Level of Reprehensibility”**

As set forth in Travelers’ Opening Brief, there are three significant measures for considering a punitive damages award: 1) the degree of reprehensibility of the defendant’s conduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded and any civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418; *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (“*Gore*”).

The most important factor is the “degree of reprehensibility” of the defendant’s conduct. *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. The district court found “this case appears to present a fairly low degree of reprehensibility.” ER00048 (40:17-19). Thus, the first and most important guidepost strongly favors Travelers.

The Supreme Court has identified five factors for courts to use in determining whether a defendant’s conduct was so reprehensible as to support the punitive damages award: 1) whether the harm caused by the defendant was physical rather than economic; 2) whether the defendant’s tortious conduct evinced a reckless disregard of the health or safety of others; 3) whether the target of the conduct had financial vulnerability; 4) whether the conduct involved repeated actions or was an isolated incident; and 5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *State Farm*, 538 U.S. at 419; *Gore*, 517 U.S. at 576-77.

ACG essentially admits two factors remain unsatisfied: there is no evidence that Travelers caused physical harm or acted with a “reckless disregard of the health or safety of others.” While ACG attempts to support the remaining three factors, this Court’s de novo review will reveal that none of those factors apply

here.

a. **There Is No Evidence ACG Was “Financially Vulnerable”**

The district court found this factor “neutral” after recognizing the parties dispute it and “Travelers asserts that ‘many businesses are highly leveraged’ and that there is no evidence that Urban, Nashban, or Nelson were aware of American’s financial condition.” ER00047-48 (39:26-40:5). Yet, ACG continues to argue the “uncontradicted evidence in the case is that American was financially vulnerable.” AAB 50.

Spragge’s testimony that ACG’s CFO told him ACG was “highly leveraged” is insufficient to prove this factor in favor of ACG. AAB 50; RT 1184:5-23/ER01747. Reserves were “frozen” on ACG’s “balance sheets,” but ACG still had a sufficient line of credit to obtain letters of credit for Hartford. *Id.* Importantly, there is no evidence ACG’s business was affected by any payments it may have made on the Custodio claim.

Even if one assumes based solely on ACG’s CFO’s statement that ACG was a struggling enterprise, the Custodio claim related to the complex workers’ compensation risk management program that ACG negotiated with Travelers. Under that program, ACG paid far less premium while maintaining more risk and knowing it would have to reimburse Travelers for deductible payments. Interestingly, there is no evidence that ACG funded the Custodio settlement or reimbursed Travelers for any payments it made. The value of the Custodio claim was less than 4 percent of the value of ACG’s claims from 2000-2005. RT 1180:16-19/ER01745. In addition, this was not a typical third party claim where Travelers’ failure to pay would have meant that a “financially vulnerable” ACG would have been liable instead.

Compare this to *Walker v. Farmers Insurance Exchange*, 153 Cal. App. 4<sup>th</sup>

965 (2007), which analyzed *State Farm's* reprehensibility factors. There, Farmers refused to defend a suit filed against Walker, a senior citizen with only social security payments for income. Thus, Walker had to hire her own lawyer, using her credit card to pay him. She also faced the prospect of having to pay the judgment and, in the face of mounting legal fees and the burden of any judgment, had to settle the claim:

The burden of the legal fees incurred in defending Wasson's action was very onerous for respondents. By May 2003 and prior to trial, respondents could no longer manage the expense and they instructed [their attorney] to settle, which she did for \$6,500. Given their exposure, respondents were lucky to settle for this amount. The funds for the settlement came from the \$4,000 retainer respondents had paid [their attorneys], and from a loan of \$2,500 from a personal friend. In other words, it was all borrowed money. When they settled, respondents owed fees of over \$45,000. By the time of the trial of the instant case, they still owed \$25,000 on the credit card that respondents used to finance the legal fees.

*Id.* at 971.

Walker's situation is what the Supreme Court had in mind when it established the "financial vulnerability" factor. Farmers' allegedly unreasonable refusal to defend and indemnify Walker against a relatively significant third party claim forced Walker to borrow money to defend herself and to settle the claim. Still, even given obvious financial vulnerability, *the Court of Appeal determined that Farmers' actions did not support more than a one-to-one ratio.* It is hard to imagine that a higher ratio is appropriate here based on ACG's unsupported claim of "financial vulnerability."

b. **Travelers' Investigation of the Custodio Claim Is an "Isolated Incident"**

ACG attempts to conjure up support for the fourth reprehensibility factor by

baldly stating that “Travelers conduct was not isolated but repeated over the course of several years...” based solely on the following statement by the district court: “[A]lthough only one claim is involved, Travelers’ agents committed multiple acts and omissions which could be characterized as reprehensible, *see* Opposition at 20-22, over a period of approximately two years.” AAB 50; ER00048 (40:11-14). ACG does not cite any facts to support its statement.

Assuming Travelers’ mistakenly accepted and resolved Custodio’s WCAB claim, any further actions with respect to the Custodio claim simply repeated the same mistake. This is an isolated incident because there is no evidence that Travelers failed to investigate or wrongfully settled any other claim it administered for ACG. *Walker*, 153 Cal. App. 4<sup>th</sup> at 975. Nor is there any evidence that Travelers’ actions were the result of an improper corporate policy or practice. If anything, ACG is criticizing Travelers’ claims handlers for not complying with Travelers’ claims handling guidelines.

c. **The Harm Shown at Trial Was Not the Result of “Intentional Malice, Trickery, or Deceit”**

As discussed above, the evidence presented by ACG that Travelers intended to harm or deceive ACG is simply too scant to support a finding that Travelers acted reprehensibly.

In sum, ACG does not dispute the first two reprehensibility factors and the other three do not apply. ACG was not “financially vulnerable,” the Custodio claim is just one hundreds handled by Travelers since 2000 (RT 1251:25-1252:4/ER01765-66), and there is no evidence of any intent to harm ACG. There is, as the district court found, “low,” if any, reprehensibility here.

2. **A \$140,000 Award Is Substantial and Does Not Justify a Higher Ratio**

A 10:1 ratio is only appropriate when the compensatory damages are

*nominal* or insubstantial. ACG just ignores Travelers' discussion of the holding in *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 776 (9th Cir. 2005), that \$50,000 in economic damages is "substantial." AOB 40. The \$140,000 economic damages awarded are substantial as a matter of law.

**D. The District Court Wrongly Relied on Travelers' Financial Condition, of Which There Is No Evidence**

As explained in Travelers' Opening Brief, reliance on a defendant's wealth to justify a higher ratio of punitive damage is legally improper. AOB 42-43. See e.g., *Textron Financial Corp. v. National Union Fire Ins. Co.*, 118 Cal. App. 4<sup>th</sup> 1061, 1084 (2004) (wealth of defendant cannot justify an otherwise unconstitutional punitive damages award). Regardless of how ACG characterizes the district court's decision, the court valued Travelers' wealth over any alleged "reprehensibility" when it concluded, "Clearly, [Travelers'] financial condition is such that if the punitive damage award were reduced to a 1:1 ratio with the compensatory damages award, little or no deterrence or punishment would be achieved." ER00052 (44:4-9).

Contrary to ACG's assertion, *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4<sup>th</sup> 1159, 1172 (2005), does not support using Travelers' wealth and disregarding due process concerns. AAB 47. Indeed, directly after the quote in ACG's brief, the *Simon* court states that "[t]he State Farm court, however, also emphasized that wealthy defendants are equally entitled to due process and that '[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award'...and that wealth cannot replace reprehensibility as a constraining principle." *Id.* at 1185-1186 (quoting *State Farm* at 427-428). And, however ACG may characterize *Bardis v. Oates*, 119 Cal. App. 4<sup>th</sup> 1, 23 (2004), and the need for punishment and deterrence (AAB 48), California's own Supreme Court was quite clear in *Simon* that "the state may have to partly yield its goals of punishment and

deterrence to the federal requirement that an award stay within the limits of due process.” *Id.* at 1187.

ACG cites Travelers’ agreement to instructing the jury “that no amount of punitive damages imposed by the jury would have a material impact on it.” AAB 49. In a world where, as discussed below, 1:1 is the correct ratio and the damages are capped at \$140,000, Travelers’ agreement only means Travelers felt it was in a position to pay \$140,000.

A defendant’s wealth does not justify an award exceeding the maximum due process ratio.

**E. The Correct Ratio Here is 1:1**

Punitive damages awards in excess of a 1:1 ratio have been upheld. However, as discussed above and in Travelers’ Opening Brief, courts have done so where a defendant’s actions are particularly reprehensible or where truly egregious behavior caused only minimal economic damages. *See, e.g., Swinton v. Potomac Corp.*, 270 F.3d 794, 818 (9<sup>th</sup> Cir. 2001) (racial taunting and discrimination); *Zhang v. American Gem Seafoods*, 339 F.3d 1020, 1043 (9<sup>th</sup> Cir. 2003) (intentional racial discrimination).

*Bains*, on which ACG heavily relies, does not compel a different result. Central to the court’s finding there was the defendant’s intentional racial discrimination against plaintiff (something common in many of the large multiplier cases). *Bains*, 405 F.3d at 769. In addition, while ordering remand for a range between 6:1 and 9:1 punitive to compensatory, the *Bains* Court noted that defendant’s conduct was “highly reprehensible” and that the similar civil penalty for comparable harm was \$300,000 (or six times compensatory). *Id.* at 777. Here, of course, the maximum penalty imposed by the California Insurance Code for *willful* misconduct by an insurer is \$10,000. Cal. Ins. Code § 190.035. The

punitive damages awarded here are *140 times* that amount.

*In re The Exxon Valdez*, 490 F.3d 1072 (9<sup>th</sup> Cir. 2007), does not justify a higher ratio here simply because it reduced the punitive damages award in that case to 5:1. AAB 55. There, unlike here, the district court found a high degree of reprehensibility. *Id.* at 1082. Exxon's conduct caused vast physical harm and emotional and economic harm to subsistence fishermen, showed a reckless disregard for health and safety, and involved the repeated action of allowing someone "to command its supertankers for three years after it knew he had resumed drinking." *Id.* at 1085-1088. Even considering all of that, the Ninth Circuit found that Exxon's conduct was in the middle range of reprehensibility. *Id.* at 1073. Travelers' acceptance and payment of the Custodio claim, even if wrongful, is not as reprehensible as Exxon's conduct.

Other cases cited by ACG are similarly unavailing. For instance, this Court may have determined in *Planned Parenthood v. ACLA*, 422 F.3d 949 (9<sup>th</sup> Cir. 2005), that a 9 to 1 ratio did not "offend its sensibilities," but there the defendants' conduct was "on the high side of reprehensibility." *Id.* at 959. The court found that while it did not make the "top rung," because it did not involve actual violence, the court noted the "intentional intimidation of physicians, aimed at forcing them to quit practicing out of fear for their lives." *Id.* Instructive here, however, the Court noted in characterizing the *State Farm* decision that "acts of bad faith and fraud warranted something closer to a 1 to 1 ratio." *Id.* at 962.

Giving all of ACG's arguments the benefit of the doubt, that is exactly what ACG presents here: a claim for "bad faith and fraud." Even if punitive damages are awarded, courts at all levels refuse to view such cases as being imbued with the level of reprehensibility required to exceed a small, single-digit ratio. *See e.g.*, *State Farm*, 538 U.S. at 425 (endorsing a 1:1 ratio in bad faith cases); *Walker*, 153

Cal. App. 4<sup>th</sup> at 972 (same); and *Jet Source Charter, Inc. v. Doherty*, 148 Cal. App. 4<sup>th</sup> 1, 4 (2007) (applying 1:1 ratio in breach of fiduciary duty case).<sup>5</sup>

Finally, when judging the purported reprehensibility of Travelers' conduct, it is also important to look at the context of this "bad faith" claim. Travelers' alleged failure to properly investigate did not lead to a breach of the promise to defend or indemnify. Compare this to *Shade Foods v. Innovative Prods. Sales & Mktg.*, 78 Cal. App. 4<sup>th</sup> 847 (2000), where there was no finding of "despicable" conduct to support *any* punitive damages even though the claims evaluation was "careless" and the insurer persistently refused to reconsider its denial of coverage in the face of factual errors called to its attention. *Id.* at 892. The court found that such conduct "*well short* of establishing by clear and convincing evidence the sort of contemptible conduct that could be described as despicable." *Id.* (emphasis added).

Note also that the insurer's failure to properly investigate the claim in *Shade Foods* led to the insurer making an unreasonable decision to deny defense and indemnity owed to the insured. Thus, like virtually every "insurance bad faith" case, the failure to properly investigate the claim was not the actual harm suffered by the insured. Rather, it was the improper refusal to defend or indemnify as a result of the failed investigation that was the real harm suffered by the insured.

ACG's claim bears no resemblance to failure to defend and indemnify

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<sup>5</sup> Recently the California Court of Appeal reduced a punitive damages award to a 2:1 ratio in a case involving "catastrophic and permanent physical injuries." See *Buell-Wilson v. Ford Motor Co.*, 160 Cal. App. 4<sup>th</sup> 1107, 1158 (2008). While the compensatory award was significant, the court found a 2:1 ratio appropriate even though it found the "reprehensibility" of the defendant's conduct "high," the matter involved "catastrophic" injuries, and the defendant intentionally, and repeatedly engaged in conduct showing reckless disregard for the safety of others. *Id.*

cases, e.g., *Walker* (insured had to defend herself even though policy afforded defense). Here, Travelers' alleged failure to investigate occurred in its *administration* of ACG's workers' compensation risk management program. The Custodio claim was but one of literally *hundreds* of other claims Travelers handled for ACG during the relevant time period. RT 1539:19-1540:20/ER 01793-94. Even taking ACG's contentions as true, the record demonstrates that Travelers did not ignore the claim but, rather, defended and then paid the claim. Thus, even if Travelers was mistaken in paying one claim or could have investigated that claim more thoroughly, this conduct was not so reprehensible as to warrant exceeding a 1:1 ratio, especially where ACG was awarded substantial compensatory damages.

This Court should note, now having the parties' full perspective about punitive damages, that the purportedly wrongful conduct highlighted by ACG looks, at worst, like a showing that Travelers may have negligently mishandled a *single* claim. AAB 43-46. This is, at worst, "a close case," and ACG's claim for punitive damages should be viewed critically:

[A] record that presents a close case with regard to the sufficiency of the evidence of bad faith will inevitably provide a tenuous basis for supporting an award of punitive damages, since both the bad faith and punitive damage findings rest on inferences to be drawn from the same evidence.

*Shade Foods*, 78 Cal. App. 4<sup>th</sup> at 893.

ACG's "close case" provides at best a "tenuous basis" for punitive damages. The punitive damages award should be denied outright as in *Shade Foods*, but in no case does this record support more than a 1:1 ratio.

**IX. ACG IS NOT ENTITLED TO ITS ATTORNEYS' FEES PURSUANT TO BRANDT**

**A. Brandt Does Not Apply Because ACG's Fees Were Not Determined by the Jury and the Parties Did Not Stipulate**

### Otherwise

From the time it filed suit through trial, ACG sought its attorneys' fees and costs based solely on *Brandt*. Yet, ACG produced no *Brandt* fee evidence prior to trial and attempted to satisfy its burden of proof by only having its CFO testify as to the "approximate" amount of ACG's fees and costs. RT 1293:21-1294:6/TSER00068-69.

"[T]he proof will consist of the *fee agreement* (establishing the insured's obligation to pay fees to collect policy benefits) and *testimony* by plaintiff's counsel as to the nature and amount of the services rendered; i.e., what portion of the services was attributable to efforts to obtain the policy benefits, and the reasonable value thereof. (This again emphasizes the importance of detailed time and cost records! *See* ¶ 13:135.)" Croskey et al., Cal. Pract. Guide: Insurance Litigation (The Rutter Group 2007) (emphasis in original) ("Croskey") § 13140; *see also id.*, § 13141 (addressing why there "is no ethical problem in the lawyer's giving such testimony").

The insured must distinguish its fees from "those attributable to the bringing of the bad faith action itself . . . Fees attributable to obtaining any portion of the plaintiff's award which *exceeds the amount due* under the policy are not recoverable," including punitive damages. Croskey, § 13127 (emphasis in original), citing *Brandt*, 37 Cal. 3d at 817-818; *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 807 (2004). *See* Croskey, § 13128 (plaintiff must prove fees incurred for policy benefits "like any other item of damages").

ACG did not, as it contends, "provide[] Travelers with the amount of fees on a running basis." AAB 79, fn 21 (citing only statements of counsel). ACG provided Travelers with a one-page summary on September 4, 2006, one week before trial, which the district court agreed was inadmissible because it violated Fed. R. Evid. rule 1006. RT 1587:15-20/TSER00116.

Consequently, when ACG's CFO testified to the "approximate" amount of ACG's fees and costs, Travelers objected<sup>6</sup> and moved to exclude evidence of ACG's fees or costs because: 1) ACG failed to produce evidence of its fees and costs despite Travelers' discovery requests; 2) ACG violated its Rule 26 disclosure obligations; 3) evidence of *all* of ACG's fees and costs, as ACG's CFO attempted to testify to, are irrelevant because not all fees and costs are recoverable under *Brandt*; 4) ACG's CFO's testimony regarding ACG's counsel's services is hearsay; and 5) ACG had not identified any witnesses who could provide the necessary foundation for the admission of ACG's fees and costs. RT 1294:17-1332:23/TSER00069-107.

The court granted Travelers' motion, ruling, "All evidence related to attorneys' fees and costs will be barred in this action." RT 1332:19-23/TSER00107. When the court asked ACG why it had failed to produce evidence of its fees prior to trial, ACG asserted its attorneys' invoices are protected by the attorney-client privilege. ER01016-17.

ACG filed a motion for reconsideration, again claiming the privilege and arguing, as it does here, that Travelers is to blame for ACG's counsel's failure to plan for the introduction of actual evidence of ACG's damages at trial. ER01017-19 (3:1-5:4); AAB 78-79. The district court aptly stated:

You know, I am really not persuaded that you all are victims here. You all are lawyers. . . . [A]nd to say that you - - because they didn't tell you that you didn't do what you said you were going to do and they didn't tell

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<sup>6</sup> ACG contends, without citation, that Travelers did not object until "several questions after [Kellick] answered a question about the total amount of fees and costs incurred by American." That is not true. *See* RT 1293:21-1295:1/TSER00068-70.

you that you have not provided information the law requires you to provide and they didn't tell you until now that they really wanted the information that they told you they wanted and that you said you would provide, and so, therefore, you all are the victims, that -- that does not carry any persuasive value to me.

...You said the documents are voluminous, but we will provide them. You didn't.

And so to suggest that they are in some way wrong for pointing out that you have never done what you said you were going to do...is absurd.

RT 1330:13-1331:7/TSER00105-6.

The district court denied ACG's motion for reconsideration:

The fact that Travelers' objections to the testimony on attorneys' fees took American by surprise, it's American's own fault. ...

...American did represent, as we discussed in Court, that in its response to Travelers' interrogatories, that it would produce the documents approving attorneys' fees, and it failed to do it. **So now you have to live with the consequences of not doing what you said you were going to do.**

...

Travelers has had no opportunity to examine the documentation... **The trial is over with. The witnesses have testified. The documentation has not been provided, and there is no reason that this should inure to the detriment of Travelers because American didn't do what they were supposed to do. Bottom line.**

So the motion for reconsideration is denied.

RT 1587:1-1588:6/TSER00116-17 (emphasis added).

Despite the court's ruling and ACG's assertion of the attorney-client privilege, ACG produced its bills on November 2, 2006, and then filed a motion for its fees and costs pursuant to *Brandt* and section 1717 on November 7, 2006.

The court rejected ACG's attempt to recover its fees via *Brandt*: "Since the attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise." ER00022 (14:18-20), citing *Brandt*, 27 Cal.3d at 819. The court agreed with Travelers that *Brandt* requires that determination of "the recoverable fees *must be made by the trier of fact unless the parties stipulate otherwise.*" ER00022 (14:18-23) (emphasis in original). The court concluded, "Because the Court excluded evidence of attorney's fees, no determination of the recoverable fees was made by the jury, and the parties have not stipulated for the Court to make that determination." ER00022 (14:24-25).

ACG argues this Court should ignore the "trier of fact" or "stipulation" requirement of *Brandt* allegedly because "courts have awarded *Brandt* fees on a post-trial motion *without mentioning* that there was a stipulation of the parties on that issue." AAB 80 (emphasis added). ACG does not cite a single case holding that an insured's fees and costs can be determined post-trial without a stipulation.

There are no cases overruling the requirement; many cases reaffirm it. In *Campbell v. Cal-Gard Surety Services, Inc.*, 62 Cal. App. 4th 563 (1998), the court confirmed, "The determination of the *amount* of fees must be made by the trier of fact, generally the jury." *Id.* at 571-572 (emphasis in original).

Again, in *Hangarter v. Paul Revere Life Ins. Co.*, 236 F.Supp.2d 1069 (N.D. Cal. 2002) (affirmed in part and reversed in part on other grounds in *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9<sup>th</sup> Cir. 2004)), the court

affirmed an attorneys' fee award because the jury was instructed as outlined in *Brandt* and the parties did not stipulate otherwise:

In the case at bar, this court carefully considered the instruction to be given to the jury, which as the fact-finder, was charged with allocating any award of attorney's fees, since fees would be awarded as part of Plaintiff's damages and the parties did not stipulate otherwise.

*Id.* at 1101 (emphasis in original).

In *Slottow*, the Ninth Circuit refused to overturn a district court's decision not to award *Brandt* fees and costs as the result of the insured's failure to "to segregate its litigation expenses as required by *Brandt*":

Because the bank made no effort to segregate its litigation expenses as required by *Brandt*, we affirm the district court's decision not to award fees.

Finally, the bank asks us to remand (rather than affirm) on the issue of fees so it may prove up its damages, i.e., do the necessary segregation of fees which *Brandt* requires. But *Brandt*'s rule is not new; the bank has no excuse for failing to comply with it the first time around.

*Slottow*, 10 F.3d at 1362. Likewise, ACG "has no excuse for failing to comply with [*Brandt*'s "segregation of fees" requirement] the first time around." The ruling of the district court should be affirmed.

**B. ACG Is Not Entitled to Its Fees and Costs Incurred on Appeal Under *Brandt***

**1. ACG Cannot Waive the Attorney-Client Privilege for the First Time Post-Trial**

ACG asserted the attorney-client privilege when the district court asked why it had not produced evidence of its fees in response to Travelers' discovery

requests. AOB 49; ER01016-17. After ACG failed to recover its fees and costs at trial, ACG waived the attorney-client privilege in order to seek its fees and costs via the 2005-2006 finance agreement. *Id.* If a party refuses to provide discovery responses based on a privilege, it cannot later waive the privilege to its advantage and introduce the previously withheld information. *See* AOB 49.

ACG argues Travelers is wrong because the cases cited by Travelers do not “involve[] the introduction of evidence in support of a post-trial motion for costs.” AAB 70. The cases cited by Travelers address waiver at trial of a privilege asserted before trial. AOB 49. ACG does not cite a single case allowing a party to assert the attorney-client privilege at trial only to waive it after trial to its benefit. ACG cannot now rely on the evidence of its fees and costs it previously refused to produce and therefore cannot prove its fees were incurred to prove breach of contract as required by *Brandt*. *Brandt*, 37 Cal. 3d at 817-818.

2. **Appellate *Brandt* Fees Are Unavailable If Only Because the Parties Agree on the Value of ACG’s Contract Claim**

*Brandt* only applies to fees and costs incurred to prove a breach of contract, not “those attributable to the bringing of the bad faith action” or to support a punitive damages claim. *Croskey*, § 13127, citing *Brandt*, 37 Cal. 3d at 817-818; *Cassim*, 33 Cal. 4th at 807. Travelers and ACG agree \$.07 is the proper measure of contract damages. AOB 35; AAB 41-42, 88. Because ACG is not incurring appellate fees or costs to obtain the benefit of the contract, it is not entitled to them under *Brandt*.

ACG relies solely on *McGregor v. Paul Revere Life Ins. Co.*, 369 F.3d 1099, 1101 (9<sup>th</sup> Cir. 2004), to argue entitlement to *Brandt* fees on appeal. AAB 81-82. *McGregor* permitted the recovery of appellate *Brandt* fees where, unlike here, the policy benefits were in dispute on appeal after a bad faith jury verdict. *Id.* at 1102. The court held the insured may file a separate motion to recover appellate *Brandt*

fees to obtain the policy benefits if the verdict is affirmed on appeal. *Id.* at 1100. *McGregor* does not address the jury's award of attorneys' fees and does not suggest the insured was prevented from introducing evidence of her fees and costs due to discovery violations and her failure to satisfy her burden of proof under *Brandt*.

If this Court finds a) a breach of the duty to investigate gives rise to bad faith; b) ACG was awarded tort relief; c) ACG is appealing the breach of contract award even though the parties agree on the \$.07 award; and d) ACG is entitled to its fees and costs on appeal under *Brandt*, then the determination of ACG's fees and costs must be remanded to the trial court. *See Track Mortgage Group v. Crusader Ins. Co.*, 98 Cal. App. 4th 857, 870 (2002) ("*Track*"). (*Track* ignores *Shade Foods*, 78 Cal. App. 4th at 909 fn. 17, and *Burnaby v. Std. Fire Ins. Co.*, 40 Cal. App. 4th 787, 795-796 (1995), both refusing recovery of appellate fees under *Brandt*.)

In *Track*, unlike here, the insurer unsuccessfully challenged on appeal the contract damages. The court remanded the issue of appellate *Brandt* fees, finding, "[The insured] is entitled to fees only to the extent [the insurer's] appeal attacked the judgment in favor of [the insured] on the contract causes of action. [*Brandt*, 37 Cal. 3d at 817.] The amount of such fees is best determined by the trial court on remand." *Id.* at 870.

ACG is not entitled to its fees and costs incurred post-trial because it has now withdrawn the attorney-client privilege and has produced some evidence of its fees and costs. ACG still has not, as required by *Brandt*, proved which of its fees were incurred to obtain policy benefits, instead claiming *all* of its fees. ACG is also not entitled to any fees incurred post-trial on its bad faith and punitive damage claims because the parties agree the contract damages are \$.07, so ACG is not

incurring any fees or costs on appeal recoverable under *Brandt*.

**X. ACG IS NOT ENTITLED TO FEES UNDER SECTION 1717**

The district court's application of section 1717 should be reviewed de novo. *Jorgensen v. Cassidy*, 320 F.3d 906, 918 (9th Cir. 2003). The court's interpretation of the contracts and refusal to apply the finance agreement's mandatory arbitration, choice-of-law, and forum-selection provisions should also be reviewed de novo. Ninth Circuit Court of Appeals, Standards of Review, September 2006, p. 272. ACG contends the court's "findings of fact on these issues are actually reviewed under a clearly erroneous standard," but ACG does not identify the findings of fact. AAB 60, fn. 20.

**A. The Fees Provision Is *Not* Before the Court**

Fundamentally, ACG cannot make any section 1717 argument without providing evidence of an agreement in effect in 2002-2003 containing a fees provision. ACG's argument fails entirely because no such agreement is in the record. The district court held, "Travelers correctly points out that Exhibit 78 is the Policy issued by Travelers to American. It does not include a copy of the Agreement containing the above-quoted language." ER00015 (7:27-28). ACG's statements in motions and appellate briefs that such an agreement is in the record are without *any* foundation.

ACG's sole argument for its assertion that a fees provision was before the district court is: "Each year, at the same time, American and Travelers' [*sic*] renew the Agreement by entering into a policy and another document that sets out the obligations of the parties with respect to the policy, and contains the fee provision at issue." AAB 61. ACG argues, without any evidentiary support, the "Agreement" is unchanged since 1991. AAB 7, 61. This directly violates Circuit Rule 28-2.8. ACG's only support for its assertion is two pages from ACG's reply

brief in support of its motion for fees and costs (ER00165-66) and two declarations from Patrick Kellick, ACG's CFO (ER00151, 930).

"1991" appears nowhere in the record. Rather, "1991" is only in AAB, which in turn cites a statement in ACG's post-trial reply brief that Kellick "stated that the contract (which includes the so-called agreement and the policies) attached to his Declaration has not changed from 1992 to this present day and is one contract."<sup>7</sup> ER00165. Statements of counsel are not evidence. *See Haynes v. Hunt*, 208 Cal. App. 2d 331, 335 (1962). ACG's inconsistency between 1991 and 1992 is disturbing, but inconsequential because neither of Kellick's declarations refers to 1991 or 1992 or includes a finance agreement with a fees provision in effect in 2002-2003.

Kellick's November 7, 2006, declaration states:

3. I was called to testify on this case on September 22, 2006, in San Francisco, California. During my testimony, I was presented with a contract between American Color Graphics and Travelers that was in place at the time the Aiza Custodio claim was filed, and which covered that matter.<sup>8</sup> I testified that the provisions of that contract with Travelers had not changed in any succeeding contract between our respective companies. Our contracts with Travelers have been renewed each year, so there has been no time since the Custodio claim was filed that the terms of our workers' compensation contract with Travelers have not been in force. Attached collectively as Exhibit 1 is a copy of the *Insurance Contract* between Travelers and American Color

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<sup>7</sup> Since the statement was first made in ACG's reply and no oral argument was allowed, Travelers could not respond to the statement before the district court.

<sup>8</sup> The declaration does not identify his testimony or the specific "contract." The only contract he was shown was the Policy. RT 1272:9-12/ER01769.

Graphics, and copies of Amendments to Coverage for the preceding years up to from [sic] 2003-2006.

ER00930 (emphasis added). This declaration accurately states Kellick was shown the 2002-2003 Policy and goes on to discuss “succeeding contracts” “since” the Policy. He does not say the terms were identical, simply that the contracts were in force, and no mention is made of 1991 or 1992.

No trial witness was shown any agreement except the Policy. Kellick’s reference to his testimony can only be to his disconnected statement that the “approximately \$140,000” “includes a 15 percent upcharge that is paid to Travelers for loss conversion.” RT 1348:1-3/ER01777. While the “upcharge” may be part of a finance agreement between the parties, neither Kellick nor anyone else testified regarding that agreement. ACG chose not to introduce the agreement, perhaps because it is inapplicable and ACG actually sought its fees under *Brandt*. ER01033, 1222-24.

Kellick’s December 26, 2006, declaration simply states, “[T]he insurance contract was negotiated and renewed at the same time each year.” ER00151. ACG does not offer any other evidence in support of its assertion that the “relevant pages” of a fees provision from a 2002-2003 finance agreement are before this Court. AAB 62.

ACG had to submit a fees provision in effect in 2003. Fed. R. Evid. 1002, 1003. Misrepresenting its witness’ declarations in motion papers is not admissible evidence of a fees provision in effect during the applicable Policy period. Fed. R. Evid. 1004. ACG failed to introduce any applicable fee provision, and its section 1717 argument fails entirely for that simple reason.

**B. Travelers Did Not Waive Its Right to Argue There Is No Applicable Fees Provision Before This Court**

ACG contends “Travelers never raised this issue below.” AAB 61. To the

contrary, *the district court ruled on* Travelers' specific objection to admission of the 2005-2006 finance agreement and parts of finance agreements for 2003-2005 attached to Kellick's declaration. (No parts were submitted for the relevant 2002-2003 Policy period). *See In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) ("A workable standard, however, is that the argument must be raised sufficiently for the trial court to rule on it.").

ACG argued in its post-trial motion for fees and costs, "The provision existed in the *policy* that was in effect at the time of the Custodio claim in 2003, which gave rise to this lawsuit, as well as each subsequent contract thereafter." ER00939 (2:13-15). In response, Travelers pointed out that the "provisions cited by ACG" are not in the Policy, but in a finance agreement attached to Kellick's declaration "entitled 'Agreement for American Color Graphics, Inc. [¶ ] Period: November 1, 2005 to November 1, 2006.'" ER00306. Travelers also filed objections, including:

Exhibit 1 is falsely cited by ACG as the insurance contract between ACG and Travelers. Exhibit 1 is not what ACG introduced at trial, which was Exhibit 78. . . . It is also not a copy of the parties' premium and expense agreement, Trial Exhibit 77, which was neither marked nor introduced at trial. In fact, Exhibit 1 contains documents that were apparently never before produced in this action. Exhibit 1 should not be considered by the Court.

ER00331 (6:11-17).

The district court overruled Travelers' objections. Because "Travelers does not appear to dispute that an Agreement was signed each year along with the Policy," the court "accept[ed] American's representation that the documents were executed at about the same time," as if contemporaneous execution alone is

evidence that an agreement was in effect during the 2002-2003 Policy period *and* contained a fees provision identical to the 2005-2006 finance agreement. ER00017 (fn 2).

The parties and the district court were well aware of Travelers' objections. Travelers raised the issue below, the court ruled on it, and Travelers did not waive its right to raise it on appeal.

**C. This Is an Action "On" the Policy, Not the 2005-2006 Finance Agreement**

ACG now argues this is an action "on" the "insurance contract," which it does not define by reference to the record. AAB 62. According to ACG:

Travelers also contends this case involved an action "on" the Policy (which is not true since the claim was for breach of contract), and not the so-called separate agreement, AOB 44, implying that the two are separate, and that American cannot recover fees for the violation of the document characterized by Travelers as the policy.

AAB 62. Without alleging or attaching any other agreement, the First Amended Complaint alleges Travelers breached the Policy. The Policy was the only contract introduced at trial, and Travelers was found liable for breach of that contract. The Policy is Exhibit 78, which, as the district court agreed, is the Policy in effect in 2002-2003 covering the Custodio claim. ER00015-16 (7:27-8:1). The "so-called separate agreement" ACG refers to is the only other complete agreement before this court. But that is the 2005-2006 finance agreement between Travelers and ACG. The district court found the 2005-2006 finance agreement was "not introduced or admitted at trial." *Id.* The 2002-2003 Policy and the 2005-2006 finance agreement are separate agreements.

The attorney invoices produced by ACG post-trial confirm this is an action "on" the 2002-2003 Policy, not an action "on" the 2005-2006 finance agreement.

The invoices contain time entries for July 19, 2004, through September 27, 2006, the end of trial. ER00861-929. ACG cites no single entry relating to any premium and finance agreement. No entry exists describing work related to such agreement. *Id.* This is not an action “on” any finance agreement as required by section 1717.

1. **The 2002-2003 Policy and the 2005-2006 Finance Agreement Are *Not* a “Single Integrated Insurance Contract” and Should Not Be Taken Together**

ACG argues the 2005-2006 finance agreement “expressly integrates” the 2002-2003 Policy, relying on the first paragraph of the finance agreement, which ACG falsely contends it has proven has been the same since 1991. AAB 63. The 2005-2006 finance agreement “incorporates herein by reference” the policies “listed in the Policy Exhibit.” ER00398. However, the “Policy Exhibit” does not identify the subject Policy in effect in 2002-2003, but the policy in effect in 2005-2006. ER00420, 430. The 2005-2006 finance agreement’s definition of “Obligations” refers to the “agreements incorporated herein by reference.” ER00400. These provisions of the 2005-2006 finance agreement do *not* make that agreement and the Policy a “single integrated insurance contract.”

Also, ACG argues the 2002-2003 Policy and the 2005-2006 finance agreement should be “read together and taken as a single contract under California Civil Code § 1642” because:

[T]he documents were executed at nearly the same time (with the Agreement being signed by American on November 23, 2002 and the policy being issued on November 27, 2002), covered the same subject matter (the workers’ compensation insurance coverage of American), with a common purpose (Travelers itself characterizes them as “complimentary”).

AAB 64-65.

Tellingly, ACG does not cite the record for its assertion that either the 2002-2003 Policy and the 2005-2006 finance agreement “were executed at nearly the same time” or an agreement was signed by American on November 23, 2002. The district court correctly found, “[T]he copy of the Agreement included as Exhibit 1 to the Kellick Declaration was signed in 2005, and American cites no source for its assertion about the dates of execution of the documents.” ER00017 (9, fn.2)

ACG cannot dispute that the only two agreements before this Court, the 2002-2003 Policy and the 2005-2006 finance agreement, were not executed at the same time. ACG also cannot dispute that only the Policy relates to the Custodio claim. Moreover, if the common purpose of a policy and a financing agreement is to provide coverage, ACG cannot dispute the 2002-2003 Policy and the 2005-2006 finance agreement do not work together to provide coverage.

2. **“On a Contract” Is Not So Liberally Construed as to Mean an Action “On” a 2002-2003 Policy Is Also “On” a 2005-2006 Finance Agreement**

ACG argues section 1717 applies because “on a contract” is liberally construed. AAB 65-66. Each of the cases cited by ACG addresses two or more contracts actually executed about the same time. ACG does not cite a single case finding an action is “on” a contract executed three years after the contract sued on was executed and after the action was filed.

Section 1717 only applies to fees incurred to enforce the contract sued on. The First Amended Complaint alleges Travelers breached the Policy; it does not mention any finance agreement. ER01257-66. ACG recovered for breach of the Policy at trial, not for breach of any other agreement. ER00089-94. ACG’s fees were not incurred to enforce the 2005-2006 finance agreement. Rather, this is solely an action “on” the 2002-2003 Policy, and ACG’s fees were incurred to enforce that Policy. *Pilcher v. Wheeler*, 2 Cal. App. 4th 352, 356 (1992) (section

1717 only applies when the contract sued on and breached contains an attorneys' fee provision).

**D. Section 1717 Does Not Apply Because Travelers Would Not Have Recovered Fees and Costs Had It Prevailed**

Travelers argued in its Opening Brief that section 1717 only applies to “ensure mutuality of remedy,” and, therefore, it does not apply here because Travelers would not have been entitled to recover its fees had it prevailed at trial. *See* AOB 48. ACG replies that Travelers ignores the 2005-2006 finance agreement’s definition of “Obligations,” and either party has a right to fees and costs if the other breaches the agreement. AAB 67-68. ACG’s argument fails for several reasons.

First, there is no “Obligations” provision in effect in 2002-2003 before this Court. ACG’s application of the definition of “Obligations” is dependent on the Court finding the 2002-2003 Policy is incorporated by reference in the 2005-2006 agreement, which it is not. Second, Travelers would only have been entitled to its fees had it prevailed at trial in enforcing ACG’s obligations under the 2005-2006 agreement; ACG’s obligations under that agreement were not at issue at trial.

Third, ACG argues if the 2002-2003 Policy and the 2005-2006 finance agreement are two separate contracts, ACG “could never have an action on the Agreement” and the “result would be two unenforceable contracts.” AAB 67. If ACG paid for its 2005-2006 policy pursuant to the 2005-2006 finance agreement and Travelers demanded additional payment which ACG disputed, ACG might have an action on the 2005-2006 finance agreement. The winner there may be entitled to fees.

Both contracts are enforceable, but ACG only enforced the Policy at trial. If ACG contended Travelers breached the 2005-2006 agreement, it could have sued Traveler for that breach. Of course, that did not occur if only because the 2005-

2006 agreement was not in effect until months after ACG filed this action. ER00389. Unlike the plaintiff in *Wong v. Davidian*, 206 Cal. App. 3d 264, 271 (1988), ACG did not attach a contract with a fees provision to the complaint. *Mattei v. Hopper*, 51 Cal. 3d 119, 122 (1958), finding contracts without mutual obligations unenforceable, does not apply because these contracts have mutual obligations. AAB 61-62.

Since Travelers would not have been entitled to its fees pursuant to the 2005-2006 finance agreement had it prevailed at trial, neither is ACG.

**E. ACG's Decision to Seek Its Fees Post-Trial under Section 1717 Does Not Excuse Proving the Contract at Trial**

ACG argues *Ganey v. Doran*, 191 Cal. App. 3d 901, 911 (1987), holds the fees *provision* did not have to be proved at trial. The holding is quite different: “An action on a contract with an attorney fee provision . . . has not been treated by the courts as an action where *the fees* must be pleaded and proved at trial. Rather, the plaintiff may elect to have the court determine the fees under section 1717 *as costs*.” *Id.* at 911, citing *Lanyi v. Goldblum*, 177 Cal. App. 3d 181, 187 (1986) (emphasis added). Travelers recognizes section 1717 *fees* do not have to be pleaded or proven at trial and may be sought post-trial “as costs”; Travelers disputes those fees are recoverable without proving at trial the *contract* with the fees provision. Indeed, that is how you know it is an action on the contract with the fees provision. The failure to prove the contract on which an action is based would have been grounds for a motion to dismiss. *First Commercial Mortgage Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001) (elements of breach of contract *prima facie* case include “the existence of the contract”).

*Ganey* does not support ACG. The plaintiff there incorporated the contract with the fee provision into the complaint and relied on it as the “foundation” to its action. *Ganey*, 191 Cal. App. 3d at 905, 911-912.

ACG also cites *Wong* as “explicitly reject[ing]” Travelers’ position that the contract containing the applicable fees provision must be proven at trial. AAB 68. This contention is nonsense. The action in *Wong* was dismissed for failure to prosecute under section 583.420 of the California Code of Civil Procedure. No trial was had. *Wong*, 206 Cal. App. 3d at 266. The fee award was based on motion practice, and the court noted the contract with the fee provision was attached to the original complaint. *Id.* at 271. ACG never attached any fee agreement to its complaint.

ACG ignores *Brittalia Ventures v. Stuke Nursery Co., Inc.*, 153 Cal. App. 4th 17, 29 (2007), which refused to apply section 1717 because the plaintiff failed to establish at trial the applicable contract contained a fees provision. AOB 46. The Court should reach the same result here.

ACG also argues because the relevant portion of the “Agreement,” the Policy, was proven at trial, it was not necessary to submit the fees provision until after ACG prevailed at trial. AAB 68-69. ACG does not cite a single case holding the contract containing the fees provision does not have to be proven at trial. AAB 68-69. And the Policy expressly incorporates no other contract by reference. ER01268, 1297-1299, 1300. “[S]ection 1717 applies only to actions that contain at least one contract claim,” and to fees “as they relate to the contract action” and not as they relate to any tort action. *Santisas v. Goodin*, 17 Cal. 4th 599, 615 (1998). In order to prove a contract claim, the plaintiff must prove the contract at trial. *Reece, supra*. ACG ignored these fundamental concepts during trial and hopes this Court will do so as well. ACG did not prove any fees provision at trial and cannot prevail under section 1717.

**F. If This Court Permits ACG's Tardy Waiver and Considers the 2005-2006 Finance Agreement, ACG Must Still Prove Which of Its Fees Were "Incurred to Enforce" that Agreement**

ACG falsely contends that "Travelers ignores that '[a]ttorney's fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are proper and one in which they are not allowed.'" AAB 71, citing *Diamond v. The John Martin Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985). Travelers neither ignores this rule nor disputes it. AOB 49-52. However, Travelers correctly pointed out in its Opening Brief that none of ACG's fees were incurred to enforce the 2005-2006 finance agreement as required by section 1717, and not all of ACG's fees were "incurred for representation of an issue common to" ACG's breach of contract, bad faith, and punitive damages claims. AOB 52.

ACG does not even attempt to explain how the activities identified in Travelers' Opening Brief, such as preparing jury instructions on and verdict forms for bad faith and punitive damages, were also incurred to enforce the Policy or the 2005-2006 finance agreement. Section 1717 in no way allows ACG to recover all of its fees. Moreover, since ACG asserted the attorney-client privilege at trial with respect to evidence of its fees and costs and ACG cannot waive that privilege now (AOB 49), ACG cannot prove which of its fees were incurred to enforce the Policy or the 2005-2006 finance agreement as required by section 1717.

**G. Travelers Did Not Waive the Forum-Selection Clause**

ACG's response to Travelers' argument that it did not waive the 2005-2006 finance agreement's forum-selection clause is: "As the district court found, Travelers waived the forum selection provision." AAB 72. ACG does not respond to any of the case law in Travelers' brief addressing waiver or finding the provision is mandatory. AOB 53-55. ACG only (and incorrectly) adds the district court's decision should be reviewed for an abuse of discretion. AAB 72-73; AOB 53.

The Ninth Circuit Court of Appeals “require[s] contentions to be accompanied by reasons.” *Independent Towers of Wash. v. State of Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) (“judges are not like pigs, hunting for truffles buried in briefs”). “Issues raised in a brief which are not supported by argument are deemed abandoned.” *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1182 (9th Cir. 2001). ACG does not provide any *reasons* to support its single statement that Travelers waived the forum-selection clause. Consequently, ACG should be deemed to have waived its opposition to this issue. ACG’s compliance with the 2005-2006 finance agreement’s forum-selection clause is mandatory. ACG *had to* file suit in Connecticut to enforce that agreement. AOB 54-55.

**H. The District Court, if Considering the 2005-2006 Finance Agreement, Should Have Applied Its Choice-of-Law Provision**

The district court refused to apply the 2005-2006 finance agreement’s choice-of-law provision after finding California had a “materially greater interest” than Connecticut in “having its law concerning attorneys’ fees applied.” ER00020 (12:23-25). ACG does not dispute the district court’s finding that Travelers has not waived this issue. AAB 74-76; ER00020-21 (12:28-13:3).

The district court correctly referred to the test set forth in *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459 (1992) (“*Nedlloyd*”), and ACG cites it, but both ACG and the district court ignore the basis of the California Supreme Court’s conclusion:

When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to *all* disputes arising out of the transaction or relationship. We seriously doubt that any rational businessperson, attempting to provide by contract for an

efficient and business-like resolution of possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship.

*Id.* at 469-470. Applying this reasoning, the court found, “A party’s incorporation in a state is a contact sufficient to allow the parties to choose that state’s law to govern their contract.” *Id.* at 467.

ACG does not dispute that the 2005-2006 finance agreement’s choice-of-law provision requires application of Connecticut law to its disputes or that provision’s purpose is the same purpose addressed in *Nedlloyd*. ACG also does not dispute Connecticut has a relationship to the parties because Travelers is incorporated in and has its principal place of business in Connecticut or that ACG is located in Tennessee and incorporated in New York. ER00020 (12:4-6), 1258. The parties further agree Connecticut law is contrary to California law.

Instead, ACG argues, “Courts have universally applied § 1717 in the face of choice of law provisions,” citing one district court decision and a California Court of Appeal decision. AAB 74-75, citing *Ribbens Intern., S.A. de C.V. v. Transport Intern. Pool, Inc.*, 47 F. Supp. 2d 1117, 1123 (C.D. Cal. 1999) (“*Ribbens*”) and *ABF Capital Corp. v. Grove Properties*, 126 Cal. App. 4th 204, 217-220 (2005) (“*Grove Properties*”).<sup>9</sup> The contrary holding in *ABF Capital Corp. v. Berglass*, 130 Cal. App. 4th 825, 838 (2005) (“*Berglass*”), shows there is no such universal rule, and the reasoning of the cases ACG relies on shows section 1717 should not apply to these facts.

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<sup>9</sup> ACG also cites a 1993 unpublished district court decision. AAB 75. The citation violates Circuit Rule 36-3(c) prohibiting the citation of unpublished decisions issued before January 1, 2007, unless cited for factual, res judicata or collateral estoppel purposes or as the law of the case.

The court in *Ribbens* acknowledged the *Nedlloyd* holdings referenced above, but refused to apply the parties' choice of law because: 1) "The TIP contracts were negotiated and executed in California"; 2) the "contracts at issue concerned the sale of a substantial amount of property that was located in California at the time of sale"; 3) the contracts "involved parties whose business dealings with each other were entirely concentrated in California"; 4) "Ribbens made payment to TIP by means of checks drawn on a California Bank"; and 5) the contracted work was performed and delivered in California. *Ribbens*, 47 F. Supp. 2d at 1121. The court held these factors sufficient to apply California law even though there was "Pennsylvania, the chosen state, has a substantial relationship to the contracts." *Id.* at 1120.

In contrast, here it is undisputed the 2002-2003 Policy was negotiated and executed outside of California and concerned ACG's workers' compensation claims in twenty-one states. ER01268. It is also undisputed ACG's and Travelers' "primary business dealings" are from their offices in Tennessee and Connecticut, i.e., outside of California. ER00020 (12:4-6), 1258. Neither party is incorporated in or resides in California. Because the factors present in *Ribbens* are missing here, no reason exists to ignore the parties' choice of law and the substantial relationship to Connecticut. *Ribbens*, 47 F. Supp. 2d at 1121; *Nedlloyd*, 3 Cal. 4<sup>th</sup> at 469-470.

Similarly, as explained in AOB, the facts here compel a different result than *Grove Properties*. AOB 56-57. There is no California resident to protect here. *Id.* ACG does not claim to be a California resident, instead acknowledging its only California operation is now closed. AAB 75-76. ACG is not a resident of California simply because it was one of twenty-one states in which ACG did business. ER01268. While the Custodio claim may have been handled by

Travelers in California, the parties' obligations under the 2005-2006 finance agreement relate to the financial arrangement between the parties, *not* to the handling of a claim under the 2002-2003 Policy.

The result here should be that in *Berglass*, where the court enforced a choice-of-law provision notwithstanding the conflict between California and New York on attorneys' fees. AOB 57. *If* the 2005-2006 agreement applies to the 2002-2003 Policy, then Connecticut law applies, and ACG is not entitled to its fees or costs because Connecticut does not have a section 1717 counterpart. *See* AOB 58.

**I. ACG Has Abandoned Any Opposition to Travelers' Substantive Arguments Regarding Arbitration**

ACG argues, without reason or reference to facts or case law, "Travelers is wrong [that the district court's order for arbitration was improper] and American is entitled to attorneys' fees pursuant to § 1717." AAB 77. ACG completely ignores Travelers' arguments that: 1) any dispute pertaining to the 2005-2006 finance agreement must be resolved in Connecticut under Connecticut law, which does not have a section 1717 counterpart; and 2) the district court lacked authority to order the parties to arbitration. AOB 59-60. ACG should be deemed to have abandoned any opposition to these issues and precluded from being heard on these issues in its "response," if any, to this brief. *Kohler*, 244 F.3d at 1182.

**XI. ACG'S FEES AND COSTS ARE NOT INCLUDED IN THE PUNITIVE DAMAGES RATIO BECAUSE THEY ARE COSTS, NOT DAMAGES**

*If* section 1717 applies, it is by operation of Rule 54(d)(2), which awards fees and costs as *costs* because a party prevailed, not as damages to compensate for a tort. The district court agreed with Travelers that any section 1717 award is considered costs, not damages. ER00049 (41:19-22). The court also concluded,

“[I]t is disingenuous of American to argue otherwise, as it asserts in its Motion for Attorney’s Fees, that pleading and proof of attorney’s fees at trial is not required under § 1717 precisely because fees awarded under that statute are properly characterized as costs, not damages.” ER00049-50 (41:2342:2).

ACG relies on *State Farm* to argue its fees and costs should be considered in determining the ratio because the court defined the second *Gore* factor as “the disparity between the *actual and potential harm* suffered by the plaintiff and the punitive damages award.” AAB 83-84, citing *State Farm*, 538 U.S. at 418 (emphasis added).

In *State Farm*, when determining whether the assessed punitive damages were excessive, the Supreme Court did not consider plaintiffs’ “costs” or “fees,” only the compensatory damages award. *Id.* at 415. On remand, the Utah Supreme Court refused to include fees and costs to calculate the ratio, reasoning: “The incorporation of attorney fees and expenses into the compensatory damages award would substantially alter the manner in which trials [are conducted].” *Campbell v. State Farm Alta. Auto. Ins. Co.*, 2004 UT 34, 98 P.3d 409, 420 (2004).

ACG also relies on *May v. Miller*, 228 Cal. App. 3d 404, 407-408 (1991), a broker malpractice case. There, the insured settled with its insurer prior to trial, eliminating the insured’s *Brandt* fees and punitive damages claims, but leaving questions about the offset given for that settlement. *Id.* at 408-409; AAB 84. *May* does *not* consider whether fees and costs should be included in determining whether a punitive damages award is excessive.

The rest of the cases cited by ACG are equally inapplicable because they involve the award of fees and costs as tort damages pursuant to *Brandt* and its counterparts in other jurisdictions. AAB 83-84.

In *Textron*, the parties stipulated, pursuant to *Brandt*, that plaintiff was entitled to \$55,616.34 in costs, and the trial court ruled plaintiff could recover \$30,268.16 in attorneys' fees as *damages*. 118 Cal. App. 4th at 1069. Here, there was no stipulation and no award of fees and costs as damages. Moreover, the costs awarded by the court separate from the costs the parties stipulated to pursuant to *Brandt* were not included in the "legal expenses recoverable under [*Brandt*]." *Id.* The *Textron* court specifically pointed out that "consideration of the disparity between plaintiff's actual harm and the punitive damage award must be limited to its tort relief," which does not include an award of costs. *Id.* at 1084. The court in *Textron* applied these rules in "reduc[ing] the punitive damage award." *Id.* at 1085.

*Neil* also does not apply. There, unlike here, the insured was awarded *Brandt* fees at trial as damages. The California Supreme Court held that tort remedies for breach of the implied covenant are not necessary to protect an insured against an insurer retroactively overcharging premiums and, thus, reversed the *Brandt* fees and punitive damages awards. 33 Cal. 4<sup>th</sup> at 941.

ACG cites one case each from the Third, Seventh and Tenth Circuits. AAB 84. In the first two cases, the insureds were either awarded their fees and costs as damages pursuant to Pennsylvania's bad faith statute, 42 Pa. Cons. St. § 8371,<sup>10</sup> or Wisconsin bad faith law.<sup>11</sup> In the third case, the court did not actually apply the

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<sup>10</sup> See *Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, 399 F.3d 224, 235-236 (3rd Cir. 2005) (awarding fees and costs in insured's bad faith suit pursuant to bad faith statute).

<sup>11</sup> See *Munro v. Golden Rule Ins. Co.*, 393 F.3d 720, 721 (7<sup>th</sup> Cir, 2004) ("both parties agree that, under Wisconsin law, an insured who is successful in a bad-faith action can recover attorney fees as compensatory damages").

costs and fees to the multiplier but said if it did, the ratio was still within constitutional limits.<sup>12</sup>

ACG cites no single case where fees and costs awarded post-trial as *costs*, not *tort damages*, under Rule 54 and section 1717 are considered to determine the constitutionality of a punitive damages award. ACG's argument must be rejected.

## **XII. CONCLUSION**

The parties agree nominal damages of \$.07 is the appropriate remedy for ACG's breach of contract claim against Travelers. As for ACG's remaining claims, the Court has more than one ground to deny each claim.

Travelers asks the Court to find Travelers did not breach the implied covenant of good faith and fair dealing in bad faith because: 1) a breach of the duty to investigate absent the denial of a defense or indemnity does not give rise to bad faith; and 2) ACG failed to satisfy its burden to prove that Travelers' failure to investigate caused ACG to pay money that it would not have had to pay but for that failure.

Travelers asks the Court to find the \$140,000 award is not supported by the record because: 1) testimony of "approximately \$140,000" is insufficient and there are no amounts in the record totaling \$140,000 paid to Travelers; and 2) there is no evidence Travelers' failure to investigate the Custodio claim caused the amounts, if any, proven at trial.

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<sup>12</sup> See *Continental Trend Resources v. Dry USA*, 101 F 3d 634, 643 (10<sup>th</sup> Cir. 1996) (reducing punitive damages award of \$30 million to \$6 million, "approximately six times the actual and potential damages plaintiffs suffered according to our best estimate of their proof," "if we use OXY's own figures . . . about three times . . . and only about twice what OXY attempted to establish on its counterclaim").

Travelers asks the Court to find ACG should not have been awarded punitive damages because: 1) ACG did not prove a tort or obtain tort relief; and 2) there is no evidence Travelers acted with malice, oppression or fraud. If the Court disagrees, Travelers ask the Court reduce the ratio to 1:1 and specifically hold any fees and costs awarded as costs, not damages, are not to be included in calculating the ratio.

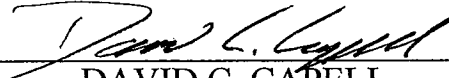
Travelers asks the Court to find ACG is not entitled to its fees and costs under *Brandt* because: 1) ACG did not prove a tort; 2) ACG failed to satisfy its burden to prove its fees and costs at trial and did not stipulate for the district court to determine them after trial; and 3) ACG has not incurred any recoverable fees and costs on appeal since neither party is appealing the jury's breach of contract award.

Travelers also asks the Court to find ACG is not entitled to its fees and costs pursuant to the 2005-2006 finance agreement and section 1717 for several reasons. First, there is no applicable fees provision before this Court. Second, if the Court finds the 2005-2006 finance agreement applies to a claim dispute under the 2002-2003 Policy, Travelers asks the Court to find Connecticut law applies, and Connecticut does not have a section 1717 counterpart. Third, if this Court concludes, despite Travelers' explanations, that ACG may recover under section 1717, Travelers requests a holding that ACG has the burden to prove which of its fees and costs were incurred to prove Travelers breached the 2005-2006 finance agreement at trial on remand.

In conclusion, Travelers requests this Court affirm the jury's verdict of \$.07 for breach of contract and resolve all other issues against ACG. As a result, there is no need to remand.

Dated: May 5, 2008

Respectfully submitted,  
GORDON & REES LLP

By:   
DAVID C. CAPELL

Attorneys for Defendant  
TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA

Dated: May 5, 2008

SONNENSCHN NATH & ROSENTHAL LLP

By:   
For PAUL E. B. GLAD

Attorneys for Defendant  
TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA

**CERTIFICATE OF COMPLIANCE**  
**(FED. R. APP. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1)**

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points, and contains 17,986 words.

Dated: May 5, 2008

GORDON & REES LLP

By:   
DAVID C. CAPELL

Attorneys for Defendant  
TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA

**PROOF OF SERVICE**

I am a citizen of the United States, a resident of the State of California, over the age of eighteen and not a party to the within action. My business address is Gordon & Rees, LLP, 275 Battery Street, Suite 2000, San Francisco, California. On May 5, 2008, I served the following documents entitled:

- **RESPONSE AND REPLY BRIEF OF APPELLANT TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA**
- **APPELLANT TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA'S SUPPLEMENTAL EXCERPTS OF RECORD IN SUPPORT OF ITS RESPONSE AND REPLY BRIEF, VOLUME 1 OF 1 (TSER 00001-124)**

by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States **mail** at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Paul H. Duvall, Esq. KING & BALLOW LAW OFFICES 9404 Genesee Ave #340 La Jolla, CA 92037	Richard S. Busch, Esq. KING & BALLOW LAW OFFICES 315 Union Street, Ste. 1100 Nashville, TN 37201
Paul E.B. Glad, Esq. Sean McEaney, Esq. SONNENSCHNEN NATH & ROSENTHAL, LLP 525 Market Street, 26th Floor San Francisco, CA 94105	

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the foregoing is true and correct, and this certificate was executed in San Francisco, California on May 5, 2008.

  
\_\_\_\_\_  
Mirna Vasquez