ConsumerDirect, Inc. v. Pentius, LLC et al.
8:21-cv-01968-JVS (ADSx)

TENTATIVE Order Regarding Motion for New Trial [554]

Before the Court is Plaintiff ConsumerDirect, Inc.'s ("ConsumerDirect") motion for new trial. (Mot., Dkt. No. 554.) Defendant and Counter-claimant Array US, Inc. ("Array") filed an opposition. (Opp'n, Dkt. No. 564.) ConsumerDirect filed a reply. (Reply, Dkt. No. 568.)

For the following reasons, the Court **GRANTS** the motion and concludes that the award of punitive damages cannot stand.

I. BACKGROUND

The parties are familiar with the procedural and factual background of this case. The Court will recite only those details necessary to resolve the issues of the instant motion.

This case arose out of a dispute between two businesses that provide consumer access to their credit scores. (Second Counterclaim ("SACC"), Dkt. No. 170.) ConsumerDirect alleged that various Defendants, including Array, infringed on ConsumerDirect's trademarks, interfered with contracts and relationships, and unfairly competed with ConsumerDirect by using unlawful and unfair practices. (SAC, Dkt. No. 93.) Array filed a counter-claim, alleging that ConsumerDirect engaged in unfair and unlawful tactics to eliminate competition and prevent economic partnerships that Array developed. (SAC ¶ 6.)

Having largely been resolved by summary judgment, this trademark case proceeded to trial in late October 2023 with ConsumerDirect claiming trademark infringement, false association, and intentional interference with contract. (Trial Tr. 10/31/23 am at 34; Jury Instructions Phase I, Dkt. No. 483.) Array maintained a claim for intentional interference with economic relation. (Id.)

On November 8, 2023, the jury returned a verdict against ConsumerDirect on all claims and found that Array prevailed on its intentional interference of prospective economic advantage claim. (Redacted Special Verdict, Dkt. No. 501.)

The jury awarded $1.3 million in damages to Array. (Id. at 7.) The jury also found by clear and convincing evidence that ConsumerDirect acted with fraud, oppression, or malice with respect to the interference claim. (Id.) The jury was then tasked with determining punitive damages and returned a special verdict of $3.9 million. (Redacted Special Verdict-Phase II, Dkt. No. 503.)

On August 22, 2024, the Court entered an Amended Final Judgment in favor of Array. (Dkt. No. 537.) The Amended Final Judgment awarded Array $1.3 million in actual damages and $3.9 million in punitive damages from ConsumerDirect. (Id.)

ConsumerDirect now files a motion for new trial on the basis that there was insufficient evidence to support the $3.9 million punitive damages award. (Mot. at 1.) Specifically, ConsumerDirect argues that Array failed to meets its burden of showing ConsumerDirect's financial condition, including net profits that are required in order to support punitive damages. (Id.) ConsumerDirect requests that the court grant a new trial or, in the alternative, offer Array a choice of a remittitur of $1.

II. LEGAL STANDARD

Pursuant to Rule 59(a), in an action in which there has been a jury trial, a new trial may be granted "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Courts may grant new trials, "even though the verdict is supported by substantial evidence, if the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." United States v. 4.0 Acres of Land, 175 F.3d 1133, 1139 (9th Cir. 1999) (internal quotations omitted). Courts may also grant a new trial where damages are "grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork." Del Monte Dunes v. City of Monterey, 95 F.3d 1422, 1435 (9th Cir. 1996).

Authority to grant a new trial "is confided almost entirely to the exercise of discretion on the part of the trial court." Allied Chem. Corp. v. Daiflon, 449 U.S. 33, 36 (1980) (per curiam). However, a trial court may "not grant [a new trial] simply because the court would have arrived at a different verdict." Pavao, 307

F.3d at 918.

III. DISCUSSION

A. Waiver of Punitive Damages Argument

Array argues that because ConsumerDirect did not object to the inadequacy of financial condition by the close of evidence, it has waived such a right to object now. (Opp'n at 7.) Indeed, this Court previously denied ConsumerDirect's Rule 50(b) motion on punitive damages for failure to properly raise the issue in its pre-verdict Rule 50(a) motion at the close of evidence. (Dkt. No. 566 at 12–14.) However, Array concedes that unlike a waiver of Rule 50(b) arguments, failure to object to arguments under Rule 59(a) does not, alone, preclude a party from raising such arguments in a motion for new trial. See Freund v. Nycomed Amersham, 347 F.3d 752, 763–64 (9th Cir. 2003) ("Unlike a motion for judgment as a matter of law, a motion for new trial does not have to be preceded by a Rule 50(a) motion prior to submission of the case to the jury."). Nonetheless, there may be circumstances where an earlier failure to object weighs against granting a new trial. See id.

In support of its position, Array cites Steffens v. Regus Grp., PLC, 2013 WL 4499112, at *23 (S.D. Cal. Aug 19, 2023). Array's reliance on Steffens is misplaced. In Steffens, the defendant failed to object at the close of evidence to what they later perceived as insufficient evidence of financial condition. Id. Importantly, however, the court noted that it had previously granted the defendant's motion in limine to *exclude* evidence of financial condition during trial. Id. at *15. Following phase one, the parties moved straight into argument for punitive damages without putting on additional evidence such as financial condition. Id. at *14. The defendant never objected to this procedure, but later filed a motion for new trial on the grounds that evidence had been *wrongfully excluded*. See id. at *23. The court held that the failure to object "when the Court went straight into punitive damages arguments without additional evidence" weighed against granting a new trial. Id.

ConsumerDirect's argument for new trial is entirely distinct from Steffens.[1] ConsumerDirect does not argue in it's motion for new trial that it was wrongfully excluded from presenting evidence of its financial condition. Indeed, such is not their burden. See Adams v. Murakami, 54 Cal. 3d 105, 120 (1991) ("It is inherently prejudicial to require a defendant to introduce evidence of personal finances."). Rather, ConsumerDirect objects that there was insufficient evidence presented at trial to prove such financial condition. (Mot. at 3.)

Moreover, even if the Court were to consider ConsumerDirect's failure to object earlier, it would not bar ConsumerDirect's motion for new trial. In both Steffens and Freund, the respective courts still rested their outcomes on clear findings of sufficient evidence concerning financial condition. See Steffens, 2013 WL 4499112 at *23 ("The jury may not have received an extended tutorial on Regus's accounting books, but it was made aware of the scale of Regus's operations, and even made aware of Regus's revenue stream . . . ."); see also Freund, 347 F.3d at 764 ("In any event, there was enough evidence in the record concerning the financial condition of [the defendant] to support the jury's punitive damage award."). Thus, ConsumerDirect's failure to object is not, alone, enough to waive its argument for new trial.

Accordingly, ConsumerDirect did not waive its ability to challenge punitive damages by not objecting during trial. The Court will now turn to whether there was sufficient evidence in the record of ConsumerDirect's financial condition to support the jury's punitive damage award.

B. Meaningful Evidence of Financial Condition

At trial, the jury awarded punitive damages in the amount of $3.9 million. ConsumerDirect argues that there was insufficient evidence of ConsumerDirect's financial condition or ability to pay $3.9 million in punitive damages. (Mot. at 2.) As such, ConsumerDirect argues that the appropriate remedy is a remittitur of $1

[1] ConsumerDirect's argument is likewise different from Freund. In Freund, the defendant's argument for new trial on punitive damages was based on a claim that the court had improperly admitted evidence of a non-party's financial condition that could have confused the jury. Id. at 765. The court held that the defendant's failure to object to the introduction of this evidence at trial, coupled with the otherwise sufficient evidence of the defendant's financial condition, warranted denial of a new trial. Id.

or a new trial on the amount for punitive damages. For the following reasons, the Court agrees that Array did not provide meaningful evidence of financial condition and finds the punitive damages award cannot stand.

California law authorizes punitive damages when a plaintiff can establish by clear and convincing evidence that the defendant engaged in oppression, fraud, or malice. Cal. Civ. Code § 3294(a). In both determining and reviewing punitive damages, courts and juries are instructed to consider: (1) the reprehensibility of the defendant's conduct, (2) the relation between compensatory damages and the harm suffered, and (3) the award's relationship to the wealth of the defendant. Adams v. Murakami, 54 Cal. 3d 105, 110 (1991). It is the last of these considerations that ConsumerDirect challenges.

In order for a reviewing court to determine whether an award is excessive compared to a defendants wealth, the court must be able to compare the financial condition of the defendant with the punitive damages. See id. at 110 ("Because the quintessence of punitive damages is to deter future misconduct by the defendant, the key question before [a] reviewing court is whether the amount of damages 'exceeds the level necessary to properly punish and deter.'"). A reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition." Id. This is because "the most important question is whether the amount of the punitive damages award will have deterrent effect—without being excessive." Id. at 111.

Thus, the trial record must contain "*meaningful evidence* of the defendant's financial condition" at the time of the trial. See id. at 109 (emphasis added). There is no "rigid standard for measuring a defendant's ability to pay." See Green v. Laibco, LLC, 192 Cal. App. 4th 441, 452 (2011) (citing Adams, 54 Cal. 3d at 109). However, California courts have routinely defined "meaningful evidence" to mean evidence of a defendant's net worth, not gross figures. See Boyle v. Lorimar Prods., Inc., 13 F.3d 1357, 1361 (9th Cir. 1994) ("The rule established by lower California courts is that only net, not gross, figures are relevant."). Therefore, "[t]he record must contain sufficient evidence of [the defendant's] assets, income, and liabilities and expenses for the punitive damages award to stand." Kaffaga v. Estate of Steinbeck, 938 F.3d 1006, 1019 (9th Cir. 2019) (vacating the jury's punitive damages award where despite some evidence of

financial condition, there was not enough evidence for even a "a reasonable approximation" of the defendant's net worth).

1. Array's Evidence of Financial Condition

Array argues that there was sufficient evidence of ConsumerDirect's financial condition in the record. Array points to several pieces of evidence and attempts to draw a chain of inferences that serve as a reasonable "proxy" for financial condition. The chain is as follows:

- There are roughly 37 white label relationships with ConsumerDirect. (See Trial Tr. 11/3/23 AM at 25:10–12.)

- Of those 37 white label relationships, Identity Club is "on the larger end" if not the largest, historically. (Id. at 25:16–18; see also Trial Tr. 11/3/23 PM at 108:13–18.) The Identity Club profit margin for ConsumerDirect was about 13 percent. (Trial Tr. 11/3/23 AM at 51:1–4.)

- White labels make up "the bulk of" ConsumerDirect's business. (Opp'n at 4.) Indeed, the jury heard testimony that nearly 80% of ConsumerDirect's business is business to business, including white labels. (See Trial Tr. 10/31/23 AM at 71:18–25, 72:4–9.)

- Angela Ortiz testified that ConsumerDirect's "last reporting" before trial was that ConsumerDirect earned "about 70 million in revenue" in connection with SmartCredit and had "over 20 million" in advertising expenses. (See Trial Tr. 10/31/23 AM 73:23–25, 74:1–5.)

- Therefore, by applying profit margin (13%) of one of the "bigger" white label customers, which themselves make up roughly 80% of ConsumerDirect's SmartCredit revenue ($70 million), which is the "bulk" of ConsumerDirect's business, the jury can infer net profits "between 9 and 10 million dollars of profit per year."[2] (See Trial Tr.

[2] The Court agrees with ConsumerDirect that it is unclear how exactly Array derived "between 9 and 10 million" in profit. The most likely scenario is that they multiplied the 13%

11/8/23 AM at 20:21–25; see also Opp'n ("that profit margin is a reasonable approximation of [ConsumerDirect's] overall profit margin").)

2. The Chain of Inferences Is Not Meaningful Evidence of ConsumerDirect's Financial Condition

Array's chain of inferences is not enough to create meaningful evidence of ConsumerDirect's financial condition for three reasons. First, the $70 million revenue presented at trial is a gross figure, not net, and is not made meaningful by evidence of one expenditure. Second, there is insufficient evidence to demonstrate that Identity Club's profit margin should apply to overall revenue. Third, even if it were reasonable to apply Identity Club's profit margin to the overall $70 million revenue, there is no meaningful evidence that 13% is the profit margin at the time of trial.

a. $70 Million in Revenue is a Gross Figure that is Not Saved by Evidence of a Single Expenditure

Array first argues that there is sufficient evidence of ConsumerDirect's financial condition because the jury heard testimony that SmartCredit, which is the core brand of ConsumerDirect, created $70 million in revenue and had $20 million in marketing costs at the last reported time before trial. (Opp'n at 13.) Specifically, the record supports that SmartCredit is the "flagship product" of ConsumerDirect. (Trial Tr. 10/31/23 AM at 70:16–19.) At the time of last reporting, SmartCredit had generated "about 70 million in revenue." (Id. at 74:1–5.) SmartCredit also had advertising costs of $20 million. (Id. at 73:23–25.)

Assuming that SmartCredit generates all or most of ConsumerDirect's business, the $70 million gross revenue and $20 million marketing costs are still not meaningful evidence of ConsumerDirect's financial condition. While there was testimony in the record that ConsumerDirect had $70 million in revenue, this

profit margin for Identity Club with the $70 million last reported revenue for SmartCredit, which would result in a figure of $9.1 million. (See Mot. at 12.) It is equally unclear, then, how Array calculated that an award of $3.9 million is "three to four months of profit" for ConsumerDirect. (See Trial Tr. 11/8/23 AM at 26:17–19.)

figure only represents a gross figure, not net. See Boyle v. Lorimar Prods., Inc., 13 F.3d 1357, 1361 (9th Cir. 1994) ("The rule established by lower California courts is that only net, not gross, figures are relevant."). Merely providing one source of expense ($20 million in marketing costs) for one "flagship product" is not enough to have meaningful evidence of ConsumerDirect's net worth, nor is it enough to show even a "reasonable approximation" of such. Thus, the evidence of $70 million revenue and $20 million in marketing costs is insufficient and not meaningful evidence of financial condition.

b. Identity Club's Profit Margin Cannot Reasonably be Applied to the Overall Revenue of SmartCredit

Array's chain of inferences relies almost entirely on the application of Identity Club's profit margin to the overall revenue. As described by Array:

> [The Identity Club] profit margin is a reasonable approximation of [ConsumerDirect's] overall profit margin. As discussed above, the record established that [ConsumerDirect's] white label business represented the bulk of its overall business; thus, the profit margin on one of [ConsumerDirect's] largest white label customers is a reasonable proxy for its overall profit margin.

(See Opp'n at 15.)

To be sure, there are often liberalities to calculations and there need not be a rigid formula for net worth in establishing financial condition. However, Array stretches these adjectives (e.g., "largest") and approximations too far without any support in the trial record. To best explain why these approximations are insufficient evidence, the Court will use fictitious percentages.

The trial record tends to support that Identity Club was "on the larger end" of the white label customers. (Id. at 25:16–18; see also Trial Tr. 11/3/23 PM at 108:13–18 (Array's damages expert stating that Identity Club was one of the "largest clients" but "not that much larger" than others).) However, "on the larger end" or even "largest" of 37 white label partners could mean anywhere from 10% of ConsumerDirect's white label business to 95% of its white label business. If, for instance, Identity Club was only 10% of white label revenue, then it would be

illogical to apply the profit margin of a partner, which makes up only 10%, of 80%, of a "flagship product" of ConsumerDirect's business. In such case, Identity Club's impact on overall revenue would be too small to provide a meaningful picture of ConsumerDirect's financial condition. Indeed, without more precise testimony at trial, it is not possible to understand the impact of Identity Club on white label revenue—nonetheless overall revenue.

Even assuming, *arguendo*, that Identity Club was an extraordinarily high percentage—such as 90%—of white label revenue, the chain of inferences still does not create a reasonable approximation of ConsumerDirect's financial condition. In that case, the only evidence of ConsumerDirect's financial condition would be that 90%, of 80%, of a flagship product that generated roughly $70 million at the time of trial. Applying the 13% profit margin to overall revenue would still be too speculative and far too attenuated to provide a meaningful understanding of ConsumerDirect's financial condition such that this Court can determine whether the award of punitive damages was reasonable.

Furthermore, there is no explanation for why Identity Club, at any level, would be a reasonable proxy for overall expenditures. It is possible—and quite likely—that Identity Club has different operating costs than other white label partners, not to mention the entire flagship brand. Attempting to use the profit margin for one white label partner to represent the profit margin of an entire business is simply too abstract and not meaningful evidence of ConsumerDirect's overall assets and liabilities. See Zhu, 2023 WL 4772338 at *6.

Finally, the trial record indicates that neither party attempted to examine the overall financial condition of ConsumerDirect because overall financial condition was not at issue in the liability portion of the case. Indeed, Array's damages expert confirmed that, to his knowledge, neither he nor ConsumerDirect's damages expert had reviewed full financial statements as part of their analyses. (Trial Tr. 11/3/23 PM 83:5–12.) While Array responds that both experts reviewed ConsumerDirect's financial conditions in their reports, such argument is unavailing where the reports were not admitted into evidence nor reflected the last reported net profits before trial. Accordingly, Identity Club's profit margin cannot reasonably be a substitute for overall profit margin of ConsumerDirect.

c. The 13% Profit Margin May Not Reflect the True Profit Margin at the Moment of Trial

The crux of Array's position relies on the use of 13% as the profit margin to be applied to overall revenue of $70 million. This profit margin comes from Identity Club. As discussed, the Court finds that it is not sufficient for Array to use Identity Club's profit margin as a proxy for ConsumerDirect's overall net worth. However, even if it were appropriate to apply Identity Club's profit margin, the Court finds that 13% is not supported by the trial record because it is unclear whether 13% reflected the last reported profit margin before trial.

"A punitive damages award is based on the defendant's financial condition *at the time of trial*." Kelly, 145 Cal. App. 4th at 915 (emphasis added). In this case, it is unclear whether the 13% profit margin of Identity Club was calculated for October 2020, when Identity Club first moved away from ConsumerDirect, or at the time of trial. The 13% figure comes from testimony by Victoria Wilkerson, ConsumerDirect's witness, who was testifying about Array's profit margins. (Trial Tr. 11/3/23 AM at 50:15–25.) ConsumerDirect's counsel briefly pivoted by inquiring whether Wilkerson calculated "the Identity Club profit margin for ConsumerDirect." (Id. at 51:1–4.) Wilkerson responded "so that was closer to 13 percent." (Id.) This profit margin was "specific . . . for Identity Club only." (Id. at 50:15–25.)

The parties dispute whether Wilkerson's critical testimony was a present-value profit margin or reflected the value October 2020, when Wilkerson calculated ConsumerDirect's damages. Array argues that the testimony could represent the present value because "she did not testify . . . that the profit margin was limited to 2020." (Opp'n at 16.) ConsumerDirect rebuts that the trial record plainly demonstrates that the questioning was about her calculation of damages for October 2020. (Reply at 8.)

The Court agrees with ConsumerDirect that the context of the questioning demonstrates that the calculations were made in October 2020. (See Trial Tr. 11/3/23 AM at 17:13–20.) Indeed, the purpose of the testimony was to show lost profits between the time of alleged interference, October 2020, and the subsequent decrease in revenue. (Id. at 18:9–25.) Wilkerson "calculated losses out five years from the date of [her] valuation report, which was April of '23." (Id. at 22:22–25.)

Moreover, on cross examination, Wilkerson clarified that she did not look at Identity Club revenue with Array following "the time period [she] testified about earlier" which was before "November of '22." (Id. at 43:7–14.) This further supports that Wilkerson's 13% figure was calculated, at the latest, one year prior to trial.

Finally, it is unlikely that the 13% would have remained static from 2020 to 2023, as Array contends, in light of the loss of Identity Club customers after 2020. If Identity Club was as large of a profit generator as Array argues, then common sense would dictate that in 2023, years after losing Identity Club and most of its customers, there would be immense financial repercussions. In that case, applying the 13% profit margin would not be indicative of ConsumerDirect's financial condition at the time of trial.[3]

Even if the record were ambiguous as to what date the 13% profit margin was calculated, such would weigh against a finding of meaningful evidence. Without a clear date, the Court would only be speculating as to ConsumerDirect's liabilities at the time of trial, which could be significantly lessened after Identity Club's transition to Array. In light of the several other reasons for this Court not to apply the profit margin, speculation about the time 13% was calculated proves fatal. Accordingly, without meaningful evidence of ConsumerDirect's financial condition at the time of trial, the punitive damages award cannot stand.

d. Conclusion

There is no "rigid standard for measuring a defendant's ability to pay." See Green, 192 Cal. App. 4th at 452 (citing Adams, 54 Cal. 3d at 109). "Indeed, it is likely that blind adherence to any one standard could sometimes result in awards which neither deter nor punish or white deter or punish too much." See Kelly, 145 Cal. App. 4th at 916. It is for this reason that California courts apply the meaningful evidence standard to a defendant's financial condition. See id. at 915–916 (noting that income alone does not permit meaningful review and that "something more is required").

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[3] Alternatively, even if the 13% is a measure of profit margin at the time of 2023, then Identity Club would no longer have been the "largest" white label at the time of trial. Thus, it would not be appropriate to apply the 13% profit margin.

Array failed to meet its burden of showing "meaningful evidence" of ConsumerDirect's financial condition and ability to pay damages. Array argues that ultimately, what matters is the defendant's ability to pay and that $3.9 million is affordable to a company that spends $20 million annually on marketing. (Opp'n at 14.) Not so. "[T]he most important question is whether the amount of the punitive damages award will have deterrent effect—without being excessive." Adams, 54 Cal. 3d at 111 (reversing punitive damages for lack of evidence of assets and liabilities supported by testimony); see also Boyle, 13 F.3d at 1361 (vacating for same). Without meaningful evidence of financial condition at the time of trial, "a reviewing court can only speculate as to whether the award is appropriate or excessive."[4] Such is the case at hand.

Ultimately, the trial record contains some evidence of ConsumerDirect's financial condition. This evidence, largely admitted into evidence by ConsumerDirect itself, showed $70 million in revenue for a flagship product, $20 million in marketing costs for the product, and a 13% profit margin for one white label partner that was indeterminably "larger" than others. This is not meaningful evidence of the financial condition of ConsumerDirect at the time of trial such that this Court can uphold a $3.9 million punitive damages award.

3. Punitive Damages Cannot Stand and New Trial is Not Warranted on These Facts

"When the plaintiff has had a full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence." Kelly, 145 Cal. App. 4th at 919. Indeed, "[f]or our justice system to function, it is necessary that litigants assume responsibility for the complete litigation of their cause during the proceedings." Id.

Kelly provides useful guidance here. There the plaintiff sued the defendant for fraud and negligence. Id. at 913. The jury awarded $75,000 in punitive

[4] Moreover, without meaningful evidence, a jury is "encouraged (indeed required) to speculate as to a defendant's net worth in seeking to return a verdict that will appropriately punish the defendant." Adams, 54 Cal.3d at 114.

damages. Id. On appeal, the court found that the plaintiff had failed to present meaningful evidence of the defendant's financial condition or ability to pay.[5] Id. at 917. The court declined to remand the case for retrial, opting instead to strike the punitive damages entirely because "[plaintiff] had a full and fair opportunity to present his case for punitive damages, and he does not contend otherwise." Id. at 919. The plaintiff had the ability to subpoena documents or witnesses and present evidence at trial to establish the defendant's financial condition. Id. While the court initially refused plaintiff's request to delay proceedings in order to prepare for punitive damages phase, it subsequently changed its mind and asked if plaintiff would "like to come back tomorrow." Id. Because the plaintiff declined this request, the court found that the facts did not merit a retrial. Id.; see also Robert L. Cloud & Associates, inc. v. Mikesell, 69 Cal. App. 4th 1141, 1153 (1999) (striking punitive damages rather than remanding the case for retrial where plaintiff did not meet his burden of providing meaningful evidence of the defendant's financial condition).

In the present matter, Array was provided with a full and fair opportunity to litigate its case, including punitive damages. Indeed, as Array claims, it included a prayer for relief for punitive damages in the original complaint. (See Dkt. No. 170, 30–31.) Moreover, on October 25, 2023, nine days before the close of evidence, the parties exchanged verdict forms that included punitive damages. (See 50(a) Order, Dkt. No. 566 at 12.) Thus, Array knew that it would seek punitive damages and had the opportunity to establish ConsumerDirect's financial condition. Yet, it appears that Array chose not to pursue such a course.

Indeed, after the jury found ConsumerDirect liable on the claim of intentional interference with prospective relations, the court moved into phase two of trial. Prior to closings, the Court asked Array "would you like to address the jury or would you like to present your evidence?" (Trial Tr. 11/8/23 AM at 17:25–18:1.) Array's counsel thanked the Court and began closing. (Id. at 18:2–6.) The Court cut in and asked "Sir, are you going to offer any evidence before argument?" (Id. at 6–7.) Array responded, "Your honor, only evidence

[5] Much like the case at hand, in Kelly the only evidence of financial condition—property of the defendant—was insufficient because there was no evidence presented at trial of any potential encumbrances on the properties at the time of trial or even evidence that the defendant still owned the property. Id.

that was entered as part of the main case, because we did not bifurcate the evidence." (Id.) The record demonstrates that Array had an opportunity to prove punitive damages and chose not to produce such evidence. At this time, the law was clear that Array had the burden of producing actual evidence of ConsumerDirect's financial condition, including net profits. See id.; see also Adams, 54 Cal. 3d at 123 ("[A] plaintiff who seeks to recover punitive damages must bear the burden of establishing the defendant's financial condition.")

Moreover, nearly all of the evidence that Array utilized to argue ConsumerDirect's financial condition, came from ConsumerDirect's testimony.[6] The $70 million revenue and $20 million figures came from direct examination by ConsumerDirect. (See Trial Tr. 10/31/23 AM at 73:25–74:4.) The testimony that 80% of core business came from white labels came from direct examination by ConsumerDirect. (See id. at 71:10.) Finally, the 13% profit margin testimony came from ConsumerDirect's redirect. (See Trial Tr. 11/3/23 AM at 51:4.)

While evidence may certainly come from any witness or exhibit, direct or cross examination, the fact that Array presented none of its own evidence of financial condition is further support that retrial is not necessary. See Adams, 54 Cal 3d at 120 ("If the plaintiff does not introduce evidence of the defendant's finances, the only alternative source of the information is the defendant. It is inherently prejudicial to require a defendant to introduce evidence of personal finances."). Array may have chosen not to present evidence because it did not expect to argue punitive damages—as ConsumerDirect contends—or simply because it thought that it had met its burden. In either event, the award of punitive damages cannot stand.

Accordingly, the Court declines to grant a new trial on the issue of punitive damages and strikes the punitive damages award.

While not directly relevant to the motion for new trial, the Court notes that but for ConsumerDirects' failure to preserve the punitive damages issue on its

[6] Indeed, it appears that Array even conceded this point at closing. (See Trial Tr. 11/3/23 AM 20:9–11 ("Finally, with respect to ConsumerDirect's financial condition, fortunately, their witnesses testified all about it.").)

Rule 50(a) motion, the Court would likely have granted a renewed Rule 50(b) motion granting judgment as a matter law based on a failure of proof.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** in part the motion for new trial on punitive damages.

IT IS SO ORDERED.