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Court of Appeal, Fourth District, Division 3,
 California.
 Ronald WILLIAMS et al., Plaintiffs and Appellants,
 v.
 BENDETTI MANAGEMENT GROUP et al.,
 Defendants and Appellants.
Nos. G031578, G031707, G031768.
(Super.Ct.No. 797067).

May 19, 2006.

As Modified on Denial of Rehearing June 19, 2006.

Appeal from a judgment of the Superior Court of Orange County, [William F. McDonald](#), Judge. Affirmed in part; reversed in part and reversed with directions in part.

Richard I. Singer Law Offices, [Richard I. Singer](#) and [Elvi J. Olesen](#) for Plaintiffs and Appellants.

Rutan & Tucker, [Milford W. Dahl](#); Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, Berger Kahn, [Arthur Grebow](#), [William S. Yee](#); Greines, Martin, Stein & Richland, Irving H. Grienes, [Robert A. Olson](#), Laura Boudrau and [Sandra J. Smith](#) for Defendants and Appellants.

OPINION

[SILLS](#), P.J.

I. PROLOGUE

*1 This appeal arises out of the efforts beginning around 1997 of the owners and managers of a mobilehome park in Cypress (Lincoln Center) to have *all* their residents sign a certain lease form. Ultimately, those efforts (and the lease itself) would

be judged to have run afoul of both the Mobilehome Residency Law (the Mobilehome Law) and statutory protections against retaliatory evictions afforded all tenants, including those of mobilehome parks ([Civ.Code, § 1942.5 \(section 1942.5\)](#)). [FN1]

[FN1](#). All statutory references in this opinion will be to the Civil Code unless otherwise specifically stated.

The case is a complex one, because of several factors: First, the sheer length of the record and the extraordinary number of issues raised by able counsel for both sides. Second, there are no less than four independent components of the ultimate judgment (rescission damages, statutory penalties under [section 1942.5](#), and attorney fees). Third, procedurally, the case was certified as a class action with 128 class members. Fourth, discovery attempted to be taken of passive members of the class resulted in the dismissal of a little more than half (110) of the passive class members because they didn't return their interrogatory forms, which is a major issue by itself. Fifth, the defendant owners and managers include multiple and overlapping parties, including two individuals named Bendetti, one of whom counts as an agent-manager of the park and the other as owner by virtue of his interest in the partnership that owns the park, and the confusion is confounded by the trial court's inclusion of both owners and managers-agents on the judgment. Sixth, this case involves both an appeal by the defendant owners and managers and a cross-appeal by the plaintiff resident class. Seventh, there are no less than four jury instructions (albeit all under the rubric of the [section 1942.5](#) penalties) which have been asserted as prejudicial error. Eighth, there are a number of issues which don't fit under the rubrics of any of the four categories of money awarded, but which represent challenges to the judgment as a whole.

Thus, we face at the outset a major organizational challenge in dealing with the case. One could organize by elements of the judgment (rescission, Mobilehome Law penalties, [section 1942.5](#) penalties, and attorney fees) with the issues pertaining to the judgment as a whole discussed before or after; organize seriatim by the "issues" raised in each side's brief (a fact complicated because this opinion is the

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result of a grant of rehearing which allowed us yet more extensive briefing); or organize by some otherwise logical order.

Ultimately, we have elected to organize first by the challenges to the judgment as a whole, then by challenges to its constituent parts in a logical order (as much as possible, from general to specific). [FN2] Within each constituent part topic we will attempt to identify where the issue was presented in the original briefing by the relevantly appealing party.

[FN2]. In doing so, our hope is to first establish points on which later issues depend. For example, it is easier to understand what we say about [section 1942.5](#) penalties for retaliatory eviction if it is first established that the lease violated the Mobilehome Law.

II. FACTS

A. Leading to Litigation

*2 Because of the multiplicity of issues, specific facts are probably best related in the context of the substantive discussion of the issue. However, certain key facts should be noted at the beginning. [FN3]

[FN3]. In substantial evidence cases (and much of this appeal is a nothing more than a substantial evidence case) the general rule is that the failure to set forth *all* material evidence is grounds for the appellate court to conclude that any such point has been waived. (E.g., [Foreman & Clark Corp. v. Fallon](#) (1971) 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362; [Brockey v. Moore](#) (2003) 107 Cal.App.4th 86, 96-97, 131 Cal.Rptr.2d 746.) The appellants' opening brief does not set forth all the relevant evidence. Respondents therefore argue that most, if not all, of the appellants' substantive argument has been waived. We decline the invitation. This case, given the number of issues, the unusual four-part structure of the judgment, and the sheer voluminousness of the record, is tough enough for everybody, and setting forth all the evidence would have made voluminous briefs even longer.

The first of these is the management structure of the park. Lincoln Center was owned by a partnership consisting of *Don* Bendetti and Lloyd Mochler. The

partnership hired Bendetti Management Company, whose president was *Bob* Bendetti, to run the park. The management company in turn hired Jim Lawson, who supervised John Sherry (and his wife), who were the weekday resident managers.

About 1997, the owners and managers of Lincoln center decided that the park residents should be standardized along the lines of one specific lease form prepared by a lawyer for the park. One reason that would be given by the park owners and management was that leases would facilitate financing by third-party lenders for residents who sought to sell their mobilehomes. To the degree that the new lease helped reassure lenders, it would correspondingly help residents' property values which in turn would help upgrade the overall appearance of the park.

The basic story can be related in the rounds of notices concerning the new standardized lease and the rounds of rent increase notices that followed in their wake. By definition these rounds of rent increase notices were directed at residents who had not, at that point, signed the new lease.

The first lease notice was in the form of a memo from "Park Management" to "All Residents" dated April 15, 1997. (The memo, like many of the documents in the record, was in all caps. Since there are no issues of, say, prominence of typeface in this case, we will, in quoting from various documents in the record, render all of them into normal capitalization to increase readability.) The memo read:

"The Park is offering a long term (five year) lease to replace any leases that have expired. A one year lease is also available. [¶] The five year and the one year leases are identical except for their duration. [¶]" The only controversial language was in the final two paragraphs: "If you do not respond to the office **within 30 days** from this date, as to whether or not you wish to sign a new lease, we will assume you want to remain on a month to month lease. [¶] Per the terms of a month to month lease, your rent may be increased every month, upon 90 days notice." (Bold type in original, as it is throughout.)

The next memo was dated "May 1997." This memo contained no reference to rent being "increased every month, upon 90 days notice."

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The May memo was followed by one dated June 10, 1997, which repeated the "every month increase" threat, though it was addressed only to "residents on expired leases" as distinct from all residences. (Even so, the number of such residents could have been substantial, since there is evidence in the record, in the form of exhibit 11, that suggests the previous practice of the park was to *automatically* renew one-year leases, and it is clear that by the Spring of 1997 none of the *old* leases were being renewed.)

*3 Seven days later, on June 17, 1997, a number of rent increase notices were going out on the Park's standard form for rent increases, effective of course October 1, 1997. These rent increases, however, followed the form used in the late 1996 rent increases of setting forth 5 percent rent increases.

These rent increase notices were followed, a day later, by yet another lease notice memo to "All residents" which had the "your rent may be increased every month, upon 90 days notice" tagline.

A meeting of homeowners held under the rubric of the Golden State Mobile Home Owners League was held in late June, 1997. The minutes of the meeting included these comments about the new lease: "The remainder of the meeting was centered around questions concerning the **New Multi Year Rental Agreement** and complaints concerning the unprofessional mannerisms and dictatorial attitude harassing threatening and vulgar language of our '**Present Managers**'. Also, discussed was the lack of cooperation and honesty of returned phone calls from Bob Bendetti and Jim Lawson." These minutes also referenced specific objections to the lease (we discuss these objections substantively below in part IV. of this opinion): "Do you want to pay an additional \$12.89 per month for garbage and pay for your own water, that up to now was included in your rent, without a decrease in your rent? Do you want to pay for all the owners expenses including taxes, insurance, uninsured losses and lawsuits, capital improvements with interest and replacement?"

Next came a round of rent increases dates July 23, 1997, but these increases were different--instead of the blank being filled in with "5.00 percent" these were for \$50--as distinct from 5 percent.

Another lease notice was sent to all residents in July 26, with the same "your rent may be increased" language.

A larger round of rent increase notices, again of the \$50 variety, went out on August 11 and August 18, effective December.

A further round of \$50 rent increases went out December 23, 1997.

And yet another round of rent increases went out in Spring 1998. These notices weren't dated, but gave July 1, 1998 (i.e., given the 90 day notice period, probably went out in March) as their effective date.

Also, a memo from park management signed by John Sherry of February 14, 1998, to "one of only a few residents that have not signed a lease" made the linkage between rent increases and not signing the lease to be quite plain. Said the letter, in all caps and underlined: "As you know, your next rent increase is set for April first. If you wish to review a lease and get all your questions answered, call me. We can waive your next increase, if we get a lease signed before March 10."

On top of that, a memo from one resident to officers of the residents' league dated March 29, 1998, also noted the linkage: "A handful of us, having refused to sign the lease, and having been assessed two \$50/mo rent increases (the second to take effect next week), are bearing the brunt of the inaction and are the most vulnerable. My personal penalty for not signing now totals \$1,200/yr."

*4 Letters from residents who *signed* the lease also recognized the linkage. One couple wrote: "We finally signed a five (5) year lease, based on the threat that we would be paying \$675.00 within the year." (Their previous rent had been \$576.26.)

Seven of the 108 plaintiffs who would ultimately be the beneficiaries of the class action award did not sign.

The record also contains a considerable amount of what might be termed anecdotal evidence concerning Sherry's interactions with residents when they would complain or otherwise talk to him about the new leases. One resident balked at the language accepting the property in good repair as is and was told the lease was " 'all or nothing.' " One resident could not get a filled-in lease; she was only given a blank one (with blanks for rental amounts). Another resident received a call "from a very angry Mr. Sherry, stating that he was still waiting for me to decide if I wanted

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one (1) or five (5) lease, and *he couldn't keep waiting around for me to decide.*" (Italics added--more on that later in parts VI.C.1. and VI.E.) Another resident described this confrontation: "When we brought [the lease] back to the club house, Mr. Sherry became enraged that we placed any notes on the lease agreement. He dropped it in the trash can and literally threw another blank agreement in my husbands face, stating that he really didn't have to take any more lease options from us, and if we did not agree to everything exactly as it was written on this new agreement, he would refuse to allow us any lease." Along these lines, at trial a number of residents testified that Sherry told them point blank that if they didn't sign the lease, they would get a \$50 rent increase every month until they did sign.

One resident wrote a rent check for *8 cents more* than required, and Sherry told the resident that if she did not have another check that evening, she would be charged a \$50 late fee.

Sherry's comments to residents about signing the new lease or facing continuing rent increases, and the residents' complaints about them, reached higher ups in the Lincoln Park organization. After one resident went to Sherry's office, she would later write to Bob Bendetti: "I was told that I could not have 30 days to review the lease, that water meters would go in the next week and would not have a 60 day notice as indicated in the old lease, and would have to pay for trash as well, without proper notification. If I did not sign the lease he would raise my rent by 5% every month. Another resident wrote in a letter of September 5, 1997 addressed to *Donald* Bendetti of the Bendetti Management Company--that is, the letter was to the Bendetti who was an *owner* of the park--that he had been threatened when he balked at an 'as is' provision in the lease. He wrote: "There is a problem with my homesite which I'd like to have corrected before entering another lease, when I told Mr. Sherry about it, he said it wouldn't be corrected, and if I didn't initial the item, I could not have a lease--and that I could expect a subsequent rent increase. [He had just received one effective December 1.]" And at another point a residents' league committee approached Sherry's boss Lawson, and told him of Sherry's statements about \$50 rent increases, but Lawson backed up Sherry by saying that the park could raise rents as much as it wanted and the lease was non-negotiable.

*5 And there were communications from Sherry to

his superiors about the residents' complaints (though Sherry was not around to be deposed about them when the litigation got under way). A fax from John Sherry to Jim Lawson referring one tenant implied that Sherry had talked to Bob Bendetti about the matter and that Bob Bendetti was fully in support of a hard line. The fax said: "His check does not include his 50 oo rent increase. [¶] What do you want to do now. [¶] Bob said to let him sue us? "

(To get ahead of the story somewhat, Sherry and his wife resigned as "resident managers" around July 1999. In the wake of their resignation, a payroll form had this comment about him and his wife: "*They abandoned their job.*" (Italics added.))

By the Spring of 1998 the homeowners had engaged a law firm, and on May 5, 1998, a letter from that law firm was sent to the park management. We will quote that letter in detail in part IV.B.1.c. of this opinion, but for the moment it is enough to say that it asserted that (1) rents were being raised in retaliation for not signing the new lease and (2) the new standardized lease violated a number of provisions of the Mobilehome Law. However, the letter offered the prospect of settlement by negotiating a new standardized lease, more acceptable to the residents.

The response to the letter came from James Lawson on Bendetti Management Group letterhead. While asserting that, "The park has never raised rents in a retaliatory manner" and noting that the "current rent roll reveals that rents charged to those that did not sign a rental agreement are similar to many that did," it also defended the new lease against allegation of violation of the Mobilehome Law. "In light of this record, your allegations of violations of [Civil Code Sections 798.17, 798.18, 798.19, 798.25, and 1942.5](#) are mistaken." The letter concluded, "In conclusion, the rental agreement offered to residents at Lincoln Center is completely legal, as was the manner in which it was offered."

In that regard questions of the legality of various of the lease provisions had been raised by the residents themselves as early as the summer of 1997. Lawson, consistent with his backing of Sherry, took the position that all the provisions of the lease were legal, though he conspicuously declined to consult with a lawyer about the merits of the residents' assertions.

Specifically, Lawson's letter of September 19, 1997 to Don Renno referenced a meeting between Lawson

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and a Mr. Miklos and a Mr. Mollenkramer. The "main topic" was "the long term lease we are offering the residents of Lincoln Center." Here is what Lawson wrote: "As I am sure you are aware, under a month-to-month tenancy, a resident's rent may be raised any time and by any unrestricted amount after a 90-day notice." Further: "If you don't like the choices offered to you, you don't have to accept any of them."

And here was his defense of the lease provisions: "Bear in mind that the lease was written by a prominent mobilehome park attorney. Nevertheless, you stated that the outline you were handing me specifically noted which sections of the lease were illegal and which sections of the Civil Code were violated. I took your outline and agreed to have the lease review by another attorney. Upon reviewing your outline, I found that it did not refer to specific violations of the Civil Code, but rather was a list of 'objections' to the lease. Several objections make vague references to Civil Code sections (which I will respond to below), but nothing in your outline makes specific allegations of illegalities. *Having been misled, I will not have the lease reviewed by another attorney. Rather, I will respond to your objections one by one.*" (Italics added.)

B. Post-Litigation

*6 This lawsuit was filed in July 1998. More than three months later, in November 1998, the owners of Lincoln Center park sent a memo to all residents, primarily trying to dispel "rumors" that the owners were planning to pass through the cost of major improvements. The memo also contained this paragraph on the topic of rescission of leases previously signed: "Finally, a few residents in the park have expressed a concern regarding the new 5 year lease, which 98% of the residents signed. To address these concerns, we have decided to offer all residents 72 hours to rescind their lease and go back to renting on a month-to-month basis, or take the same terms for one year, as required by the mobile home residency law."

There was no offer to rescind *previously imposed rent increases*.

The lawsuit was eventually certified as a class action, but the class was later reduced when 110 class members did not respond to discovery. Sherry defaulted.

At trial 15 (16, if you count one couple as two) of the remaining 108 class plaintiffs testified.

Let's now review the judgment in detail. The trial court found that the lease violated the Mobilehome Law in no less than six different ways. The trial court (as the judgment would ultimately be corrected) assigned penalties of either \$500 or \$100 to each violation, with three \$500 violations and three \$100 violations. The total was \$1,800 per remaining class member for a total award of \$194,400 in Mobilehome Law penalties. ($500 + 500 + 500 + 100 + 100 + 100 = 1800$; $1800 \times 108 = 194,400$.)

The total rescission (often called "restitutionary") damages were \$190,891.52, but this figure was the aggregate of differing amounts for each of the 108 class members. One couple, for example, received only \$37.50 and one woman only \$2.91, while another couple received \$4,048.98. As explained in Judge McDonald's statement of decision, the calculation was made by first determining a "monthly fair rental value set off" for two periods (1) July 1997 through the end of 1999, and (2) the first year and a half of the 2000's (January 1, 2000 through June 2001). Judge McDonald determined the former to be \$480 a month, while the latter was \$500. The difference between that and the actual rents received were then recoverable by each class member. (Some people actually paid less than \$480 in the first period, and there was no set off for them.)

Section 1942.5 penalties for retaliatory eviction (denominated "punitive damages" in the judgment [\[FN4\]](#)) amounted to a total of \$334,800, based on \$3,100 per 108 class members. The \$3,100 was one penalty, but assessed against four specific defendants, in varying amounts capped by \$1,000. The four defendants were: Bendetti Management Company (\$975); John Sherry (\$500); Bob Bendetti (\$850); and Jim Lawson (\$775). ($975 + 500 + 850 + 775 = 3,100$; $3,100 \times 108 = 334,800$.) However, despite the fact that *Don* Bendetti and the partnership were specifically absolved by the jury of any oppression, malice or authorization or ratification of oppression or malice, the judgment provides that Don Bendetti and the partnership are jointly and severally liable for the \$334,800.

[FN4](#). We will discuss the problems of using that term in part V.A. below.

*7 Finally, the trial court awarded \$882,991.14 in

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attorney fees.

This appeal followed. [\[FN5\]](#) After an initial opinion generally affirming the judgment (albeit allowing the claims of the dismissed 110 passive class members to go forward), this court granted rehearing in order to consider all the numerous issues raised by the parties.

[FN5](#). There are three appellate docket numbers because there was (1) a first appeal, G031578 by the owners and managers from the first judgment (R-1); then, after that judgment was amended downward in a new judgment (R-2), the residents filed an appeal--in substance really only their cross-appeal, G031707; and finally, the owners and managers filed their own appeal (G031768) from the R-2 judgment as well.

III. ISSUES REGARDING THE JUDGMENT AS A WHOLE

A. The Propriety of the Certification of the Class in the First Place

[\[FN6\]](#)

[FN6](#). Our discussion here corresponds to Argument I.E. in the appellants' opening brief.

While framed in a contingent mode (*if* the court remands for any reason, *then* the certification order must be reversed), the owners and managers argue that the trial judge's certification order was an abuse of discretion because "common issues did not predominate." (Appellants' Opening Br. at p. 31.) In that regard, they present an argument identical to that in *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 313, 327, where the defendant also argued that common issues did not predominate. In *Sav-On Drug*, which was a class action for unpaid overtime, the defendant drug store chain argued that determining the liability for unpaid paid overtime compensation "necessarily" required "individual computations of how much time each class member actually spent working on specific tasks." (*Id.* at p. 328.) In this case, the defendants argue that the rights of each of the residents was "based on a separate set of facts" as regards the park's treatment of them. In *Sav-On Drug* the trial court concluded that questions of the policies and procedures would predominate over the minutia of specific tasks performed by specific employees (see *id.* at p. 329), and it was held that the trial court did not abuse its discretion in that

case. Here, as in *Sav-On Drug*, the record also shows that overall policies and procedures adopted to apply to all residents easily predominate over individual treatment, so no abuse of discretion could be shown.

More specific authority on point is the leading case on class certifications for violations of the Mobilehome Law, [Rich v. Schwab \(1984\) 162 Cal.App.3d 739, 209 Cal.Rptr. 417 \(Rich I\)](#). There, five tenants in a San Diego area mobilehome park, each specifically identified by the court in its opinion, lobbied the local city council for a rent control ordinance. The city council adopted such an ordinance, and two days later the tenants were hit with a 13 percent rent increase. The parties agreed to arbitrate rent increases, but the defendants notified tenants that the rent would be increased once again. So, the five tenants "brought a class action" alleging in their first cause of action that the notice of the second rent increase was not properly given since it was given without adequate notice, and in any event was retaliatory for the tenants having petitioned the city council for a rent control ordinance in the first place. After the trial court granted summary judgment motions eliminating the tenants' causes of action, the tenants appealed and the trial court was reversed.

*8 After disposing of the merits of the rent increase issues, the *Rich I* court turned briefly to the propriety of proceeding as a class action. The court noted that the class was readily identifiable from the park's business records, and further stated that common questions of law and fact predominated because every member of the class received an identical rent increase in March 1981. Whether that notice violated provisions of the Mobilehome Law or was in retaliation for the earlier lobbying were common questions of law and fact to all class members. Moreover, the named tenants' claims were typical of the class. (See [Rich I, supra, 162 Cal.App.3d at pp. 744-745, 209 Cal.Rptr. 417.](#))

Let us now examine these basic factors here.

The idea that the class was *defined* as residents who had been "bullied, harassed and/or intimidated" into signing the new lease is inaccurate. The actual definition--from the notice of class action sent to all residents in the park--was "all homeowners or tenants who live or lived in the Park at the relevant time period and were subjected to the conduct alleged in the complaint and set out in paragraph 4 of this notice."

So what was this "conduct"? To be true, the complaint said: "Defendants, including specifically John Sherry, threatened, harassed and bullied class member plaintiffs into signing such [new] leases." (It also averred that "Many homeowners, afraid of losing their home and after being harassed, coerced, threatened and afraid of having to pay the threatened exorbitant rates, signed the leases, even though they believed they were unlawful.")

But paragraph 4 of the notice added more detail, showing that the bullying, harassment etc. did not necessarily have to be directed at all class members *individually*. Said the notice: "In the complaint, plaintiffs allege that at all times relevant during 1997 and thereafter, defendants offered leases to homeowners containing unconstitutional provisions, unfair and unlawful waivers, and generally unconscionable terms. The complaint further alleges that defendants demanded the leases be signed and moreover all homeowners had to agree to the objectionable provisions and, if leases were *not* executed, nonsigning homeowners would receive \$50 rent increases every 90 days." (Original underlining.)

It is thus clear that, substantially, the allegations of "bullying" "harassment" and "intimation" cannot be taken literally as asserting that *everybody* in the park had been the object of a Sherry temper-tantrum. The "bullying" etc. was basically an overwrought metaphor for what was more particularly described in paragraph 4 of the notice--namely, that *all* residents had been the target of a park-wide *policy* to force them into signing the new lease, which policy was backed up by the *threat* of \$50 rent increases to be directed at any given park residents who did not sign the lease. Thus there needn't have been any *individual* bullying by Sherry for a resident to be a member of the class. The general policy, even if only implemented by notices of rent increases given to a small number of recalcitrants, had the general effect of "bullying" all residents into signing the leases.

*9 By the same token, we further note that the notice-of-lease memos were directed to "all residents" and contained statements about rent increases that would be visited upon each one of them as an implied consequence of not signing.

In that regard, there is the fact that the notice of class action has very clear opt-in and opt-out provisions. Residents who, for sake of argument, might not have felt themselves the object of the *bullying policy* of

imposing rent increases if a lease wasn't signed could have opted out.

Finally, the proof of this pudding is in the judgment itself. Nothing in the judgment involves individual claims as such. The only individualized recoveries are in the damages for restitution, and those were based on an easily applied formula. (And in fact the appellants challenge that formula *qua* formula in the brief (see part V.A.)) There is also no question that the essence of this case involved just a few discrete actions (offering the new lease, raising rents on those who didn't sign) taken *collectively* against all residents in the park. Thus, as in *Rich I*, there can be doubt that claims common to all residents predominate. [\[FN7\]](#)

[FN7](#). Though, granted, the recoveries on *one* of those class claims-- rescission--varied by individual circumstance. That individual circumstance, however, was readily ascertainable by reference to the business records of Lincoln Center.

B. The Deletion of 110 Class Members Because of Discovery Nonresponses [\[FN8\]](#)

[FN8](#). Our discussion here corresponds to part II. A. of the residents' cross-appeal.

Our discussion on the propriety of class certification leads naturally to one of three issues raised by the residents' cross-appeal. [\[FN9\]](#) The residents assert the trial court erred in dismissing 110 class members who failed (after two extensions) to return interrogatory forms propounded by the owners and managers.

[FN9](#). One of the remaining issues deals with attorney fees, and will be included in our discussion of the appellants' challenge to attorney fees in part VII. The other involves certain reductions in the Mobilehome Law penalties, and will be dealt with in our discussion of the appropriateness of those penalties in part IV.C.

1. *Procedural Defenses*

We may at the outset reject the contention of the owners and managers that the cross-appeal regarding the dismissed class members is untimely because the dismissal order antedated the eventual notice of cross-appeal. That contention is simply a variation on

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the theme that this case really isn't a class action, and that individual resident's claims should be treated in isolation. No. Since the action was one class action, and yielded one final (albeit amended) judgment (a judgment providing for no recovery for the dismissed class members), the cross-appeal as to those class members properly is from that one final judgment.

2. The Merits

Apropos what we just said about the theme of the defendants' denial that this case properly proceeded as a class action, the owners and managers make the point that they had the right to discover the facts on which each class member asserted that he or she was a victim, the theory being that if a class member was not really aggrieved by owner or agent conduct, that person really should not have been a class member. Thus, if the gravamen of the complaint was that residents had been "bullied, harassed and/or intimidated" into signing the leases, and some class members signed them simply of their own free will, why should the latter be included in the lawsuit?

We have already addressed the substance of this contention above. The premise that the *definition* of the class was exactly equal to those residents who were individually and personally bullied by Sherry is a false premise. The class properly consisted of all residents who were the object of the *parkwide* policy of forcing a choice between signing the new lease or having one's rent increased, and that was all residents. [\[FN10\]](#)

[FN10.](#) The correlative argument that *some* (hypothetical) class of residents, postulated to be outside the informal grapevine or otherwise disposed to sign the lease anyway, should not have been included in the class, fails for this same reason. *Everybody*, whether exposed to gossip or independently minded to sign a lease, was the target of the park-wide policy.

*10 Thus any need on the part of the owners and managers for discovery of more individual instances of bullying (or lack thereof) was dubious to begin with. The discovery itself (albeit generally speaking) appears designed to weed out individual claims of individual class members, i.e., to discover who in the class had not been *individually* intimidated by Sherry into signing the lease. As we have said, this need was obviated because the class claims and the ultimate judgment do not depend on universal *individual*

intimidation by Sherry. Even if Sherry had never spoken a word to the 110 dismissed passive class members, they were still the target of a *policy* that applied to everybody. To use a metaphor that crops up here and there in the written complaints made by some of the residents, like a prison camp, the park management had made a deliberate decision to force all residents to sign the new lease, and any who balked would be made *examples of* by the commandant. Thus the undisputed fact that Sherry clearly made *some* explicit threats against some tenants--making examples of them--to raise rents \$50 a month until a given resident signed the lease was signed is sufficient. You don't have to threaten everybody with punishment if those who get out of line are made to feel immediate pain.

Even more significant, though, is the clear *effect* of the order. The leading case on discovery of passive class members is [Danzig v. Superior Court \(1978\) 87 Cal.App.3d 604, 151 Cal.Rptr. 185](#). To be true, *Danzig* does indeed contemplate that there will be some circumstances where discovery may be taken from passive members in a class action. Even so, that discovery must be aimed at *class issues* ("common questions, see [id. at p. 611, 151 Cal.Rptr. 185](#), citing *Dellums v. Powell* (D.C.Cir.1977) 566 F.2d 167,187) as distinct from individual issues, and most importantly for our purpose here, cannot have either the "purpose or *effect* of decreasing class size." ([Danzig, supra, 87 Cal.App.3d at p. 614, 151 Cal.Rptr. 185](#), italics added.) After all, "if adverse parties were allowed full discovery of every unnamed class member, there would probably be no class actions." ([National Solar Equipment v. Grumman Corp. \(1991\) 235 Cal.App.3d 1273, 1282, 1 Cal.Rptr.2d 325.](#))

The owners and managers never quite come to grips with *Danzig's* "no effect of decreasing class size" rule. The implication of that rule is that even in cases where discovery may be appropriate of passive class members, the *remedy* of decreasing class size by the summary dismissal of nonresponsive class members is off limits, and some other lesser sanction must be implemented. The trial court, however, did not craft a lesser sanction. Its sanction was to *directly* decrease the class size by dismissal.

The trial court's order dismissing 110 class members must therefore be reversed as beyond the limits of what the *Danzig* case will permit. Having said that, there is no need to speculate as to further issues on

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the point now since we do not want to tie the hands of the trial judge as to what lesser-than-dismissal sanctions might actually be appropriate. [\[FN11\]](#)

[FN11.](#) Though obviously a discovery sanction that was the functional equivalent of full dismissal (e.g., the trial judge says that the court won't actually dismiss the 110 passive class member claims, but will still enter an issue sanction which precludes any recovery) would be contrary to the *Danzig* rule of no decrease of class size.

C. The Proof Concerning the 93 Passive Members Who Weren't Dismissed
[\[FN12\]](#)

[FN12.](#) Our discussion here corresponds to Arguments I.A.-D. in the appellants' opening brief.

*11 A related theme to the idea that the owners and managers had the right to ascertain the individual grievances of each member of the class is the idea that *each* of the 108 (remaining) class members were required to prove that they were "bullied, harassed or intimidated" into signing the leases or otherwise justify any award for restitution, [section 1942.5](#) penalties, and Mobilehome Law penalties. Again, this argument fails because it is just another way of attacking the very idea this case should have proceeded as a class action.

This judgment does not depend on individual bullying, intimidation or harassment. It depends on a general course of conduct independent of individual actions: specifically proffering a lease with manifold violations of the Mobilehome Law [\[FN13\]](#) in it (that point is proven below), having a *general policy* of requiring every resident to sign the lease, and then threatening residents who objected to signing that there would be a series of \$50 rent increases if they didn't. *That* was the essential bullying, etc., and, at least as it is manifested in the judgment under our review now, it was independent of Sherry's bad manners. The judgment does not depend on the fact that there may have been some (perhaps isolated) residents who, outside the usual rumor mill, for the sake of argument, hadn't heard of Sherry's sometimes ballistic reaction to certain residents who balked in his presence at signing the leases.

[FN13.](#) Everybody, for example, was

expected to sign the same lease, which contained the same arbitration clause.

D. Nunc Pro Tunc Entry of Judgment [\[FN14\]](#)

[FN14.](#) Our discussion here corresponds to Argument VI. in the appellants' opening brief.

The operative judgment in this case is an amended judgment filed January 2, 2003. The first judgment was filed in October 2002, and the amended judgment, like the first, provided that it would be entered nunc pro tunc of a June 30, 2001--the date of the second period by which the trial court calculated rescission (restitutionary) damages.

The device of nunc pro tunc entries of judgments and orders is designed to correct errors and mistakes. (E.g., [Carpenter v. Pacific Mut. Life Ins. Co. of California](#) (1939) 14 Cal.2d 704, 707, 96 P.2d 796 .) Sometimes the grounds can include a party's death, but the basic reason is clerical error. (See 7 Witkin, Cal. Procedure (4th ed.1996) judgment, § 65, p. 593.) The device of entry nunc pro tunc is *not* a way of circumventing the rules concerning awards of prejudgment interest. One must thus distinguish between (a) judgments amended nunc pro tunc to reflect, say, a proper calculation of prejudgment interest (so as, if anything, to aid in the calculation of post-judgment interest) and (b) judgments where the use the nunc pro tunc device is simply a way of circumventing what would otherwise be the absence of prejudgment interest. (There is no argument here, say by cross-appeal, that the residents are entitled to pre-judgment interest.)

This case falls into the latter category, (b). There was no clerical error here, and therefore we must conclude that the provision in effect backdating the judgment to June 2001 is error.

*12 The residents suggest that the nunc pro tunc provision was a perfectly understandable response by the trial court to what they (and perhaps it) perceived as a deliberate strategy on the part of the defendants of dragging out the period before judgment by filing numerous post-verdict motions. The answer to that is that frivolous post-verdict motions may be sanctioned in their own right, and there is simply no authority to use nunc pro tunc powers as a separate punishment for bringing a lot of post-verdict motions. We are therefore required to reverse the judgment to the

extent that it was entered nunc pro tunc.

IV. ISSUES REGARDING THE MOBILEHOME LAW

A. The Lease Violated Various Provisions of the Law [\[FN15\]](#)

[FN15.](#) Our discussion here corresponds to all of Argument III.A. in the appellants' opening brief.

As noted above, the trial court assessed six violations of the Mobilehome Law in the lease per class member, and the six violations totaled \$1,800 (per class member).

At the outset here, a few preliminary observations are in order. While it is true, as the court opined in [Gregory v. San Juan Capistrano \(1983\) 142 Cal.App.3d 72, 82, 191 Cal.Rptr. 47](#), that the Mobilehome Law is not a rent control ordinance, it is safe to say that the Mobilehome Law imposes a formidable set of rules on the owners and managers of mobilehome parks, some of which certainly have an impact on the methods and motivations behind rent increases, particularly in regard to things like pass-through costs and the right of tenants on month to month rental agreements to have the same rent as tenants on leases.

The relatively high degree of regulation reflected in the Mobilehome Law is a product of the unique vulnerability in which residents of mobilehome parks inevitably find themselves. (Cf. [Egan v. Mutual of Omaha \(1979\) 24 Cal.3d 809, 169 Cal.Rptr. 691, 620 P.2d 141](#) [insurer got into trouble not recognizing the vulnerability of insured receiving disability payments].)

We will now explore the violations of the Mobilehome Law found by the trial court one by one:

1. Section 798.74, subdivision (a)

The judgment provides: "For violation of section 798.74, subdivision (a) the sum of \$500."

Section 798.74, subdivision (a) consists of three paragraphs. The first basically says that while management can require prior approval to sell one's mobilehome to someone intending to live in that home in the park, that approval cannot be withheld if the buyer can afford the purchase "unless the management reasonably determines that, based on the

purchaser's prior tendencies, he or she will not comply with the rules and regulations of the park." Management can also require documentation of buyer income.

In short, the plain language of section 798.24 puts the focus on any management withholding of permission on the "tendencies" of the *buyer*. There is nothing in the statute to indicate that management can use the *seller's* conduct as hostage to prevent the deal.

Now, here is section 20.2 of the lease:

"Owner shall not be required to consider the application of a prospective buyer in the event *Resident* or any of *Resident's Guests* shall be in breach of this Agreement or the Exhibits hereto. Such breach need not have been communicated to Resident prior to the submission of the proposed application. Owner shall have the right to require as a condition to approval of such application, that Resident remedy such breach." (Italics added.)

*13 This language attempts to make the conduct of the resident or even the resident's guest as grounds for withholding approval. Thus, plainly, it is a violation of the law. What is more egregious (as we shall see below), another provision of the lease attempted to say that if a resident reports the *owner's* dereliction in some maintenance issue, that itself was a "breach" by the *resident*. Thus having a single unfortunate experience with a noisy guest years before could be used by the management as grounds to hold up a future sale. The net effect, of course, was to give the owner a scope of discretion on approvals of sales wholly inconsistent with section 798.24.

2. Section 798.42

The judgment provided: "For violation of section 798.42, the sum of \$500."

Subdivision (a) of section 798.42 says management cannot pass onto a homeowner ("charge" or "impose" being the operative verbs) any fee or increase in rent that reflects the cost of any fine, forfeiture, penalty, money damages, or fee assessed or awarded by a court of law against the management for a violation of this chapter, including any attorney's fees or costs incurred by the management in connection therewith. Subdivision (b) says the court must consider remoteness in time in determining whether the resident meets the burden of showing a violation of subdivision (a), and subdivision (c) makes void any

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provision in a lease after 1995 that "permits a fee or increase in rent that reflects the cost to the management of any money damages awarded against the management for violation of this chapter."

Section 3.3E of the lease dealt with "Uninsured Losses." It said: "On ninety (90) days' prior notice, the Base Rent may be adjusted for uninsured losses of Owner." Uninsured losses included not only any loss which Owner was not compensated for by insurance, but also "any loss for which the Park or its Owner, management, or employees is ordered by any court or arbitrator to pay as damages or to compensate any person or group of persons, because of any claim, lawsuit or arbitration or administrative action brought against Park, its owner, managers, or other employees."

Thus section 3.3E contemplated that, under certain circumstances, residents *could* be liable for money damages incurred for violation of the Mobilehome Law, since surely there are some instances where such violations would not be covered by insurance. (The coverage issues that a case such as this might raise are a whole different universe; thankfully we do not need to go there in this opinion.)

The net effect is the possibility of rent pass-throughs of uninsured losses for violations of the Mobilehome Law as regards park maintenance.

The argument of the owners and managers that section 798.42 only prohibits the "conduct" of imposing pass-throughs (which it had yet to do) as distinct from providing for such pass-throughs in a lease, is not meritorious. [Section 798.19](#) voids lease provisions that waive rights otherwise guaranteed in the Mobilehome Law; the mere fact that a boilerplate provision in the lease said the lease did not purport to waive statutory rights [\[FN16\]](#) does not mean it couldn't have that *effect*. In that regard, a lease term can be, in the statutory phrase, just as much an "imposition" on a resident as a notice. A sophisticated prospective buyer might read the provision and be less willing to pay a price for a given mobilehome than he or she might otherwise pay--which gives tangibility to this "imposition" of rent increase under certain circumstances.

[FN16](#). Another section of the lease, section 23.2, said: "Owner and Park shall not be liable for any loss, damage or injury of any kind whatsoever to the person or property of

any resident or to any of the employees, guests, invitees, permittees or licensees of any resident, or to any other person whomsoever, caused by any use of the Park or Homesite, which is the result of any defect in improvements erected thereon, or arising from any accident in the Park or Homesite, arising from any fire or other casualty thereon, or arising from any cause whatsoever, unless resulting from circumstances described in the subparagraph [23.1] above. As a material part of the consideration of this Agreement, Resident hereby waives all claims and demands against Owner and Park..." Section 23.1, referenced in section 23.2, said that section 23.2 would not have the effect of causing a resident to "release, indemnify and hold harmless Owner, Park or any other person for the negligent or willful acts or omissions of Owner, Park or any other person or from a breach by Owner of Park or any [of their agents]."

*14 Finally, the distinction which the owners and managers seek to draw between actually charging a pass-through, and merely having residents already agree to pass-throughs generally in the lease, is profoundly inconsistent with the behavior of the park management. A number of residents specifically complained of the pass-through provisions and wanted them changed, but the managers maintained a hard line. The absolute non-negotiability of the lease was a hill on which Sherry, Lawson and Bob Benedetti were prepared to die. Unless we are to assume that the management's insistence that no terms of the lease were negotiable was all a meaningless charade, we must assume that every provision in the lease was of sufficient importance that the owners and managers intended on using it if the occasion ever arose. Hence even in that sense, the owners and managers were intent on *imposing* the pass-through term on the residents.

3. *Section 798.25.5*

The judgment provided: "For violation of section 798.25.5, the sum of \$500."

Section 798.25.5 provides: "Any rule or regulation of a mobilehome park that (a) is unilaterally adopted by the management, (b) is implemented without the consent of the homeowners, and (c) by its terms purports to deny homeowners their right to a trial by

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jury or which would mandate binding arbitration of any dispute between the management and homeowners shall be void and unenforceable."

Section 39 of the lease is a long compulsory arbitration provision that begins: "39.1 Any dispute between resident and park relating, in any way, to this agreement, residency documents, the interpretation or enforcement thereof, the leasehold, the leasehold premises, services, facilities, or maintenance in or about the mobilehome park, and any dispute respecting these matters between resident and any officer, director, agent, employee, or partner of Owner ("Owner's Affiliate"), shall be resolved solely by mediation and arbitration in accordance with the provisions set forth below, instead of in court."

The question arises: Is provision in a *lease* a "rule or regulation" under the statute? As the owners and managers point out, a provision in a lease cannot be *unilaterally* adopted by park management.

It is perhaps true that the provision of an arbitration agreement in a mobilehome lease is not *per se* a violation of section 798.25.5. One can imagine circumstances where, for example, a resident and owner both being of a mind to enter into a lease might provide for arbitration in what was substantively a bilateral transaction. Thus, under different circumstances, say, where management did not have a policy of imposing \$50 rent increases if the lease were not accepted, we might be inclined to hold that the inclusion of an arbitration provision did not violate [section 798.25](#).

Here, though, the context, substance and circumstances of the transaction bring it within the meaning of "rule or regulation" of section 798.25.5. As noted, owners and management had a concerted policy of having *every* resident sign the lease, and backing up that policy with rent increases. This was not a "take-it-or-leave-it" deal, i.e., genuinely bilateral. It was, substantively, a unilateral imposition of an arbitration rule.

*15 Indeed, the very nature of the statute confirms our conclusion. One must remember that a park could not get away with unilaterally imposing an arbitration "rule" in the same sense that it might be able to unilaterally impose a "no swimming after 10 p.m." rule. An arbitration rule thus imposed would be of no legal effect--residents could just sue anyway. So why would residents need section 725.25.5? In order to

give the statute meaning, one must conclude that the Legislature contemplated lease provisions within its scope-- the only practical way a park could "impose" an arbitration rule would be to have a policy of having *everybody* sign leases with an arbitration clause.

4. *Section 798.15*

The judgment provided: "For violation of section 798.15, the sum of \$100."

Section 798.15 provides that "The rental agreement shall be in writing and shall contain, in addition to the provisions otherwise required by law to be included, all of the following:" and then lists a number of items, (a) through (h).

One of these items is: "(d) A provision specifying that (1) it is the responsibility of the management to provide and maintain physical improvements in the common facilities in good working order and condition and (2) with respect to a sudden or unforeseeable breakdown or deterioration of these improvements, management shall have a reasonable period of time to repair the sudden or unforeseeable breakdown or deterioration and bring the improvements into good working order and condition after management knows or should have known of the breakdown or deterioration...."

Section 38.1 of the lease was a provision that "Residents shall report defects in the maintenance of the Park's common facilities [etc.]." Then section 38.2 adds: "Resident further agrees that if Resident fails to report any such defects in writing by certified mail within sixty (60) days of its discovery, Resident is in substantial violation of this Agreement. Should Resident fail to report any such defect within six (6) months of its discovery ... Resident ... shall be deemed to have waived any damages Resident had or has by reason of such unreported defect completely and without qualification."

Section 41 of the lease said: "By signing this Agreement, Resident acknowledges that Resident has carefully inspected the Homesite to be leased and all the Park's facilities, has found them to be in good and sanitary order ... and to the extent that they are not exactly as represented, either orally or in writing, agrees to accept them as they are...."

The theory of the owners and managers here is that another portion of the lease, section 8, contains

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language exactly tracking subdivision (d) already quoted, ergo section 798.15 is literally satisfied. They further assert that nothing in sections 38.2 or 41 purports to relieve the park of the responsibilities in section 8.

This relatively small issue of drafting construction provides an insight into why the park and its owners and managers got themselves into the trouble they are now in. Readers should notice the ingenuity of the lease construction: the technique of tracking the required language in section 8, but then hobbling the practical enforcement of the provision in sections 38.2 and 41. It does park residents little practical good if their own "failure" to "report" defects in *management's* maintenance of the park is somehow deemed to be their *own* breach, and a relatively draconian private statute of limitations is imposed. Indeed, the provision saying the *residents* are in breach if they fail to report the *management's* failure is Kafkaesque: The effect of the lease provision is: "Yes, we (begrudgingly admit that we) have the duty to maintain the park (section 8) but you have the duty to report any failure of ours to do so (section 38.2) and what's more, if you don't report in six months, you lose your rights to that aspect of maintenance, 'without qualification.' " And remember that any "breach" of the agreement (see section 798.24 discussed above) is even grounds for refusing permission to a resident to sell his or her mobilehome!

*16 Consider this scenario: Management fails to repair broken sprinklers for, say, three months, most residents don't report it, and then one of those non-reporting residents goes to sell a mobilehome and the management then says, "you are in breach, you didn't report the sprinkler problem in two months, and in fact you didn't report it at all (so what if you relied on your neighbor?), so we're not going to approve your sale and what's more, at least as far as *you* are concerned, you have no rights to complain about the sprinklers because you signed them away 'without qualification.' " The lease is thus structured so as to *effectively* eviscerate the duties which section 798.15, subdivision (d) imposes on park managements.

5. Section 798.84

The judgment provides: "For violation of section 798.84, the sum of \$100."

Subdivision (a) of section 798.84 states: "No action based upon the management's alleged failure to

maintain the physical improvements in the common facilities in good working order or condition or alleged reduction of service may be commenced by a homeowner unless the management has been given at least 30 days' prior notice of the intention to commence the action."

We have already just seen that section 38 of the lease purports to establish a private statute of limitations for failures to maintain physical improvements based on non-reporting to the management within six months.

One should now note the syntax of the statute. Under the rule of *expressio unius est exclusio alterius*, the statute implies that residents *may* bring actions within the normal statute of limitations period *if* they give management at least 30 days prior notice of intention to commence the action.

And that implied right is clearly contravened by the lease. Giving notice of commencement of action--the statutory trigger--is something distinctly different from giving notice to the management of a particular problem. So, for example, a resident who suffers through bad sprinklers for seven months, and then gives management even 60 days notice of intention to commence an action is subject to dismissal under the operation of section 38.2. And top of that, even if the reporting requirements of section 38 are not enforced, our hypothetical resident will have the obstacle if the sprinklers were bad at the time he or she signed the lease, because under section 41, the resident will be deemed to have accepted a bad sprinkler system "as is," even though section 798.15, subdivision (d) explicitly requires management to maintain improvements in good working order, *independent* of whether a resident is willing to accept them in bad working order.

6. Section 798.31

The judgment provides: "For violation of section 798.31, the sum of \$100."

Section 798.31 provides: "A homeowner shall not be charged a fee for other than rent, utilities, and incidental reasonable charges for services actually rendered. [¶] A homeowner shall not be charged a fee for obtaining a lease on a mobilehome lot for (1) a term of 12 months, or (2) a lesser period as the homeowner may request. A fee may be charged for a lease of more than one year if the fee is mutually agreed upon by both the homeowner and

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management ."

*17 Section 22 of the lease involves mechanics' liens, and basically says to residents, don't let any get filed: "Resident shall not suffer or permit to be enforced any lien, claim or demand arising from any work of construction, repair, restoration or maintenance of the Homesite or mobile home ('Lien')...."

However, the section also says that should mechanics get filed and are not paid off, the management can come in and pay off the lien and charge the resident for it: "Should Resident fail to discharge any such Lien or furnish bond against the foreclosure thereof, Owner may, but shall not be obligated to, discharge the same ... and all costs and expenses ... shall be repaid by Resident to Owner on written demand. *All amounts due under this paragraph shall be considered rent. ...*" (Italics added.)

Section 23 of the lease involves indemnification. Section 23.1 says that "All amounts due under this paragraph shall be considered rent and a failure by Resident to pay any amount due hereunder shall afford Owner all rights and remedies allowed Owner under applicable law for failure to pay rent." Section 23.3 further provides, in part: "In the event a legal cause of action or claim is brought against Owner or Park or any of their agents ... related to or arising from any action or failure to act on the part of 'Resident or any Guest of Resident,' Resident shall indemnify and hold such Indemnified Party harmless from liability for all claims and demands for any such loss, damage or injury, including attorneys' fees...."

Section 40 of the lease gives the park a right of first refusal when a resident wants to sell his or her mobilehome. It further specifies that the resident must convey the offer in writing to the park management: "If Resident receives a bona fide offer to purchase Resident's mobile home, that offer (including all terms of the offer) shall be submitted in writing by Resident to the Park Office in person or by U.S. First Class Mail, and the Park shall have two (2) business days from receipt of Resident's notification to meet the terms of the offer...."

Section 40.3 provides a penalty in case the resident is recalcitrant--or just forgetful--in relaying the third party's offer: "If resident fails or refuses to submit the offer of the park under the terms of this section,

Resident agrees to immediately pay the park One Hundred Dollars (\$100.00) in liquidated damages, since the Park and Resident agree that it would be difficult to determine the Park's damages should Resident fail to perform under the terms of this provision."

The question thus becomes whether any of these provisions (involuntary pay-off of a mechanics' lien, indemnification for damages caused by the resident or a guest, or liquidated damages for not sending in the terms of an offer) contravene section 798.31. We are willing to grant that indemnifications, as such, are not in the nature of fees. Indemnification is making up for someone's loss (which is what the mechanics' lien provision and the general indemnification provisions do--the loss being to the park ownership), while a fee typically entails an exchange in which both sides receive value. As one song about money collected for a particular service rendered goes, "it's not blood money, it's a fee ... nothing more."

*18 It also seems unlikely that the Legislature intended to preclude park owners from recouping *losses* that residents really do inflict on them by its limitation on types of fees. The clear import of the statute is obviously to prevent the creative use of so-called "services" to circumvent rent protections. Apparently the Legislature did not contemplate giving landlords unrestricted license to collect, as one song goes, "reasonable charges plus a little extra on the side."

It is a much closer call with section 40.3's liquidated damages provision for not forwarding the terms of an offer within a very short time span. The \$100 provision functions as a kind of penalty for failing or forgetting to send a copy of an offer to the park management.

Suppose that park owners were to actually try and enforce section 40.3 as against, say, a resident who forgot to send the terms of an offer to them. Would a court characterize it as a "fee," or something else? Since there really isn't an exchange of value, and section 40.3 on its face isn't about an exchange of value, we cannot say that, by itself, it operates to collect a fee in circumvention of section 798.31's limitations on the type of fees park owners may charge.

But there is one more bothersome aspect to the structure of the lease which tips the scales the other

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way. Both section 22 and 23.1 essentially transform losses for which a resident should ultimately be liable to the landlord into *rent* that is ... instantly collectable. This has a particularly nasty effect, which we will now illustrate with this hypothetical: Suppose a resident's drunken guest, driving home on a private road within the park complex, plows into the fence around the pool. Management quickly repairs the fence for, say, \$5,000. But, because the \$5,000 is deemed rent, the resident's *ultimate* obligation to indemnify the park owner for the loss (say, after proper notice and an opportunity for the resident to tell his or her side of the story [\[FN17\]](#)) is transformed into an *immediately payable* (or, at least, payable after the required 90-day notice for rent increases) obligation. So, basically, the resident is now in the position of having to fork over the \$5,000 or face immediate eviction.

[FN17.](#) As when, for example, the park were to try to enforce the indemnity provision in a court of law *cleanly* by way of an action for indemnity.

But let's carry the scenario one step farther: Let's say the accident was not in any way caused because of any intoxication of the guest, but because of a combination of bad lighting and stripping of the road which was the fault of the park. If the park's claim for indemnification proceeded as a normal indemnification case, the park management would have the burden of proof in a proper legal proceeding on the point, and the resident could assert the defense that the damage was not really the fault of the guest after all. But by making such monies owed "rent," the resident is put in the position of having already had a final judgment against him or her, and the monthly rent bill would be the equivalent of *immediate collection proceedings* via the private mechanism of a passed-through rent increase after management expended the money to repair the fence.

***19** So the question *now* devolves into whether the transformation of what is substantively an indemnification obligation into "rent" contravenes the statute. The key phrase is, "a fee for other than rent, utilities, and incidental reasonable charges for services actually rendered."

"Services actually rendered" is the rub. As we said above, indemnification is not for a service actually rendered, but to cover a loss incurred. Converting indemnification into immediately collectable rent

changes its character from indemnification into a *fee immediately collectable*, charged by the management for having taken care of an obligation which might otherwise have to be proved in court.

B. The Issue of Intent to Violate the Mobilehome Law [\[FN18\]](#)

[FN18.](#) Our discussion here corresponds to Argument III.B. in the appellants' opening brief.

1. *Issues Involving the Lease*

Section 798.86 is an enforcement provision of the Mobilehome Law. It provides (and at the time the leases were propounded in 1997 provided) for penalties for "each willful violation of this chapter [the Mobilehome Law] by the management."

The theme of the owners and managers is that, assuming the lease indeed violated the law, the violations were not "willful" under section 798.86. The key piece of evidence is that the lease was prepared by an attorney, who is a mobilehome park specialist. [\[FN19\]](#) The owners and managers' theory is that *reliance* on the attorney's work obviates any inference of willful violation. After all--if you are a layperson and the attorney gives you a lease and says, "this complies with the law," then, well, doctor's orders, you can proceed in reasonable reliance on the attorney's assurance.

[FN19.](#) The attorney will remain nameless in this opinion. We suspect that he has already received considerable grief over the drafting of this particular lease and, alas, this opinion (particularly the immediately preceding part) will not lessen it.

There are no less than three reasons, though, why the attorney-reliance theory cannot be accepted.

a. No Actual Reliance

The first is simple. Substantial evidence supports rejection of this defense. Specifically, there is substantial evidence that the owners and managers of the park *didn't* actually rely on the lease's supposed compliance with the Mobilehome Law. The attorney testified that he never discussed with the Bendettis or Lawson whether the lease complied with the Mobilehome Law. Moreover, as we have seen, Lawson got all huffy in his letter of September 19, 1997: "I took your outline and agreed to have the

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lease reviewed by another attorney. Upon reviewing your outline, I found that it did not refer to specific violations of the Civil Code, but rather was a list of 'objections' to the lease. Several objections make vague references to Civil Code sections (which I will respond to below), but nothing in your outline makes specific allegations of illegalities. Having been misled, I will not have the lease reviewed by another attorney. Rather, *I* will respond to your objections one by one." (Italics added.)

Lawson, in short, decided to play attorney himself rather than rely on an independent review by an attorney. Given his authority, a jury could also reasonably conclude that in doing so he was acting as Bendetti Management wanted him to act.

b. A Facially Unreasonable Lease

*20 The second is also simple. At least one of the lease provisions was so unreasonable on its face that warning bells should have gone off even in the head of a layperson. Those warning bells should have at least led Lawson to check with the attorney to see if they were okay, rather than inventing excuses not to do (as shown in his September 19, 1997 letter).

We have already noted the outrageously perverse operation of the provisions putting the burden on individual residents to report *managements'* derelictions in common area upkeep. Any fair-minded person should have realized that at least *that* provision was so unconscionable that further inquiry was necessary. On top of that, though, was the fact that even before their lawyers got into the act in May 1998, various residents continually asserted that the lease violated provisions of the Mobilehome Law. You can't use advice of counsel as a defense if, when you are confronted with the possibility that counsel may have erred, you refuse to check.

c. No Reasonable Reliance on Counsel

The third reason is what the medieval theologians might call willful persistence in error. Specifically, as we have noted, in May 1998, an attorney for the residents sent a letter to the park managers detailing asserted violations of the Mobilehome Law by the lease.

In their supplemental briefing the owners and managers say that the trial court described the letter as semi-literate and unintelligible, the suggestion being that its recipients could be excused if they didn't grasp what it was trying to say. Actually, no.

When you check what the trial court actually said on the cited reference, it doesn't appear that the court was even referring to the letter from the residents' lawyers; what's more, when you actually examine the letter, you find that it was quite literate and quite intelligible, and, more to the point, *clearly* informed its recipients that they were violating the Mobilehome Law. In fact, the trial judge characterized it as a "wake-up call" [\[FN20\]](#) To demonstrate that to the reader, we will now set forth the contents of that letter:

[FN20.](#) The court said: "The letter that was sent out by the GSMOL officers I think was, I would agree, inadequate to put anyone on notice of any present conduct. That was more a bargaining letter and I don't think it was a wake-up call. [] Ms. Olesen's letter was not well drafted. However, it was certainly sufficient to trigger responsibility all the way up through the management levels. [] *It was a wake-up call.* They did nothing other than go back down to where it stopped with Sherry. [Talking about contentiousness] This case was a slam dunk. It should have never gone the way it did." (Italics added.)

We do disagree, though, with the trial judge that the letter was not well drafted, as we are about to show.

The first paragraph is introductory. The lawyer says that her firm has been hired by the residents and has consulted with them about the leases that were proffered to the residents in the summer of 1997. In part it reads: "We have been consulted about numerous matters relating to the management of the Park and specifically about the terms of the leases offered to the homeowners last summer and also the manner in which they were offered. Moreover, we are also aware that park management has increased the rent by \$50 a month three times since last summer for certain homeowners who chose not to sign the leases or who objected to certain parts of the leases."

The second paragraph reminds the readers that despite complaints by residents, no higher-ups did anything to stop on-site manager Sherry "from conducting himself in a particularly abusive and harassing manner and you have not altered your approach as to the lease requirements."

*21 The next paragraph zeroes in on the lease itself

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and we quote it in full: "What we understand is that you decided to offer a new lease in May/June and July of last year. You did not offer it at the same time to all homeowners which resulted in various (confusing) deadlines for different homeowners. You/your manager asserted these leases must be signed, that there were no alternatives and all parts of the lease must be agreed to or they would not be accepted. Your manager, John Sherry, harassed and badgered homeowners into signing even as they were asking questions or trying to obtain information. He told homeowners they must sign and initial all parts of the leases, and they had to do so immediately--30 days were not given. For example, some homeowners did not want to sign away their right to a jury trial. Mr. Sherry stated they had to do so. Some also complained that trash and water were now charged extra where this had not been true before. If homeowners asked for 30 days to analyze the lease Mr. Sherry stated they had a very short deadline and they better sign now or they would get \$50 month increases right away. In some cases they found \$50 rent increase notices in their mailboxes as they returned from the Park office. If homeowners asked for a one year lease Mr. Sherry often stated there were none left, etc. etc., and became even more abusive."

The next paragraph continues with the theme that residents were left with little practical choice as to whether the sign the lease: "In fact, most homeowners signed the leases after having been treated in this manner; they did so without having been given their proper rights of inspection and rescission rights. They did so because they were threatened and were very afraid of the consequences if they did not do so."

The next paragraph made it very clear that the lawyers were asserting violations of the Mobilehome Law: "All of this conduct is of course in violation of the Mobilehome Residency Law, [Civil Code sections 798.17](#), [798.18](#), [798.19](#) and [798.25.5](#) (amongst others). Not satisfied with those violations of the law, you then noticed three \$50 rent increases to those homeowners who did not sign your leases. These are undoubtedly retaliatory rent increases in violation of [Civil Code section 1942.5](#). Finally, to compound these problems even more, you are not maintaining the Park properly. There are pool problems, and sewer and electric problems from time to time.

The next paragraph returned to the theme of Sherry's

general rudeness, and included these assertions: "Mr. Sherry also demands unlisted telephone numbers from homeowners with threats of eviction if they do not comply. He even sent a notice to the [homeowner] Association's board (and several other homeowners *not* on the Board) he would sue them for libel/slander, clearly an effort to intimidate."

Then came the olive branch--an invitation on the part of the park management to make its case or show where the residents' attorneys were mistaken: "We understand Bendetti Management Group owns and manages the Park and that you are the principals of the company. If we are mistaken and/or there are other or additional owners we hereby pursuant to [Civil Code section 798.28](#) request the name/address and phone numbers of all such owners of the Park. They are all entitled to be notified of the possibility of legal action."

*22 Continuing with the olive branch theme, the letter held out the option of settlement, albeit, velvet glove iron fist and all that, maintaining the wrongfulness of the rent increases: "As noted in the beginning of this letter, our clients would prefer to come to a peaceful--not litigation--resolution to the issues raised in this letter. The Association asks you withdraw the lease, even if signed by the homeowners, and agree to negotiate a lease which is acceptable to all the homeowners as well as to you. We (for example) do not believe you can simply require homeowners to sign away (without their consent) their right to a jury trial. We also ask that you immediately withdraw the rent increases to the homeowners who did not sign leases and refund their rent monies wrongfully collected which they have had to pay to avoid an eviction action; those rent increases were/are clearly retaliatory and thus illegal."

And finally, the letter left its recipients with the point that the residents meant business, and that the dogs of litigation would be unleashed if settlement could not be reached: "We trust you understand the Association is willing to fight for the rights of its members and will do so if a reasonable solution cannot be found. However, we believe a resolution can be found with good will on both sides. We hope for a favorable response to this letter by the end of the business day May 15, 1998. This hopefully will give you enough time to consider your options."

It is true, of course, that a letter from an adversary's

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attorney (often too typically full of huffing and blustering and ipse dixits) should not, by itself, put an individual on notice to check the legal foundations of his or her position. It is too commonplace for lawyers to "blow smoke" or otherwise exaggerate their clients' positions for the mere fact of a letter to have much in the way of significance by itself.

But context in this case easily varies that thought. Let's examine some of the context of this May 1998 letter. In the first place, there is no question that the owners and managers were aware of at least some dissatisfaction with their policy of standardizing all residents on one lease on a take-it-or-get-a-rent-increase basis. Recall that the letter of September 5, 1997 by one resident was addressed to *Donald Bendetti*, the owner Bendetti as distinct from the mere manager Bendetti. Also, the owners and managers were in the mobilehome park business; they were certainly aware, at the absolute least, that there was a Mobilehome Law out there, somewhere, that required their compliance. Having received a letter from attorneys representing the park residents' homeowners association--which means that the dissatisfaction had come to the point that residents were willing to run at least some exposure to attorney fees because of their frustration with management's policy--ordinary prudence demanded at least a legal re-examination of their position.

We have quoted the letter at length, though, to show that it spelled out various asserted violations of the Mobilehome Law in the lease. What to do? The option the owners and managers chose was--the word "stubborn" comes to mind-- dig in their heels and hide behind the fact that an attorney specializing in the law had already prepared the lease. Perhaps they were thinking, "well, even if the lease does violate portions of the law, we'll simply tag the attorney for malpractice. What, us worry?" Even so, in the face of such clear assertions of violations of the law, the jury and trial court could easily, and we think reasonably, infer conscious disregard of whether the Mobilehome Law was being violated.

*23 With that, we may segue to the leading appellate case which has grappled with the question of the Mobilehome Law's requirement of willfulness, [Patarak v. Williams \(2001\) 91 Cal.App.4th 826, 111 Cal.Rptr.2d 381](#). *Patarak* arose out of the problems manifested by a park's septic system. Residents found themselves enduring repeated odors, sewage leaks, clogs, failing septic pumps, broken pipes, broken

septic tank lids, and saturated leach fields. (*Id.* at p. 828, 111 Cal.Rptr.2d 381) Of course, the residents complained. The landlord did nothing but be *aware* of the problems.

In the ensuing suit, the question arose as to whether the landlord's *inaction* was "willful" within the meaning of section 798.86. In affirming a judgment based on an affirmative answer to the question, the appellate court focused on the consciousness of probable results as the test for willfulness. (See [Patarak, supra, 91 Cal.App.4th at p. 829, 111 Cal.Rptr.2d 381](#) ["willful" defined as "intentional conduct undertaken with knowledge or consciousness of its probable results" and further stating that although willful conduct "does not require a purpose or specific intent to bring about a result," it nevertheless requires "more than mere negligence or accidental conduct"].)

Now, to be true, a stinking mess from a faulty septic system is harder to ignore than a letter from an adversary's attorney about more abstruse points, complete with code references, concerning a lease. Even so, the element of consciousness of probable results remains: Somebody has hired an attorney who tells you that your lease violates the Mobilehome Law in several ways, your job is to manage a mobilehome park--to decide then not even to check with an attorney (much less the attorney who prepared the document!) about whether the lease really does violate the law reflects a mindset toward violations of the Mobilehome Law worthy of the attitude of the captain of the Titanic toward icebergs.

One more point here: For this court to hold that mere reliance on an attorney who holds himself out as a mobilehome park specialist is enough, by itself, to establish reliance on counsel as a complete defense to alleged violations of the Mobilehome Law would be a most pernicious interpretation of the word "willful" for purposes of the statute. To borrow an expression, it would confer on management "cheap grace" for taking an ostrich-like approach to residents' complaints; that is, the position urged by the owners and managers confers such easy immunity as against penalties otherwise contemplated by section 798.86 that it effectively circumvents the statute. *Reasonable* reliance on the advice of counsel means a good faith effort to ascertain whether you are violating the law if that assertion is made complete with chapter and verse of the Mobilehome Law, not hiding behind the mere fact that an attorney purportedly specializing in

the law already prepared the very document under attack.

2. Motivation: An Issue Extrinsic to the Lease

*24 Quite independent of the lease and the decision to stick with it after May 1998 is the initial motivation for it. The owners and managers point to the fact that they wanted to raise rents before the lease was proffered, and they had every right to raise rents under the Mobilehome Law. Further, as we have noted already, the idea of simply offering residents a five-year lease by itself was probably a good one, as it facilitated lending on existing units. From these points the owners and managers extrapolate the conclusion that they did not willfully violate the law.

The problem here is that one can initially have a legitimate reason for doing something, but go about it in a way that is quite unlawful. The fact that you have the right to go to the grocery store doesn't mean you can drive recklessly to get there. Logically it does not follow that because the owners and managers of Lincoln Center had every legitimate reason in the world in 1997 to raise rents or at least try to persuade the residents to accept a standardized lease that they could not, in the process of preparing the lease, raising the rents, or trying to persuade residents to accept the lease, have violated the law. A standardized lease might have been a good thing; *this* standardized lease violated the Mobilehome Law in six different ways. Rent increases qua rent increases may have been permissible; rent increases tied to refusals to sign a lease violative of law are not.

3. The Seven Non-Signers

However, seven of the 108 class members never signed leases. The question arises as to whether there could legitimately be any Mobilehome Law penalties as to them because the Mobilehome Law violations were all a product of lease clauses.

The owners and managers have a valid point here--those seven were not harmed *by the lease*. Those signers may have suffered retaliatory rent increases, but that was taken care of elsewhere in the judgment. Consequently, we reverse the judgment to that extent (7 times \$1,800 = \$12,600.) [\[FN21\]](#)

[FN21.](#) The question of the seven non-signers was not specifically raised by separate heading in the argument section of appellants' original opening brief, and thus

could be held to have been waived. This partial reversal is the product of this court's decision to request supplemental briefing on rehearing.

C. The Post-Verdict Reduction [\[FN22\]](#)

[FN22.](#) Our discussion here corresponds to Argument II.C. in the respondents' brief on cross-appeal.

The difference between the first and second judgments was a reduction in Mobilehome Law penalties from \$4,300 for each of the 108 plaintiffs to \$1,800 for each of the 108 plaintiffs. The thinking was this: In 1997, section 798.86 had a limit of only \$500 for each willful violation. But in 1998 section 798.86 was amended to provide for a limit of \$2,000 for each willful violation. The original judgment was predicated on the new 1998 ceiling, but, since the leases were drafted and offered in 1997, the appropriate ceiling was the 1997 ceiling, not the 1998 ceiling.

To be true, some leases were signed in 1998, and the defendants' conduct in 1998 seems even more obdurate than in 1997--by 1998 the defendants had the benefit of the May 1998 letter on top of the accumulated complaints of 1997. But the trial court's ultimate reduction was sound. The essence of the Mobilehome Law violations was the various lease provisions themselves, and willfulness was easily established by 1997, though (granted) that willfulness seems more intense in 1998. To assess 1998 penalties for provisions written in reliance on the 1997 law was unfair, and the trial court properly corrected the error of its ways.

V. ISSUES ARISING OUT OF THE RESCISSION
(RESTITUTIONARY) AWARD

A. Fair Market Value Offsets [\[FN23\]](#)

[FN23.](#) Our discussion here corresponds to Argument II.E. in the appellants' opening brief.

*25 Having established that the lease violated the law, it follows that residents were entitled to get back the difference between what they paid under the (illegal, for want of a better word) lease and the fair rental value of their spaces. Note here that if the leases did not charge a rate above fair rental value, damages based on the rescission of the lease could be

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held to a minimum. Thus it is not surprising that the parties squared off at trial over what the fair rental value actually was. The owners and managers presented an expert who testified that the fair value was \$550 per unit space, while the residents' expert testified that it was \$450. In the end, the trial court found a figure closer to the residents' side of the equation--\$480 for the period until 2000, and \$500 for the period 2000 through the first half of 2001. There is no challenge in this appeal to the merits of these figures. (I.e., there is no argument that the trial court was compelled to prefer the testimony of the park owners' expert over that of the residents' expert.)

The owners and managers now assert that in awarding the difference between these figures and what various owners actually paid, the trial court gave a windfall to some 63 tenants who were actually paying more than \$480 a month before the owners began proffering the ill-fated lease. The residents respond by noting that the 63 were offset by some 44 class members who actually paid less, and who did not receive the difference between \$480 and what they actually paid.

The dispositive answer here is that this sort of averaging is inherent in class actions where statistical averaging is within the trial court's discretion. (See [Bell v. Framers Insurance Exchange \(2004\) 115 Cal.App.4th 715, 750-751, 9 Cal.Rptr.3d 544.](#)) Granted, the trial court's approach, as all averaging, allows for a certain amount of "fudging," and it appears that the residents came out the winner by a score of 63 to 44. Perhaps--we needn't decide here--if the actual amount of money involved were grossly disproportionate (i.e., that the averaging was merely a pretext for the trial court to stick it to the defendants beyond the penalties and damages otherwise appropriate under law), then an abuse of discretion might be shown and the case would need to be returned for exact calculations, i.e., comparing what the residents gained for the 63 with what the owners won as regards the 44, so as to keep the calculation reasonably honest. But the owners and managers do not argue abuse of discretion under class action principles (the argument is not to be found in their 89-page opening brief, their 79-page reply brief, or their 40-page supplemental brief), but simply a per se rule that no individual resident can receive a windfall in terms of restitutionary amounts. Like a chess game in which one opening eventually transposes into another, this argument is really only a corollary of the more fundamental assertion that proceeding as a class

action was improper. If they lose one, they must lose the other.

B. The Post-Litigation Offer of Rescission [\[FN24\]](#)

[FN24.](#) Our discussion here corresponds to Argument II.B. in the appellants' opening brief.

*26 In November 1998, several months into the litigation, the owners made an offer to let each tenant rescind his or her lease. There were no takers. The owners argue that this fact negates any restitution award, because the tenants (all of them) chose the benefits of the lease (including rent stability) over the vicissitudes of month-to-month tenancies. To award the tenants, then, money based on the lease (which they accepted) is to give them the best of all possible worlds. After all, if you want out of a deal, you can hardly accept the benefits of the deal. (See e.g., [Neet v. Holmes \(1944\) 25 Cal.2d 447, 457, 154 P.2d 854.](#))

The issue has two aspects, prospective and retrospective. The prospective aspect is easy. There is no question that, in making the offer, the owners and managers did not--for want of a better word--"rescind" the corresponding policy of rent increases visited upon residents who did not sign the lease. So a resident's decision not to accept the new offer can hardly be said to be the equivalent of the typical one-shot transaction where you can have the benefits of a deal or the benefits of not having the deal, but not both. There was still the threat that if the resident took the offer, a series of rent increases *in retaliation* for the choice would still be forthcoming. As we have seen, the initial notices offering the new lease and park managers personally made it extremely clear that *not* having a lease would be followed by rent increases.

Readers should also remember what we said earlier about the unique vulnerability of mobilehome park residents: Management giveth and management taketh away. The residents here had no assurance that management would not make up in future rent increases what it was offering to return by way of rescission of the lease.

The more difficult conceptual problem is looking at the issue retrospectively. The net effect of the trial court's decision on the point was to give the residents immunity from all monthly rent increases that management might have imposed during the litigation

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period. Note that we say "that management might have imposed," because the trial court *did* allow the park an offset for the fair rental value of each space.

The problem is ultimately resolved by making the wrongdoer bear the costs of the Hobson's choice. True, the park owner did offer to rescind the lease, but residents had every reason to believe that the management would take it out of their hide in properly noticed increases in rent later. (Again the dispositive fact is that the rescission offer did nothing on the rent increase side of the equation.) Without the willingness of the park to, in essence, grant amnesty to residents who elected to rescind the (illegal) lease, equity demands that the cost of the choice must be visited on the wrongdoer. The point about repentance of a previous bad act, as Claudius--the guy who murdered his brother for the throne of Denmark in Hamlet--put it, you have to give up your ill-gotten gains. [\[FN25\]](#) If a court were to decide differently--let the park off without being willing to give up the rent increases--it would effectively reward the "we-still-win-anyway-because-we'll-increase-your-monthly-rent" brinkmanship in which the owners and managers engaged. That brinkmanship which, if we accepted it now, would give the park's owners and managers the best of all possible worlds.

[FN25.](#) "Since I am still possessed of those effects for which I did the murder: my crown, mine own ambition, and my queen, may one be pardoned and retain the offense?"

C. The Problem of the Agents' Relationship to the Judgment for Rescission [\[FN26\]](#)

[FN26.](#) Our discussion here corresponds to Argument II.A. in the appellants' opening brief.

*27 The question arises as to whether the agents of Lincoln Center (Bendetti Management, Bob Bendetti, Jim Lawson, and John Sherry) should be jointly and severally liable for the \$190,891.52 restitution award, given that there is no question that *they* were not parties to any lease contract. This issue must be distinguished from a similar one with which deal in part VI.E. below, namely whether agents could be liable for [section 1942.5](#) penalties for retaliatory eviction.

The agents have a valid point here. The residents suggest that the award against the agents can be upheld by analogizing to cases (e.g., [7 Motel Associates v. Wang \(1993\) 16 Cal.App.4th 541, 549-550, 20 Cal.Rptr.2d 193](#)) which indicate that both sellers and their agents can be liable for claims of fraud in real estate deals. But the violations of the Mobilehome Law in the lease and the ensuing rescission of the lease by the court cannot be analogized to fraud. The residents style the agents' conduct as "coercive," but coercion is not the essence of restitution, which is to undo a deal. Of course, what we say here about the liability of the agents for a *restitution* judgment does not affect our analysis on the issue of their liability under a statute which provides for its own penalties.

D. Did the Lease Cause Injury? [\[FN27\]](#)

[FN27.](#) Our discussion here corresponds to Argument II.C. in the appellants' opening brief.

The owners and managers point to a comment of the trial judge that the lease was "a very favorable lease" and further assert that in any event that there was no evidence that the lease caused any plaintiff to suffer injury; ergo there was no right to rescind it at all.

This is a variation of the lack-of-prejudicial-error argument made about pass-throughs in part IV.A.2. above, i.e., since the illegal provisions were never enforced, they were never really "imposed."

There are three simple answers to the argument. First, being compelled at the point of \$50 monthly rent increases to sign a lease with no less than six provisions obviating rights to which one is otherwise entitled by statute is *itself* an injury, if only because one is *now vulnerable* to the discretionary enforcement of the various illegal provisions by the management. At the very least, one must contemplate the possibility of hiring a lawyer to defend oneself against the *possibility* of enforcement. (And, as we have seen, the operation of the indemnity pass-throughs could be both draconian and immediately visited upon any resident.)

Second, the very fact of an illegal lease with the kind of Damoclean contingencies that this one had had immediate and palpable impacts on the value of one's investment. It surely didn't help anybody in Lincoln Center trying to sell his or her mobilehome over the

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past eight years to have to disclose that the residents were in litigation over, among other things, the contents of the lease. And any rational buyer reading the lease and contemplating taking the unit under the terms of the lease would most certainly demand some sort of price reduction over what he or she might otherwise pay in order to protect against the right of the management to impose pass-throughs in the form of rent as well as the other provisions violative of the Mobilehome Law.

*28 Third, as noted in part V.A. above, the direct economic effect of the lease, at the very least, was to have 63 members of the class pay more than the fair rental value of their spaces.

E. The Problem of the Three Class Members Who Did Not Sign Leases [\[FN28\]](#)

[FN28.](#) Our discussion here corresponds to Argument II.D.1.in the appellants' opening brief.

The owners and agents argue that three of the testifying class members never signed leases and therefore should not receive any restitution damages: After all, in this case there was nothing to be rescinded. The residents' brief appears to concede this common sense point ("Arguably they are not entitled to restitution pursuant to rescission."), but makes this interesting point in rejoinder: Could not they still be awarded the same amount of damages pursuant to the retaliatory eviction statute ([section 1942.5](#)) on the theory that these three class members paid extra rent (albeit pursuant to a month-to-month tenancy) above the fair market value because of the "coercion" to which they were subjected?

The problem with the residents' rejoinder is that the trial court didn't award those three residents the difference between what they paid and the fair rental value because of a violation of the retaliatory eviction statute; it awarded them that difference on a rescission theory. Perhaps the trial court *should* have awarded them that difference as extra compensation under [section 1942.5](#) (we express no opinion on the point here), but the issue is not raised in the cross-appeal. The restitution award to those three residents (Berg, Hallas, and Kelly) totaling \$5,981.34, will, accordingly, have to be reversed. Since the appellants' opening brief does not argue that there should be a similar reduction for the remaining four non-testifying non-signers of the lease, we have no

occasion to disturb the judgment in their regard.

F. The Problem of the Four Class Members Who (Supposedly) Testified They Did Not Want to Rescind [\[FN29\]](#)

[FN29.](#) Our discussion here corresponds to Argument II.D.2.in the appellants' opening brief.

The owners and managers also assert that four residents (McNeese, Melby, Blakeman, and Salinas) who were awarded rescission damages testified that they did not want to rescind, and therefore invite us to reverse their portion of the restitution award (\$9,332.79).

This point is not persuasive. Two of the residents (McNeese and Melby) testified that they *would* rescind if either an "amicable agreement" or a "proper" offer were made, the valid inference being that their position on rescission was ambiguous, based on the fear that rescission might easily lead to something worse (such as, for example, as McNeese said, rent increases). One resident, Salinas, pretty much came out and said that his position on rescission was based on fear that he would lose his home, and the final resident (Blakeman) also never came out unequivocally against rescission; like Salinas he feared the consequences of *not* signing the lease. The owners and agents have no answer to these important qualifications to their testimony except to merely reassert the proposition that these four residents did not want to rescind.

*29 No. These residents didn't want to rescind *if* it meant they were going to be the object of retaliatory rent increases.

VI. ISSUES RELATING TO THE [SECTION 1942.5](#) PENALTIES FOR RETALIATORY EVICTION

A. The Preliminary Problem of the Word "Punitive"

At the outset we must confront a semantic problem. In our requests for supplemental briefing following the grant of rehearing, we specifically requested the parties not to refer to money awarded pursuant to [section 1942.5](#) as "punitive damages" as the trial court (and original briefing) had done. The point was to clearly distinguish money awarded pursuant to [section 1942.5](#) statute from traditional common law punitive damages, albeit codified in California at section 3294.

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We recognize, though, that to some degree this request must have at least incommoded the owners and managers, one of whose arguments involves the substantively "punitive" nature of money awarded under [section 1942.5](#). Let us simply say now that while section 1942 .5 money may indeed be "punitive" in nature, case law has already differentiated it from traditional common law punitive damages under section 3294. (See generally [Rich v. Schwab \(1998\) 63 Cal.App.4th 803, 75 Cal.Rptr.2d 170 \(Rich II\)](#) [affirming [section 1942.5](#) penalties in context of mobilehome park rent increases].) Referring to money awarded pursuant to [section 1942.5](#) as "punitive damages" can create confusion, because the reader may think of traditional punitive damages, not a distinct statutory penalty for delineated kinds of conduct on the part of landlords. The significance of that confusion becomes clear when one examines the arguable tension between *Rich II* and [De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates \(2001\) 94 Cal.App.4th 890, 114 Cal.Rptr.2d 708](#), which we discuss below in part VII.G.4.

For the moment, let us have quick recourse to the text of the statute. [Section 1942.5](#) is a part of a whole series of statutes in the Civil Code (beginning with section 1940) prescribing various rules governing landlord-tenant relationships, including such minutia as telephone jacks (section 1941.4) and waterbeds (section 1940.5). The operative part of [section 1942.5](#) for our purposes is subdivision (c), which opens with this sentence: "It is unlawful for a lessor to increase rent, decrease services, cause a lessee to quit involuntarily, bring an action to recover possession, or threaten to do any of those acts, for the purpose of retaliating against the lessee because he or she has lawfully organized or participated in a lessees' association or an organization advocating lessees' rights or has lawfully and peaceably exercised any rights under the law." (Italics added.)

B. The Issue of Whether Any Actual Retaliation Occurred [\[FN30\]](#)

[FN30](#). Our discussion here corresponds to Argument IV.A. in the appellants' opening brief.

The owners and managers posit that no [section 1942.5](#) damages are appropriate because no rent increase was made *in response* to some exercise of a legal right by any tenant. Under this theory, because

the residents only reacted passively to the "sign or your rent will be raised" threat, they never exercised any legal right which could even possibly be the object of retaliation.

*30 The fallacy of the argument may be illustrated by following through events as a hypothetical class member resident would have experienced them. First, the resident receives a notice that the park management is making available a new five-year lease, but follows that opportunity with a veiled threat of rent increases if the resident does not take advantage of the opportunity. Then the resident examines the lease and discovers that several provisions are obviously unconscionable on their face (e.g., "we hold you responsible and in breach of the lease if you don't tell us if we are derelict in our care of the sprinkler system"), and may intuit that other provisions might violate this Mobilehome Law that the resident may have heard about. So the resident ... exercises his or her legal right *not* to sign.

Then this resident gets a call from Sherry, bothered by the resident's *inaction*, demanding that the resident sign the new lease, no negotiation, no questions asked, or face successive \$50 monthly rent increases until he knuckles under.

So--what do we have? First we must note this: Since we have already determined that the lease was violative of the Mobilehome Law, we may safely conclude that residents had a legal right *not* to sign it. *Not signing* was a peaceable exercise of rights under the law. The policy of inevitable rent increases for this "exercise" by inaction is then the object of a threat of retaliation.

In short, the owners and managers argument is so much legerdemain built on glossing over the idea that a resident's *declining* to sign the new lease was itself a peaceable exercise of the resident's rights under the Mobilehome Law. That means that residents who got rent increases because they didn't sign were the *actual* object of retaliation, and residents who quickly knuckled under were under the *threat* of retaliation. Either way, the policy of "sign or we'll increase your rent" violates [subdivision \(c\) of section 1942.5](#).

C. The Issue of Who Bears Responsibility for the Program of "Sign or Else"

1. *The Actions of the Agents (the Bendetti Company, Bob Bendetti, and Jim Lawson)* [\[FN31\]](#)

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FN31. Our discussion here corresponds to Argument IV.H. in the appellants' opening brief.

Having established that the parkwide policy of "sign or else" contravened [subdivision \(c\) of section 1942.5](#), we turn first to the remarkable contention of the owners and agents that there was insufficient evidence that the individual entities in the Lincoln Center management structure *closest* to the policy engaged in "oppressive retaliatory conduct." The briefing on the point (appellants' opening brief pages 79-82) asserts simply the absence of evidence of "despicable" conduct, as distinct from the "negligent supervision" of Sherry and reliance on his denials that he was imposing multiple rent increases "for an improper reason" (see appellants' opening brief at page 81).

It should now be apparent why we prefer to refer to "[section 1942.5](#) penalties" as distinct from "punitive damages." As the text of subdivision (c) shows, [section 1942.5](#) may be violated because of even the *threat* of retaliatory rent increases for the peaceful exercise of rights under the law; and therefore the traditional dynamics of common law punitive damages cannot be imported wholesale into the realm of [section 1942.5](#).

*31 However, subdivision (c) must be read in conjunction with subdivision (f), which is the penalty portion of the statute. [Subdivisions \(f\)\(1\) and \(2\) of section 1942.5](#) provide: "Any lessor or agent of a lessor who violates this section shall be liable to the lessee in a civil action for all of the following: [¶] (1) The actual damages sustained by the lessee. [¶] (2) Punitive damages in an amount not less than one hundred dollars (\$100) nor more than two thousand dollars (\$2,000) for each retaliatory act *where the lessor or agent has been guilty of fraud, oppression, or malice with respect to that act.*" (Italics added.)

It therefore must be recognized that penalties under section 1942 .5, subdivision (f)(2) indeed require "fraud, oppression, malice." The jury here found that Bendetti Management, Bob Bendetti, and Jim Lawson were guilty of at least one of those three.

We'll dispense with fraud, since park management was clear from the beginning what it was going to do, and indeed went ahead and did it. (The jury found only Sherry guilty of fraud, and he's not in this

appeal.) But what about oppression or malice?

It is one thing, of course, to negligently supervise someone performing a discrete act, particularly when one has a mindset that that act is perfectly legal. So we may grant, for example, that if Sherry came up with the idea of "sign or else," imposed it in an initial instance, and then the residents sued, it would be hard to find oppression or malice in the failure of Bendetti or Lawson to catch Sherry's error the first time.

But that's not this case. This case--to return to the theme of "willful persistence in error" mentioned above--is about a concerted policy, first implemented in the lease notices of April 1997 and never really abandoned even when residents were allowed to rescind.

Thus, during the period of April 1997 through November 1998, both Bob Bendetti (who we may identify as synonymous with Bendetti Management) and Jim Lawson were presented with complaints from the more vocal residents about legal deficiencies in the lease and the policy of forcing signatures by the threat of rent increases.

We have recounted a number already:

-- The resident who wrote to Bob Bendetti complaining that she "could not have 30 days to review the lease," and that Sherry told her that "If I did not sign the lease he would raise my rent by 5% every month."

-- The approach of the residents' league committee to Lawson, and Lawson's response that the park could raise rents as much as it wanted and the lease was non-negotiable.

-- The fact, as shown by a fax from Sherry to Lawson, that one resident had talked to Bob Bendetti and Bob Bendetti's attitude was: so sue us. ("What do you want to do now. [¶] Bob said to let him sue us?")

Again, one senses that the essence of the agents' argument is semantic. That is, the appellants' opening brief recognizes "at some point that Sherry was sending out rent increase notices," but then hastens to add that Bendetti and Lawson did not know of any retaliatory *purpose* in those rent increases; rather Bendetti and Lawson supposedly "authorized rent increases *pursuant to the Park's preexisting plan to*

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bring rents closer to what their research showed were market levels." (Italics added.) Thus Bendetti and Lawson perhaps relied "too quickly on Sherry's denials that he was imposing multiple rent increases for an improper reason." (Appellants' opening brief at pp. 80-81, italics added.)

*32 Is there a pea hidden in this series of artful gesticulations? We think so. The art is in the concealment of the fact that what Sherry was doing was clearly pursuant to pre-existing policy of forcing acquiescence to the new lease by means of the threat of rent increases to month-to-month tenants. And there is, to be sure, clear and convincing evidence that there was such a parkwide policy: The first lease notice of April 1997 was from "Park Management" to "All Residents" and it is simply not credible to think that it was not at least approved by Bob Bendetti and Lawson. After all, this was the beginning of the grand effort to bring all residents under one standardized lease. And yet that document began the grand effort with the saber rattle of the threat of rent increases ("If you do not respond to the office **within 30 days** from this date, as to whether or not you wish to sign a new lease, we will assume you want to remain on a month to month lease. [¶] Per the terms of a month to month lease, your rent may be increased every month, upon 90 days notice.") Subsequent lease notices to all residents (or all non-signing residents) contained the same implied threat. Then there was the whole series of waves of rent increase notices sent on the park's standard form: in June 1997, in July 1997, in August 1997 and in the Spring of 1998. It begs credulity to think that Bendetti and Lawson were unaware of these rent increases. They were in the business of managing rental property and if there is anything with which a rental property manager is mainly concerned, it is rent increases. Rent, from the point of view of someone like Bendetti or Lawson, was job one.

As for Lawson, his culpability rests on more than just his supervisory position over Sherry. Consider his letter of September 19, 1997 to Don Renno referencing the meeting between him, Miklos, and Mollenkramer. It is pretty clear that the residents' representatives in that meeting were asserting various violations of the Mobilehome Law. Of course, one might characterize Lawson's ultimate response as merely unreasonable ("Having been misled, I will not have the lease reviewed by another attorney. Rather, I will respond to your objections one by one."), and the jury might have so concluded. But the jury was also entitled to see in the response a kind of obstinate

indifference to the residents' rights worthy of the word "oppression." Consider in that regard that Lawson's main excuse for not checking with a lawyer was a transparently flimsy objection to the *form* in which the residents had presented their arguments rather than a confrontation with the merits. (We know from the drafting lawyer's testimony that Lawson didn't check with him, so we're talking about *any* lawyer, not just "another" lawyer.)

What about Bob Bendetti? He was Lawson's superior, he was the target of a number of letters complaining about the "sign or else" policy, and at one point his basic approach was, "so sue me." Again, a jury could reasonably infer an obstinate, perhaps in the "so sue us" comment an indifferent, even malevolent approach to the residents' rights under the Mobilehome Law--the implied thought being: "We can afford to hire top-notch lawyers and overwhelm you folks who live in trailers."

*33 Finally, the evidence of Sherry's reactions merits some consideration in regard to Bob Bendetti's and Jim Lawson's culpability, particularly the evidence from one resident that "a very angry Mr. Sherry" stated "he couldn't keep waiting around for me to decide." On the one hand, the jury might have validly concluded that Sherry was just a bit hyper, excitable, and all together too inclined to take his job "zealously" and acting on his own. But the implied finding is they didn't; rather, the jury found Bob Bendetti and Jim Lawson guilty of oppression or malice, so we must accordingly draw the reasonable inferences that can be drawn in that direction. Indeed, the jury assessed Bendetti Management a greater amount of culpability per retaliatory eviction (\$975) than the Sherry (only \$500), while assessing zero culpability against Don Bendetti and the partnership, suggesting that the jury decided that the buck started and stopped with the management company.

Accordingly, it is a reasonable inference that Bob Bendetti and Jim Lawson were putting a tremendous amount of pressure on Sherry to "produce" 100 percent compliance with the new lease, and deliberately gave him authority to raise month-to-month rents to bring about that compliance. Why *couldn't* Sherry "wait [] around" for a particular resident to decide to sign--it was no skin off his nose if the resident didn't hurry up and sign--*unless* his *superiors* had given him strict orders to get all residents on the new lease and concomitantly had also given him direct authority to keep raising rents

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until he got their desired result. Also, the notation that the Sherrys had "abandoned their job" is ambiguous, and a reasonable jury could decide that the "the job" being referred to was more than just being the front-line managers. Rather, the "job" was to successfully implement the policy of imposing standardized leases. Sherry, the jury could reasonably believe, was simply following orders.

2. *The Problem of the Award Against the Park and Its Owners* [\[FN32\]](#)

[FN32](#). Our discussion here corresponds to Argument IV.C. in the appellants' opening brief.

It is one thing, of course, to find oppression in the actions of the day-to-day operations managers Bob Bendetti and Jim Lawson, whose persistent (easily for more than a year) refusal to take the residents' complaints seriously crossed the line between negligence and oppression. (Cf. [Weeks v. Baker & McKenzie](#) (1998) 63 Cal.App.4th 1128, 74 Cal.Rptr.2d 510 [managing agents of big law firm were fully aware of partner's proclivities to harass female employees, and acted oppressively in their own right by not taking "misconduct seriously"].)

But the trial court awarded [section 1942.5](#) penalties against both Don Bendetti (an owner) and the Lincoln Center partnership (an owner), *despite* their specific exoneration by the jury of oppression or malice. That is--just to repeat the point--the *jury* specifically found that Don Bendetti and Lincoln Center did *not* act with either oppression or malice (and there are no facts in any event to suggest fraud).

*34 In this regard, the wording of the special verdict forms is particularly significant. There were three questions, with identical wording except for choices respectively between oppression, malice and fraud: "Do you find by clear and convincing evidence any defendant was guilty of ["oppression" in question 1, "malice" in 2, "fraud" in 3] in defendants' conduct towards the class *or authorized or ratified* such conduct?" (Italics added.) The partnership got only 4 yes votes for oppression, 3 yes votes for malice, and no votes for fraud. Don Bendetti got 1 vote for oppression, and zero votes for malice and fraud. (By contrast, Lawson got 10 votes for oppression, 9 for malice, and 4 for fraud.)

So how, then, could the trial court award [section](#)

[1942.5](#) penalties against two parties (owners) who had been not found to have acted oppressively or maliciously? Since *the jury* resolved the questions of oppression or malice in their favor, the resolution of conflicts in the evidence and the drawing of reasonable inferences therefrom are *not* available to uphold the trial court's decision on this point. Moreover, without substantial evidence of oppression or malice on the part of these persons, [section 1942.5](#) penalties would not be appropriate. Remember that [subdivision \(f\)\(2\) of section 1942.5](#) requires, by its terms, that "[p]unitive damages" awarded against "any lessor or agent who violates this section" are dependent on the "lessor or agent" having "been guilty of fraud, oppression or malice with respect to that act [i.e., "each retaliatory act"].)

Traditional common law of respondeat superior (merely showing that Bendetti Management and Bob Bendetti and Jim Lawson were employees of the owners) will not do. As explained at length in the *Weeks* case (see [Weeks, supra](#), 63 Cal.App.4th at pp. 1148-1149, 74 Cal.Rptr.2d 510), under traditional common law rules involving employer liability for the punitive-level acts of underlings, there must be an *independent* basis for the principal (or employer) of an agent (or employee) to be held responsible for the agent's acts meriting punitive damages before the principal can be assessed them. (See *id.* at pp. 1148-1149, 74 Cal.Rptr.2d 510, citing and quoting [Hale v. Farmers Ins. Exch.](#) (1974) 42 Cal.App.3d 681, 691, 117 Cal.Rptr. 146, overruled on other grounds in [Egan v. Mutual of Omaha Ins. Co.](#), *supra*, 24 Cal.3d at p. 822, fn. 5, 169 Cal.Rptr. 691, 620 P.2d 141; see also [Weeks, supra](#), 63 Cal.App.4th at p. 1149, 74 Cal.Rptr.2d 510, quoting comment b to section 909 of the Restatement Second of Torts at page 468 [it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously"].) Put another way, when it comes to traditional common law punitive damages and respondeat superior, there is, strictly speaking, no vicarious liability.

Of course, principals and employers have been properly assessed punitive damages under traditional common law rules, but such an assessment is found in something *additional* than merely having employed the bad acting employee or agent. The traditional bases for this something "additional" were enumerated in *Weeks* as one of four kinds of actions: (1) if the employer or principal *authorized* the bad act, or (2) the agent or employee was unfit and the

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agent or employer was *reckless in employing* the agent or employee, or (3) the agent was acting in a *managerial capacity and was acting in the scope of his employment*, or (4) the agent or employer *ratified* the bad act. ([Weeks, supra, 63 Cal.App.4th at pp. 1148-1149, 74 Cal.Rptr.2d 510.](#))

*35 To the degree that these common law rules are codified in title IX of the Civil Code dealing with, among other things, the liability of principals for their agents, this general approach is, if anything, narrowed. Section 2338 provides that a principal is responsible for the "*negligence* of his agent in the transaction of the business or agency" and the next provision, section 2339, provides that a principal "is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, *even though they are committed while the agent is engaged in his service.*" (Italics added.) That is: nothing other than negligence unless authorized or ratified. (Accordingly, the trial court properly instructed the jury that it was to judge each defendant liable for his or its own actions.)

Now, clearly, had the jury determined that Don Bendetti and the partnership were guilty of oppression or malice or had *authorized or ratified* it, we could easily uphold the trial court's award on at least three of the common law bases including the two statutory bases: There is evidence from which we could infer that Don Bendetti and the partnership authorized the "sign or else" policy; it is clear that Bob Bendetti and Lawson were managerial agents and, given the nature of the policy (intimately related to the actual operation of the business) we could infer that implementation of the policy was within the scope of their employment; and also we could infer ratification from the owners' acquiescence to the policy for the long time period to which it was adhered in the face of resident complaints.

But all that founders on the jury's specific findings of no oppression, no malice, and *no authorization and no ratification*. We thus cannot even uphold the trial court's decision on the theory that the culpable agents were acting in a managerial capacity, because the implication of the jury's finding is that they were not acting within the scope of their employment. We are, by contrast, forced to draw the inference that Bob Bendetti, Lawson, and their Sherry were off on their own frolic and detour, implementing a policy of retaliatory rent increases *without* the owners'

authority.

Now, one might respond to that point by saying it is somewhat counterintuitive--surely the owners knew what was going on--and perhaps not itself supported by substantial evidence. However, if that is truly the case, it was incumbent on the residents to raise the issue in a protective cross-appeal (i.e., "the jury's exoneration of Don Bendetti and the partnership was not supported by substantial evidence"). None is raised. Accordingly, we cannot find support in traditional common law respondeat superior principles to uphold the trial judge's decision to assess [section 1942.5](#) penalties against two parties found specifically innocent of oppression or malice.

But, having earlier made the point above that [section 1942.5](#) penalties should not be simplistically equated with traditional common law punitive damages, we may next ask whether the statute itself contemplates some sort of vicarious liability. The answer here is no as well.

*36 One of the more remarkable aspects of [section 1942.5](#) is its express provision for agent liability in subdivision (f) and subdivision (f)(2) even though the definition of retaliatory eviction (particularly as defined in subdivision (c) quoted above) is confined only to the acts of *lessors*. From that fact the agents have argued that *they* could not be liable at all, a point which we will reject below in part V.E. But, to be fair, a logical consequence of the plain provision in subdivision (f)(2) that penalties may be assessed against any "lessor or agent" who "has been guilty of fraud, oppression or malice" is that a lessor may not be guilty of fraud, oppression or malice while an agent may be. In short, the language of subdivision (f)(2) contemplates lessors and agents *themselves* bearing the consequences of their own fraud, oppression, or malice. Moreover, even if, for sake of argument, subdivision (f)(2) contemplates lessor liability for authorization or ratification of a retaliatory eviction, *this jury* specifically found no authorization or ratification.

Our conclusion in regard to the text of [section 1942.5, subdivision \(f\)\(2\)](#) is strengthened when we compare the statute to the codification of traditional punitive damages in section 3294, particularly as explained in *Weeks*. Most conspicuously, section 3294 has an express provision for employer liability in subdivision (b), while [section 1942.5](#) does not.

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The nuances of employer liability under subdivision (b) were explored in *Weeks* (the court ultimately affirming over \$3 million in punitive damages under that subdivision against the employing law firm), the key question being the circumstances under which an employer could be held liable for punitive damages. (See *Weeks, supra*, 63 Cal.App.4th at pp. 1153-1155, 74 Cal.Rptr.2d 510.) The employer in *Weeks* argued that the elements of subdivision (b) had to be present *plus* the employer itself had to be guilty of fraud, oppression or malice. No, said the court, the elements of subdivision (b) are "the *equivalent* of fraud, oppression or malice," (see *id.* at p. 1154, 74 Cal.Rptr.2d 510, italics added), so it was enough that there was evidence that (to track the language of the subdivision) the law firm had "advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights of others." Subdivision (b) also provides for employer liability for the authorization or ratification of the wrongful conduct, or when the employer is "personally guilty of oppression, fraud or malice." This latter avenue is, however, clearly foreclosed by the jury's finding.

D. The Issue of Calculation of [Section 1942.5](#)
Penalties by Reference to Four
Different Defendants [\[FN33\]](#)

[FN33.](#) Our discussion here corresponds to Argument IV.G. in the appellants' opening brief.

What we have just concluded regarding the owners' liability for [section 1942.5](#) penalties obviates a related issue regarding the calculation of those penalties for which the judgment makes Don Bendetti and the partnership liable. As noted, the trial court arrived at a total figure under [section 1942.5](#) of \$334,800, based on a total of \$3,100 times 108 for retaliatory rent increases, based on various amounts (all under \$1,000) assessed against each of four different *agent* defendants (Bendetti Management, Bob Bendetti, Jim Lawson, and John Sherry) themselves representing various layers of management under the park owners. This accumulation resulted in a large award against Don Bendetti and the partnership despite their specific exoneration.

*37 With that exoneration the accumulation of penalties against Don Bendetti and the partnership must likewise fall. Since they were determined by the

jury not to be guilty of oppression or malice or the authorization or ratification of oppression or malice, *they* cannot be assessed any penalties under [section 1942.5](#) which, as we have noted, requires oppression or malice or fraud.

Our determination on the point, however, does not affect a change in the overall amount of money owed by other defendants under the judgment. Assuming, as we will show in the next section, that agents may be liable for penalties under [section 1942.5, subdivision \(f\)\(2\)](#), there will still be an overall *total* of \$334,800 in [section 1942.5](#) penalties assessed. Residents will still have a judgment for a total of \$334,800 in [section 1942.5](#) penalties, but that \$334,800 will now be the sum of four constituent parts: For Bendetti Management, \$975 x 108 = \$105,300; for Bob Bendetti, \$850 x 108 = \$91,800; for Jim Lawson, \$775 x 108 = \$83,700; and for John Sherry, \$500 x 108 = \$54,000. Put these sums together and they still come to \$334,800.

At most, our determination regarding Don Bendetti and the partnership only makes these penalties harder to collect, because now they will be borne by each individual agent, but that is, after all, what the jury originally assessed. Given the jury's exoneration of the owners and *its* assessment of penalties against the individual agents with no penalties leveled against Don Bendetti or the partnership, there is even some rough justice in this regard.

E. Agent Liability [\[FN34\]](#)

[FN34.](#) Our discussion here corresponds to Arguments IV.B. and IV.D.1 in the appellants' opening brief.

But now we turn to the flip side of the exoneration of Don Bendetti and the partnership from [section 1942.5](#) penalties, which is the argument (presumably made by the agents Bendetti Management, Bob Bendetti and Jim Lawson, despite its incorporation in a joint brief) that agents *qua* agents of lessors cannot be liable under [section 1942.5](#). We have already discussed this argument above, noting that the actual language of the statute (specifically subdivision (f)(2)) leads exactly to the opposite conclusion. At oral argument, counsel for the defendants pointed to arguably analogous civil rights law where the Supreme Court refused to hold employees liable even though the predicate definition of the statutory violation specifically envisioned the acts of

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employees (see [Reno v. Baird \(1998\) 18 Cal.4th 640, 645, 76 Cal.Rptr.2d 499, 957 P.2d 1333](#), noting that "employer" was defined to *include* "any person acting as an agent of an employer"). Counsel noted the contrast to [section 1942.5](#), where the predicate definitions are framed solely in terms of acts of lessors (and the word "lessor" is not defined to include agent).

This argument, however, contains a logical flaw. It does not follow that because the Legislature might want to *define* discrimination in terms of acts of agents as well as employers that the Legislature did not want to *punish* retaliatory eviction when practiced by agents as distinct from lessors. The definition of a wrong is a question distinct (though granted, often related) from the punishment of that wrong.

*38 As noted above, the language of [section 1942.5](#), particularly subdivision (f)(2), seems plain enough. Lessors *or* agents of lessors may be personally liable for violations of [section 1942.5](#). (Thus making [Reynolds v. Bement \(2005\) 36 Cal.4th 1075, 32 Cal.Rptr.3d 483, 116 P.3d 1162](#) [officers, directors and shareholders of corporation not liable for nonpayment of overtime wages where applicable statute did not define "employer"] inapposite to this case.) Any other interpretation simply nullifies the Legislature's choice of words. (We therefore need not explore the more jurisprudentially problematic question of whether an agent's action resulting in retaliatory eviction is "wrongful in its nature" or merely *malum prohibitum* like parking ticket. (Cf. [Otanez v. Blue Skies Mobile Home Park \(1991\) 1 Cal.App.4th 1521, 3 Cal.Rptr.2d 210](#) [manager of mobilehome park could not be liable under Mobilehome Law provision which by its terms prohibited only landlords from terminating utilities].))

F. The Directed Verdict [\[FN35\]](#)

[FN35](#). Our discussion here corresponds to Arguments IV. D.2. and IV.D .3. in the appellants' opening brief.

The trial court decided that there had been retaliatory rent increases as a matter of law, and directed a verdict to that effect. The motion that prompted the determination was based solely on the undisputed facts of what *Sherry* did in threatening successive \$50 rent increases. Lawson, for example, claimed that he didn't know of the policy, though the jury would ultimately not believe him.

The question thus arises as to whether taking the question from the jury's determination was correct. One must remember here, though, that the trial court was not directing a verdict against any particular entity other than Sherry, who had defaulted. The trial court was merely determining that the threat delivered *by Sherry* of continued \$50 rent increases was retaliatory as a matter of law.

Was that the only conclusion to which a reasonable jury could come? Yes. The power to raise rent is the power to evict. And we have seen that the power to raise rents was clearly linked to a refusal to sign the defective lease. As we have also shown, the residents were within their rights not to sign the lease, because it was violative of the Mobilehome Law. That clearly was retaliatory eviction, as shown in [Rich II, supra, 63 Cal.App.4th 803, 75 Cal.Rptr.2d 170](#).

Rich II arose out of two distinct sets of rent increases. In response to the first of about 13 percent, the residents sought a political solution from the local city council. (*Rich II, supra*, 63 Cal.App.4th 808.) That prompted a second round of increases, and the issue was whether those increases were retaliatory. The court came to the common sense conclusion (yes), and held that even those residents who did not move out were entitled to [section 1942.5](#) damages. (See *id.* at p. 819.)

We must remember that in its directed verdict the trial court did not take away from the jury the question of *individual responsibility* for the policy of successive rent increases (other than arguably the question of Sherry's responsibility), and in fact the jury would ultimately exonerate Don Bendetti and the partnership owning the park from that policy.

*39 Finally, any arguable error as to the fact that there was a directed verdict that the rent increases were retaliatory as a matter of law is shown to be harmless, by virtue of the fact, explained above, that the jury found that Bob Bendetti's and Lawson's actions were oppressive in any event.

G. Jury Instruction Issues [\[FN36\]](#)

[FN36](#). Our discussion here corresponds to Argument IV.E. in the appellants' opening brief.

The owners and managers take issue with four jury instructions given in regard to [section 1942.5](#)

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penalties.

1. *Based on Mobilehome Law Violations?* [\[FN37\]](#)

[FN37](#). Our discussion here corresponds to Argument IV.E.1. in the appellants' opening brief.

The court instructed: "If you find that the class suffered actual injury, harm, or damage caused by the violations the Mobilehome Residency Law or retaliatory rent increase or the threat thereof or the use of duress or economic coercion to force class members to sign leases, you must decide in addition whether by clear and convincing evidence you find that there was oppression, malice or fraud in the conduct on which you base your finding of liability."

The defendants contend that this instruction meant the jury could impose statutory 1942.5 penalties based on conduct not covered by [section 1942.5](#), and in particular that they could find [section 1942.5](#) penalties based on Mobilehome Law violations.

The first level of the assertion appears to be correct. The syntax of the instruction can be reduced to at least this: If you find that the class suffered harm by the Mobilehome Law violations *or* retaliatory rent increase, then you must decide whether there is clear and convincing evidence of oppression etc. to assess 1942.5 liability. That pesky "or" does indeed allow for retaliatory eviction based only on Mobilehome Law violations as distinct from what the trial court based its finding on--the coercion of the \$50 rent increases.

The key question, however, is still whether it is probable that the error affected the jury's verdict. (See [Logacz v. Limansky \(1999\) 71 Cal.App.4th 1149, 1156, 84 Cal.Rptr.2d 257.](#)) And on that point the answer is no. The trial judge had properly concluded that there had indeed been retaliatory eviction based on Sherry's threats, so by definition the defendants could not be prejudiced by the thought that a finding of retaliatory eviction could *also* be premised on Mobilehome Law violations--that was simply cumulative to what the jury already knew and indeed had been told. Since the oppression etc. finding had, under the instruction, to be *on top of* any finding of predicate violation, the error was only academic. The jury still had to assess oppression, malice or fraud in regard to each individual defendant.

We need only add that *Rich II* is itself clear that there is no mutual exclusion between [section 1942.5](#) penalties and Mobilehome Law penalties. Given the vulnerability of mobile home residents, the court held Mobilehome Law penalties to be supplementary to [section 1942.5](#) penalties. (See [Rich II, supra, 63 Cal.App.4th at p. 814, 75 Cal.Rptr.2d 170](#) ["Plainly, the holding that mobilehome owners receive more, rather than less, protection than other lessees supports our conclusion that the MHRL does not limit any of the rights otherwise provided mobilehome tenants by statute or the common law."].)

2. *Presumption of Knowledge of the Law* [\[FN38\]](#)

[FN38](#). Our discussion here corresponds to Argument IV.E.2. in the appellants' opening brief.

*40 The trial court gave this one paragraph-one sentence Jury instruction: "All persons are presumed to know the law." The owners and managers argue that this instruction allowed the jury to presume conscious disregard of the tenants' rights (under the Mobilehome Law) even though individual defendants and entities may not have known they were violating any tenant's rights by offering the lease and raising rents.

Malice may be proved by circumstantial evidence ([Beroro v. National General Corp. \(1974\) 13 Cal.3d 43, 66, 118 Cal.Rptr. 184, 529 P.2d 608.](#)) And the circumstantial evidence that Bendetti Management, Don Bendetti, and John Lawson (we need not worry about the defaulted John Sherry) knew that the tenants had rights under the Mobilehome Law which they were disregarding is quite substantial. Specifically, Don Bendetti has been in the park management business for years. The Bendettis have owned other parks. Lawson had worked for other park management companies. Further, as we have emphasized above, the letter from the residents' counsel in May 1998 surely put them all on notice of need to ascertain whether there were violations of the Mobilehome Law, and rather than consult with their lawyer, they dug in their heels.

3. *Effect of Sherry's Default* [\[FN39\]](#)

[FN39](#). Our discussion here corresponds to Argument IV.E.3. in the appellants' opening brief.

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Sherry defaulted. The trial court instructed: "The requests for admissions that were submitted to Mr. Sherry are going to be read to you, ladies and gentlemen. They are not binding upon any of the other defendants in this matter. [¶] You may consider them and the totality of the circumstances surrounding their submission and their nonresponse for whatever weight you wish to give them. [¶] All right. Go ahead, Mr. Singer [plaintiffs' attorney]. Mr. Singer: Would you instruct the jury they are binding on Mr. Sherry, your honor. [¶] The court: They are binding on Mr. Sherry, that is correct. [¶] Mr. Singer: The following matters have been deemed admitted. I will read them as they were asked."

The owners and managers now say that Sherry's admissions could be used (improperly) against them. (Specifically, Sherry's admissions implicated Lawson, Bob Bendetti, and the Bendetti company in the monthly rent increases.)

But the actual text of the instruction refutes the assertion: The court was clear that Sherry's admissions were not binding on anyone else. "They are not binding upon any of the other defendants in this matter." Indeed, the trial court repeated that very point later: "Requests for admission were served to Mr. Sherry and were deemed admitted by the court. [¶] They are not binding upon any of the other defendants in this matter. You may consider them and the totality of the circumstances surrounding their submission and their nonresponses for whatever weight you wish to give them."

4. [Section 1942.5 Penalties In Favor of All 108 Members](#) [\[FN40\]](#)

[FN40](#). Our discussion here corresponds to Argument IV.F in the appellants' opening brief.

The trial court instructed: "Your award of punitive damages against each defendant will be applied in favor of each of the 108 members of the class." Thus, as we have seen, the jury awarded a specific amount as to each of four specific defendants, which would be multiplied by 108 plaintiffs.

*41 The owners and managers (in light of our earlier determination, now only the managers) say that the instruction was error because there was no individualized consideration of the effect of the conduct of each defendant on "particular plaintiffs,"

i.e., what each defendant did to each plaintiff.

The argument is basically a corollary of the defendants' position that the trial court erred in treating the case as a class action. But it has this wrinkle. The theory is that because 1942.5 penalties are described as "punitive damages" in the statute (subd .(f)(2)), *constitutionally*, punitive damages must be measured by the factors including the magnitude of the plaintiff's injury.

The problem with the theory is that it reduces to the absurdity that there could never be punitive damages awarded in a class action, since the individualized proof that punitive damages require would defeat the idea of a class action in the first place. And we know that isn't true. As our high court said in [Ferguson v. Lieff, Cabraser, Heimann & Bernstein \(2003\) 30 Cal.4th 1037, 135 Cal.Rptr.2d 46, 69 P.3d 965](#): "[C]ourts have encouraged the use of mandatory class actions to handle punitive damages claims in mass tort cases. Mandatory class actions avoid the unfairness that results when a few plaintiffs--those who win the race to the courthouse--bankrupt a defendant early in the litigation process. They also avoid the possible unfairness of punishing a defendant over and over again for the same tortious conduct." (Quoting [In re Exxon Valdez \(9th Cir.2000\) 229 F.3d 790, 795-796](#).)

Moreover, one must differentiate classic traditional common law punitive damages (albeit codified in [section 3294 of the Civil Code](#)) from [section 1942.5](#) penalties. In [De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates, supra](#), 94 Cal.App.4th 890, 114 Cal.Rptr.2d 708, the court reasoned that Mobilehome Law penalties and traditional punitive damages were mutually exclusive--the Legislature meant to displace the punitives in its penalty scheme under the Mobilehome Law. By contrast, as we have seen, in [Rich II](#) the court held that penalties under the Mobilehome Law were "supplementary" to the older strictures against retaliatory eviction.

The two cases can be easily reconciled. [De Anza](#) involves the comparison between traditional common law punitive damages and a discrete statutory scheme, while [Rich II](#) involves two discrete statutory schemes. It elevates substance over form to say that because traditional common law damages are codified in [section 3294 of the Civil Code](#), they reflect a mutually exclusive statutory scheme.

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VII. ATTORNEY FEES

Both the owners and managers and the residents raise issues regarding the trial court's determination of attorney fees at \$883,000. [\[FN41\]](#)

[FN41.](#) Hence our discussion here corresponds to both Argument V. in the appellants' opening brief and Argument II.C. in the respondents' cross-appeal.

A. General Authority

There are three bases for *an* attorney fee award here: section 798.85, the attorney fee provision in the Mobilehome Law, [subdivision \(g\) of section 1942.5](#), the attorney fee provision in the retaliatory eviction statute, and section 1717, for litigating causes of action on a contract.

*42 We'll start with the easiest category. The argument that [section 1942.5](#) fees are not appropriate because there were no "claims" for retaliatory eviction is exceedingly weak. As we have shown, the *threat* of rent increases for the lawful refusal to sign the lease certainly made out valid retaliatory eviction claims under subdivision (c) of the statute.

A bit of complexity is introduced into the analysis when one considers the fact that the residents had a contingency attorney fee agreement with their counsel of 50 percent of any damage recovery for attorney fees. The theory of the owners and the managers, then, is that section 1717 fees pertaining to contract, being limited to what a client becomes liable to pay (see [Trope v. Katz](#), (1995) 11 Cal.4th 274, 282, 45 Cal.Rptr.2d 241, 902 P.2d 259) can only justify a fee of about \$92,500 (half the some \$185,000 restitution award on the contract). By the same token, section 798.85 fees arising out of Mobilehome Law violations are limited to a similar amount, \$94,500 (half of the \$1,800 times 105 signers, or some \$94,500). Together, according to the defendants, these permissible awards of about \$200,000 max is a considerable distance from the \$883,000 actually awarded.

The flaw in the argument as regards the section 798.85 fees is fairly easy to spot. When one actually reads the statute, one finds that it is not in any way limited to amounts recovered. We quote it in full now: "In any action arising out of the provisions of this chapter the prevailing party shall be entitled to reasonable attorney's fees and costs. A party shall be deemed a prevailing party for the purposes of this

section if the judgment is rendered in his or her favor or where the litigation is dismissed in his or her favor prior to or during the trial, unless the parties otherwise agree in the settlement or compromise."

There is nothing in section 798.85 about limits based on actual amounts recovered, and we find that in the "arising out" language sufficient justification (we'll get to general reasonability soon) for the entirety of the \$883,000 fee award. After all, litigation for the Mobilehome Law violations, the rescission damages, and the retaliatory eviction damages all *arose out* of the violations of the Mobilehome Law in the lease.

We need only add that [subdivision \(g\) of section 1942.5](#) similarly is not limited by total amounts awarded pursuant just to [section 1942.5](#) penalties under subdivision (f)(2). That statute, in full, reads: "In any action brought for damages for retaliatory eviction, the court shall award reasonable attorney's fees to the prevailing party if either party requests attorney's fees upon the initiation of the action."

Thus, as between both [section 798.85](#), and [section 1942.5, subdivision \(g\)](#), there is ample power to take up any slack arguably left by section 1717. Again, the restitution damages was litigation that "arose out" of the bad lease that violations of the Mobilehome Law begat. By the same token, the idea that the residents' counsel were obligated to segregate their fees into recoverable and non-recovery components fails: It was all recoverable work.

B. Calculation of Fees

*43 However, just because the trial court had legal authority to make the whole award does not mean that the court was within its discretion in awarding the amount it did. [\[FN42\]](#)

[FN42.](#) Thus we will now deal with the appellants' glancing grumble (not really a contention) in Argument V. of the opening brief that the trial court awarded fees based on "every hour" at the full hourly rate and Argument II.B in the cross-appellant's brief that fees should have been enhanced in light of various factors.

Preliminarily, we note that the trial court did not make the common error, when dealing with statutorily recoverable attorney fees paralleling contingency fee agreements, of just taking the total recovery and adding the contingency percentage on

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top of that. (E.g., you won \$1 million in litigation where fees are statutorily recoverable, your contingency fee is 40 percent, ergo you are awarded \$400,000 in fees pursuant to the statute.) The trial court did it correctly, that is to say, by following [Serrano v. Priest \(1977\) 20 Cal.3d 25, 141 Cal.Rptr. 315, 569 P.2d 1303](#), nicely explained in [Lealao v. Beneficial California, Inc. \(2000\) 82 Cal.App.4th 19, 40-43, 97 Cal.Rptr.2d 797](#). Under *Serrano*, the judge takes the actual time spent, multiplies it by a reasonable hourly rate (which is called the "lodestar") and then increases or decreases that amount by applying a positive or negative multiplier to reflect a variety of factors, including novelty and complexity of issues, results obtained, and contingency of the risk. (See also [Hammond v. Agran \(2002\) 99 Cal.App.4th 115, 135, 120 Cal.Rptr.2d 646](#).)

Here, the trial judge took the total time devoted by the residents' attorneys to the case, and multiplied by the residents' attorneys' actual hourly rate. Now, while the residents' attorneys argue on cross-appeal that the trial court should have used an hourly rate *greater* than their actual hourly rate, it is impossible to say that there was any abuse of discretion by the court in using their actual hourly rate, even if, for sake of argument, other firms doing similar work charge more per hour.

The harder issue is the multiplier. Here the court effectively used a multiplier of 1. There is indeed much evidence in the record that Judge MacDonald appears to have ignored or undervalued in arriving at that multiplier; the case for increasing the multiplier turns out on evaluation to be quite formidable.

We begin with comments in that regard made by Judge MacDonald on February 7, 2003 in a hearing to reconsider his denial of enhancement on the attorney fee issue. We will now set forth those comments at length:

"This case was about as close to a slam dunk as just about any case I heard in 20 years on the bench or tried myself in 17 years before that. [¶] The only challenging issue, to my mind, at all in this case was how far up the ladder liability should go. [¶] The statutory violations, some were more serious than others. Those were affected in the various numbers awarded. Some were more serious than others. [¶] But continuing the basketball analysis [*sic*: court probably meant analogy], this was--I am kind of comparing it to the whole shot that Shaquille O'Neal

could be successful on 95 percent of the time, comparing it to basketball--and why it went as far as it did. [¶] Things got awfully contentious, more contentious than they should have. Whether that was precipitated--I'm not going to say whether this was appropriate or, under the circumstances, given the clarity of the statutory violations or the semi-literacy and unintelligibility, more general intelligibility of the communications of plaintiffs' counsel to the defendants' counsel early on, I don't know, but the contentiousness that went on throughout this was just mind boggling. [¶] So, as to the contingency risk, there was really no contingency risk, except what might have been created by competency of counsel. [¶] This case was a slam dunk. It should have never gone on the way it did. [¶] To the extent that there was a consideration of contingency or delay in getting paid, the 50 percent fee, I think, more than adequately covers that issue."

*44 These comments require some parsing. On the one hand, the sheer egregiousness of the "sign or face an indefinite series of monthly rent increases" policy imposed by the park management *is* so unavoidable that, in insurance-speak, this was a case where liability was "reasonably clear." (See [Ins.Code, § 790.03, subd. \(h\)\(5\)](#).) To the degree that one might predict that there would be *some* liability incurred by somebody in park management, the case was indeed a "slam dunk." Indeed, we must ourselves admit that the essential culpability of park management is so overwhelming that it is easy to miss the thicket of tedious legal points that perceptive and energetic counsel can raise.

This case is thus a bit like looking at a gothic church viewed at a great distance. It is easy to see the building and its general pointy shape--that's unavoidable, the "slam dunk" part in the trial court's phrase.

But you can easily miss major details. Then, get a little closer and look a little longer, and all of a sudden you notice all the gargoyles grinning down at you, which have to be tediously exorcised one by one. So, if by "slam dunk" Judge MacDonald meant that this was an easy case for the plaintiffs' attorneys to *litigate*--that is, to go *easily* from complaint to judgment, even though some sort of favorable judgment was probable in the Holmesian sense of the law being the prophecy of what a court will do--we must disagree; the issue is not so simple. Consider: the sheer crushing number of issues raised (notice we

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haven't said any of them were or are frivolous), the sheer volume of paper, the multiplicity of defendants and tenacity of counsel and the consequent "tag team" effect created by multiple defendants with separate representation, the fact that there are only a relative few cases dealing directly with problems of leases in the context of the Mobilehome Law and linked rent increases (*Rich I* and *Rich II* are the closest, and anyone who reads those opinions must conclude that those cases were cakewalks compared to this one), the fact that the case did drag out extraordinarily long at the trial level (and now, alas, at the appeal level as well). If this were a probate case it would be a candidate for a Jarndyce award. [\[FN43\]](#)

[\[FN43\]](#). After the famous fictional case in Dickens' Bleak House that dragged on so long that eventually nothing was left to fight over.

So there is a very, very strong case indeed to send the case back for an upward re-evaluation of the *Serrano* multiplier. [\[FN44\]](#) Against this case, however, is the classic abuse of discretion standard of review, and there are some things to be said in favor of the trial court's decision not to multiply upward. First, the total award was large in comparison with the total recovery, counsel were compensated for all their time, and the large contingency fee (as Judge McDonald noted) does (at least partially) compensate for the case being dragged out. Since the whole point of an abuse of discretion standard is that you don't have to hit the bull's eye, just the target, we cannot say that Judge McDonald's decision to use a multiplier of 1 didn't at least hit the outer edge.

[\[FN44\]](#). For people who think in whole integers, the word multiplier can be misleading. A trial court is not forced to double fees (multiply times 2) as the next level up. Percentages are also allowable--a court can use, for example, a multiplier of 1.1 or 1.2, the effect of which would be only a modest upward adjustment.

C. Automatic Reversal? [\[FN45\]](#)

[\[FN45\]](#). Our discussion here corresponds to Argument V.A. in the appellants' opening brief.

*45 But now we come to the future, and the final assertion by the owners and managers: The idea that

any reversal of the judgment--"in whole or in part" as the opening brief puts it--no matter how trivial in connection with the judgment as a whole, should *automatically* force a reversal of the entire attorney fee award.

It is, of course, fairly common for attorney fee orders or judgments providing for those fees to fall with the reversal of the judgment on which they are predicated. So, for example, where a party wins a summary judgment motion, and the ensuing judgment is reversed, reversal of a consequent attorney fee order is a matter of course. (E.g., [Department of Industrial Relations v. Nielsen Construction Co.](#) (1996) 51 Cal.App.4th 1016, 1031, 59 Cal.Rptr.2d 785.)

The problem is not "the whole," but the "in part." The owners and managers cite three cases for the "if any part falls, all the attorney fees fall" rule, but none of those cases really bear that brittle proposition out. [Allen v. Smith](#) (2002) 94 Cal.App.4th 1270, 1284, 114 Cal.Rptr.2d 898 was a summary judgment reversal case. The point of the case was that even though there was no appeal of the separate attorney fee order, the fact that the underlying (and appealed from) judgment was reversed still meant that the trial court could reverse the order on remand. (*Ibid.*) The court said nothing about partial reversals.

If anything, [Neecke v. City of Mill Valley](#) (1995) 39 Cal.App.4th 946, 965- 966, 46 Cal.Rptr.2d 266 undercuts the owners and managers' all-or-nothing approach. In *Neecke*, a property owner challenged three local city tax ordinances as violative of Proposition 13; he also sought class certification. The trial court determined that all three ordinances violated Proposition 13, but rejected class certification. The trial court then awarded the property owner all his fees (under the private attorney general statute) except those incurred in his unsuccessful effort to certify the class. On appeal, the city conceded that the first two ordinances violated Proposition 13, but appealed from the determination that the last one did. The owner challenged the denial of class certification. The city prevailed on both issues. With regard to the attorney fee award, the *Neecke* court merely said that in light of the fact that the current version of the ordinance had passed constitutional muster, the question of whether he should receive attorney fees had been "significantly altered." ([Neecke, supra](#), 39 Cal.App.4th at p. 965, 46 Cal.Rptr.2d 266.) But--and this is important--the

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appellate court clearly left the door open for the owner to receive his fees. The appellate court "exercised" its "discretion to instruct the trial court to consider on remand whether, in light of our decision, but also in light of the fact that [the owner] prevailed regarding the two earlier ordinances, Neecke should be awarded attorney fees ... and, if so, in what amount." (*Id.* at p. 966, 46 Cal.Rptr.2d 266.)

Finally, the owners and managers cite our earlier acquaintance, *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates*, *supra*, 94 Cal.App.4th at page 922, 114 Cal.Rptr.2d 708. But *De Anza* was basically an "in whole" case. There, the trial court awarded classic punitive damages of \$6 million, and actual damages (a mere \$36,000) had already been paid. With the complete elimination of the \$6 million on appeal, no wonder the post-judgment attorney fee award was reversed as well.

*46 If there is a unifying idea in the fee reversal cases, it is that the reversal has also reversed the substance of the judgment, making the party awarded fees no longer the prevailing party for purposes of a fee statute. (E.g., *Casey v. Overhead Door Corp.* (1999) 74 Cal.App.4th 112, 124, 87 Cal.Rptr.2d 603 ["Since we reverse the judgment upon which the fees and costs were awarded, we must also reverse the judgment for fees and costs." (Italics added.)]; *Southern Pacific Transportation Co. v. Mendez Trucking, Inc.* (1998) 66 Cal.App.4th 691, 696, 78 Cal.Rptr.2d 236 ["Since we reverse the judgment below, respondent is no longer the prevailing party, and thus not entitled to attorney fees...."]; *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096-1097, 64 Cal.Rptr.2d 457 ["Because it is based on the judgment favoring Blockbuster, the award of attorney fees and costs to Blockbuster must be reversed along with the judgment." (Italics added.)].)

So the precise question before us now is not whether there is some kind of reversal of some kind, no matter how small in comparison to the general scheme of things, that requires reversal of the entire fee award, but whether what reversals we now contemplate "substantially alter" (in *Neecke's* phrase) or otherwise undercut the judgment as the *basis* for the attorney fee award. And that question must be answered in the negative.

What have we done in this appeal? The residents

have prevailed in their cross-appeal on the dismissal of 110 passive class members. For their part, the owners and managers will gain what might better be described as "modifications" rather than "reversals" of the judgment in these particulars: The nunc pro tunc provision will have to be deleted (which will be worth something in interest, but not readily calculable now); there will be a reduction of \$12,600 in Mobilehome Law penalties to account for seven non-signers of the lease; there will be a reduction of about \$6,000 in restitution damages to account for three non-signers, and agents will not have to be liable on the judgment for such damages; and there is *no net reduction* in total [section 1942.5](#) penalties, though the judgment will now not make the owners jointly and severally liable for them. Given that most of the judgment favoring the residents remains intact, and that future proceedings involving the 110 dismissed class members could easily yield results more than offsetting the modifications we must make here, it is clear that, in substance, the residents have prevailed in this appeal and remain the prevailing party in this litigation. The attorney fee award must therefore remain entirely intact.

VIII. DISPOSITION

The judgment ("R-2") is hereby wholly affirmed except, and *only* except, in the following particulars:

(1) The judgment is reversed with respect to the dismissal of the 110 passive class members weeded out by discovery nonresponses, and remanded to the trial court with instructions for further proceedings consistent with this opinion.

*47 (2) All references in the judgment to its entry nunc pro tunc as of June 30, 2001 are deleted.

(3) The Mobilehome penalties of \$194,400 are reduced by \$12,600 to \$181,800 to account for the seven non-signers of the lease.

(4) The judgment is modified to delete any provision for liability on the part of Bob Bendetti, Bendetti Management, Jim Lawson, or John Sherry for the \$181,800 in Mobilehome Law penalties.

(5) The aggregate rescission penalties of \$190,891.52 is reduced by \$5,981.34 (new total: \$184,910.18) to account for the three testifying class members who never signed leases.

(6) The judgment is modified to delete any provision

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for liability on the part of Don Bendetti, Lloyd Mokler (aka Mochler) or the Lincoln Center partnership for the (otherwise unaffected) total of \$334,800 in [section 1942.5](#) penalties. In that regard, the judgment shall reflect that the following entities and individuals *are* each individually liable in [section 1942.5](#) penalties in the following amounts: Bendetti Management: \$105,300; Bob Bendetti: \$91,800; Jim Lawson: \$83,700; and John Sherry: \$54,000.

We also direct the trial judge to have an amended partial judgment prepared incorporating the above provisions so that the parties may have only one operative document reflecting the status of the judgment after this trip to the Court of Appeal. The trial court file is voluminous enough already, and it will only compound the difficulties of any judge who will preside in future proceedings to have to cross-refer between the "R-2" amended judgment and this opinion to figure out exactly what the judgment now provides after the reversal and modifications directed by this court in this decision.

Since the residents clearly remain the prevailing parties in this appellate litigation, in the interests of justice they will recover their costs on appeal. All future proceedings shall be consistent with this opinion.

I CONCUR: [ARONSON, J.](#)

[O'LEARY, J.](#), concurring.

I concur in the rationale and result of the majority opinion only. The California Constitution requires decisions of the Supreme Court and Courts of Appeal to be "in writing with reasons stated." ([Cal. Const., Art. VI, § 14.](#)) In any given opinion, it is the responsibility of the justices to individually determine what is necessary to satisfy this constitutional mandate. [\[FN46\]](#) Reasonable minds can differ. Respectfully, I do not join the majority opinion, because I am not in accord with its tenor and scope.

[FN46.](#) "An opinion sufficiently states reasons if it sets forth the grounds upon which the justices concur in the judgment. This requirement is not subject to measurement by objective criteria, since what constitutes an adequate statement of reasons necessarily is a subjective determination. The author of an opinion must follow his or her own judgment as to

the degree of elaboration to be accorded to the treatment of any proposition and as to which questions are worthy of notice at all." ([Lewis v. Superior Court \(1999\) 19 Cal.4th 1232, 1236, 82 Cal.Rptr.2d 85, 970 P.2d 872.](#))

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