No. 21-

IN THE

Supreme Court of the United States

M & N FINANCING CORPORATION
AND MAHMOOD NASIRY,

Petitioners,

v.

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING, A DEPARTMENT OF THE
STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an action for alleged gender discrimination in violation of a state civil rights statute, is an award of more than $6 million in penalty damages against a small business and its owner unconstitutionally excessive, as a violation of the Eighth Amendment, where none of the alleged victims of discrimination suffered any financial loss at all?

LIST OF PARTIES TO THIS PROCEEDING AND STATEMENT OF RELATED CASES

The plaintiff in this case is the Department of Fair Employment and Housing, a department of the state of California, which is represented by the state's attorney general. No individual claiming gender discrimination has joined as a plaintiff.

Defendant M&N Financing Corporation is a finance company that purchases retail installment contract rights from automobile dealerships, which assign the right to receive payments from car purchasers. Defendant Mahmood Nasiry is an individual, and the sole owner of M&N Financing Corporation.

Below is a list of all proceedings in state trial and appellate courts that are directly related to the case in this Court:

> *Department of Fair Employment and Housing v. M&N Financing Corporation,* California Supreme Court Case Number S271527. Petitions for review were denied December 22, 2021.
>
> *Department of Fair Employment and Housing v. M&N Financing Corporation,* California Court of Appeal, Second Appellate District, Case Number B298901. Opinion filed September 27, 2021.
>
> *Department of Fair Employment and Housing v. M&N Financing Corporation*, Los Angeles

Superior Court case number BC591206. Judgment entered May 24, 2019.

Department of Fair Employment and Housing v. M&N Financing Corporation, Los Angeles Superior Court case number BC591206. Opinion of the Superior Court of the State of California for the County of Los Angeles dated July 25, 2017, granting summary adjudication of the amount of damages against defendants.

Department of Fair Employment and Housing v. M&N Financing Corporation, Los Angeles Superior Court case number BC591206. Opinion of the Superior Court of the State of California for the County of Los Angeles dated September 16, 2016, granting summary adjudication of the defendants' liability.

CORPORATE DISCLOSURE STATEMENT

Defendant M&N Financing Corporation is a California corporation owned solely by Mahmood Nasiry. It does not have any parent corporation, and there is no publicly held company owning 10% or more of the corporation's stock.

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PROCEEDINGS AND OPINIONS BELOW[1]

The plaintiff filed suit against the defendants, alleging gender discrimination in *Department of Fair Employment and Housing v. M&N Financing Corporation*, Los Angeles Superior Court case number BC591206. It was claimed that the defendants operated a business that purchased retail installment sales contracts (RISCs) from used car dealerships, and that the defendants decided how much to bid for contracts using a formula that considered the gender of car purchasers. [Appendix B, pages 3a-7a; AA, Volume 1, pages 80-111.] In deciding how much to bid for a particular installment contract, the defendants considered not only the gender of the car purchaser, but also 18 to 20 other factors that were obtained from 10 years of experience and analyzing M&N's deficiency accounts. M&N paid an amount equal to or greater than the highest bid of its competitors in the auction to purchase the RISC. [Appendix B, pages 4a-7a; AA, Volume 2, pages 372-379.] M&N's former practices have now been found to constitute unlawful discrimination, under the Unruh Act, a state Civil Rights statute.

The state moved for summary adjudication of liability under California's *Civil Code* sections 51 and 51.5, and subsequently obtained a judgment of more than $6 million in statutory damages pursuant to California *Civil Code* section 52(a). [Appendix C, pages 27a-30a; AA, Volume 8, pages 2162-2163.] The sole damages awarded consisted

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1. In this petition, the defendants will cite to both the record in the Court of Appeal and to the appendix to this petition. The word "Appendix" will refer to the Appendix to this petition, while "AA" refers to the Appellant's Appendix on file in the Court of Appeal.

of a $4,000 penalty for each of 1,554 statutory violations. [Appendix D, pages 31a-34a; AA, Volume 8, pages 2088-2094.]

The defendants appealed from the judgment against them, which was affirmed by the Court of Appeal in a partially published opinion on September 27, 2021, case number B298901, on May 24, 2019. [Appendix B, pages 3a-26a.] The published portion of the opinion is reported at (2021) 69 Cal.App.5th at 434.

In its opinion, the Court of Appeal ignored the defendants' argument that their business practices were not discriminatory because they did not cause any actual injury. [Appendix B, pages 6a-12a.] Rather, the Court of Appeal ruled that the plaintiff "was not… required to demonstrate actual injury because it sought only statutory minimum damages." [Appendix B, page 12a.] The appellate court found that the conduct of the defendants constituted "an invasion of the female borrowers' legally protected interest to be free from arbitrary sex discrimination, by rendering their contracts less valuable than those with male purchasers." [Appendix B, page 12a.] The court did not explain how a person obligated under an installment contract had any legally protected interest in the market value of his or her contractual obligation to pay a creditor. No authority was cited supporting such an interest.

In three paragraphs, the Court of Appeal rejected the contention that the award of $6,212,000 in statutory damages is unconstitutional as an excessive fine. [Appendix B, pages 15a-17a.] The court stated that it reviewed the factual findings of the trial court for substantial evidence, but apparently failed to realize that there were no factual

findings made by the trial court in awarding massive damages. [Appendix B, page 15a.]

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. section 1257, the Supreme Court of the United States has jurisdiction to review, by a writ of certiorari, the judgment of the Supreme Court of California of December 22, 2021, whereby the decision of the California Court of Appeal of September 27, 2021, became final under state law.

The judgment of the trial court was entered on May 24, 2019. Whether an award of statutory damages, in the absence of any actual damages, is unconstitutionally excessive is an important question of federal law that should be decided by the Supreme Court of the United States. The decisions of the California courts conflict with at least one decision of this court, *United States v. Bajakajian* (1997) 524 U.S. 321. The Supreme Court of the United States has jurisdiction over civil actions arising under the federal Constitution, under 28 U.S.C. section 1257.

The defendants petitioned for rehearing in the Court of Appeal, but their petitions were denied on October 22, 2021. The defendants then filed petitions for review in the Supreme Court of California, Supreme Court case number S271527, but their petitions were denied on December 22, 2021. [Appendix A, pages 1a-2a.]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

California *Civil Code* section 51(b) provides that

> "*All persons* within the jurisdiction of the state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are *entitled* to the full and equal accommodations, advantages, facilities, privileges, or services at *all business establishments* of every kind whatsoever." (Emphasis added.)

In pertinent part, California *Civil Code* section 51.5(a) states that:

> "*No business establishment* of any kind whatsoever *shall discriminate* against, boycott or blacklist, or refused to buy from, contract with, sell to, or trade with *any person* in the state on account of any characteristic listed or defined in subdivision (b)(3) of section 51." (Emphasis added.)

California *Civil Code* section 52(a) mandates that:

> "Whoever *denies, aids or incites* the denial, or makes any *discrimination* or distinction contrary to section 51, 51.5, or 51.6, is liable for each and every offense for the *actual damages* and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than four thousand dollars ($4,000) and any attorneys' fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in section 51, 51.5, or 51.6." (Emphasis added.)

STATEMENT OF THE CASE

1. The Claim of Gender Discrimination.

In its operative second amended complaint, the state Department of Fair Employment and Housing stated that the purpose of the lawsuit was to remedy "intentional sex discrimination against female buyers in [the defendants'] subprime automobile loan practices." [AA Volume 1, page 81.] In particular, the plaintiff's objective was to enforce the Unruh Civil Rights Act, *Civil Code* sections 51 and 51.5, and to "redress systematic discrimination." [AA Volume 1, page 81.]

The plaintiff alleged that the corporate defendant is a lender that purchases automobile contracts of subprime buyers from used car dealerships. [AA Volume 1, page 85.] The purchase price for a contract is typically lower

than the car buyer's contract price, because the defendant reduces its offer to buy a contract to account for the potential risk of default. [AA Volume 1, page 91.] It was asserted that the defendants are liable for violation of *Civil Code* section 51, in an amount no less than the statutory minimum damage "for each and every violation." [AA Volume 1, page 99.] *Civil Code* section 52(a) provides for a $4,000 minimum award of actual damages.

Beginning in early 2012, the defendant company created a spreadsheet for use in deciding whether the company would bid for a contract from a dealership and at what price. The spreadsheet included numerous categories of information including, but not limited to, the make of the car, the mileage, the amount financed, the monthly income of the buyer, the buyer's occupation, the buyer's credit history, the buyer's driver's license record, and the buyer's gender. [AA Volume 1, pages 91-92.] The spreadsheet was used to evaluate the risk of default on the part of a particular buyer, and the defendants' experience over a period of many years indicated that the risk of default was slightly higher with respect to female car buyers than male car buyers. [AA Volume 1, pages 91-92.]

2. The Summary Adjudication of the Defendants' Liability.

The plaintiff moved for summary adjudication of the issue of the defendants' liability for violation of California *Civil Code* sections 51 and 51.5. The court granted the motion, finding that the defendants' use of gender in this decision making was illegal as a violation of these statutes. [AA Volume 2, pages 526-531.]

3. The Award of More Than $6 Million in Statutory Penalties Against the Defendants.

Having established liability, the plaintiff moved for summary adjudication concerning the award of monetary damages. [AA Volume 8, pages 2043-2048.] The plaintiffs were awarded $6,212,000 in actual damages, [AA Volume 8, pages 2088-2094.] This sum was calculated by multiplying the total number of contracts by $4,000.

4. The Issue of Excessive Damages in Violation of the Eighth Amendment.

The federal question raised by defendants, whether the penalty damages awarded violated the Eighth Amendment, was raised in the lower courts. Defendant Mahmood Nasiry raised it in his appellant's opening brief in the Court of Appeal and again in his petition for review in the Supreme Court of California, which was denied on December 22, 2021. [Appendix A, pages 1a-2a.] M&N Financing Corporation raised the issue in its petition for review in the state Supreme Court, which was also denied on December 22, 2021. [Appendix A, pages 1a-2a.]

5. The Opinion of the California Court of Appeal Affirming the Award of Penalties.

The judgment of the trial court was affirmed in a partially published opinion. [Appendix B, pages 3a-26a.] The court found that each potential claimant had been injured, and that the defendants caused each injury. [Appendix B, pages 3a-26a.]

The heart of the court's opinion can be found in a single sentence. "Having demonstrated that the defendants' conduct was directly discriminatory to these victims, the Department was not additionally required to demonstrate actual injury because it sought only statutory minimum damages." [Appendix B, page 12a.]

As to causation, the appellate court did not even address the issue. It did not explain how the conduct of the defendants in purchasing contract rights could have harmed anyone, where the purchase of such rights occurred after the rights were already fixed. The closest the Court of Appeal came to an explanation of its conclusion was the statement that the conduct of the defendant "constitutes an invasion of the female borrower's legally protected interest to be free from arbitrary sex discrimination, by rendering their contracts less valuable than those with male purchasers." [Appendix B, page 12a.] There was no explanation how such a property right exists or ever existed. Once a contractual obligation is assigned, only the assignee has an interest in performance of the contract by the debtor.

6. The Denial of Review by the Supreme Court of California.

After their petitions for rehearing in the Court of Appeal were denied, both defendants petitioned for review by the Supreme Court of California. Their petitions were denied on December 22, 2021. [Appendix A, pages 1a-2a.]

7. Why a Writ of Certiorari Is Needed.

The law often imposes penalties for violation of a statute. However, such penalties can be so large as to

be unconstitutional, especially where there is no actual damage to anyone. The aggregated penalties imposed here, a total of more than $6 million, are constitutionally excessive as a matter of law. Arbitrary statutory penalties violate the Eighth Amendment because they constitute excess civil fines. Such fines should be set aside.

LEGAL ARGUMENT

I. A State Statute Imposing a Minimum Amount of Damages for Its Violation Is Subject to the Eighth Amendment Prohibition Against Excessive Fines.

In *Browning-Ferris Industries v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, the Supreme Court of the United States addressed the issue of whether the Eighth Amendment to the Constitution restricts the size of awards of punitive damages in civil cases. The high court held that the Eighth Amendment was intended to apply only to criminal prosecutions and to punishments imposed by the government. The present case does not involve a criminal prosecution, but it does involve punishment in the amount of more than $6 million imposed by a department of the state government of California. The Eighth Amendment does not constrain an award of monetary damages in a civil suit where the government has neither prosecuted it nor have any right to receive a share of the damages awarded. 492 U.S. at 263-264. The Eighth Amendment applies to this case, because the state government is prosecuting it.

Justice Sandra Day O'Connor dissented in *Browning-Ferris* and expressed the view that the $6 million award of punitive damages in the *Browning-Ferris* case was "subject to the limitations of the Eighth Amendment." 492

U.S. 257, 297. She noted that "in current usage, the word 'fine' comprehends a forfeiture or penalty recoverable in a civil action." 292 U.S. at 297. She would have applied the Eighth Amendment in *Browning-Ferris*.

The question of whether a particular forfeiture or fine was civil or criminal does not control the issue of whether it was subject to the Eighth Amendment. Rather, the question is whether it represented punishment. *Austin v. United States* (1993) 509 U.S. 602, 622-623. Since the forfeiture in *Austin* served at least in part to punish the owner of the forfeited property, the Eighth Amendment excessive fines clause was deemed applicable. The judgment of the trial court was reversed, for consideration of whether the amount of the forfeiture imposed was excessive. 509 U.S. 602, 621-623. A civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving a retributive or deterrent purpose, is punishment. 509 U. S. at 621-622. Forfeiture of property is a penalty that has absolutely no correlation to any damages sustained by society. 509 U.S. at 621.

The Eighth Amendment prohibits punishment that is disproportionate to the offense. *Solem v. Helm* (1983) 463 U.S. 277, 284. The same principle applies in forfeiture cases. *United States v. Bajakajian* (1997) 524 U.S. 321, 334-344.

II. The Provision of California's Unruh Act Mandating Minimum Damages of $4,000 "Per Violation" of the Act, a Total of $6,212,000 in This Case, Constitutes an Arbitrary Penalty.

California's Unruh Civil Rights Act, *Civil Code* section 51, *et seq.*, is intended to prevent invidious discrimination by the state's businesses. Its "purpose and overarching goal" is "deterring discriminatory practices by businesses." *White v. Square, Inc.* (2019) 7 Cal.5th 1019. *Civil Code* section 52(a) provides for damages of up to three times the amount of "actual damages but in no case less than $4,000." In this case, the trial court awarded the minimum damages for each of 1,554 alleged violations, a total of more than $6 million.

The appellate court upheld the award of damages, in spite of its recognition that there was no evidence of any actual damages at all suffered by any purported victim of gender discrimination. An award of actual damages, where there are none, can only be described as a penalty. In this case, the penalty is completely arbitrary. It applies regardless of whether anyone has been injured by the defendants allegedly discriminatory business practice.

In *Orloff v. Los Angeles Turf Club, Inc.* (1947) 30 Cal.2d 110, the Supreme Court of California considered a statute providing for damages for violation of the state's civil rights law. It was held that the plaintiff was entitled to recover actual damages, plus a $100 penalty. 30 Cal.2d at 114-115. When a statute provides for damages greater than actual damages, it is clearly a penalty. The $4,000 award for each violation of *Civil Code* section 52(a) is obviously a penalty. It is arbitrary, because it applies whether or not there are any actual damages.

In *Hale v. Morgan* (1978) 22 Cal.3d 388, the Supreme Court of California addressed a claim that a state statute was unconstitutional, where it assessed a penalty of $100 per day against a landlord who willfully deprived his tenant of utility services for the purpose of evicting the tenant. At trial, the court found that the plaintiff had been deprived of utility services at the defendant's mobile home park for 173 days, and accessed a penalty in the amount of $17,300. 22 Cal.3d at 393. The state Supreme Court reversed the judgment in favor of the plaintiff, and remanded.

The court in *Hale* noted that it is a general rule in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived. 22 Cal.3d at 394. Nonetheless, the court rejected the argument that the defendant had improperly presented the constitutional claim of excessive damages "for the first time on appeal." 22 Cal.3d at 394. It held that the "the defendant's challenge to a statute which is clearly penal presents a question of law directly addressed to the propriety of plaintiff's claim for relief." 22 Cal.3d at 394.

The high court in *Hale* noted that "a statute which applies such a mandatory, fixed, substantial and cumulative punitive sanction against persons of… disparate culpability is manifestly suspect." 22 Cal.3d at 400. Nonetheless, the court declined to find the statute under review to be unconstitutional on its face, because "[t]he imposition of $100 daily penalty over a limited period may indeed, in a given case, be a perfectly legitimate means of encouraging compliance with the law." 22 Cal.3d at 404. In the case before it, nonetheless, the high court found that "the assessment of a penalty of $17,300 in

Hale against the defendant for his conduct [was] 'clearly, positively, and unmistakably'" unconstitutional. 22 Cal.3d at 404. In particular, "[w]e are of the view… that under all of the circumstances of this case the amount of the penalties is constitutionally excessive." 22 Cal.3d at 405. The judgment was reversed and the case remanded to the trial court "for retrial on the issue of the appropriate penalty only, consistent with the views expressed" by the Supreme Court.

In light of the *Hale* decision, and in light of the circumstances of the present case, it is surprising that the Court of Appeal did not find penalties of over $6 million to be excessive, while an aggregate penalty of $17,300 in *Hale* had been ruled to be excessive as a matter of law.

The *Hale* court observed that, where the operation of a penalty is "mandatory, mechanical, potentially limitless in its effect regardless of circumstance" is "capable of serious abuse." 22 Cal.3d at 404. The court noted that the severity of the hundred dollar a day statute "appears to exceed that of sanctions imposed for other more serious civil violations in California." 22 Cal.3d at 404. In this case, a penalty statute has been seriously abused.

III. The Defendants Were and Are Entitled to De Novo Review of Their Contention That the Statutory Award of $6,212,000 in Penalty Damages Is Excessive as a Violation of the Eighth Amendment.

Where a penalty or forfeiture is claimed on appeal to be excessive, the standard of review is de novo. *United States v. Bajakajian* (1997) 524 U.S. 321, 336-337. The appellate court must review the lower court's

proportionality determination and decide whether the amount of a penalty or forfeiture is "disproportional to the gravity of the defendant's conduct." 524 U.S. at 337. If it is disproportional, it is unconstitutional under the Eighth Amendment. 524 U.S. at 337.

IV. An Award of Penalty Damages Is Unconstitutionally Excessive Where There Is Little or No Harm, and Where There Is Little or No Connection Between the Harm and the Amount of the Penalty.

The defendant in *United States v. Bajakajian* (1997) 524 U.S. 321 was arrested when he attempted to leave the United States without reporting that he was transporting more than $10,000 in currency. The prosecution sought forfeiture of the full amount of money that the defendant was carrying, which was $357,144. However, the trial judge decided that this amount would be excessive, in violation of the Eighth Amendment, and ordered that only $15,000 should be forfeited. The United States Court of Appeals for the Ninth Circuit affirmed the trial court's judgment, and the government asked the Supreme Court of the United States to grant certiorari, which it did. The Supreme Court then affirmed the decision of the Ninth Circuit.

The highest court in the United States found that the harm caused by the defendant's failure to report was "minimal." 524 U.S. at 332. The only party adversely affected, "in a relatively minor way," was the government, which was deprived of information. 524 U. S. at 340. The Supreme Court determined that the forfeiture mandated by statute served no remedial purpose, but simply constituted punishment. 524 U.S. at 344.

The Supreme Court in *Bajakajian* held that the Eighth Amendment limits the government's power to extract payments as punishment for an offense. 524 U.S. at 328. The punishment imposed "must bear some relationship to the gravity of the offense." 524 U.S. at 334. The level of the defendant's culpability must the considered. 524 U.S. at 337. The size of a penalty cannot be disproportional to the gravity of the defendant's offense. 524 U.S. at 324.

The *Bajakajian* court did not define "gravity of the offense." The issue seems to rest on the nature of the harm caused and the culpability of the defendant in causing the harm. A particular penalty violates the Eighth Amendment if it is disproportional to the gravity of a defendant's offense. 524 U.S. at 334. In light of the facts of the case, the trial judge imposed a fine that was far less than the amount sought by the government. As a result, the Eighth Amendment was not violated in *Bajakajian*.

The Court of Appeal here apparently concluded that the purported victims of discrimination, who never pursued any claims in court, were damaged by the defendants "by rendering their contracts less valuable than those with male purchasers." The record does not show how any conduct of the defendants harmed anyone.

V. The Alleged Individual Victims of Discrimination Suffered No Damage at All, and Thus the Defendants' Conduct Was Not Very Culpable, if It Was Culpable at All.

If there was any discrimination here with respect to installment contracts for the sale of motor vehicles, it cannot be charged to the defendants. The rights and

obligations of the car buyers were fixed when cars were sold. No subsequent act or omission on the part of the defendants caused any harm to the car buyers, because their rights and obligations were fixed prior to the time that the defendants purchased the right to receive payment under installment contracts.

The conduct of the defendants, in bidding for and purchasing certain installment contracts, was not very culpable, if it was culpable at all. It could not and did not harm any of the car buyers, because their rights and obligations were determined before the defendants did anything. In its decision, the Court of Appeal apparently realized that no "actual injury" had been demonstrated, but it found it was not necessary to do so. The plaintiff was not required "to demonstrate actual injury because it sought only statutory minimum damages." [Appendix B, page 12a.] If there was no actual injury, there was no basis for finding culpability.

The Court of Appeal states that "defendants were perpetrators of sex discrimination who maintained that their unequal treatment of female borrowers was justified by the higher likelihood that women would default on their loans." [Appendix B, pages 15a-16a.] There is no explanation why a party cannot consider its experience in assessing the risk of default on an installment contract. Moreover, the risk assessment here involved the defendants' decision making with respect to possible purchase of contract rights with car buyers. The defendants did nothing that affected the contractual obligations of individuals, which were fixed before the defendants did any business at all with the car buyers. The Unruh Act prohibits discrimination in business, but the

defendants were not involved in the business relationships between car buyers and automobile dealers. In assessing the risk of default, the defendants were entitled to use all available information. The contractual relationships between the automobile dealers and the defendants were relationships between corporations. They did not involve discrimination against individuals.

Premiums on life insurance policies covering males are higher than similar policies on females. This is because the risk of death during a particular time period is higher for males than females.

Where no one is harmed in a business relationship, there is no invidious discrimination. Similarly, the use of gender as a minor factor in assessing the risk of default on a loan is not wrongful, and it is certainly not very culpable, if it is culpable at all. Where no one is harmed in a business relationship, there is no invidious discrimination.

VI. Conclusion.

The penalties imposed by California for alleged discriminatory conduct that caused no harm violate the Eighth Amendment prohibition against excessive fines. Certiorari should be granted and the judgment against defendants should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER DENYING REVIEW OF THE COURT OF APPEAL OF THE SUPREME COURT OF CALIFORNIA, SECOND APPELLATE DISTRICT, FILED DECEMBER 22, 2021

COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
DIVISION FIVE - NO. B298901

S271527

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING,

Plaintiff and Appellant,

v.

M&N FINANCING CORPORATION *et al.*,

Defendants and Appellants.

The petitions for review are denied.

The request for an order directing publication of the opinion is denied.

Appendix A

SUPREME COURT
FILED
December 22, 2021
Jorge Navarrete Clerk
Deputy

CANTIL-SAKAUYE
Chief Justice

APPENDIX B — OPINION OF THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE, FILED SEPTEMBER 27, 2021

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

September 27, 2021, Opinion Filed

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING,

Plaintiff and Appellant,

v.

M&N FINANCING CORPORATION *et al.*,

Defendants and Appellants.

B298901

(Los Angeles County
Super. Ct. No. BC591206)

I. INTRODUCTION

Defendants M&N Financing Corporation (M&N) and Mahmood Nasiry operated a business that purchased retail installment sales contracts (contracts) from used car dealerships. In deciding how much to pay for the contracts, defendants used a formula that considered the gender of the car purchaser. Specifically, defendants would pay more for a contract with a male purchaser than for a

contract with a female purchaser or female coborrower (collectively, female borrowers).

The Department of Fair Employment and Housing (the Department) filed a complaint that alleged numerous causes of action. The Department moved for summary adjudication. The trial court entered judgment in favor of the Department on the first and second causes of action, which alleged violations of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) and Civil Code section 51.5, and assessed over $6 million in statutory damages pursuant to Civil Code section 52, subdivision (a). The court dismissed the fifth, sixth, and seventh causes of action, which alleged violations of Government Code[1] section 12940, subdivisions (i) and (k) of the California Fair Employment and Housing Act (FEHA) (§ 12900 et seq.). Defendants appeal and the Department cross-appeals. We hold that the court erred in dismissing the fifth cause of action. We otherwise affirm.

II. BACKGROUND

A. Factual Background[2]

Nasiry is the owner of M&N, a California corporation that purchased contracts from used car dealerships and

1. Further statutory references are to the Government Code unless otherwise indicated.

2. "In performing our review, we view the evidence in a light favorable to the losing party . . . , liberally construing [the] evidentiary submission while strictly scrutinizing the moving party's own showing and resolving any evidentiary doubts or ambiguities in the losing party's favor." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 859 [172 Cal. Rptr. 3d 732] (*Serri*).)

thereafter serviced them by collecting monthly installment payments from the car purchasers and contacting those purchasers who failed to make payments.

In deciding whether and how much to bid on a contract, M&N utilized a risk assessment spreadsheet (spreadsheet) that Nasiry created in 2012. Based on Nasiry's 10 years of experience with loan defaults, he believed that there was "a greater risk of default for female borrowers." Thus, Nasiry included the gender of the used car purchaser as one of the 18 to 20 specific factors on the spreadsheet. For gender, M&N employees, at Nasiry's direction, assessed one point for a contract with a female purchaser, zero points for a contract with a male purchaser, and a half-point for a contract with a female coborrower. Each point on the spreadsheet corresponded to a percentage point so that M&N would pay a car dealership one percent less for a contract with a female purchaser and half a percent less for a contract with a female coborrower than it would pay for a contract with a male purchaser.

M&N purchased approximately half of the contracts that it reviewed. From October 17, 2012, to July 2, 2014, M&N purchased 1,037 contracts with female borrowers from 517 car dealerships.

In 2014, the Department initiated an investigation of M&N's business practices, following which M&N ceased to use gender as a factor in its spreadsheet.

B. Pleadings

The Department filed its initial complaint in 2015. On February 16, 2016, the Department filed the operative second amended complaint, alleging in the first and second causes of action violations of Civil Code sections 51 and 51.5 and section 12948.[3] In lieu of actual damages, the Department sought the statutory minimum penalty of $4,000 per violation, and also sought injunctive relief.

On July 25, 2016, the Department filed a motion for summary adjudication on the first and second causes of action. On September 14, 2016, the trial court granted summary adjudication on the first and second causes of action, ruling that defendants' conduct violated Civil Code sections 51 and 51.5 as a matter of law.

On November 4, 2016, the Department filed a motion for an injunction and monetary relief in the amount of $6,216,000, the statutory minimum penalty for 1,554 violations[4] of Civil Code sections 51 and 51.5. On July 25, 2017, the trial court granted the motion, issuing an

3. The Department alleged nine causes of action against defendants and eventually voluntarily dismissed the third, fourth, eighth, and ninth causes of action with prejudice. On January 15, 2019, the trial court granted M&N's motion for judgment on the pleadings and dismissed the fifth, sixth, and seventh causes of action. We discuss the fifth, sixth, and seventh causes of action below when we address the Department's cross-appeal.

4. The number of violations was the sum of the total number of contracts defendants purchased with female borrowers and the number of car dealerships from whom they purchased such contracts.

injunction and awarding statutory damages in the amount of $6,212,000.

On May 24, 2019, the trial court entered judgment. The Department and defendants appealed.

III. DISCUSSION

A. Defendents' Appeal

1. Applicable Law

"A grant of summary adjudication is appropriate if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. [Citations.] A plaintiff moving for summary adjudication meets its burden if it proves each element of the cause of action. [Citation.] '[I]f a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as *a matter of law*, but would have to present his evidence to a trier of fact.' [Citation.] If the plaintiff meets its burden, the defendant must set forth specific facts showing a triable issue of material facts exist." (*Quidel Corporation v. Superior Court of San Diego County* (2020) 57 Cal.App.5th 155, 163–164; see Code Civ. Proc., § 437c, subd. (p)(1).) "The trial court's ruling on a motion for summary adjudication, like that on a motion for summary judgment, is subject to this court's independent review." (*Serri*, *supra*, 226 Cal. App.4th at p. 858.)

Appendix B

The Unruh Civil Rights Act (Unruh Act) provides: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).)[5] "The [Unruh] Act, like the common law principles upon which it was partially based, imposes a compulsory duty upon business establishments to serve all persons without arbitrary discrimination. [Citations.]" (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167 (*Angelucci*).) "The [Unruh] Act is to be given liberal construction with a view to effectuating its purposes." (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28 (*Koire*); accord, *White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1025 (*White*).)

Civil Code section 51.5, subdivision (a) further provides: "No business establishment of any kind whatsoever shall discriminate against . . . or refuse to buy from, [or] contract with . . . any person . . . on account of any characteristic listed or defined in subdivision (b) or (e) of [Civil Code] [s]ection 51 . . . or because the person is associated with a person who has, or is perceived to have, any of those characteristics." Thus, Civil Code section 51.5 proscribes not only direct discrimination based on sex but also discrimination against an entity "on account of its association with women." (See *Rotary Club of Duarte v. Board of Directors* (1986) 178 Cal.App.3d 1035, 1061

5. "'Sex' also includes, but is not limited to, a person's gender. 'Gender' means sex, and includes a person's gender identity and gender expression." (Civ. Code, § 51, subd. (e)(5).)

(*Rotary Club of Duarte*).) Additionally, "the analysis under Civil Code section 51.5 is the same as the analysis" under the Unruh Act. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1404.)

2. Analysis

Here, defendants do not contest that they used gender in setting the price they paid for contracts or that they paid less for contracts with female borrowers than for contracts with male purchasers. We have little trouble concluding that such conduct constitutes sex discrimination within the meaning of Civil Code sections 51 and 51.5 against female borrowers (*Angelucci, supra*, 41 Cal.4th at p. 174) and against the car dealerships who associated with them (*Rotary Club of Duarte, supra*, 178 Cal.App.3d at p. 1061).

Rather than dispute the lack of a triable issue of material fact regarding the nature of their business practice, defendants contend that the judgment against them must be vacated because: (1) the Department did not have standing to sue; (2) the female borrowers and car dealerships did not suffer an injury; and (3) the female borrowers were not "clients, patrons, or customers of . . . defendants" within the meaning of the Unruh Act. Nasiry additionally argues that (1) he cannot be individually liable for M&N's conduct because he did not know that his conduct was illegal; (2) defendants' conduct was authorized by Civil Code section 51.6, subdivision (c); and (3) the amount of statutory damages is unconstitutionally excessive. We consider each of defendants' arguments below.

Appendix B

a. Standing

The Department is authorized pursuant to sections 12920 and 12930, subdivision (f)(2) to prosecute violations of Civil Code sections 51 and 51.5. (See also § 12948 ["It is an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51 [or] 51.5 . . . of the Civil Code"].) The Department is also authorized to bring a civil action on behalf of aggrieved parties (§§ 12930, subd. (h), 12965, subd. (a)), including a class or group (§ 12961).

Defendants contend that because there is no evidence that any female borrower or car dealership filed a complaint with the Department, the Department lacked standing to sue. In defendants' view, section 12961 conditions the Department's filing of a complaint upon receipt of an individual verified complaint. We disagree. Section 12961 provides, in pertinent part: "Where an unlawful practice alleged in a verified complaint adversely affects, in a similar manner, a group or class of persons of which the aggrieved person filing the complaint is a member, or *where such an unlawful practice raises questions of law or fact which are common to such a group or class*, the aggrieved person or *the director* may file the complaint on behalf and as representative of such a group or class." (Italics added.) Thus, section 12961, by its plain terms, does not require the filing of a complaint by an aggrieved person prior to the Department's initiation of a lawsuit. (See also § 12960, subd. (c) ["The director or the director's authorized representative may in like manner, on that person's own motion, make, sign, and file a complaint"].)

Defendants also assert that because they ceased their discriminatory practice, the Department lacked standing under section 12965, subdivision (a) to pursue its civil action for statutory damages and injunctive relief. Defendants, however, cite no authority for the proposition that Civil Code sections 51 and 51.5 claims cannot be filed against defendants who cease their discriminatory conduct after the initiation of a governmental investigation, and we are aware of none. The statutory damages that the trial court assessed under Civil Code section 52, subdivision (a) were for violations that predated defendants' removal of gender as a factor on their spreadsheets. Further, "there is no hard-and-fast rule that a party's discontinuance of illegal behavior makes injunctive relief against him or her unavailable." (*Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 315.) Thus, the Department had standing to bring the civil action here.

b. Injury

Defendants next assert that their business practice, even if discriminatory, did not cause any injury and cite *White*, *supra*, 7 Cal.5th 1019 in support. In *White,* our Supreme Court held: "[W]e have acknowledged that '"a plaintiff cannot sue for discrimination in the abstract, but must actually suffer the discriminatory conduct."' (*Angelucci, supra*, 41 Cal.4th at p. 175.) 'In essence, an individual plaintiff has standing under the [Unruh] Act if he or she has been the victim of the defendant's discriminatory act.' (*Ibid.* ['plaintiff must be able to allege injury—that is, some "invasion of the plaintiff's legally protected interests"'].)" (*White, supra*, 7 Cal.5th at p. 1025.)

We reject defendants' characterization of the discrimination here as "abstract." When bidding on and purchasing contracts, defendants paid less for those with female purchasers and female borrowers and did so based solely on gender. Such conduct constitutes an invasion of the female borrowers' legally protected interest to be free from arbitrary sex discrimination, by rendering their contracts less valuable than those with male purchasers, and violates the car dealerships' rights of association with female borrowers by lowering the price they were able to obtain for contracts with such borrowers.

Having demonstrated that defendants' conduct was directly discriminatory to these victims, the Department was not additionally required to demonstrate actual injury because it sought only statutory minimum damages. "[T]he [Unruh] Act renders 'arbitrary sex discrimination by businesses . . . *per se* injurious.' (*Koire*, *supra*, 40 Cal.3d at p. 33.) . . . '[Civil Code] [s]ection 51 provides that all patrons are entitled to *equal* treatment. [Civil Code] [s]ection 52 provides for minimum statutory damages . . . for *every* violation of [Civil Code] section 51, *regardless* of the plaintiff's actual damages.' ([*Koire, supra*, 50 Cal.3d at p. 33, fn. omitted].)" (*Angelucci*, *supra*, 41 Cal.4th at p. 174.)

c. Civil Code sections 51 and 51.5 apply to defendants' conduct

Defendants next assert that they did not discriminate within the meaning of Civil Code sections 51 and 51.5 because they did not negotiate the terms of the contracts

with any female borrowers. According to defendants, "Unruh Act liability requires a finding that the allegedly discriminated-against party either did business with, or was denied the opportunity to do business with, the alleged discriminator on the basis of unlawful discrimination. In this case, there is no evidence that the used car [purchasers] had any part in the only transaction about which discrimination is alleged—M&N's bidding for existing finance contracts." To the extent defendants contend that the Unruh Act prohibits only the denial of the opportunity to do business, "[t]he scope of the statute clearly is not limited to exclusionary practices. The Legislature's choice of terms evidences concern not only with access to business establishments, but with equal treatment of patrons *in all aspects of the business*." (*Koire, supra*, 40 Cal.3d at p. 29, italics added.) Here, the car dealerships conducted business with defendants by offering and selling contracts to them. Further, after defendants purchased contracts with female borrowers, they proceeded to service such contracts, which rendered female borrowers patrons of defendants. Accordingly, defendants' business practices fall within the scope of conduct proscribed by Civil Code sections 51 and 51.5.

d. Nasiry's knowledge of unlawfulness

Nasiry contends he cannot be found individually liable because he did not believe that M&N's conduct violated the Unruh Act. We disagree. Nasiry created the spreadsheet used by M&N to engage in discriminatory practices and ordered its use. He therefore is responsible for the violations of Civil Code sections 51 and 51.5. To the extent

Alch v. Superior Court (2004) 122 Cal.App.4th 339, 389, cited by defendants, suggests that an individual can only be liable for discrimination if he knows that his conduct violates a statute, we disagree, as Civil Code sections 51 and 51.5 do not require that a discriminator know that he is in violation of a statute. (See *Hale v. Morgan* (1978) 22 Cal.3d 388, 396 ["'It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof'"].)

e. Civil Code section 51.6

Nasiry additionally asserts that his conduct was authorized by Civil Code section 51.6, known as the Gender Tax Repeal Act of 1995, and which provides, in pertinent part: "(b) No business establishment of any kind whatsoever may discriminate, with respect to the price charged for services of similar or like kind, against a person because of the person's gender. [¶] (c) Nothing in subdivision (b) prohibits price differences based specifically upon the amount of time, difficulty, or cost of providing the services." (Civ. Code, § 51.6, subds. (b) and (c).) Civil Code section 51.6, subdivision (c) thus excludes price differences from liability under the Gender Tax Repeal Act of 1995. The Department, however, did not allege a violation of that act and indeed the Department is not authorized to prosecute violations of Civil Code section 51.6. (See §§ 12930, 12948.) Section 51.6, subdivision (c), by its express terms, does not immunize otherwise unlawful sex discrimination under Civil Code sections 51 and 51.5. Accordingly, we reject Nasiry's argument.

f. Excessive damages

Nasiry also argues that $6,212,000 in statutory damages is unconstitutional as an excessive fine. In analyzing whether the damages here were unconstitutionally excessive, we consider the four factors enumerated in *United States v. Bajakajian* (1998) 524 U.S. 321 (*Bajakajian*): "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.) "'We review de novo whether a fine is constitutionally excessive and therefore violates the Eighth Amendment's Excessive Fines Clause.' [Citations.] "[F]actual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous.' [Citation.]" (*Sweeney v. California Regional Water Quality Control Bd.* (2021) 61 Cal.App.5th 1093, 1136–1137.) "We review the 'underlying factual findings . . . for substantial evidence, viewing the record in the light most favorable to the ruling.'" (*Lent v. California Coastal Com.* (2021) 62 Cal.App.5th 812, 857.)

Our review of the four *Bajakajian* factors demonstrates that the statutory damages were not excessive. First, defendants' level of culpability supports the imposition of a heavy fine: defendants were perpetrators of sex discrimination who maintained that their unequal treatment of female borrowers was justified by the higher likelihood that women would default on their loans. Second, the relationship between the harm and the penalty

is strong: defendants harmed female borrowers and the car dealerships that entered into contracts with them, and were fined for each discriminatory transaction. (See *White*, *supra*, 7 Cal.5th at p. 1025 ["The purpose of the [Unruh] Act is to create and preserve 'a nondiscriminatory environment in California business establishments by "banishing" or "eradicating" arbitrary, invidious discrimination by such establishments'"].) As to the third factor, although defendants do not identify similar statutes, a statutory minimum penalty for each violation is generally not unconstitutional. (See *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 397 ["'Within the civil penalty context, . . . a provision authorizing the imposition of a minimum civil penalty per violation, with each day constituting a separate violation, could not because of its civil character be subject to challenge under the constitutional provisions prohibiting excessive fines'"].)

Finally, the record supports an inference that defendants were able to pay the damages. Carl Saba, a forensic accountant hired by the Department, opined that based on his review of defendants' financial information, defendants had the ability to pay "either a significant portion of, or all of . . . [a] $7.2 million judgment in favor of [the Department . . . .]" Saba noted that M&N's cash balance for fiscal years 2012 and 2013 totaled $5.98 million and $9.12 million, respectively, and, based on his evaluation of M&N's operating expenses, he believed that the excess cash balance would be between $4.4 million and $7.5 million. Further, Saba identified two residential properties that Nasiry appeared to have obtained, debt-

free, in 2015 and 2017, for $3.150 million and $1.725 million. Finally, Saba opined that, based on his review of financial statements, if M&N continued to perform services required over the term of the remaining contracts beyond 2013, "it would earn between another $10.71 and $9.1 million in contracts receivable respectively."

We therefore hold the trial court properly granted summary adjudication on the Department's first and second causes of action against defendants.

B. The Department's Cross-appeal

On cross-appeal, the Department contends that the trial court erred by granting M&N's motion for judgment on the pleadings as to its fifth, sixth, and seventh causes of action.

1. Background

"'"The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer, that is, under the state of the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law." [Citation.]'" (*Southern California Edison Co. v. City of Victorville* (2013) 217 Cal.App.4th 218, 227 [158 Cal. Rptr. 3d 204].) We recite the relevant allegations from the second amended complaint as follows.

When Nasiry created the spreadsheet in 2012, Khayyam Etemadi, then an M&N employee, told Nasiry

that it was illegal to use gender to assign an additional risk point to women. Nasiry refused to remove gender as a factor in assessing risk and asserted that all banks engaged in such conduct. Etemadi complained again when the spreadsheet was placed on employee laptops, and again in November 2013. Nasiry refused each time to remove gender as a factor on the spreadsheet.

After complaining to Nasiry about discrimination in November 2013, Etemadi collapsed at work and was taken to the hospital. Etemadi experienced heart palpitations and was hospitalized overnight.

During the course of Etemadi's employment with M&N, Nasiry threatened to "ruin him financially" and directed him to do his job or be fired, thus coercing him to engage in conduct that was discriminatory and unlawful.

After Etemadi filed a complaint with the Department, M&N falsely reported to various credit agencies that Etemadi had failed to repay a loan from M&N. Etemadi left M&N in March 2014 due to stress at work.

2. Fifth, Sixth, and Seventh Causes of Action

In the operative complaint, the Department alleged for the fifth cause of action that M&N "knowingly compelled and coerced its employees to engage in practices that violated" FEHA and Civil Code sections 51 and 51.5, in violation of section 12940, subdivision (i).

As to the sixth and seventh causes of action, the Department alleged, on behalf of all current and former M&N employees and itself, respectively, that M&N failed to take all reasonable steps to prevent discrimination from occurring, in violation of section 12940, subdivision (k).

3. Motion for Judgment on the Pleadings

On October 9, 2018, M&N moved for judgment on the pleadings as to the fifth, sixth, and seventh causes of action.[6] M&N argued that the fifth through seventh causes of action failed to state a claim because Etemadi did not exhaust his administrative remedies. M&N also argued that the sixth and seventh causes of action failed because the Department did not allege an employment discrimination cause of action under FEHA.

On January 15, 2019, the trial court granted M&N's motion, ruling that section 12940, subdivision (i) did not apply because Etemadi and the current and former employees of M&N were not aggrieved parties under that statute. As to the sixth and seventh causes of action, the court ruled that section 12940, subdivision (k) did not impose a duty on employers to prevent violations of the Unruh Civil Rights Act against nonemployees.

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6. Nasiry also moved for judgment on the pleadings. The trial court denied his motion because he was not a named defendant in the fifth, sixth, and seventh causes of action.

4. FEHA

"In enacting the FEHA, the Legislature spoke at length about its purposes. Section 12920 states: 'It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation. [¶] It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.'

"Section 12920 further declares: 'It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.' And section 12920.5 provides: 'In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons.'

"In addition, section 12921, subdivision (a) says: 'The opportunity to seek, obtain, and hold employment without discrimination because of race, religious creed,

color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation is hereby recognized as and declared to be a civil right.' Section 12993, subdivision (a) instructs that the FEHA 'shall be construed liberally for the accomplishment of [its] purposes.'" (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 223 [152 Cal. Rptr. 3d 392, 294 P.3d 49].)

Relevant here are subdivisions (i) and (k) of section 12940, which provide: "It is an unlawful employment practice [with exceptions not applicable here]: [¶] . . . [¶] (i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so. [¶] . . . [¶] (k) For an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

5. Analysis

We review a trial court's decision on a motion for judgment on the pleadings de novo. (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777 [174 Cal. Rptr. 3d 626, 329 P.3d 180].) "'"Our role in interpreting statutes is to ascertain and effectuate the intended legislative purpose. [Citations.] We begin with the text, construing words in their broader statutory context and, where possible, harmonizing provisions concerning the same subject."' [Citation.] In doing so, we give '"the words their usual and ordinary meaning [citation], while construing them in light of the statute as

a whole and the statute's purpose [citation].'" [Citation.] Our inquiry ends '"[i]f this contextual reading of the statute's language reveals no ambiguity . . . ."' [Citation.]" (*Lee v. Kotyluk* (2021) 59 Cal.App.5th 719, 729 [274 Cal. Rptr. 3d 29].)

a. Section 12940, subdivision (i)

The trial court ruled, and we agree, that it is unlawful under section 12940, subdivision (i) for any employer to coerce an employee to violate Civil Code sections 51 and 51.5. (See § 12948.) Nonetheless, the court ruled that Etemadi and former and current M&N employees were not aggrieved within the meaning of section 12965, subdivision (a).[7]

An "aggrieved" party is a person who has standing to sue. (See, e.g., §§ 12965, subd. (a) ["In any civil action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by that person's own counsel"], 12960, subd. (c) ["Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing . . ."].)

"'To have standing, a party must be beneficially interested in the controversy; that is, he or she must have "some special interest to be served or some particular

7. We consider whether the Department can bring suit on behalf of employees for an alleged violation of section 12940, subdivision (i). There is no dispute that the Department can sue on its own behalf. (§ 12930, subd. (f)(1).)

right to be preserved or protected over and above the interest held in common with the public at large." [Citation.] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical.' [Citation.] [¶] The prerequisites for standing to assert statutorily[-] based causes of action are determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute." (*Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal.App.4th 456, 466 [165 Cal. Rptr. 3d 669].)

We hold that employees who are coerced by their employer to violate Civil Code sections 51 and 51.5 are "aggrieved" within the meaning of section 12965, subdivision (a) and have standing to sue their employer pursuant to section 12940, subdivision (i). As discussed, "[i]t is an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section[s] 51, 51.5, 51.7, 51.9, 54, 54.1, or 54.2 of the Civil Code." (§ 12948.) Liability for violations of Civil Code sections 51 and 51.5 "extends beyond the business establishment itself to the business establishment's employees responsible for the discriminatory conduct." (*North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1154 [81 Cal. Rptr. 3d 708, 189 P.3d 959].) Thus, Etemadi and other employees of M&N who were coerced by M&N into violating Civil Code sections 51 and 51.5 could be individually liable for sex discrimination. These employees would necessarily be "aggrieved" by their employer's unlawful employment practice as their personal interests would be affected by their employer's misconduct. The Department therefore

was authorized to file a civil action on behalf of these employees and the trial court erred by dismissing the fifth cause of action.

b. Section 12940, subdivision (k)

The Department also asserts that the trial court erred by dismissing its sixth and seventh causes of action for violation of section 12940, subdivision (k). Section 12940, subdivision (k) proscribes an employer's failure to take reasonable steps to prevent *discrimination* and harassment. Moreover, in order to state a claim under section 12940, subdivision (k), a plaintiff must be able to prevail on an underlying claim of discrimination. Here, the Department does not allege that M&N discriminated against or harassed Etemadi and other employees. Rather, the Department asserts that "discrimination" under subdivision (k) encompasses violations of various subdivisions of section 12940, including subdivision (i), and cites in support *Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1239–1240 [51 Cal. Rptr. 3d 206] (*Taylor*), disapproved on other grounds in *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1162 [72 Cal. Rptr. 3d 624, 177 P.3d 232].

In *Taylor*, the court held that retaliation under section 12940, subdivision (h) is a form of discrimination actionable under section 12940, subdivision (k). (*Taylor, supra*, 144 Cal.App.4th at p. 1240.) The court reached this conclusion, in part, based on the language of subdivision (h), which makes it an unlawful employment practice "'[f]or any employer . . . to discharge, expel, or *otherwise discriminate* against any person because the person has

opposed any practices forbidden under this part . . . .'" (*Taylor, supra*, 144 Cal.App.4th at p. 1237, italics added.) Thus, an employer who has retaliated against an employee has necessarily discriminated against that employee and has failed to prevent discrimination, within the meaning of section 12940, subdivision (k). (*Taylor, supra*, 144 Cal. App.4th at p. 1240.)

Section 12940, subdivision (g) also proscribes as an unlawful employment practice "[f]or any employer . . . to harass, discharge, expel, or *otherwise discriminate* against any person because the person has made a report pursuant to [s]ection 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities." (Italics added.)

By contrast, section 12940, subdivision (i) does not include similar language. (See § 12940, subd. (i) [proscribing as unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so"].) Where, as here, "'the Legislature makes express statutory distinctions, we must presume it did so deliberately, giving effect to the distinctions, unless the whole scheme reveals the distinction is unintended.'" (*Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 502 [9 Cal. Rptr. 3d 857, 84 P.3d 966]; see also *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59 [124 Cal. Rptr. 2d 507, 52 P.3d 685] ["When interpreting statutes, 'we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . . . "This court has no power to rewrite the

statute so as to make it conform to a presumed intention which is not expressed"""].) We therefore presume that the Legislature intended the distinction between section 12940, subdivisions (g) and (h), which include the terms "otherwise discriminate" and reference other unlawful acts, and subdivision (i), which does not, and hold that a violation of subdivision (i) is not "discrimination" within the meaning of section 12940, subdivision (k).

The Department therefore failed to allege facts demonstrating that defendants violated section 12940, subdivision (k) and the trial court did not err by dismissing the sixth and seventh causes of action.

IV. DISPOSITION

The judgment is reversed as to the dismissal of the fifth cause of action and the matter is remanded for further proceedings. The judgment is otherwise affirmed. The Department is entitled to recover costs pertaining to M&N's and Nasiry's appeals. The parties are to bear their own costs pertaining to the Department's appeal.

CERTIFIED FOR PARTIAL PUBLICATION

KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.

APPENDIX C — OPINION OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, DATED JULY 25, 2017

SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES
DEPARTMENT 311

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING,

v.

M&N FINANCING CORPORATION, *et al.*

BC591206

Case Home Page

Motion for summary adjudication

The Department of Fair Employment and Housing moves for summary adjudication of injunctive and damages issues. The motion is granted.

I

The Department sued M&N Financing and its owner for gender discrimination. When deciding how much to pay for car loans, M&N treated women less favorably than men. M&N discriminated in the following way. When used car buyers finance their purchases, they borrow to pay

for their purchase. Buyers negotiate loan terms with the dealership. The dealership then offers this loan contract for sale to potential loan buyers like M&N. After a decade of experience with defaulting borrowers, M&N created a formula for calculating default risk. One of the 18 or 20 significant factors in M&N's formula was gender. If the borrower was female, M&N assigned her point. M&N assigned zero points for gender if the borrower was male. The more points, the greater risk M&N perceived and the less it would be willing to bid for the loan at auction.

The court previously ruled the Department need not meet the requirements for a class action to bring this group action on behalf of victims. The court then granted the Department's motion for summary adjudication of liability under the Unruh Act, because express use of gender in business decisionmaking is blatantly illegal. (E.g., *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28-39.)

The Department now seeks statutory damages for each loan victim. After withdrawing one claim, the Department identifies 1036 individual borrowers and 517 car dealer victims where the principal loan borrower was female. The total number of violations is 1553. The statutory damage sum is $4000. (See Civil Code 52, subd. (a) ("Whoever . . . makes any [gender] discrimination . . . is liable for each and every offense for the actual damages . . . but in no case less than four thousand dollars . . . .").) Multiplying 1553 by $4000 yields $6,212,000. The Department also seeks an injunction. This motion is granted.

Appendix C

II

M&N seeks to continue the hearing on this motion. There is no valid reason for delay. M&N asserts the person verifying some of the Department's discovery did not have personal knowledge of the discovery data. The verifier is Patrice Doehrn, who was a District Administrator with the Department and who conducted the initial investigation of the M&N matter. Doehrn's signature satisfied subdivision (a) of section 2030.250 of the Code of Civil Procedure, which requires signature by an agent of a governmental agency.

III

M&N claims the Department must prove victims personally suffered from M&N's discrimination. By this M&N presumably means the Department must quantify the dollar injury to women involved in this case. This court rejected this incorrect statement of law in 2016. M&N's effort to reargue this past ruling is not pertinent to the present motion.

IV

M&N states the Department lacks standing to proceed because the victims in this case are not "aggrieved persons" as required by law. This invalid argument rephrases the previous invalid argument.

Appendix C

V

M&N submits there are triable issues of fact as to whether victims personally suffered the alleged discrimination and were harmed as a result. (Opposition 21.) This point restates the same erroneous argument M&N made in the two last points.

VI

M&N challenges the Department's requested injunction as overbroad and burdensome. M&N's specific complaints concern posting a notice in M&N's office and on its website, giving news of the injunction to dealerships and others, maintaining a database of pertinent information, reporting to the Department on an annual basis for five years, and certifying compliance annually for five years. These requirements are relevant and appropropriate to the conduct in this case. M&N has made no factual showing of an undue or inappropriate burden.

VII

M&N claims the Department's motion is simultaneously unripe and moot. The motion is ripe, however, and it is not moot. The motion is ripe because the Department has developed and adduced facts needed to determine liability and remedy. The motion is not moot because M&N has adopted the stance that it has done nothing wrong and owes nothing to anyone. The Department's motion aims to dispel these views.

APPENDIX D — OPINION OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, DATED SEPTEMBER 16, 2016

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES
DEPARTMENT 311

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING,

v.

M&N FINANCING CORPORATION, *et al.*

BC591206

Case Home Page

Motions for summary adjudication and to seal

This is a case of admitted and illegal discrimination against women. The motions are granted.

I

Mahmood Nasiry is owner and president of M&N Financing Corporation, which finances used cars. When a dealership sells a used car to a customer, the two negotiate price and credit terms, such as the down payment, interest rate, number of payments, and so forth. The dealership writes the terms into a retail sales installment contract,

which the dealership circulates to lenders like M&N. M&N competes with other lenders by bidding on the contract. If M&N submits the highest bid, it pays the dealership that price, assumes the risk the customer will default, and begins collecting the loan. If the buyer defaults, M&N may repossess the car or sue the customer. (See Nasiry declaration paragraphs one - six.)

In 2012, Nasiry surveyed a decade of his business experience and identified 18 to 20 factors he considered significant in evaluating whether and how much to bid on a contract. Nasiry created an Excel spreadsheet to quantify these factors into a point system. (Nasiry declaration paragraph nine.)

M&N's spreadsheet expressly listed "gender" as one factor. Nasiry wrote the Excel spreadsheet to add zero points if the customer was male and one point if female.

"My assignment of a point to a female [car] purchaser was based on the results of my ten-year survey with respect to the risk of a loan default which indicated a greater risk of default for female borrowers over the ten-year period." (Nasiry declaration paragraph 11.)

The Department of Fair Employment and Housing sued M&N and Nasiry for gender discrimination.

II

The motion for summary adjudication is granted. M&N's express use of gender in business decisionmaking

is blatantly illegal under the Unruh Act. (E.g., *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28-39.)

M&N offers invalid defenses for its practice. First, M&N says no individual consumers or dealerships were denied "full and equal" services. (Opposition 9:25.) This is incorrect. Nasiry admits M&N treated women differently than men. Women got a point against them. Men did not. That is not equal. Gender was not the only factor M&N considered, true, but that makes no difference. An express gender tax is illegal no matter the degree.

N&M says its practice was not "motivated by gender discrimination," which presumably means Nasiry denies ill will toward women. (Opposition 9:27-28.) Rather his motivation was, as he puts it, "legitimate business reasons/ analyses." (Opposition 10:1.) Statistics do not rescue stereotypes, however, even if the statistics are accurate. (E.g., *City of Los Angeles v. Manhart* (1978) 435 U.S. 702, 707-711 (women on average live longer than men, but requiring women to make larger pension contributions is illegal), superseded in part by 42 U.S.C. § 2000e–5(g)(2), as stated in *Parris v. Keystone Foods, LLC* (N.D. AL 2013) 959 F.Supp.2d 1291, 1303.) "Practices that classify [people] in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." (*City of Los Angeles v. Manhart*, *supra*, 435 U.S. 702, 709.)

M&N incorrectly argues its practice was not "a denial of some right to which plaintiff was entitled." (Opposition 10:13.) This begs the question. The Unruh Act entitles all

Californians, including car buyers and sellers, to business decisionmaking free from gender discrimination. Nasiry admits he considered gender to be one of the "factors I consider significant" in conducting his business. (Nasiry declaration 4:1; see also *id.* paragraph 11.) When a business expressly makes gender a routine and significant factor in its decisionmaking, the plaintiff need not identify particular victims or quantify the marginal disadvantage the discrimination creates.

M&N cites the irrelevant *Harris* decision. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1169 ("defendant's minimum income policy does not violate the Unruh Act") and 1175 ("A disparate impact analysis or test does not apply to Unruh Act claims."), superseded by statute as stated in *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 664.)

Irrelevant as well is *Mundy v. Pro-Thro Enterprises* (2011) 192 Cal.App.4th 1, 4. That defendant did not use gender as a basis for decisionmaking.

III

The motion to seal is granted. The Department of Fair Employment and Housing seeks to seal an exhibit that reveals identifying information for a loan borrower and co-signer. The proposed sealing is narrowly and properly tailored to protect the privacy rights of these third parties.