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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| JANETTE NOLASCO et al.,<br>Plaintiffs and Respondents,<br>v.<br>SCANTIBODIES LABORATORY, INC.,<br>Defendant and Appellant. | D071923<br><br>(Super. Ct. No. 37-2014-0004716) |

APPEAL from a judgment of the Superior Court of San Diego County, Gregory W. Pollack, Judge. Affirmed.

Niddrie Addams Fuller Singh and David A. Niddrie for Defendant and Appellant.

Pine Tillett, Norman Pine, Scott L. Tillett; Letizia Law Firm and Clarice J. Letizia for Plaintiffs and Respondents.

Plaintiffs Janette Nolasco and Brenda Taylor (Plaintiffs) sued defendant Scantibodies Laboratory, Inc. (Scantibodies), for retaliation under California Labor Code

section 1102.5.[1] They contended Scantibodies terminated Nolasco and took other adverse actions against Taylor after they disclosed information about the company's specialty plasma program to the United States Food and Drug Administration (FDA) and refused to participate in certain practices. A jury found Scantibodies liable for retaliation and awarded Plaintiffs compensatory and punitive damages.

Scantibodies contends the judgment should be reversed because (1) the trial court erroneously instructed the jury that whistleblower protection is not limited to the first employee to disclose; (2) the trial court mishandled deliberations by improperly instructing the jury before further deliberations and seating an alternate juror before the punitive damages phase; and (3) Plaintiffs failed to establish their retaliation claims. We reject these arguments and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### I

### *Underlying Events*

Scantibodies produces medical diagnostic tests and their components. In 2009, Scantibodies formed Scantibodies Biologics, Inc. (SBI) to operate a center to collect plasma. Nolasco was the plasma center manager, and Taylor was the regulatory compliance officer. Mark Nordstrom was Scantibodies's Director of Quality Assurance and Regulatory Affairs, and Taylor's supervisor.

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1 Further statutory references are to the Labor Code, unless otherwise noted.

The center collected both source plasma (normal or healthy plasma) and "specialty" plasma, which includes disease state plasma and high-risk plasma (e.g., from donors with HIV). Specialty plasma is used for applications including research, managing in vitro diagnostic controls, and manufacturing diagnostic test kits. Specialty plasma was shipped to a Scantibodies facility in Santee.

Plaintiffs raised concerns about the specialty plasma program. Taylor testified she advised Nordstrom that a specialty program must be approved by the FDA and include appropriate donor consents and labeling, and provided him with FDA materials. Nordstrom acknowledged Taylor advised him they needed FDA approval, but indicated she did not identify the type of approval or provide authority for her position. He determined specialty plasma did not fit within the FDA source plasma regulations.

To obtain approvals for the specialty plasma program, Scantibodies contracted with the Western Institutional Review Board (WIRB). WIRB approved six collection protocols.

In October 2011, SBI submitted a biologics license application to the FDA for source plasma. According to Nordstrom, he wrote a letter to the FDA in response to comments regarding their application, and referenced the collection of specialty plasma and its use in interstate commerce. It was his understanding, based on the letter, that the FDA was aware Scantibodies was intending to use and sell specialty plasma as of August 2012.

In early April 2013, the FDA audited SBI in connection with its source plasma application. Nolasco testified they were told by upper management not to mention the specialty plasma program, which Nordstrom denied doing.

Nordstrom opened the meeting with the FDA inspectors. He indicated they "were having the inspection for the normal source plasma," and were "also collecting . . . for specialty plasma but that was not under the scope of the inspection." He believed he advised the inspectors that Scantibodies was selling specialty plasma. The FDA subsequently explained the specialty plasma was under the source plasma regulations; provided dates where this was mentioned in the Federal Register; and indicated Scantibodies needed to discontinue selling it.

Taylor testified she and Nolasco made disclosures to the FDA while Nordstrom was not present. They told the FDA "that as soon as the [specialty plasma] units got to the parent company, they were removing the labels and . . . selling the product international and domestic." Taylor explained they "showed . . . that the informed consent showed research use only, that we labelled it research use only." They also told the FDA about "two post-donation information reports that [they] were told to bury"; "information about what the programs were" and "how [they] were writing them to meet sales"; and that "there was no research being done by the company on these products."

The FDA provided Form FDA 483 (Form 483) for the SBI audit, which made observations regarding SBI's quality assurance program and standard operating procedures. The form explains it "lists observations made by the FDA representative(s)

during the inspection of your facility," which "do not represent a final agency determination regarding your compliance."

Between late April and May, the FDA conducted an ad hoc inspection of the Scantibodies facility, regarding the specialty plasma program. Taylor testified she gave the FDA "the confidential documents that contained the post donation information that we had been told to bury . . . ." She also provided a declaration stating, in part, that "units leave [SBI], labelled as 'Research Use Only,' but are re-labelled by [Scantibodies] 'For research or manufacturing use only' . . . and distributed . . . ."; "[o]rders to SBI for specialty draws mostly come from [Scantibodies] Sales and Customer Service, not from Research and Development (R&D)"; and "[s]ix clinical trials were . . . approved by the [WIRB] but there is no research project which cover[s] all the types of specialty units collected."

The FDA provided a Form 483 for the Scantibodies audit, which made observations regarding the distribution of specialty plasma prior to licensure and the use of "2-caution" statements (i.e., "research or manufacturing use only"). Nordstrom wrote to the FDA and described corrective actions, stating in part that they would "keep the High Risk, Disease State, and Disease Associated Antibody Plasma in quarantine and not distribute the material for further manufacturing use until SBI receives approval of the [biologics license application] supplements for these materials."

SBI submitted a biologics license application supplement for specialty plasma. Nordstrom proposed creating an informed consent addendum, which would indicate the donor understood plasma was collected for research only, but Scantibodies was applying

for a supplement to collect specialty plasma. He indicated Nolasco participated in drafting the informed consent, and did not recall her refusing to do so. Nolasco testified she refused to do a retroactive informed consent and raised concerns based on her understanding that the form would be used retroactively, but did not know if that was actually done.

In July 2013, the FDA issued a closure letter on the SBI audit. In August 2013, the FDA issued the license for source plasma. Later that month, Nolasco was told she was being let go.

In or around March 2014, the FDA indicated they could not grant approval of the supplement regarding specialty plasma because of certain deficiencies in the submission. In May 2014, the FDA issued a closure letter on the Scantibodies audit.

Taylor had gone on medical leave in March 2014, and resigned in March 2015.

II

*Litigation*

In February 2014, Plaintiffs sued Scantibodies for retaliation under section 1102.5 and on other grounds not at issue in this appeal.[2] They alleged that Scantibodies terminated Nolasco, and took adverse employment actions against Taylor, based on their disclosures to the FDA and their refusal to participate in certain practices. The matter

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2 Scantibodies contends that two of Plaintiffs' other claims (wrongful termination and Private Attorney General Act of 2004 (PAGA)) fall with their section 1102.5 claims. Because we affirm, we need not address these contentions. Scantibodies also states Plaintiffs dismissed their PAGA claims. That issue is irrelevant to this appeal.

proceeded to a jury trial. Pertinent here, Nordstrom and Plaintiffs testified about their respective communications with the FDA and the specialty plasma practices, including the new informed consent form. The parties also presented evidence on Plaintiffs' job duties and Taylor's treatment by Scantibodies, which we address *post*. We also address the jury instructions and deliberations, *post*.

The jury found Plaintiffs made five disclosures to the FDA: (1) Scantibodies was "distributing specialty plasma collected under the WIRB approved protocol, for research use only, into interstate commerce, without an FDA license"; (2) it was "taking off the WIRB approved labels 'for research use only' and adulterating the labels and changing them to say 'for research or manufacturing use only' "; (3) it was "selling the specialty plasma to customers for profit and not using it for research"; (4) it "had no research projects for the specialty plasmas that it was collecting"; and (5) "upper management was instructing [them] not to complete documentation of post-donation information." The jury found Plaintiffs had reasonable cause to believe each disclosure to the FDA disclosed a violation of FDA rules or regulations.

The jury then found Nolasco refused to participate in "the retroactive application of the new informed consent forms," and that such action would violate an FDA rule or regulation. The jury also found Plaintiffs refused to participate in other practices, and each practice would violate an FDA rule or regulation.[3]

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[3] The jury found both Plaintiffs refused to participate in management's instructions not to complete documentation of post-donation information, and Taylor refused to

The jury also determined Scantibodies took an adverse employment action against each plaintiff, and each plaintiff proved malice, fraud, or oppression. It awarded compensatory and punitive damages.

The trial court denied Scantibodies's posttrial motions for new trial and judgment notwithstanding the verdict, and entered judgment for Plaintiffs.

## DISCUSSION

### I

### *Jury Instruction on Effect of Prior Disclosure*

Scantibodies contends the trial court erred by instructing the jury that whistleblower protection is not limited to the first employee to disclose. We conclude the court's instruction was not erroneous, and, even assuming error, Scantibodies was not prejudiced.

#### A. *Additional Background*

The trial court instructed the jury that "[w]histleblower protection is not limited to only the first employee to disclose to the FDA the violations of its rules or regulations." During closing arguments, Plaintiffs' counsel cited the special instruction and argued: "whistleblower protection is not limited only to the first who discloses the unlawful

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participate in approving an adulterated label and ignoring FDA regulations requiring Scantibodies to notify donors who had tested positive for diseases, notify the FDA that some normal source plasma donors tested positive for disease, and to quarantine disease-positive plasma and not allow shipment to customers.

activity" and that "the disclosures by Janette Nolasco and Brenda Taylor are protected activity even if Michael Nordstrom had already told the FDA."[4]

B. *Applicable Law*

" ' "The propriety of jury instructions is a question of law that we review de novo." ' " (*Mize-Kurzman v. Marin Community College Dist*. (2012) 202 Cal.App.4th 832, 845 (*Mize-Kurzman*).) "Where it is contended that the trial judge gave an erroneous instruction, we view the evidence in the light most favorable to the claim of instructional error." (*Ibid*.) However, we only reverse the judgment if " 'the error complained of has resulted in a miscarriage of justice.' " (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580, quoting Cal. Const., art. VI, § 13.) "[T]rial error is usually deemed harmless in California unless there is a 'reasonabl[e] probab[ility]' that it affected the verdict. . . . [Citation.]" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

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4 Scantibodies states it objected to the instruction because it "was a misstatement of the law and would mislead the jury." The cited portions of the record reflect no such objection to the "first employee to disclose" language, and the record elsewhere shows Scantibodies acknowledged it was not objecting on those grounds. To the contrary, Scantibodies stated "there's no argument that we've made or intend to make that because Nordstrom blew the whistle, that [Plaintiffs] can't be whistleblowers," and "there's been no argument or evidence that they can't be whistleblowers if they're not the first ones to report it." Scantibodies is now trying to make this argument on appeal, and we could deem it waived. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29 [party cannot "change his position and adopt a new and different theory on appeal"]; *City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, 29 [even on questions of law, "whether an appellate court will entertain a new theory . . . is strictly a matter of discretion"].) In any event, the argument fails on the merits too.

Section 1102.5, subdivision (b) (§ 1102.5(b)) "protects an employee from retaliation by his employer for making a good faith disclosure of a violation of federal or state law." (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548 (*Hager*).) "This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation." (*Green v. Ralee Engineering Co*. (1998) 19 Cal.4th 66, 77 (*Green*).) We discuss section 1102.5, subdivision (b), in more detail *post*.

C. *Analysis*

Scantibodies argues the trial court's instruction that "protection is not limited to only the first employee to disclose" was erroneous. Citing *Mize-Kurzman*, Scantibodies contends "a report of information that was already known by the agency is not a protected disclosure." We reject Scantibodies's claim that whistleblower protection is limited to the first employee to disclose a violation. Such a limitation cannot be derived from *Mize-Kurzman*, and it was rejected in *Hager*, which we find persuasive.

In *Mize-Kurzman*, a community college dean had claimed retaliation based on certain disclosures to her supervisor and the college president. (*Mize-Kurzman*, *supra*, 202 Cal.App.4th at pp. 840-842.) With respect to one disclosure, the supervisor testified that she "already knew" about the programs at issue and the issue raised by plaintiff. (*Id*. at p. 841.) The Court of Appeal agreed with cases holding "that the report of information that was already known did not constitute a protected disclosure," and cited the dictionary definition of disclosure as exposure of something hidden. (*Id*. at p. 858, fn. 10, citing Webster's Third New International Dict. (1968) p. 645.) The court held it was not error

to instruct the jury that "reporting publicly known facts is not a disclosure protected by the California whistleblower statutes . . . ." (*Id*. at p. 859.) Thus, *Mize-Kurzman* merely stands for the principle that reporting information that is publicly known is not a protected disclosure.

However, as the Court of Appeal in *Hager* explained, a "report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager, supra,* 228 Cal.App.4th at p. 1552.) There, a county relied on *Mize-Kurzman* to argue a deputy sheriff did not disclose, contending it was aware of the information at issue and that others reported first. (*Id*. at p. 1548.) The Court of Appeal disagreed, holding that an "interpretation of former section 1102.5(b) as limiting whistleblower protection to the first employee who discloses . . . is contrary to the plain statutory language and legislative intent in enacting former section 1102.5(b)." (*Id*. at p. 1541.) In rejecting a " 'first report' " rule, the *Hager* court observed that no such rule was discussed in *Mize-Kurzman* or appeared in the statute (*id*. at p. 1549), and that applying such a rule would discourage whistleblowing because "employees would not come forward to report unlawful conduct for fear that someone else already had done so." (*Id*. at p. 1550.)

We find the distinction identified in *Hager* to be sound. A reasonable interpretation of "disclosure" under section 1102.5 (b) excludes information that is publicly known or that the employee knows has been disclosed, but not information previously disclosed without knowledge of the employee. This interpretation is

consistent with the statutory language, which places no limit on successive disclosures, and the broad statutory purpose of encouraging disclosure without fear of retaliation. (*Hager*, *supra*, 228 Cal.App.4th at p. 1541; *Green*, *supra*, 19 Cal.4th at p. 77; see *McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 (*McVeigh*) [§ 1102.5(b) "should be given a broad construction commensurate with its broad purpose"].)[5]

Even if we assume the trial court erred in instructing the jury that "protection is not limited to only the first employee to disclose," reversal is not required because Scantibodies has failed to show prejudice. Scantibodies contends the challenged jury instruction effectively foreclosed its defense that Plaintiffs "did not 'disclose' any confidential information to the FDA *based on the undisputed fact that Nordstrom had already previously revealed the same information* to the agency." (Italics added.) However, it is not undisputed Nordstrom disclosed the same information. In its briefing, Scantibodies identifies evidence that Nordstrom told the FDA about the sale of specialty

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5 We reject Scantibodies's claim that *Hager* supports its position, or is distinguishable. First, Scantibodies argues *Hager* agreed with its reading of *Mize-Kurzman*, citing *Hager*, *supra*, 228 Cal.App.4th at page 1549 and *Mize-Kurzman*, *supra*, 202 Cal.App.4th at page 858. *Hager* agreed with *Mize-Kurzman* that disclosures of public information are not protected, but it rejected a first report rule. (*Hager*, at pp. 1541, 1552.) *Hager* therefore does not support Scantibodies's view that the jury instruction here—"protection is not limited to only the first employee to disclose"—was erroneous. Second, Scantibodies contends *Hager* is factually distinguishable because it involved a public employee and the court's decision was based on section 1102.5, subdivision (e) (governing reports by public employees). Although *Hager* did involve a public employee, the court addressed disclosure under section 1102.5, subdivision (b), and its analysis of the statutory purpose is generally applicable. (*Hager*, at p. 1549 ["Section 1102.5(b) Does Not Support a 'First Report' Rule"].)

plasma, but not about the other four disclosures (i.e., switching labels; sale for profit and not use for research; lack of research projects; and instructions regarding post-donation information).[6] Further, Scantibodies's assertion that Plaintiffs acknowledged Nordstrom already disclosed "all of the same information" is not supported by the record citations in its briefs.[7] Thus, even assuming the jury found Nordstrom was the first to report the sale of specialty plasma to the FDA and Plaintiffs did not make this disclosure, it would not impact the jury's findings on the other disclosures.

We similarly reject Scantibodies's claim that Plaintiffs' closing argument and the closeness of the jury vote demonstrate prejudice. (See *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876 [factors supporting prejudice including "whether respondent's argument to the jury may have contributed to the instruction's misleading effect" and "the closeness of the jury's verdict"].) Even if Plaintiffs' counsel's closing

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6 In its reply brief, Scantibodies cites portions of Nordstrom's testimony and contends "the FDA was aware of the company's labelling and relabeling of plasma for research and/or manufacturing uses, its donor consent process, as well as the procedures used for plasma donations." But specific disclosures are at issue. This cited testimony does not reflect Nordstrom disclosed the relabeling issue reported by Plaintiffs. And Scantibodies does not contend, much less establish, that Nordstrom disclosed the lack of research use; the lack of research projects; or the instructions regarding post-donation information.

7 The cited testimony reflects Nolasco agreed Nordstrom "first told the FDA inspectors about the specialty program"; Taylor agreed "Nordstrom told them . . . . [Scantibodies] was collecting specialty plasma from SBI and was selling it" and "that it was being collected from SBI, shipped to SLI, and sold to customers"; and that Taylor confirmed he "told the FDA inspectors, first, that they were selling specialty plasma . . . ."

argument emphasized the jury instructions, it would not have impacted the jury's findings regarding the matters Nordstrom did not disclose. The jury vote does not establish prejudice. Scantibodies argues it "revealed 9-3 and 10-2 votes on the most crucial Section 1102.5 liability questions—i.e., whether Plaintiffs had 'disclosed' anything, whether they 'reasonably believed' that a violation had occurred, whether they had 'refused' on [*sic*] participate in anything illegal or unlawful." But Scantibodies seeks to show prejudice from an instruction indicating Plaintiffs did not have to be the first to disclose, so only the questions about whether Plaintiffs disclosed are relevant. Just two of those questions were 9-3 or 10-2 votes: whether Taylor disclosed management's instruction not to complete post-donation information, and whether Nolasco made the same disclosure. As noted *ante*, Scantibodies cites no evidence that Nordstrom disclosed anything to the FDA on this issue, so the instruction could not have had any impact. Further, the jury found the other disclosures by unanimous vote.[8]

II

*Jury Deliberations*

Scantibodies contends the trial court erred by failing to properly instruct on further deliberations, and by seating an alternate juror for the punitive damages phase. We conclude there was no error and Scantibodies has not shown prejudice in any event.

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8 Although the issues of reasonable belief of illegal activity and refusal to participate in practices that violate the law do not pertain to whether Plaintiffs disclosed, we note the majority of these questions were unanimous too.

A. *Additional Background*

At the outset of trial, the court bifurcated the issue of punitive damages. Before deliberations began, Juror No. 8 advised the court she had her son's graduation the following day. The court asked Juror No. 8 what time the graduation was. She indicated the graduation was in the afternoon, and she had to prepare for the graduation party.

The jury deliberated for approximately five hours. The following morning, the jury deliberated for approximately two more hours, and reached a verdict.

The trial court polled the jurors. Pertinent here, the jury voted that Taylor established malice, oppression, or fraud. With respect to Nolasco's verdict form, Juror No. 9 indicated that he stopped after Question No. 5 (whether Nolasco experienced an adverse employment action), and did not answer Question Nos. 6, 7, 8, 9, or 11. Juror No. 9 explained that, "[i]t says if you answered 'No,' stop." The court stated, "that's collectively as to the jury," and said, "we'll have to send this back for you to vote on." When Juror No. 9 stated, "I can answer the remaining," the court explained, "You really can't do it out here."

In a side bar with counsel, the trial court stated, "I'm going to tell them right now there's a second phase, because there's going to be a second phase as to Brenda Taylor," and defense counsel responded, "Right." The court stated to the jury:

> "Ladies and gentlemen of the jury, we're going to send you back to redeliberate on those issues. When you come back here, I'm going to give you one more instruction and then ask you to answer one final question as to each plaintiff. It's a second phase. Because you've found that there was malice, fraud, and oppression. And then there's a question that's going to follow

that. You still have to answer that question. But right now we need to get your answers on these others."

The jury returned to deliberate. After approximately 30 minutes, the jury returned verdicts in favor of both Plaintiffs, as described *ante*.

The court confirmed Juror No. 8 had a graduation party for her son, and excused her. An alternate juror was seated. The jury then deliberated on punitive damages, and awarded punitive damages to both Plaintiffs.

B. *Propriety of Instructions on Further Deliberation*

1. *Applicable Law*

The California Constitution guarantees the right to a jury trial. (Cal. Const. art I, § 16.) This right "requires each juror to have engaged in all of the jury's deliberations." (*People v. Collins* (1976) 17 Cal.3d 687, 693 (*Collins*).) In criminal cases, "[t]he requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them." (*Ibid*.) "The same considerations require that each juror engage in all of the jury's deliberations in both criminal and civil cases. The requirement that at least nine persons reach a verdict is not met unless those nine reach their consensus through deliberations which are the common experience of all of them." (*Griesel v. Dart Industries, Inc*. (1979) 23 Cal.3d 578, 584 (*Griesel*), overruled on other grounds by *Privette v. Superior Court* (1993) 5 Cal.4th 689, 696; Code Civ. Proc., § 618 ["If upon inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if

no disagreement is expressed, the verdict is complete and the jury discharged from the case."].)

"When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out." (Code Civ. Proc., § 619.) " 'If the verdict is ambiguous the party adversely affected should request a more formal and certain verdict. Then, if the trial judge has any doubts on the subject, he may send the jury out, under proper instructions, to correct the informal or insufficient verdict.' " (*Woodcock v. Fontana Scaffolding & Equip. Co*. (1968) 69 Cal.2d 452, 456 (*Woodcock*).)

2. *Analysis*

a. *Instructions for Further Deliberations*

Scantibodies contends that "when the jury was sent back into deliberations on Question Nos. 6-9 and 11, the trial court was required [to] instruct the jury to disregard all past deliberations and begin deliberating *anew* on those issues with Juror No. 9's participation," using CACI No. 5014.[9] No such instruction was required here.

The jury polling revealed Juror No. 9 did not participate in certain questions on the Nolasco verdict form (and that more than three jurors may have disagreed with the outcome on certain other questions). The trial court told the jury it was "going to send [them] back to deliberate on those issues," and that it "need[ed] to get [their]

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9 CACI No. 5014 provides, in pertinent part, that the "alternate juror must participate fully in the deliberations" and "you must set aside and disregard all past deliberations and begin your deliberations all over again."

answers . . . ." Thus, the court recognized potential disagreement with the verdict and sent the jury out with appropriate instructions: to deliberate further on the questions warranting clarification. (*Woodcock*, *supra*, 69 Cal.2d at p. 456.) No more was required.

Scantibodies's argument that further instruction was required is based on its position that Juror No. 9's abstention was analogous to substitution of an alternate juror. We reject the analogy. When an alternate juror is substituted in certain circumstances, a court is required to "instruct the jury to disregard all past deliberations and begin deliberating anew." (*Griesel*, *supra*, 23 Cal.3d at p. 585; *Collins*, *supra*, 17 Cal.3d at p. 691 [substitution is constitutionally permissible when "the jury has been instructed to begin deliberations anew"].) The concern is that the alternate is a juror new to deliberations, and without starting over, the deliberations would not be common and the juror could not provide full input. (See *Collins*, at p. 693 [balance of deliberations is "easily upset if a new juror enters the decision-making process"]; *Vaughn v. Noor* (1991) 233 Cal.App.3d 14, 18, 21, 22 [alternate was placed after initial liability deliberations; "it is likely the new juror would be predisposed to finding liability" and "may have found it difficult to offer any input, where the jury had believed it had finished its task"].) This concern does not apply to an existing juror, like Juror No. 9, who had full opportunity to participate in deliberations, did so, and for some reason (here, misunderstanding the verdict form) did not answer certain questions on the verdict form.[10]

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10 Plaintiffs suggest further deliberations would not have been necessary if nine jurors had voted yes. (Code Civ. Proc., § 618; *Keener v. Jeld-Wen, Inc*. (2009)

Scantibodies also has not established prejudice. Scantibodies attempts to rely on the factors that supported prejudice in *Griesel*. Specifically, Scantibodies contends that "the evidence on liability was close"; "[o]n at least four of the critical questions (Nos. 6, 7, 9, and 11), the jury was split in its verdict"; and "[t]he jury returned the verdict less than 30 minutes after the alternate was seated . . . .[11] But Scantibodies did not establish the evidence was close; it argued jury votes on certain liability questions were close (even though most were not, as explained *ante*). Although the specific votes on Nolasco Question Nos. 6, 7, 9 and 11 were not unanimous, none were 9-3 votes; so unlike *Griesel*, Juror No. 9 was not "necessary to return the verdict." (*Griesel*, *supra*, 23 Cal.3d at p. 585.) Finally, the jury initially spent seven hours deliberating on both verdict forms in their entirety. Spending approximately 30 minutes to further deliberate on a small subset of the questions is not suspect.

Scantibodies also relies on the court's discussion with Juror No. 9 to contend the jury did not consider the issues anew, citing Juror No. 9's offer to vote on the omitted questions and the court's response that "[y]ou really can't do it out here." This does not

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46 Cal.4th 247, 257 ["[S]ection 618 effectively creates a 'rebuttable presumption: If a verdict appears complete, it is complete unless there is an affirmative showing [during polling] to the contrary.' "], italics omitted.) However, the court permitted further deliberations, so this issue is not before us. We also need not address Scantibodies's argument that the court's instructions were insufficient under the "begin anew" standard (or that other comments regarding deliberations after substitution of alternates were problematic), because it has not established the standards governing alternate jurors apply here.

11 The court minutes reflect the jury returned after 26 minutes.

establish what the jury did or did not do. To the contrary, it reflects the court made clear Juror No. 9 could not vote this way, and then the court proceeded to instruct the jury they had to deliberate further.

b. *Trial Court Comment Regarding Malice, Fraud, and Oppression*

Scantibodies argues the court's statement " 'you've found that there was malice, fraud, and oppression' was inappropriate in light of the fact that Question No. 11 was being resubmitted to the jury." (Fn. omitted.) Question No. 11 asked: "Has Janette Nolasco proven by clear and convincing evidence that one or more officers, directors, or managing agents of Scantibodies engaged in retaliatory conduct against her with malice, oppression, or fraud?"[12]

Coercion by the trial court is improper. (See *Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 651 ["[A]ny coercive effect should be determined by reading the instruction as a whole in light of the surrounding circumstances. Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned."].) However, Scantibodies does not establish the trial court's comments were coercive.

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12 Plaintiffs argue Scantibodies waived this argument by failing to object, contending the statement was at worst confusing, while Scantibodies maintains it was deemed objected to as a comment on the evidence. The statement appears to be a comment on trial proceedings, not evidence, but we will address the argument. We understand Scantibodies's position to be that the court's instructions and comments to the jury before further deliberations were deficient, not simply confusing. (See *Griesel*, *supra*, 23 Cal.3d at p. 583, fn. 4 [giving of instruction is deemed excepted to].)

The jury had already determined that Taylor proved malice, oppression, and fraud, so there was going to be a second phase regardless of what happened during further deliberations. Defense counsel acknowledged as much, when the trial court indicated it was going to tell the jury "there's going to be a second phase as to Brenda Taylor" and defense counsel responded, "Right." It appears the court was simply explaining to the jury what was going to happen when they returned. The court may have failed to distinguish between the two plaintiffs in doing so, but otherwise used neutral language and imposed no time limits on the jury's additional deliberations. It also made clear the jury had to answer the questions at issue, which included the Nolasco malice, oppression, and fraud question.

The authorities cited by Scantibodies involve either clearly coercive behavior, or no coercion at all, and thus do not support its position. (See *Cook v. Los Angeles R. Corp*. (1939) 13 Cal.2d 591, 593, 594 [reversing judgment where trial court stated it would give the jury " 'ten minutes more' " because it would not keep them longer " 'on a simple question like that' "; "plain implication" was the court "did not consider the plaintiff was entitled to recover," as it would have taken more than ten minutes to address damages]; *Mizel v. City of Santa Monica* (2001) 93 Cal.App.4th 1059, 1071, 1072 [jury returned inconsistent liability and damages findings, and trial court described inconsistency and sent jury back for further deliberations; Court of Appeal found no error, explaining it is appropriate for courts to "reinstruct the jury in an objective, neutral, and noncoercive manner . . . ."].)

C. *Replacement of Sitting Jury Between Liability and Punitive Stages*

Scantibodies argues the trial court erred by replacing a juror with an alternate for the punitive damages phase, when it could have waited to proceed. This argument lacks merit.

"A trial court has authority to discharge a juror upon good cause shown to the court that the juror is unable to perform his or her duty. (Code Civ. Proc., § 233; [citation].) An appellate court reviews such a determination for abuse of discretion. [Citations.] . . . . [Citation.] Although the trial court's ruling will be upheld if there is substantial evidence to support it, the juror's inability to perform as a juror must ' " 'appear in the record as a demonstrable reality.' " [Citation.]' " (*Shanks v. Department of Transportation* (2017) 9 Cal.App.5th 543, 550; see Code Civ. Proc., §§ 233, 234 [providing for placement of alternate juror, if available].)

The trial court did not abuse its discretion. When Juror No. 8 informed the court she had her son's graduation the following day, the court asked about timing and she responded. Before excusing Juror No. 8, the court confirmed the juror's conflict resulting from her son's graduation. Scantibodies does not dispute Juror No. 8 had to leave, or contend there was an absence of good cause to support her discharge. (See *People v. Bell* (1998) 61 Cal.App.4th 282, 288 [discharge of juror who needed to take child to doctor was not abuse of discretion; "[T]he court made a reasonable and permissible inference juror No. 2 might not be able to return at all that day."].) Rather, Scantibodies contends the court could have waited to continue deliberations. But Scantibodies does not establish failure to wait, without more, is an abuse of discretion. (Cf. *ibid*. [rejecting

party's arguments about what "the court could or should have done" and that court could have waited; explaining it would "not second-guess the trial court's discretionary decisions"]; see *People v. Hall* (1979) 95 Cal.App.3d 299, 307 [discretion to discharge a juror and seat an alternate "is not rendered abusive merely because other alternative courses of action may have been available to the trial judge"].)

Scantibodies's remaining arguments also lack merit. First, Scantibodies contends "courts have repeatedly held the same jury must determine liability, the existence of malice, oppression, or fraud, and the amount of punitive damages." Civil Code section 3295, subdivision (d), provides that where punitive damages are bifurcated, "[e]vidence of profit and financial condition shall be presented to the same trier of fact . . . ." In *Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045 (*Rivera*) the Court of Appeal determined that substitution of two alternates before punitive damages, due to dismissal of the original jurors for financial hardship, did not violate the " 'same trier of fact' " requirement in section 3295, subdivision (d). (*Id*. at pp. 1047-1048.) The court explained that "[a]lternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors." (*Id*. at p. 1049.) It concluded:

> "[W]hen a juror who participated in the liability phase of the trial is excused and replaced by an alternate juror for the punitive damages phase the case is being tried to 'the same trier of fact' which found for the plaintiff on the issues of liability and oppressive or malicious conduct." (*Ibid*.)

Similar to *Rivera*, the trial court here dismissed a juror due to her unavailability, and substituted an alternate juror for punitive damages. Thus, punitive damages were tried to the same trier of fact.[13]

The cases relied upon by Scantibodies are distinguishable. (See *City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272 (*El Monte*) and *Medo v. Superior Court* (1988) 205 Cal.App.3d 64 (*Medo*).) These cases were "consider[ing] the statute's application where juries were inadvertently and prematurely discharged prior to determining the amount of punitive damages," not the discharge of a single juror for good cause. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 778-779 (*Torres*) [holding § 3295, subd. (d), did not entitle defendant to full new trial, following reversal of punitive damages; distinguishing *El Monte* and *Medo*].)[14]

Second, Scantibodies suggests that having the same jury determine liability and punitive damages is a "constitutional requirement." However, both *Torres* and the cases Scantibodies cites reflect this is a statutory right. (See *Torres*, *supra*, 15 Cal.4th at p. 780; *Medo*, *supra*, 205 Cal.App.3d at pp. 68-70; *El Monte*, *supra*, 29 Cal.App.4th at

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13 Scantibodies also argues *Rivera* has not been cited by other courts. This observation is not helpful and Scantibodies does not identify any other cases addressing juror substitution before punitive damages.

14 Quoting *Medo*, Scantibodies contends the reason for the same jury requirement is that "[p]unitive damages are not simply recoverable in the abstract" and that the jury "must consider the conduct giving rise to liability." (*Medo*, *supra*, 205 Cal.App.3d at p. 68.) But the *Torres* court found this argument unpersuasive. (*Torres*, *supra*, 15 Cal.4th at p. 780.)

p. 276.) We recognize juror substitution during deliberations may implicate a party's constitutional right to trial by jury. (*Griesel*, *supra*, 23 Cal.3d at p. 584.) But Scantibodies identifies no authority applying that principle between jury phases. Further, the California Supreme Court has concluded that when an alternate joins the jury in a criminal trial before the penalty phase, "the *Collins* instruction [to begin deliberations anew] [i]s not necessary to insure the preservation of the 'essential elements of trial by jury. . . .' " (*People v. Brown* (1988) 46 Cal.3d 432, 461; *People v. Cunningham* (2001) 25 Cal.4th 926, 1030 [accord].) If there is no bar to substituting an alternate juror before a criminal penalty phase (and without instruction to begin anew), we see no reason to apply such a bar here—in the context of a civil case before punitive damages.

Finally, Scantibodies cannot prevail on appeal because it has failed to show the juror substitution was prejudicial. (*Candelaria v. Avitia* (1990) 219 Cal.App.3d 1436, 1444 [" 'Prejudice is not presumed and the burden is on the appellant to show its existence.' "].) In its opening brief, Scantibodies argues the mishandling of the jury was prejudicial, but focuses on the begin anew issue (which is irrelevant to the juror replacement issue). On reply, Scantibodies cites criminal cases for the proposition that structural defects in a trial are reversible per se. (See, e.g., *People v. Collins* (2001) 26 Cal.4th 297, 311.) We need not consider this argument. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 (*Stroh*) ["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument."].) Even if we did, we would reject it as Scantibodies still fails to address the specific issue of juror substitution. The

court's ruling substituting a juror before the punitive damages phase did not deprive Scantibodies of the right to trial by jury and thus does not constitute a structural defect.

III

*Plaintiffs' Retaliation Claims*

Scantibodies contends Plaintiffs have failed to establish their retaliation claims. We conclude Plaintiffs have properly stated their claims, and we reject Scantibodies's claims to the contrary.

A. *Additional Background*

Because Scantibodies's arguments require an understanding of Plaintiffs' job duties and the adverse treatment alleged by Taylor, we discuss each in turn.

Plaintiffs' job duties included writing the standard operating procedures for the plasma center, and ensuring they were followed. Taylor was primarily responsible for the quality assurance system, but they worked together to set it up and Nolasco ran the facility to ensure compliance. Taylor was also the "corrective and preventative action" (CAPA) coordinator. Plaintiffs were responsible for participating in FDA inspections and interacting with the FDA.

Taylor testified to her alleged adverse treatment, stating that Nordstrom cancelled her vacation in April 2013. She also testified Nordstrom excluded her from the wrap-up of the second FDA inspection, and from participating in the response. In July 2013, Taylor was placed on a 90-day probation for certain performance issues. She met with Nordstrom and Anna Marie C., director of human resources, and described three cases of Nordstrom yelling at her in front of coworkers. She testified Nordstrom held only one of

the required weekly probationary meetings, provided no feedback, and did not hold further meetings. Nordstrom testified he did not yell at or act inappropriately toward Taylor, or reduce her job duties.

Nordstrom left the company, and Taylor's counseling statement was closed. Taylor testified she still had not received her annual review, due April 2013, by February 2014, and that raises are only effective after the review. Plaintiffs contend Taylor could not get performance goals without the review, and Anna Marie acknowledged Taylor had not received goals for the review period that was almost over.

When asked about the duties taken away, Taylor responded, "pretty much everything." She testified she was taken off the emergency alarm list and her building access was removed, limiting after-hours access. She stated she was not allowed to attend the weekly meetings for planning the National City plasma center. She also stated she had previously run tours, but was told she was not needed for a potential customer audit; she was no longer supervising quality assurance people; the standard operating procedures she had written were "being ignored"; and she was asked to train her replacement.

Anna Marie testified Taylor indicated she was overwhelmed, and actions were taken to lighten her load, including removing her CAPA duties and bringing her "from SBI . . . to [Scantibodies] . . . to just kind of get some of that stress off of her from SBI." Taylor acknowledged she was "good with" being relieved of CAPA duties, as well as certain supplier audit duties.

B. *Applicable Law*

1. *Standard of Review*

"[F]actual findings made by the trier of fact are generally reviewed for substantial evidence." (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 500-501.) We review issues of law de novo. (See *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

We briefly address the scope of our review here. Scantibodies contends Plaintiffs have not established certain elements of their claims as a matter of law. Because Scantibodies does not make substantial evidence arguments, or set forth all material evidence on matters where it does question the sufficiency of Plaintiffs' showing, Scantibodies cannot establish error on substantial evidence grounds. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*) ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."]; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman*) [An appellant arguing a lack of substantial evidence is " 'required to set forth in their brief all the material evidence on the point and not merely their own evidence. Unless this is done the error is deemed to be waived.' "], italics omitted.)[15]

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15 Scantibodies does make a conclusory assertion at the end of its opening brief that the claims are unsupported by substantial evidence, and responds to Plaintiffs' arguments on reply. Neither is sufficient for a substantial evidence challenge. Scantibodies also contends on reply that whether there is substantial evidence for "a statutory claim

2. *Section 1102.5*

At the time of the events here, section 1102.5, subdivision (b) provided: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Stats. 2003, ch. 484, § 2.)

Section 1102.5, subdivision (c), provided in pertinent part: "An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Stats. 2003, ch. 484, § 2.)

To establish retaliation, the plaintiff "must show he engaged in protected activity, his employer subjected him to an adverse employment action, and there is a causal link between the two." (*Hager*, *supra*, 228 Cal.App.4th at p. 1540.)

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presents a question of law that the appellate court reviews de novo," citing *Acqua Vista Homeowners Assn. v. MWI, Inc.* (2017) 7 Cal.App.5th 1129, italics omitted. Scantibodies further contends statutory claims are reviewed de novo, citing *McNary v. Haitian Refugee Ctr., Inc.* (1991) 498 U.S. 479. If Scantibodies means sufficiency of the evidence is not at issue because the claims are statutory, we disagree. (See, e.g., *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 127 (*Mokler*) [substantial evidence supported § 1102.5 claim].) Courts have characterized the existence of substantial evidence as a question of law (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1515), but this does not relieve an appellant from establishing an absence of evidence. (*Foreman*, *supra*, 3 Cal.3d at p. 881 [defendant must " 'demonstrate that there is no substantial evidence to support the challenged findings' "].) *McNary* is inapposite. (*McNary*, at pp. 487, 493 [challenge to federal immigration procedures].)

C. *Analysis*

1. *Whether Plaintiffs Engaged in Protected Activity Under Section 1102.5, Subdivision (b)*

a. *Whether Plaintiffs Disclosed Anything to the FDA*

Scantibodies contends, but does not establish, that Plaintiffs did not disclose anything to the FDA. First, Scantibodies argues Nordstrom had already disclosed the information at issue to the FDA. As discussed *ante*, a prior disclosure would not necessarily bar protection for Plaintiffs, and Scantibodies does not establish Nordstrom provided the FDA with information regarding most of the disclosures found by the jury.

Second, Scantibodies argues Plaintiffs had to show the disclosures were beyond their normal job duties, and "raising suspected FDA violations was part of their job duties." Plaintiffs disagree, noting the statute was amended to protect a whistleblower " 'regardless of whether disclosing the information is part of the employee's job duties' " and contending this was a clarifying amendment consistent with existing law. (Stats. 2013, ch. 781, § 4.1.) We need not resolve whether Plaintiffs had to go beyond their job duties to engage in protected activity, because Scantibodies does not show they failed to do so. There is no dispute Plaintiffs ran the plasma center, were involved in compliance, and were responsible for interacting with the FDA. But they voluntarily told the FDA about specific specialty plasma issues during an audit for a source plasma license application; they did so outside Nordstrom's presence; and, according to them, they were instructed by management not to do so. A reasonable jury could conclude they went outside their normal duties when they reported their concerns to the FDA. (See *McVeigh*,

*supra*, 213 Cal.App.4th at pp. 467, fn. 7, 469 [employee whose job included reporting customer theft and who suspected fraud "was not necessarily just doing his job in reporting to law enforcement' "].)[16]

Third, Scantibodies argues that employee complaints to the employer are not protected disclosures, while Plaintiffs contend the issue is moot because the jury found disclosures to the FDA. We agree with Plaintiffs' position that we need not address this issue. All of the disclosures on the verdict form involved communications to the FDA.

b. *Whether Plaintiffs Established Reasonable Cause to Believe the Disclosed Information Showed a Violation of Law or Regulation*

Scantibodies argues Plaintiffs were required to identify a specific statute or regulation in order to prove they reasonably believed their communications disclosed violations of law or regulation, and they failed to do so. This argument lacks merit.

Under section 1102.5, subdivision (b), an employee need not prove an actual violation of law, but rather that he or she "disclose[d] to a governmental agency ' "reasonably based suspicions" of illegal activity.' " (*Mokler*, *supra*, 157 Cal.App.4th at

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16 Scantibodies relies on federal cases and a California case citing them on this issue, but there are conflicting California decisions and the Ninth Circuit distinguished between federal and state law. (Compare, e.g., *Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1207 [employee's refusal to process reimbursement requests was "consistent with, if not required by, her general job description and duties," citing federal cases], with, e.g., *McVeigh*, *supra*, 213 Cal.App.4th at p. 469 ["employee's report of illegal activity can . . . constitute protected conduct . . . even if she ' "was simply doing her job" ' "]; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1312-1313 [accord]; *Lukov v. Schindler Elevator Corp*. (9th Cir. 2015) 594 Fed.Appx. 357, 358 [noting state appellate courts "refused to extend the federal 'step outside of his role' rule to California wrongful termination claims"].)

p. 138.) The employee must believe a law or regulation was violated and this belief, even if incorrect, must be reasonable. (See *Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 933, 934 (*Carter*) [public policy wrongful termination claim based in part on § 1102.5; teacher's disclosure that coach recommended protein shake to student was not protected, where information did not disclose a violation of law or regulation; teacher "was not motivated by his belief that a law had been broken"; and "even if [he] subjectively believed that [the coach] had violated a statute or regulation . . ., the record is devoid of anything that would support a conclusion that his belief was 'reasonable' "]; *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1385-1386 (*Patten*) [disclosures regarding program expenditures presented triable issue that employee "reasonably believed she was disclosing a violation of state or federal law"].)

Scantibodies maintains a plaintiff must also identify a specific statute or regulation, citing *Layton v. Terremark N. Am., LLC* (N.D.Cal. 2014) 2014 U.S. Dist. LEXIS 77694 and *Prem v. Access Servs.* (C.D.Cal. 2011) 2011 U.S. Dist. LEXIS 44843. These cases rely on *Carter*, but *Carter* does not articulate such a requirement. (*Layton*, at *13; *Prem*, at *11.) Rather, as noted *ante*, the disclosure in *Carter* was not protected because, among other things, the record was "devoid of anything" supporting reasonable

belief that the disclosed behavior violated any laws or regulations. (*Carter*, *supra*, 148 Cal.App.4th at p. 933.)[17]

Scantibodies makes two related contentions: that a conclusory assertion of illegality is insufficient and plaintiffs must attempt to verify their suspicions. Scantibodies does not establish Plaintiffs' allegations were conclusory. (Compare, e.g., *Montgomery v. John Deere & Co*. (8th Cir. 1999) 169 F.3d 556, 561 [summary judgment properly granted, where employee alleged employer "discharged him because of his knowledge of certain allegedly improper, possibly illegal, environmental practices"].) As for Scantibodies's claim that verification is required, the cases that Scantibodies cites do not support such a requirement and are otherwise distinguishable. (See, e.g., *Jones-McNamara v. Holzer Health Sys*. (2015) 630 Fed.Appx. 394, 403-404 (*Jones-McNamara*) [plaintiff failed to present proof of connection between gifts and referrals, to support claim based on alleged kickback scheme].)

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17 On reply, Scantibodies contends that in *Green* "the California Supreme Court also held plaintiffs must be able to identify a specific state or federal statute, rule, or regulation which they believed defendants were violating." We need not address points raised on reply. In any event, *Green* does not support Scantibodies's position. It involved a public policy wrongful discharge claim, which requires showing that the public interests at issue are " 'tethered to fundamental policies that are delineated in constitutional or statutory provisions.' " (*Green*, *supra*, 19 Cal.4th at p. 71; *id*. at p. 83 ["[W]e have rejected public policy claims that were 'largely unaccompanied by citations to specific statutory or constitutional provisions.' "].) In concluding statutorily authorized regulations could support a claim, the court determined the plaintiff met his burden to provide specific regulations. (*Id*. at p. 84.) Although *Green* notes section 1102.5 in its overview of wrongful termination law (*id*. at pp. 76-77), it does not address requirements for showing reasonable cause to believe a disclosure established a violation of law within the meaning of section 1102.5, subdivision (b).

We recognize that a failure to identify a statute or regulation may be evidence that the employee's belief is unreasonable. (*Jones-McNamara*, *supra*, 630 Fed.Appx. at pp. 403-404; see *Love v. Motion Industries, Inc*. (N.D.Cal. 2004) 309 F.Supp.2d 1128, 1135 [failure to identify "statutory or regulatory basis" for claim in summary judgment briefing "[m]ore than three years after [P]laintiff discovered the alleged safety issue" was "telling and indicates a lack of any foundation for the reasonableness of his belief"].) But Scantibodies does not challenge the jury's reasonable belief findings on substantial evidence grounds or set forth all material evidence on the issue, and cannot establish error based on insufficient evidence.

We do elect to clarify certain aspects of the record, however, because doing so highlights how Scantibodies's claims lack merit. First, Scantibodies cites the trial court's comment that "there wasn't the specificity in terms of being tethered to a specific regulation, at least the way the case was presented." But Scantibodies omits the discussion that followed, in which the court referenced evidence on these matters that had been presented and advised Plaintiffs' counsel that she could "argue illegality based on the evidence, and . . . can blow up any writings by anyone that references specific codes, regulations."

Second, Scantibodies contends that "to the extent Plaintiffs referred to *any* relevant source for their beliefs," they referenced internal standard operating procedures and WIRB protocols. The record shows Plaintiffs referred to FDA regulations at trial.

Finally, Scantibodies contends the "Form 483 did not indicate a violation of any FDA regulation. . . ." To the extent Scantibodies is suggesting the forms established its

specialty plasma practices were lawful, and precluded reasonable belief, we are not persuaded. Form 483 states it is not a final agency action. (See *City of Pontiac Gen. Emps.' Ret. Sys. v. Stryker Corp*. (W.D.Mich. 2012) 865 F.Supp.2d 811, 825 [Form 483 "was not the final word on whether the . . . facility was in compliance with FDA regulations."]; *In re Omnicare, Inc. Securities Litigation* (E.D.Ky. 2013) 2013 U.S. Dist. LEXIS 42973 at *38 [a Form 483 is issued " 'when an investigator has observed any conditions that in their judgment may constitute violations' "].)[18]

2. *Whether Taylor Experienced an Adverse Employment Action*

Scantibodies contends Taylor's section 1102.5 claims fail, because "[a]s a matter of law, Taylor did not suffer any 'adverse employment action.' " We disagree.

An adverse employment action is one that "materially affect[s] the terms and conditions of employment . . . ." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036 (*Yanowitz*); *Patten*, *supra*, 134 Cal.App.4th at p. 1389 [applying materiality test to claim under § 1102.5, subd. (b)].) "The 'materiality' test . . . looks to 'the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career,' and the test 'must be interpreted liberally . . . with a reasonable appreciation of the realities of the workplace . . . .' " (*Patten*, at p. 1389, italics omitted, quoting *Yanowitz*, at p. 1054.)

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18 On reply, Scantibodies contends Plaintiffs rely on federal regulations never discussed at trial, and that substantial evidence must be presented to the jury. Even if we were to address this argument raised on reply, we would conclude it lacks merit. Assuming Plaintiffs were required to present regulations to the jury, at least some FDA regulations were addressed at trial as previously discussed.

"[I]n determining whether an employee has been subjected to treatment that materially affects the terms and conditions of employment, it is appropriate to consider the totality of the circumstances . . . ." (*Yanowitz*, at p. 1036.)

Here, Taylor testified about a number of incidents, including the cancellation of vacation time, being excluded from portions of the second FDA audit, public admonishment by Nordstrom, being placed on probation for purported performance issues, not receiving a performance review (or, in turn, a raise or performance goals), losing various job responsibilities, and being excluded from the planning of a new plasma center. Plaintiffs contend, in substance, that these actions constituted harassment amounting to an adverse employment action and that they materially impaired Taylor's ability to advance. We agree with the latter argument, and we need not address their contentions regarding harassment.

A jury could conclude this series of actions was " 'reasonably likely to impair . . . [Taylor's] job performance' " (*Patten*, *supra*, 134 Cal.App.4th at p. 1390), and potentially derail her career. (See *Yanowitz*, *supra*, 36 Cal.4th at p. 1060 ["Actions that threaten to derail an employee's career are objectively adverse . . . ."].) Certain events, including exclusion from the second audit, reduction in job duties, and public admonishment by Nordstrom, could have impacted her ability to perform in her current role. (See *ibid*. ["[m]onths of unwarranted and public criticism of a previously honored employee, an implied threat of termination, contacts with subordinates that only could have the effect of undermining a manager's effectiveness, and new regulation of the manner in which the manager oversaw her territory" was more than an "inconvenience"

to plaintiff, as they "placed her career in jeopardy"].) Other incidents, including the absence of new performance goals (resulting from the missed performance review) and her exclusion from new plasma center planning, could have impaired her ability to advance. (See *Patten*, at p. 1389 [lateral transfer of principal to school that did not present sufficient administrative challenges, along with other actions impairing job performance, could be an adverse employment action]; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1456, 1457 (*Akers*) ["reduced promotional opportunities may constitute an adverse employment action"].)

We recognize that "many of these actions and problems . . . do not rise to material adverse actions on their own," but " 'there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries.' " (*Patten*, *supra*, 134 Cal.App.4th at p. 1390, quoting *Yanowitz, supra,* 36 Cal.4th at p. 1055.) Considering the totality of the circumstances, we conclude that a reasonable jury could find that this series of actions materially impaired Taylor's employment, and thus constituted an adverse employment action.

Scantibodies's arguments in support of its claim that Taylor suffered no adverse employment action are not persuasive. Scantibodies contends that "[t]he reduction of Taylor's workload was an accommodation in response to her complaints about being overworked," meaning it could not be an adverse employment action. But Scantibodies only cites Taylor's testimony about removal of her CAPA and supplier audit duties, and Anna Marie's testimony about removing Taylor's CAPA duties and shifting her to

Scantibodies—none of which Taylor relies upon to establish an adverse employment action.

Scantibodies further argues "an adverse employment action requires the loss of some tangible job benefit," such as " 'loss in salary or benefits, subsequent denial of promotions, workplace reassignment, transfer or change in her permanent job title.' " Scantibodies makes a related argument that the actions at issue are minor or trivial. The standard is whether the action or actions "materially affect the terms and conditions of employment," not whether a formal change to compensation or job title has already taken place. (*Yanowitz, supra*, 36 Cal.4th at p. 1036.) For reasons already discussed, a jury could reasonably conclude the actions taken against Taylor did materially impact her employment and constitute an adverse employment action.[19]

Finally, Scantibodies contends that Taylor's continued employment at the outset of the case precluded not only an adverse employment action, but also standing. Scantibodies cites authority for the undisputed proposition that you need standing to pursue a claim (e.g., *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232-233), but Scantibodies does not explain why it believes she lacked standing. Scantibodies also cites its summary judgment papers, but there, Scantibodies

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19 Scantibodies also cites cases to contend that particular events are not adverse employment actions. (See, e.g., *Akers, supra*, 95 Cal.App.4th at p. 1457 [noting "written criticisms alone are inadequate to support a retaliation claim"].) At most, these cases provide examples that were found insufficient to constitute adverse employment action in certain contexts; they do not foreclose their relevance generally, or when considered collectively.

simply contended Taylor had not experienced an adverse employment action. Scantibodies then contends that even if her "continued employment does not disqualify her on standing grounds," it precludes her claim that she suffered an adverse employment action. The law is well-settled that an adverse employment action does not require termination of employment, and Scantibodies does not establish otherwise. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1054; *Patten*, *supra*, 134 Cal.App.4th at p. 1389.)

3. *Whether Plaintiffs Established Their Claims Under Section 1102.5, Subdivision (c)*

Scantibodies contends Plaintiffs did not prove the elements of their section 1102.5, subdivision (c) claims. None of Scantibodies's arguments supports this contention.

First, Scantibodies argues that "Plaintiffs assert their Section 1102.5(c) claims are based on their alleged refusal to participate in 'serious violations of the FDA rules and regulations' and 'very clear-cut, black-and-white federal regulations," but Plaintiffs "never identified the 'clear-cut, black-and-white federal regulations' precluding use of such a form." Scantibodies cites an exchange in which the trial court asked "what's the refusal," and Plaintiffs' counsel addressed the new consent form. Even assuming there were no evidence reflecting the practice regarding the consent form was unlawful (and the cited exchange does not establish this), Scantibodies does not address any of the other instances in which the jury found Plaintiffs had refused to participate in certain practices.[20]

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20 *Fernandes v. TW Telecom Holdings, Inc.* (E.D.Cal. 2013) 2013 U.S. Dist. LEXIS 176325, cited by Scantibodies here, is inapposite. (*Id*. at *9 [dismissing § 1102.5(c)

Second, Scantibodies contends "the FDA ultimately approved SBI's [biologics license application]—finding no violations of any statutes, rules or regulation in SBI's operation," and that "[i]n the absence of any *actual* violations of the law, Plaintiffs' section 1102.5(c) claims are unsupported by the evidence." SBI's source plasma application was approved, but Scantibodies does not explain how this relates to the refusals found by the jury (which implicated matters beyond normal source plasma). If Scantibodies is otherwise arguing there was insufficient evidence, it does not address the evidence supporting Plaintiffs' position and forfeits the argument. (*Foreman*, *supra*, 3 Cal.3d at p. 881.)

Finally, Scantibodies contends that "[f]or the reasons discussed above in connection with Plaintiffs' Section 1102.5(b) claims, Plaintiffs' Section 1102.5(c) claims also fail for lack of the required showing on the remaining elements, as well." The arguments Scantibodies makes regarding 1102.5, subdivision (b) are that Plaintiffs did not make a protected disclosure and that Taylor did not experience an adverse employment action (or have standing), and we have rejected them. Scantibodies addresses facts that could be pertinent to other elements of the claims, but Scantibodies

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claim where " 'consistent complaints' " and " 'refusal to ignore' " safety and compliance violations were insufficient to allege refusal to participate].) On reply, Scantibodies also argues Plaintiffs had to, but did not, identify a specific regulation they believed the company was violating, and that Plaintiffs provide no record citations establishing Scantibodies instructed them to violate federal regulations or that they identified regulations to the jury. We need not address these points (*Stroh*, *supra*, 10 Cal.App.4th at p. 1453), but note Scantibodies does not explain why Plaintiffs, as respondents, would have any burden in identifying evidence.

does not state it is contesting those elements, or provide argument or authority regarding them. Any such challenges are forfeited. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 ["Plaintiff has not raised this issue on appeal, however, and it may therefore be deemed waived."]; *Badie, supra,* 67 Cal.App.4th at pp. 784-785.)[21]

DISPOSITION

The judgment is affirmed. Plaintiffs shall recover their costs on appeal.

GUERRERO, J.

WE CONCUR:

AARON, Acting P. J.

DATO, J.

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21 Plaintiffs contend that because Scantibodies did not apportion damages between the two claims—under section 1102.5, subdivision (b) or subdivision (c)—the damage award can be upheld based on either claim. Scantibodies has not established grounds for reversal, and we do not address this argument.