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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DANIEL TAHERI,

Plaintiff and Appellant,

v.

ALEX A. KHADAVI, et al,

Defendants and Appellants.

B222132
(Consolidated with B226670 & B228313)
(Los Angeles County
Super. Ct. No. BC 3989292)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County. Rita J. Miller, Judge. Affirmed.

Reed Smith, Margaret M. Grignon, Zareh A. Jaltorossian and Brandon W. Corbridge for Plaintiff and Appellant Daniel Taheri, M.D.

Kinsella Weitzman Iser Kump & Aldisert, Gregory J. Aldisert and Aaron C. Liskin for Defendant and Appellant Alex A. Khadavi, M.D.

Steptoe & Johnson, Michael P. McNamara, Francis J. Burke, Jr. and Bennett Evan Cooper for Defendant and Appellant Alexander Hersel, M.D. and Defendant Thousand Oaks Surgery Center, Inc.

Doctors Alexander Hersel, Alex A. Khadavi and Daniel Taheri formed Thousand Oaks Surgery Center (TOSC). Taheri and Khadavi each sold Hersel their one-third interest in TOSC. Khadavi subsequently repurchased a 50 percent interest in TOSC. A jury found Khadavi and Hersel conspired to commit fraud and breached their fiduciary duty and awarded Taheri $8,097,879 in compensatory damages. The jury assessed $500,000 in punitive damages against Khadavi and $250,000 against Hersel and TOSC. The court denied Hersel's and Khadavi's motions for a judgment notwithstanding the verdict (JNOV) or a new trial, but granted TOSC's motion for JNOV. Hersel and Khadavi contend they were entitled to a JNOV or a new trial based on various alleged errors. Taheri contends that the court improperly granted TOSC's JNOV and that he is entitled to prejudgment interest and attorney's fees. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Factual Background[1]

A. The Parties

Taheri and Khadavi are board-certified dermatologists. In June 2003, they entered into a written partnership agreement as equal partners. Taheri and Khadavi opened a dermatology practice in Thousand Oaks, Manhattan Beach[2] and Encino. The practice did business as Dermatology Laser and Medical Center, a corporation jointly owned by Taheri and Khadavi. When Taheri and Khadavi leased space for their dermatology office in Thousand Oaks, both signed the lease agreement. At that time, Taheri was

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1 Except as noted, most of this background is based on Taheri's version of the facts as he was the prevailing party.

2 Taheri and Khadavi subsequently sold their Manhattan Beach office due to insurance company audits involving Taheri.

independently involved in several other dermatology offices,[3] so he and Khadavi agreed to limit Taheri's involvement in their dermatology practice; Taheri was to help establish the offices and teach Khadavi how to operate the businesses and perform certain surgeries, but Taheri was not to have active involvement in the practice.

In 2004, Khadavi introduced Taheri to Hersel, whom Khadavi had met during laboratory research in college. Hersel is an anesthesiologist and is board-certified in pain management. Hersel testified that pain management cannot be done in an office because the procedures require local anesthetics, which require monitoring.

B. Formation of TOSC

In early 2004, the three physicians decided to open a separate surgery center in Thousand Oaks.[4] To that end, Taheri and Khadavi leased additional space immediately adjacent to their Thousand Oaks office and signed an amendment to their existing lease. TOSC's revenue would be facility fees charged for surgeries performed there; the fees were separate from the physician's fee charged by a doctor to perform the surgery.

There was no written agreement regarding the center's business, but the three doctors agreed to put in equal amounts of money and be equal shareholders. At the time, Taheri, Khadavi and Hersel expected that each would be entitled to one-third of TOSC's profits. The three did not have any discussions as to the amount of business each was expected to generate or the number of patients each was expected to treat. As with Taheri's dermatology practice with Khadavi, Taheri did not intend to be actively involved in the day-to-day treatment of patients at TOSC; rather Taheri planned to

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3 Before becoming a partner with Khadavi, Taheri had five other dermatology offices in the Los Angeles area, including one in Westwood. Taheri operated a surgery center in Westwood.

4 In 2004, Hersel also subleased a portion of space in Taheri and Khadavi's Thousand Oaks office.

contribute by employing other physicians to treat his (Taheri's) patients at TOSC. TOSC was "another investment" for Taheri.

In April 2004, TOSC was incorporated as a professional corporation.

C. Accreditation

The surgery center needed accreditation to bill insurers and Medicare for services provided to patients. TOSC was interested in two types of accreditation -- the Accreditation Association for Ambulatory Health Care (AAAHC) and a certification by Medicare. AAAHC accreditation allows a medical provider to bill private insurance companies for services rendered to their insureds. The AAAHC accreditation process involves an inspection of the medical facility to ensure compliance with certain standards and legal requirements. Medicare certification allows a provider to bill the Medicare program for services provided to Medicare patients. Medicare certification also is dependent upon an inspection. AAAHC is tasked with performing the inspection for Medicare certification as Medicare does not perform such inspections itself. For TOSC, AAAHC accreditation was a higher priority because it enabled TOSC to bill private insurance companies and was a prerequisite to obtaining Medicare approval.

The three doctors agreed Khadavi would be responsible for seeking accreditation. TOSC hired Troy Lair to facilitate both AAAHC accreditation and Medicare certification. Lair interfaced with AAAHC in his efforts to secure accreditation and certification and with both Hersel and Khadavi, but primarily with Hersel; Lair never communicated with Taheri.

On February 11, 2006, AAAHC conducted an inspection or survey of TOSC for both AAAHC and Medicare approval. Lair was present at the survey, which went very well with respect to AAAHC accreditation. With respect to Medicare certification, a deficiency was identified with respect to the lack of a back-up generator for the facility. Lair informed Hersel that the survey had gone "really well" and that he "knew [TOSC] would get accredited." With respect to Medicare approval, Lair planned to apply for a waiver of the generator requirement. Taheri had no knowledge the survey had taken place.

D. Taheri Sells His Interest in TOSC

On February 27, 2006, Khadavi called Taheri and told Taheri that TOCS had failed AAAHC accreditation. Khadavi said that he and Taheri needed to "get out" of TOSC right away and that he had convinced Hersel to buy their interests. Khadavi urged Taheri to agree to the sale right away or "Hersel might back out."

Shortly after speaking with Taheri, Khadavi e-mailed Taheri a purchase and sale agreement (Purchase Agreement). The suggested sale price was $140,639.01, which was less than Taheri's investment in TOSC. When Taheri questioned Khadavi about the price, Khadavi stated Hersel "is not going to pay a penny more." Taheri did not contest the sale price, trusting it was the highest attainable price because Khadavi was selling his interest for the same price. Khadavi again urged Taheri to promptly sign the purchase and sale agreement in case Hersel changed his mind. Taheri believed and trusted Khadavi as his partner. Taheri also believed that accreditation for TOSC was hopeless as Khadavi had "worked two and a half years trying to get accreditation" without success.

A day or so later, Taheri contacted Hersel to inquire why Hersel wanted to buy the interests of Taheri and Khadavi. Hersel told Taheri that TOSC "had failed accreditation and that he was going to use it for [a] minor procedure room and possibly for office space."

On March 2, 2006, Khadavi and Taheri met in Taheri's office to sign the Purchase Agreement. Taheri's mother, Mehri Taheri, who worked in his dermatology practice, was also present. During the meeting, Mehri asked Khadavi why he and her son were selling their interests in TOSC, and Khadavi told her "'because we cannot get accredited for AAAHC and Medicare.'"

Khadavi sold his interest for the same price as Taheri, $141,800.81. Hersel paid a total of $283,601.62 for both interests.

After the Purchase Agreement was signed, Hersel told Lair that he had purchased Taheri's interest in the surgery center, but he did not tell Lair that he had purchased Khadavi's interest.

E. Post Sale

On March 24, 2006, AAAHC officially informed TOCS that it was being awarded a six–month accreditation. TOSC opened for business that month. Neither Khadavi nor Hersel informed Taheri of the accreditation. In August 2006, TOSC obtained a further three-year accreditation from AAAHC. Neither Khadavi nor Hersel informed Taheri of this further accreditation. Taheri did not discover that TOSC had been accredited until 2007. TOSC never obtained Medicare certification.

Before Khadavi sold his interest, he had not referred any patients for surgeries at TOSC or any other surgery center. After selling his interest, Khadavi started to feed TOSC a steady diet of patients.

On April 18, 2006, Lair applied for a waiver of Medicare's back-up generator requirement. Lair's letter described TOSC as not being a "multi-specialty outpatient surgery center" and being run by "two physicians" who are "practicing pain management and dermatology." Lair testified that the two physicians were Hersel and Khadavi. Hersel received a copy of that letter, but never informed Lair that the letter was inaccurate.

On August 1, 2006, five months after selling his one-third interest, Khadavi purchased a 50 percent interest in TOSC. The purchase price was $282,700, almost exactly the cumulative amount Hersel had paid Khadavi and Taheri in March for their shares. Khadavi paid the money directly to Hersel, not to TOSC. TOSC never issued any stock to Khadavi in connection with that transaction.

At trial, Khadavi claimed that Hersel approached him about reacquiring an interest because TOSC needed an infusion of cash. Khadavi admitted he had never reviewed any financial information to evaluate TOSC's cash needs. Hersel admitted that in August

2006, the same month Khadavi purchased his interest, TOSC had more than $200,000 in its bank account.

Hersel testified that between March and August 2006, he personally devoted considerable labor and effort to develop TOSC's business, that he contributed his own money to TOSC, and that his family members worked at TOSC without pay. Yet, Hersel sold the 50 percent interest to Khadavi for the same price Hersel had paid to buy the interests of Khadavi and Taheri some months earlier. In October and again in December, Khadavi and Hersel withdrew profit distributions from TOSC in equal amounts of $300,000, so that each received $600,000 in total profits for 2006.

Taheri was not informed of Khadavi's re-purchase of an interest in TOSC.

In 2008, Taheri began to develop suspicions that Khadavi was involved in TOSC after he noticed Khadavi taking patients from their Encino office to TOSC for routine procedures which did not require TOSC's facilities. In June, Taheri sent Khadavi an e-mail asking whether he had a financial interest in TOSC. Khadavi replied, "I have a legal contract that states that neither one of us does." Taheri sent another e-mail that same day, again asking whether Khadavi had a financial interest in TOSC. Khadavi responded, "no." Khadavi admitted his response was "misleading."

On July 17, Taheri sent Khadavi yet another e-mail asking whether he had a financial interest in TOSC. Taheri stated, "I now have a strong suspicion that you deceived me two years ago when you told me that the surgicenter was not going to be approved in [T]housand [O]aks." Once again, Khadavi replied, "We both sold the surgery center," and continued to conceal his stake in TOSC. Khadavi admitted that response was also misleading.

Taheri e-mailed Khadavi again on July 24, stating, "In March 2006, you suggested that both of us sell our interests in the Surgical Center, because it will not be approved under any circumstances and we'll be stuck paying rent for empty space. Based on your representations, I sold my interest. Subsequently, I learned that it had been approved.

Are you a shareholder or partner or a member of an LLC that owns the [T]housand [O]aks surgical center? When did it get approved? How did it get approved?"

Khadavi responded, "Both you and I elected to sell our shares in the Surgery Center based on the fact that your Mother told me that the business is not good and that she did not feel that it would be the correct business for us to be in." Khadavi again stated that TOSC still did not have Medicare certification, but he did not disclose that TOSC had obtained AAAHC accreditation,.

F. Blue Cross Agreement[5]

In 2003, Blue Cross and Blue Shield placed Taheri and his businesses on "special investigation" regarding Taheri's billing practices. Other major health insurers put Taheri on audit. According to Khadavi, Taheri spent much time reviewing patient treatment notes and justifying services, and, due to his preoccupation with the investigations, Taheri stopped working at the Thousand Oaks dermatology office in July 2005.

In August 2005, Blue Cross issued a notice of termination to Taheri, meaning that it would no longer pay claims from patients with Blue Cross coverage who received services from Taheri or one of his companies. In the fall of 2005, Taheri and Patric Hooper, his lawyer, had a series of communications with Blue Cross by e-mail, and at least one meeting, in order to avoid termination from the Blue Cross network. Taheri blamed Khadavi for some of the billing problems. Taheri proposed to Blue Cross that he and Khadavi separate their business relationships. Khadavi was not the subject of an audit.

By e-mail dated October 24, 2005, Blue Cross made a proposal to Taheri whereby he could remain part of the Blue Cross network under certain conditions. Among the conditions, Blue Cross required Taheri to terminate his business relationship with Khadavi and to only use Blue Cross-contracted providers and facilities, including surgery

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5 Defendants claimed Taheri sold his shares in TOSC because of an agreement with Blue Cross.

centers. By e-mail dated November 19, 2005, Taheri agreed to most of the terms, including those two provisions. Taheri forwarded to Khadavi the proposal from Blue Cross and his acceptance of the key terms.

Khadavi testified that Taheri approached him in November 2005 about selling his interest in TOSC because of the Blue Cross agreement. Khadavi also testified he decided to sell his shares because Taheri and Taheri's mother told Khadavi that Taheri's Westwood surgery center was not doing well and was "not busy" and Taheri said that "it would be a good idea to sell [Khadavi's] interest also." Khadavi stated that he had several conversations with Taheri about the fact the surgery center would not receive Medicare approval and Taheri told Khadavi that Taheri wanted to sell because Blue Cross and Blue Shield would not pay claims without Medicare certification. According to Khadavi, they both agreed to sell their interests in TOSC. Taheri denied approaching Khadavi about selling for any reason.

On March 6, 2006, Taheri and Blue Cross signed a settlement agreement and mutual general release of specific claims (Settlement Agreement) cancelling Blue Cross's termination notice and requiring Taheri to pay Blue Cross $300,000 as reimbursement.

At issue are two of the conditions of Taheri's continuing participation as a Blue Cross provider:

> 2(d) Dr. Taheri will refer Blue Cross patients to facilities and providers that are within the Blue Cross network. If the current Ambulatory Surgery Center or facility utilized by Dr. Taheri is not contracted with Blue Cross, it will immediately apply for contract with Blue Cross or Dr. Taheri will treat Blue Cross members in another facility that is contracted with Blue Cross. Dr. Taheri acknowledges that Blue Cross members must be treated in contract facilities.

> 2(f) Dr. Taheri represents that he is attempting to sell or otherwise sever his partnership with Dr. Khadavi. He or his authorized representative will provide Blue Cross with legal documentation showing the dissolution of this business relationship or sale of Dr. Taheri's interests. (Any financial terms in the document may be redacted.) Until a sale is accomplished, Taheri or [his] authorized representative will provide Blue Cross with the

> current status of the partnership dissolution/sale efforts monthly. During all such time, Dr. Taheri agrees to be a passive investor only at the partnership offices and will not provide services there or otherwise work there. He will use his best efforts to be removed from the partnership.

II. Procedural Background

The jury returned a unanimous verdict for Taheri against defendants (Hersel, Khadavi and TOSC) on the causes of action for intentional misrepresentation and breach of fiduciary duty. The jury also found Khadavi and Hersel conspired to commit fraud or breached their fiduciary duty. The jury awarded Taheri $8,097,878 in compensatory damages. Subsequently, it assessed $500,000 in punitive damages against Khadavi and $250,000 against Hersel and TOSC. The court denied Khadavi's and Hersel's motions for JNOV and new trial, but granted TOSC's motion for JNOV.

Khadavi and Hersel filed timely notices of appeal from the judgment and orders denying their motions for JNOV and new trial, and Taheri filed a timely notice of appeal from the orders granting TOSC's JNOV and denying his requests for prejudgment interest and attorney's fees.

DISCUSSION

APPEAL

On the special verdict form, the jury expressly found defendants (referring to Khadavi and Hersel) committed fraud, conspired to commit fraud, and breached their fiduciary duty to Taheri. Defendants moved for JNOV and for new trial attacking those findings on several grounds. The court denied their motions.

Khadavi contends that the court erred in (1) denying his motion for JNOV because the claims for fraudulent misrepresentations, breach of fiduciary duty and conspiracy all failed as a matter of law, and (2) by not granting a new trial as there was no substantial evidence that Khadavi made a fraudulent misrepresentation or that Taheri relied on any misrepresentation and no substantial evidence in support of the breach of fiduciary duty and conspiracy claims. Hersel contends he is entitled to JNOV or a new trial because there is no evidence that he had a fiduciary duty, that he made any misrepresentations, that Taheri relied on them or that Hersel and Khadavi conspired to commit fraud. Defendants also contend that at least, they are entitled to a new trial because the court incorrectly instructed on damages.

I. Standard of Review

A. JNOV

"The trial court's power to grant a motion for judgment notwithstanding the verdict is the same as its power to grant a directed verdict. (Code Civ. Proc., § 629.) 'A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.' On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. If there is, we must affirm the denial of the motion. If the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions, however, our review is de novo." (Citations omitted.) (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.)

"Moreover, [in reviewing a challenge to the sufficiency of the evidence] we defer to the trier of fact on issues of credibility. '[N]either conflicts in the evidence nor "'testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."' Testimony may be rejected only when it is inherently improbable or incredible, i.e., "'unbelievable per se,"' physically impossible or "'wholly unacceptable to reasonable minds."'" (Citations omitted; italics deleted.) (*Lenk v. Total-Western, Inc*. (2001) 89 Cal.App.4th 959, 968.

B. New Trial

Unlike motions for JNOV, "the judge has much wider latitude in deciding the motion [for new trial], which is reflected in an abuse of discretion standard when the ruling is reviewed by the appellate court. (Citation omitted.) (See *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 751; see also *Charles D. Warner & Sons, Inc. v. Seilon, Inc*. (1974) 37 Cal.App.3d 612, 616 [The court's " action in refusing a new trial will not be disturbed on appeal unless it is affirmatively shown that [it] abused [its] discretion."].) "A new trial motion allows a judge to disbelieve witnesses, reweigh evidence and draw reasonable inferences contrary to that of the jury, and still, on appeal, retain a presumption of correctness that will be disturbed only upon a showing of manifest and unmistakable abuse." (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs*, *supra*, 67 Cal.App.4th at p. 751.)

"Yet a new trial motion may itself be based on insufficient evidence to support a favorable judgment. Moreover, even though there are some extra requirements on the judge before he or she may grant a new trial on insufficient evidence, the fact remains that the trial judge may, in granting such a motion, draw inferences and resolve conflicts in the evidence different from that of the jury." (Citation & fn. omitted; italics deleted.) (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs*, *supra*, 67 Cal.App.4th at p. 751.)

II. Fraudulent Misrepresentation

"The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Robinson Helicopter Co., Inc. v. Dana Corp*. (2004) 34 Cal.4th 979, 990.)

A. Matter of Law

Khadavi asserts the fraud claim fails because Taheri could not have reasonably relied on any misrepresentation as the Settlement Agreement required as a matter of law that Taheri sell his interest in TOSC. Khadavi posits that the only reasonable interpretation of paragraph 2(f) of the Settlement Agreement is that Taheri was required to sell his interest in TOSC. The interpretation of a written instrument "is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect." (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865.) It is solely a judicial function "unless the interpretation turns upon the credibility of extrinsic evidence." (*Ibid*.) "Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible.'" (*Ibid*.)

In addition, Khadavi opines that even if extrinsic evidence was considered, it was undisputed and the most reasonable interpretation was that Taheri was required to sell his interest and that Taheri's e-mails demonstrate he thought he had an obligation to do so. "The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (*Kennecott Corp. Union Oil Co*. (1987) 196 Cal.App.3d 1179, 1189.)

The provision at issue states:

> 2(f) Dr. Taheri represents that he is attempting to sell or otherwise sever his partnership with Dr. Khadavi. He or his authorized representative will provide Blue Cross with legal documentation showing the dissolution of this business relationship or sale of Dr. Taheri's interests. (Any financial terms in the document may be redacted.) Until a sale is accomplished, Taheri or [his] authorized representative will provide Blue Cross with the current status of the partnership dissolution/sale efforts monthly. During all such time, Dr. Taheri agrees to be a passive investor only at the partnership offices and will not provide services there or otherwise work there. He will use his best efforts to be removed from the partnership.

By e-mail dated March 7, 2006, Taheri sent the Purchase Agreement to his lawyer Hooper so Hooper would send it to Blue Cross as proof of Taheri's compliance with the Settlement Agreement. Taheri wrote: "we were just able to sell thousand oaks to a pain specialist. here is a copy of the executed agreement. please forward to blue cross. trust me, i'm working to get rid of these offices best i can." Taheri testified that Thousand Oaks referred to the surgery center, Hersel was the pain specialist and the executed agreement was the Purchase Agreement. At his deposition, Taheri explained TOSC was not included in the term "offices." Taheri also stated, "I can send it to Blue Cross to appease them because it is part of the agreement. So here it is." Hooper forwarded that e-mail to Craig Laidig, Blue Cross's counsel: "Pursuant to the agmt, I'm forwarding the attached information about the sale of the Thousand Oaks practice." Hooper testified that "the agmt" referred to the Blue Cross settlement and that the Purchase Agreement was a document further showing the separation of their (Taheri and Khadavi) relationship.

By its own terms, that provision refers to Taheri's "partnership" and "this business relationship" with Khadavi. Taheri and Khadavi had a written partnership agreement. The Settlement Agreement was the result of billing problems. The problems did not arise from TOSC's billing, but from billing problems in Taheri's dermatology practices. Taheri blamed Khadavi for some of those problems. TOSC was not yet operational at the time of the Settlement Agreement. Thus, it is not clear from the plain language of that paragraph that Taheri had to sell his interest in TOSC as a condition of the Settlement Agreement.

Although the lawyers for Taheri and Blue Cross indicated they thought Taheri was going to sever all relationships with Khadavi, Hooper testified that paragraph 2(f) was added at his suggestion and that he never discussed TOSC with Laidig during settlement negotiations and he was not even aware of Taheri's interest in TOSC at that time. Testimony at trial established that the paragraph had been added by Taheri, not Blue Cross and that the partnership referenced in the paragraph was Taheri's dermatology partnership with Khadavi. Hooper, Taheri's attorney, confirmed that the Settlement

Agreement was unrelated to TOSC. Laidig, the attorney who represented Blue Cross in the negotiations with respect to the Settlement Agreement, stated Blue Cross was not enforcing that provision and did not view Taheri's non-performance as a breach because the purpose of the settlement agreement was not "to break up medical partnerships." Laidig confirmed "Blue Cross didn't care about implementing any portion of paragraph 2-f." Blue Cross's not enforcing the paragraph supports an inference that severing his relationship with Khadavi was not a condition of Taheri's settlement with Blue Cross. To the extent there was a conflict in the extrinsic evidence, that factual conflict was for the jury to resolve. (See *Wolf v. Walt Disney Pictures & Television*, *supra*, 162 Cal.App.4th at p. 1127.)

Citing *Estate of Anderson* (1997) 60 Cal.App.4th 436, 441-442, Khadavi suggests Taheri is estopped from arguing the Settlement Agreement did not require selling his interest because Taheri's e-mail requested his attorney forward the Purchase Agreement to Blue Cross. As paragraph 2(f) did not require Taheri sell his interest, forwarding a copy of the Purchase Agreement could be viewed as a courtesy or act of good faith. Indeed, Taheri testified to that effect.

Thus, it was a fact question for the jury as to whether it believed Taheri sold his interest because of Khadavi's and Hersel's misrepresentations about the accreditation or because of the Settlement Agreement with Blue Cross. "Actual reliance occurs when a misrepresentation is "'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,'" and when, absent such representation, "'he would not, in all reasonable probability, have entered into the contract or other transaction.'" 'It is not . . . necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominate or decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.'" (*Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 976-977.) The jury was so instructed.

Khadavi also contends the court improperly limited the jury's consideration of the Blue Cross matter, he did not agree to the instruction, and it impaired one of his principal defenses to fraud.

Before trial, Taheri filed a motion to exclude all references to certain audits and investigations of billing practices by various insurance companies. Defendants initially opposed any limitation to the admission of that evidence. During the hearing on motions in limine, the court suggested a compromise and asked whether the parties would agree to limit the references as they related to Taheri being too occupied to spend time on TOSC. Defense counsel answered, "yes." The court requested Taheri propose an appropriate limiting instruction. Upon the first mention of evidence of audits, Taheri's counsel proposed an instruction, but defense counsel claimed he had not seen the instruction. The court deferred reading the instruction, and the next day, the court asked defense counsel whether he had reviewed Taheri's version and found anything wrong with it. Defense counsel responded, "No, it's okay." A few days later, when Taheri was asked about audits, the court inquired if the parties had a final version of the limiting instruction, and Taheri's counsel gave the court the proposed instruction. When the defense protested that was not the final version, the court responded the time had passed for "another one" and instructed:

> "The sole purpose for which you are to consider any evidence regarding investigations or audits of Dr. Taheri is whether Dr. Taheri sold his interest in [TOSC] because he was too occupied to spend time on [TOSC]. You must not consider it for any other purpose."

By its terms that instruction does not limit consideration of the Settlement Agreement. "[A] jury instruction which is incomplete or too general must be accompanied by an objection or qualifying instruction to avoid the doctrine of waiver." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 760.) Accordingly, the instruction was not improper.

B. Substantial Evidence

Hersel contends there was no substantial evidence he misrepresented anything to Taheri or that Taheri relied on anything Hersel said in deciding to sell his (Taheri's) stock. Hersel bases his argument on the fact that during the course of the lawsuit, Taheri alleged that Khadavi, not Hersel, made misrepresentations to Taheri and that it was not until Taheri was on the stand that he stated Hersel also said TOSC had failed accreditation. Hersel asserts that was true as TOSC did not receive Medicare accreditation and there was also evidence of a concern TOSC would not succeed without Medicare accreditation. Hersel notes that he denied speaking to Taheri about business at any time prior to the Purchase Agreement and that Taheri's claim Hersel intended to use TOSC for office space did not make sense as Hersel testified he did not need more office space.

Khadavi contends the court erred in not granting him a new trial because there was no substantial evidence that he made any misrepresentations or that Taheri relied on those misrepresentations. For instance, Khadavi complains there was no documentary evidence that he or Hersel made any misrepresentation to Taheri, Hersel testified he never spoke to Taheri about the surgery center any time before the Purchase Agreement, and Taheri did not include a representation about the failure to obtain AAAHC accreditation in the Purchase Agreement or ask why the center did not receive approval.

In addition, Khadavi cites to two e-mails Taheri sent to his attorney in September 2007 stating Khadavi misrepresented the center would not receive Medicare approval, which it never did. Taheri testified that he used the term "Medicare" as shorthand to refer to both AAAHC and Medicare approval because Khadavi had told him that the February inspection was for both AAAHC and Medicare and that TOSC had failed both. Khadavi argues Taheri's explanation that his reference to Medicare being shorthand for both AAAHC and Medicare makes no sense because Taheri believed that without Medicare approval, he could not bill Blue Cross and Blue Shield.

Khadavi suggests that the allegation of fraud was beyond the bounds of reason as he could not have intended to defraud Taheri as Taheri would have realized the center received accreditation as it opened for business the same month Taheri sold his interest and Taheri owned 50 percent of the dermatology office next door to the center. Taheri stated he did not visit or speak to anyone in that office for an entire year. Khadavi also suggests Hersel's willingness to buy the stock supported the fact the center would receive AAAHC approval. Khadavi's argument that Taheri did not actually rely on the misrepresentation is based on much the same facts, i.e., that Taheri sold the stock to satisfy Blue Cross, he failed to ask why the center did not receive accreditation and he did not trust Khadavi at the time of the sale.

We conclude Khadavi's and Hersel's arguments are based on the evidence in their favor and go to the credibility of the witnesses and the weight of the evidence. "The absence of [corroboration] goes to the weight of the evidence and the credibility of the witness. Those determinations are for the jury." (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 768.) "The testimony of one witness may provide substantial evidence." (*Id*. at pp. 767-768.) Taheri testified that he was defrauded into selling his TOSC shares based on Khadavi's representation on February 27, 2006, that the surgery center was not going to receive AAAHC accreditation and that information was important to his decision to sell his stock. Taheri also testified that he telephoned Hersel one or two days later and Hersel told him why he wanted the center even though it was not going to get AAAHC accreditation. Both Taheri and his mother testified Khadavi repeated the claim TOSC was not going to get AAAHC accreditation at the time of the signing of the Purchase Agreement.[6]

Khadavi notes that the evidence of the misrepresentations is based on Taheri's testimony and citing *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525 suggests that testimony may be disregarded. In *Vallbona*, after discussing the testimony of a particular

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6 The jury also found defendants conspired to commit fraud and breach of fiduciary duty.

witness, the court noted, "the jury could reasonably disbelieve his self-serving assertions." (*Id*. at p. 1537.) In the instant case, the jury believed Taheri's version of who said what, not defendants' version. In addition, in ruling on defendants' motions for new trial, the trial court, which was in a better position than this court, acted as a 13th juror (cf. *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn. 6) and reevaluated the credibility of the witnesses and the weight of the evidence and impliedly found for Taheri when it denied the motions.

As far as Khadavi's claim that there was no evidence of reasonable reliance, he argues that even if Taheri had no legal obligation to sell his shares, he sold them to satisfy Blue Cross and Taheri's failure to ask why TOSC did not receive accreditation suggests he did not rely on the misrepresentation or, if he had, he would have determined the center was on the verge of getting accreditation. But whether Taheri's reliance was reasonable is a question of fact. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864.) The jury could reasonably infer the main reason Taheri sold his shares was because of the misrepresentations not because of the Blue Cross settlement. (See *Ajaxo, Inc. v. E*Trade Group, Inc*. (2005) 135 Cal.App.4th 21, 50.)

III. Fiduciary Duty

Khadavi and Hersel assert the claim for breach of a fiduciary duty fails as a matter of law as the parties did not have a fiduciary relationship as they were equal shareholders in TOSC not partners. The fiduciary duty instruction (CACI No. 4100) stated: "A partner owes what is known as a fiduciary duty to his partner. A fiduciary duty imposes on a partner a duty to act with the utmost good faith in the best interests of his [partner]." The jury was also instructed (with CACI No. 4102) on a partner's undivided duty of loyalty and the elements needed to establish such a claim, including proving Khadavi, Hersel and Taheri were partners. No instructions were presented based on the parties' status as co-shareholders nor did defendants argue the three doctors were not partners.

“While breach of fiduciary duty is a question of fact, the existence of a legal duty in the first instance and its scope are questions of law.” (*Kirschner Brothers Oil, Inc. v. Natomas Co*. (1986) 185 Cal.App.3d 784, 790.)

“To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate the existence of a fiduciary relationship, breach of that duty and damages.” (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 182.) “‘[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law.’” (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 386.) Taheri contends that the parties had a fiduciary relationship because they were partners; the jury found defendants made misrepresentations while acting as partners or agents. Partners “have a fiduciary duty to act with the highest good faith towards each other regarding affairs of the partnership.” (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524.)

The parties all cite *Persson v. Smart Inventions, Inc*. (2005) 125 Cal.App.4th 1141 as support for their positions regarding the existence of a fiduciary relationship between them. In *Persson*, the court concluded: “Accordingly, we apply the ordinary principle that, after a partnership is incorporated, the rights or obligations which partners can enforce against each other no longer exist. In the absence of a pre-incorporation agreement or evidence the corporate form was disregarded, shareholders in a duly formed corporation operating in accordance with legal requirements do not become de facto partners, and thereby acquire fiduciary duties to each other, simply because they earn the same salary and refer to each other for convenience as partners. They have the rights and obligations of shareholders, not partners, and the trial court erred in concluding otherwise.” (*Id*. at p. 1159.)

Similarly, in contrast to the written partnership agreement between Taheri and Khadavi relating to their dermatology practice which preceded their incorporating that practice, TOSC was not incorporated to carry out any partnership agreement between the three doctors.

Citing *Horn v. Atchison, T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, Taheri asserts the verdict for breach of fiduciary duty is based on an express concession because the defendants argued during closing that the doctors were partners in TOSC and owed each other a fiduciary duty. In *Horn*, the court determined that unequivocal invitation to the jury to enter a specific plaintiff's verdict could be considered "a concession of liability." (*Id*. at p. 605.)

During closing argument, defense counsel, who represented all three defendants, discussed CACI No. 4102 pertaining to breach of fiduciary duty: "This is another really important jury instruction . . . . And this has all the elements here, and I want to go through this . . . first, it says that Dr. Khadavi and Dr. Hersel were Dr. Taheri's partners. We agree. There's no dispute there, so they can establish point one." Defense counsel argued that if anyone had breached his fiduciary duty, it was Taheri and repeatedly referred to Khadavi and Hersel as Taheri's partners and even described TOSC as a "three-way partnership." Taheri argues those statements were a concession the three doctors were partners. Defendant assert the statements are irrelevant as they were entitled to JNOVs at the closing of the presentation of evidence before the statements were made. However, both Khadavi and Hersel referred to TOSC as a partnership in their testimony.

"It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and the opposing litigant. To be sure, we have discretion to consider a new theory on appeal when it is purely a matter of applying the law to undisputed facts." (Citations omitted.) (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.)

The jury was instructed to determine if the parties were partners. Hersel asserts the court should not have given those instructions as there was no factual support for them and the issue of fiduciary duty should never have been submitted to the jury. Hersel did not make those assertions during trial. "The invited error doctrine is based on estoppel. '"Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal" on appeal.'" (Italics deleted.) (*Huffman v. Interstate Brands Corp*. (2004) 121 Cal.App.4th 679, 706.) "[T]he invited error doctrine requires affirmative conduct demonstrating a deliberate tactical choice on the part of the challenging party." (*Ibid*.) In the instant case, any error in finding the parties were partners, and thus fiduciaries, was invited by defendants as, under the circumstances, the finding was the result of an implied deliberate tactical decision by defendants. (See *Pappert v. San Diego Gas & Electric Co*. (1982) 137 Cal.App.3d 205, 212, fn. 3.)

IV. Conspiracy

In *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511, the court discussed conspiracy:

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors. [¶] . . . . 'A bare agreement among two or more persons to harm a third person cannot injure the latter unless and until acts are actually performed pursuant to the agreement. Therefore, it is the acts done and not the conspiracy to do them which should be regarded as the essence of the civil action.'" (Citations omitted.)

Khadavi contends the conspiracy claim fails as a matter of law as there is no tort supporting it. Hersel contends there was no substantial evidence of a common plan or that he knew of any scheme to defraud Taheri of his stock. (*Kidron v. Movie Acquisition Corp*. (1995) 40 Cal.App.4th 1571, 1582 ["The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme."].) What is needed is "clear evidence of an agreement to join in the tortious conduct." (*Id*. at p. 1590.)

Hersel cites to the fact that unlike Khadavi, Taheri did not accuse him of any wrongdoing in his e-mails or otherwise and even stated he did not believe Hersel had done anything wrong at the time he suspected Khadavi had some kind of financial interest in TOSC. Hersel posits there was no evidence to justify Taheri's change of view. However, other evidence supports an inference that Hersel did conspire with Khadavi. Taheri testified Hersel also told him that TOSC failed accreditation. Although Hersel and his family had worked hard to get TOSC underway, in August 2006, Hersel sold a half interest to Khadavi for basically the same amount he had paid to Khadavi and Taheri when he bought their interests five months before. In addition, Hersel and Khadavi withdrew the same amount of $300,000 profits in October and December 2006 amounting to a total of $600,000 each. Although this evidence was of events which occurred after the Purchase Agreement was entered into, given those financial dealings, the jury could reasonably infer it was evidence of a conspiracy to defraud Taheri at the time of the Purchase Agreement.

V. Damages

A. Evidence

Barbara Luna, Taheri's damage expert, opined that Taheri was entitled to recover $5,347,878, representing one-third of the $16,043,638 profits from TOSC's inception in May 2006 up to the time of trial in September 2009. Luna's calculations were based on TOSC's financial records. From the total profits, Luna gave defendants credit of $1,977,469 in the form of their salaries for their management of TOSC from 2006 to 2009. Luna calculated the value of Taheri's one-third interest in TOSC as $3,738,866 using three methods. From that value, Luna deducted the amount Taheri received from Hersel in 2006 for the sale of Taheri's interest. Luna arrived at a total damages of $9,086,744. The jury awarded damages of $8,097,878.

B. Compensatory Damages

Khadavi contends he was entitled to a new trial because (1) the court incorrectly instructed the jury on how to assess damages as Taheri was only entitled to recover the difference between his share of the value of the business at the time of the alleged fraud and what he actually received, (2) by affirming the contract by which he sold his interest, Taheri could not also recover lost profits as if he had not sold his interest, and (3) the compensation award was excessive and not supported by substantial evidence. Hersel raises similar issues.

On review of a denial of a new trial based on a claim of an incorrect jury instruction, the evidence is reviewed in the light most favorable to the plaintiff. (*Alcala v. Vazmar Corp*. (2007) 167 Cal.App.4th 747, 754.)

The court gave CACI Nos. 3900, 3903N and 3904. CACI No. 3900 instructed the jury that if Taheri proved his claim against defendants, it "must decide how much money will reasonably compensate" him for the harm and that the amount of damages "must include an award for each item of harm" caused by defendants. Determining the value of the items of harm was described in No. 3903N for lost profits and No. 3904 for present cash value.

Defendants assert that Taheri could only recover his out-of-pocket losses (i.e., the fair market value of the stock) as of the date he sold his stock, not as of the date of trial. (*Glindemann v. Ehrenpfort* (1915) 29 Cal.App. 87, 91; see also *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 ["There are two measures of damages for fraud: out of pocket and benefit of the bargain. The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The “benefit-of-the-bargain” measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.’ ‘In California, a defrauded party is ordinarily limited to recovering his “out-of-pocket” loss.”’”].)

Defendants argue that Taheri is precluded from recovering lost profits once he affirmed the stock sale, sued for fraud and abandoned his rescission claim, noting Taheri did not tender the approximately $142,000 he received as consideration from Hersel for his (Taheri’s) stock.[7] Basically, defendants argue that Taheri had to elect his remedy, i.e., he could choose to enforce the Purchase Agreement and recover the value of the stock as of the time it was sold or rescind the Purchase Agreement and sue for fraud and recover lost profits. (*Buist v. C. Dudley DeVelbiss Corp*. (1960) 182 Cal.App.2d 325, 333.)

Taheri contends that pursuant to Civil Code section 3333,[8] for breach of fiduciary duty, he was entitled to compensation for all the damage caused by the breach, whether it could have been anticipated or not, i.e., he was entitled to his share of the profits and to his share of the value of TOSC. (See *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 571; see also *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 446-447 [“There is no fixed rule for the measure of tort damages under [section 3333]. The measure that most appropriately compensates the injured party for the loss sustained should be adopted.”].)

“A partner who is deprived of possession of the business through a conspiracy

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[7] Luna deducted that amount from her calculation of TOSC’s profits.

[8] Unless otherwise noted, all statutory references are to the Civil Code.

. . . . [¶] . . . is not limited to the actual value of the property of which he was deprived but he is also entitled to prospective profits which he lost as the natural and direct consequence of the wrongful conduct of appellants. Evidence of profits, both past and present, is admissible to determine the compensation to which he is entitled." (*Ellis v. Navarro* (1943) 61 Cal.App.2d 755, 759-760.)

In *Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th 1226, 1240-1241, the court noted: "In fraud cases involving the 'purchase, sale or exchange of property,' the Legislature has expressly provided that the 'out-of-pocket' rather than the 'benefit-of-the-bargain' measure of damages should apply. (§ 3343, subds. (a), (b)(1).) This section does not apply, however, when a victim is defrauded by its fiduciaries. In this situation, the 'broader' measure of damages provided by sections 1709 and 3333 applies." (Citation & fns. deleted.)

In *Strebel v. Brenlar Investments, Inc*. (2006) 135 Cal.App.4th 740, 750, the court discussed whether damages proximately caused by fraud had to be determined as of the date when the fraud occurred. The court reasoned that in *Estate of Anderson* (1983) 149 Cal.App.3d 336, 354, "the court rejected the argument that 'there is no basis in California law for an award of so-called "appreciation damages."' The court upheld an award of damages based on the value at the time of trial rather than the time of the sale of property which the seller had been fraudulently induced to sell. The court concluded that 'California law is not as restrictive as the bank urges, and [found] that the award in this case does not offend against reasonableness or any other policy of recovery.' The court relied in part on [*Estate of Talbot* (1956) 141 Cal.App.2d 309, 323], in which another court recognized that in cases involving a breach of loyalty, "'the trier of the fact should have some discretion to fix the damages in accordance with the nature and degree of the breach. . . . Thus, what constitutes making 'good' the loss may vary according to the circumstances."" Likewise, in [*Garrett v. Perry* (1959) 53 Cal.2d 178, 185], the court held that '[t]he statement . . . that damages are to be assessed as of the date of the fraudulent transaction is too broad insofar as it means that the court can not consider subsequent factors which affect the amount of the actual loss." 'The fact that values must ordinarily be considered as of the time of the fraudulent transaction does not mean that the court cannot consider circumstances other than value which operate to increase or reduce the injury.' Here, measuring Strebel's damages at the time of the sale would provide no compensation for the most significant portion of the loss he suffered as a result of defendants' fraud. ([*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 568 [measuring benefit of the bargain damages '"as of the date of the transaction would defeat the goal of compensation for the entire loss where, as here, discovery of the fiduciary's constructive fraud did not occur until years after purchase of the property'].)" (Citations omitted.) (*Strebel v. Brenlar Investments, Inc.*, *supra*, 135 Cal.App.4th at pp. 750-751.)

Thus, given defendants' breach of fiduciary duty, it was possible for Taheri to recover lost profits and the value of his shares at the time of trial. Accordingly, the court did not improperly instruct the jury on damages.

Khadavi contends there was no substantial evidence of damages because Luna's assessments were based on incorrect assumptions, i.e., that the three doctors were going to share profits equally when there was no evidence of any such agreement and that Luna failed to account for the fact TOSC was a professional services corporation, meaning her estimates of defendants' salaries was inadequate and she over-valued the business as it would be worth less if they left. Defendants did not present a damage expert at trial who testified that Luna's method of determining Taheri's share of TOSC's profits or her method of estimating defendants' salaries was improper.

Defendants suggest that because the court expressed doubt that Taheri was entitled to one-third of the profits, it improperly deferred to an excess verdict. (*Collins v. Lucky Markets, Inc.* (1969) 274 Cal.App.2d 645, 652.) An order granting or denying a new trial based on excessive damages is reviewed for an abuse of discretion. (*Ibid*.)

Defendants note the court made comments to the effect that it doubted whether Taheri was entitled to one-third of the profits and a one-third interest given that he had contributed nothing towards TOSC's eventual success. Those comments were made at the subsequent hearing on Taheri's motion for prejudgment interest after the court had denied defendants' motion for new trial. At that time, the court also noted it did not have the right to second guess the jury which might have agreed with things the court did not agree with, but the court made no contrary findings. At the time the court denied the new trial motions, it held a lengthy hearing and indicated it had read all the papers and would read all of the cases and invited and heard argument from counsel and took the motions under submission. The court's subsequent remarks do not indicate the court did not properly evaluate the motions for new trial and find the evidence supported the award. (See *Fortman v. Hemco, Inc*. (1989) 211 Cal.App.3d 241, 258.)

C. Punitive Damages

Khadavi asserts no clear and convincing evidence supported the punitive damages award because the award was based on Taheri's self-serving testimony. (See *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 605-606.) Section 3294 "authorizes recovery of punitive damages in a tort action on the basis of findings 'that the defendant has been guilty of oppression, fraud or malice.'" (*Shade Foods Inc. v. Innovative Products Sales & Marketing, Inc*. (2000) 78 Cal.App.4th 847, 890-891.) The jury found defendants committed fraud. As discussed above, that finding was supported by substantial evidence and Taheri's credibility was a question for the jury. Accordingly, the punitive damages must be upheld. (*Id*. at p. 891.)

CROSS-APPEAL

I. JNOV in favor of TOSC

Taheri contends the JNOV in favor of TOSC should be reversed because the jury found that defendants were acting within the scope of the partnership or as agents in making misrepresentations and breaching their fiduciary duty and defendants did not challenge the instructions. A court may grant a JNOV "'only if the verdict is not supported by substantial evidence.'" (*Palm Medical Group, Inc. v. State Comp. Ins. Fund* (2008) 161 Cal.App.4th 206, 218.)

The court found there was no substantial evidence "Khadavi or Hersel was acting within the course and scope of his alleged agency with respect to the activities that give rise to plaintiff's claims." Taheri argues there was substantial evidence of ostensible agency (*Rutherford v. Ridout Bank* (1938) 11 Cal.2d 479, 483-484) because it was undisputed that Khadavi and Hersel managed TOSC's day-to-day operations and obtaining accreditation was part of their responsibilities.[9]

In *Hobart v. Hobart Estate Co*. (1945) 26 Cal.2d 412, 450, a case relied on by the trial court, the Court of Appeal noted: "Ordinarily, a corporation is not interested in a sale of stock by one shareholder to another and, in the absence of special circumstances, such transactions are not within the implied authority of a general manager." The court reasoned: "Plaintiff contends, finally, that the corporation is liable because of the position in which it had placed Greene, who was apparently the only person who had knowledge and information as to the value of the stock and the factors on which the value depended. This contention is based on the doctrine of ostensible authority, which is defined as such authority 'as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess' [§ 2317]. Under this doctrine a principal is 'bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof' [§ 2334]. The California cases hold that, under sections 2317 and 2334, a plaintiff cannot recover on the basis of ostensible authority without a showing of facts sufficient to raise an estoppel . . . . 'its essential

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9 In his reply brief, Taheri changes his argument to one that because the jury was asked to determine if defendants were acting within the scope of their agency, their misrepresentations about accreditation satisfy the requirement of CACI No. 3720 of being "reasonably related to the kind of tasks that the agent was employed to perform." It is improper to raise a new point in a reply brief. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal § 723, p. 790.)

elements are representation by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance.' [¶] The evidence does not permit a finding that these elements are present here. The record is devoid of any showing that plaintiff at the time of the transaction thought or believed that Greene was acting for the corporation, or that he relied on any such belief." (Citations omitted.) (*Id*. at pp. 451-452; see also 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment § 96, p. 143 ["Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the third party to believe that the agency exists."].)

Similarly, Taheri cites to no evidence TOSC made any such representation or that Taheri believed Khadavi or Hersel was acting for TOSC, rather than themselves, at the time of the misrepresentations. (See *Dominguez v. Financial Indemnity Co*. (2010) 183 Cal.App.4th 388, 392, fn. 2.) Thus, the court properly granted JNOV in favor of TOSC.

II. Prejudgment Interest

Taheri contends that as a matter of right he was entitled to prejudgment interest on his share of TOSC's profit distributions pursuant to section 3287, subdivision (a) as the distributions were liquidated as they were based on an unchallenged financial review of TOSC's profits. (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 27.) The denial of prejudgment interest is a question of law which we review independently. (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co*. (2008) 169 Cal.App.4th 340, 347.)

The court held the entire award was unliquidated because it could not determine what part of the award was based on the value of TOSC and what part was based on Taheri's share of TOSC's profits or how the jury determined defendants' salaries in determining the profits.

"'[P]rejudgment interest is awarded only when the sum is liquidated within the meaning of the statute.' [¶] '"Damages are deemed certain or capable of being made certain within the provisions of subdivision (a) of section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage."' Thus, '"'[t]he test for recovery of prejudgment interest under section 3287, subdivision (a) is whether defendant actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount.' 'The statute . . . does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, "depends upon a judicial determination based upon conflicting evidence and it is not ascertainable from truthful data supplied by the claimant to his debtor."' Thus, where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate."'" (Citations omitted; italics deleted.) (*Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 728-729.) "'The fact it is possible to determine with some certainty one figure which is but a single element in the mathematical calculations involved in deriving a claim does not necessarily render the claim itself either certain or calculable.'" (Italics deleted.) (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960-961.)

Taheri contends the court was incorrect when it found the salary determination rendered his share of the profits unliquidated; rather he asserts salaries were an offset and offsets do not make a liquidated sum uncertain. (*Hansen v. Covell* (1933) 218 Cal. 622, 629.) However, salaries may be considered a cost deduction from gross revenues in calculating profits. (See *Aladdin Mfg. Co. v. Mantle Lamp Co.* (7th Cir. 1941) 116 F.2d 708, 713 ["in determining the actual profits for which [defendant] should account, we must credit all costs," including officers' salaries].) Defendants contested the salaries assigned to themselves, arguing the salaries were inadequate. Hence, there was a dispute over salaries and thus over TOSC's profits.

Taheri posits that just because the jury awarded less damages than he sought did not render the damages uncertain. The jury awarded damages of $8,097,878. Taheri suggests it is clear the jury awarded one-third the profits ($5,347,878) and $2,750,000 for value. Taheri asked for damages of $9,086,744. (See *Wisper Corp. v. California Commerce Bank*, *supra*, 49 Cal.App.4th at p. 961 ["'[T]he cases indicate that where there is a large discrepancy between the amount of damages demanded in the complaint and the size of the eventual award, that fact militates against a finding of the certainty mandated" by section 3287.].) In addition, there is no indication of how the jury arrived at its damages award; it was not asked to break down damages between lost profits and value. (See *Kelly-Zurian v. Wohl Shoe Co*. (1994) 22 Cal.App.4th 397, 418 ["We cannot speculate on the basis of the jury's verdict and cannot surmise how much the jury awarded for economic damages."]; *McKenzie v. Kaiser-Aetna* (1976) 55 Cal.App.3d 84, 88 ["[T]here is no way to ascertain, in the absence of special jury findings, on which of the theories of recovery . . , the jury mainly based its award ."].)

Accordingly, the court properly denied prejudgment interest.

III. Attorney's Fees

The court denied Taheri's request for attorney's fees on the basis the fee provision in the Purchase Agreement did not authorize fees incurred in connection with tort damage claims.

Taheri contends that he is entitled to attorney's fees pursuant to section 1717 because he prevailed on an action to set aside the Purchase Agreement, i.e., his action was essentially a challenge to the enforcement of the Purchase Agreement. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870.) Taheri also notes that an action for rescission is an "action on the contract" for purposes of an award of attorney's fees under section 1717. (*Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1152, fn. 6, disapproved on other points in *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1261 and *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 775, fn. 6.) Taheri, who dismissed his rescission claim, reasons that the judgment had the effect of declaring the Purchase Agreement null, void and unenforceable and put him in the same position he would have been in if he had not been fraudulently induced to sell his stock.

“A request for an award of attorney fees is largely entrusted to the discretion of the trial court, whose ruling ‘will not be overturned in the absence of a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence.’ . . . However, the ‘determination of the legal basis for an award off attorney fees’ is a ‘question of law’ which the reviewing court will examine de novo.” (Citations omitted.) (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894.)

“By its terms, therefore, [section 1717] has a limited application. It covers only contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce that contract. Its only effect is to make an otherwise unilateral right to attorney fees reciprocally binding upon all parties to actions to enforce the contract.” (Italics deleted.) (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.) We must first determine whether the attorney’s fees provision in the Purchase Agreement would permit an award of fees in this case. (*Ibid*.)

The fee provision in the Purchase Agreement stated: “In the event any party shall commence legal proceedings to enforce the terms of this Agreement or to declare rights hereunder, the prevailing party in any such proceeding shall be entitled to recover from the losing party or parties his . . . reasonable attorneys’ fees.” Cases indicate that where a contract authorizes an award of attorney’s fees to enforce the contract, tort claims are not covered. (See *Exxess Electronixx v. Heger Realty Corp*. (1998) 64 Cal.App.4th 698, 708-709.) “The language ‘brings action to enforce the contract’ is quite narrow.” (*Gil v. Mansano* (2004) 121 Cal.App.4th 739, 744.) “[T]he assertion of a defense does not constitute bringing of an action to accomplish that goal.” (*Ibid*.) As Taheri recovered for fraud and not recission, the court properly denied Taheri’s request for attorney’s fees.

DISPOSITION

The judgment, the orders denying Khadavi's and Hersel's motions for JNOV and new trial, the order granting TOSC's motion for JNOV, and the orders denying Taheri's motions for prejudgment interest and attorney's fees are affirmed. Each side to bear its own costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.