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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALEX STUCKERT, JR., Plaintiff and Respondent, v. ROBERT M. PYKE et al., Defendants and Appellants.	E051690 (Super.Ct.No. CIVSS701516) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed as modified; reversed with directions.

Haberbush & Associates, David R. Haberbush and Robert I. Brayer for Defendants and Appellants.

Best Best & Krieger, John Higginbotham and Kira L. Klatchko for Plaintiff and Respondent.

I. INTRODUCTION

Plaintiff and respondent Alex Stuckert, Jr. and defendants and appellants Robert Pyke and Jon Ciotti are shareholders in Global Equipment Logistics (Global). In March 2007, Pyke and Ciotti informed Stuckert that they were terminating him and offered to buy his interest in Global. Stuckert made a counteroffer and, when that was ignored, commenced this action for damages and other relief under a variety of contract, tort, and statutory theories. A jury made special verdict findings favorable to Stuckert and awarded him approximately $2.15 million in compensatory damages and $750,000 in punitive damages.

The jury filled out the special verdict form for the breach of contract cause of action (vf-303) with specific, positive dollar amounts. On many of the special verdict forms for other claims, the jury wrote "$0," but added the marginal note: "refer to vf-303." The items of damages the jury specifically awarded to Stuckert included $885,018 for the value of Stuckert's interest in Global and $75,000 for the unpaid balance on a loan Stuckert made to Advanced Rigging & Logistics, LLC (ARL), a business owned by Stuckert and Ciotti.

On appeal, Pyke and Ciotti make the following arguments: (1) The court erred by including in the judgment a statement that the jury incorporated its damage award from the special verdict form for breach of contract into the special verdict findings on other causes of action—according to appellants, when the jury wrote "$0" on the verdict form, they meant to award no damages for that claim; (2) the jury erroneously determined the

value of Stuckert's interest in Global based on an analysis that varied from a formula in a written shareholder buy-sell agreement; (3) appellants cannot be liable to Stuckert for the $75,000 unpaid loan Stuckert made to ARL because they were not parties to that loan; and (4) there was insufficient evidence of the appellants' financial condition to support the award of punitive damages.

Although we reject appellants' interpretation of the jury's use of "$0" on the special verdict forms, we will modify the challenged language of the judgment to reflect the jury's findings. We reject appellants' second argument—that the jury was required to determine Global's value based on the buy-sell agreement. We agree with appellants that they cannot be liable for ARL's debt to Stuckert. We further agree with appellants' arguments as to punitive damages. We hold that, based on the evidence presented: the punitive damages award as to Pyke is excessive and that a new trial is required (unless Stuckert consents to reduce the award to $175,000); and there was insufficient evidence to support any award of punitive damages as to Ciotti. Accordingly, we will modify the judgment as set forth below, reduce the award of compensatory damages by $75,000, and reverse the punitive damages award with directions.

II. FACTUAL BACKGROUND[1]

In 1999 or 2000, Stuckert, Ciotti, Steve Gebhart, and Three-Way Van Lines (Three-Way) formed ARL. ARL was engaged in the business of providing logistics, rigging, and transportation services used in the installation of heavy machinery.

In 2002, Three-Way sued ARL and the other shareholders. The settlement of that action involved (1) a cash payment from ARL to Three-Way, (2) ARL's promissory note to Three-Way for $300,000, (3) the individual defendants' personal guarantees of that obligation, and (4) Three-Way's relinquishment of rights in ARL. Appellants' obligation was secured by the individuals' shares in ARL. Thereafter, Stuckert, Ciotti, and Gebhart each held equal, one-third interests in ARL.

The settlement payment to Three-Way was funded in part by a loan from a bank. Later, ARL repaid that loan with funds borrowed from Stuckert and the other ARL principals.

In 2001, ARL retained Jerry Epstein as a management consultant. Stuckert, Ciotti, Gebhart, and Epstein discussed issues regarding the business at what they called "vital factor team," or "VFT," meetings.

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[1] Appellants complain that Stuckert, in his respondent's brief, frequently refers to facts without citing to the record or provides only lengthy string citations to the record at the end of a paragraph that includes a series of factual statements. The point is well taken. This practice violates rule 8.204(a)(1)(C) of the California Rules of Court, hinders our review, and risks the possibility that the offending portions of the brief will be disregarded. (See *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 745; *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 846.)

While the Three-Way litigation was pending, Stuckert, Ciotti, and Gebhart formed Global in 2002. Initially, they each owned 10,000 shares of the company. This entity was not used for any purpose until 2004 or 2005.

Stuckert and Ciotti met Pyke in 2004. Pyke was a general contractor and the sole owner of Pyke Construction, Inc. (PCI). PCI is in the business of building hospitals and surgery centers, and installing oncology and radiology equipment.

Stuckert, Ciotti, Gebhart, and Pyke agreed to do business together and to use Global for that purpose. They used the name Global Construction Services as a fictitious business name, or "dba," of Global.

According to Stuckert, Global would be a joint venture between ARL and PCI. Although ARL and PCI would remain separate companies, "Global would be the main company." Global would contract with customers to perform work on projects. ARL and PCI would submit subcontract bids to Global at their cost, without a profit margin. Global would mark up the bid 10 percent to cover Global's overhead and an additional 10 percent for profit. After the customer paid Global, Global would pay ARL and PCI the amount of their bids. The "remainder, the overhead and profit, stayed in Global."

The parties entered into a "Buy-Sell Agreement" concerning Global in December 2004. According to the agreement, the ARL shareholders (Stuckert, Gebhart, and Ciotti) each owned 5,000 shares of Global, and Pyke owned 15,000 shares. Pyke paid or contributed $15,000 for his shares.

Global began business operations in January 2005. The following month, Gebhart resigned from ARL. His interest in the business was purchased by Stuckert and Ciotti, who thereafter owned ARL in equal shares. Stuckert and Ciotti also bought Gebhart's interest in Global. An amended buy-sell agreement was entered into, which indicated that Stuckert and Ciotti each owned 25 percent of Global, and Pyke owned 50 percent.

Initially, Stuckert oversaw the accounting for Global. Although the accounting services were performed at ARL's offices, Global had its own accounting system and bank accounts. Toward the end of 2005 or beginning of 2006, at Pyke's request, Pyke began handling the accounting for Global.

By early 2006, Ciotti and Stuckert had become frustrated with Pyke and considered parting ways with him. Global's salesperson, Deborah Ware, was complaining to Stuckert and Ciotti that Pyke was representing PCI on projects and undermining the work she was doing for Global. Pyke was also failing to respond to e-mails. According to Stuckert, they felt like Pyke "was more interested in [PCI] than Global."

Epstein suggested that instead of splitting up the businesses, they merge them together. In March or April 2006, the parties began discussions to combine ARL, PCI, and Global into one company and, as Stuckert put it, "letting [PCI] and ARL sort of fade away." Eventually, the parties agreed to merge. Stuckert and Ciotti believed that the conflicts they had with Pyke "would start to go away because we would all be under one company."

The parties agreed that PCI and ARL would still exist as separate entities, but only to collect existing receivables and pay accounts payable on preexisting projects. Pyke was to transfer his general contractor license to Global, and all new business would be handled by Global. Existing liabilities of ARL and PCI, including ARL's debt to Three-Way, would not be assumed by Global; each entity would be responsible for its own debts.

They agreed to pay themselves salaries of $200,000 each; however, they also agreed that Ciotti and Stuckert would defer $47,500 of the salaries due to them for the second half of 2006. These deferred salaries would be on Global's books as a liability.

As part of the agreement, ARL and PCI would contribute equipment to Global. At the time of the merger, Ciotti estimated that the equipment ARL was contributing was worth $500,000. Stuckert testified at trial that he believed the equipment was worth $900,000. Pyke estimated the value of the equipment PCI contributed to be $17,000.[2]

The parties set July 1, 2006, as the "merger date," but anticipated a transition, or winding up, period of three to six months. By September or October 2006, all ARL employees had been transferred to Global; PCI employees became Global employees in January 2007.

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[2] The $500,000 value was Ciotti's estimate of the replacement value of the equipment, which was substantially greater than the value stated in ARL's books. Pyke and Ciotti presented evidence that the equipment that was supposedly contributed by ARL was never actually transferred to Global. However, Ciotti agreed that even if title to the equipment was not actually transferred to Global, Global received the benefit of the equipment.

The merger agreement was not formally memorialized in writing. However, the parties did enter into a new "Buy-Sell Agreement" dated July 1, 2006. Under this agreement, Stuckert, Ciotti, and Pyke each owned one-third of the shares of Global. This agreement included an option for shareholders to purchase the shares held by a terminated shareholder. The purchase price for the shares of the terminated shareholder was determined according to a formula set forth in the agreement.

Although the buy-sell agreement states that the shareholders are concurrently entering into an employment agreement, no employment agreements were signed.

According to Stuckert, after the parties agreed to merge, Pyke requested, and the others agreed, that Pyke would have the right to a 50 percent vote on any issue and that Stuckert and Ciotti had to vote their 25 percent votes collectively.[3] As a result, he explained, "no action could be taken without . . . unanimous consent." Thus, notwithstanding the termination provisions in the buy-sell agreement, there was (according to Stuckert) "no way you could terminate somebody without a unanimous vote." Although this agreement was not memorialized in writing, it is apparently referred to in written minutes of the shareholders' VFT meetings.[4]

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[3] Ciotti agreed with Stuckert that Pyke requested and received a 50 percent voting right, but denied that he and Stuckert ever agreed to vote their shares in one block.

[4] Although written agenda and minutes regarding the relevant VFT meetings were admitted into evidence and discussed at trial, they are not included in our record on appeal.

The merger agreement did not resolve the conflicts and tension between Stuckert and Pyke. Pyke did not transfer his general contractor's license to Global as agreed, and Stuckert continued to be frustrated by accounting issues. Stuckert learned, for example, that Pyke never set up accounting books for Global apart from PCI's books. Pyke, on the other hand, complained that he was taking all the risk and doing all the work, but receiving only one-third of the profits.

According to Stuckert, Pyke wanted PCI to receive all the revenue from construction work performed under Global's name. Indeed, Pyke admitted that all accounting for construction work after the merger was included in PCI's books. As a result, as Stuckert's expert testified, "the books and records of the three various entities were so effectively commingled, [he] could not break them apart to provide or calculate separate values for the various entities." The accountant who prepared PCI's financial statements also admitted he had no way of knowing whether the income reported on the financial statements was attributable to Global jobs as opposed to PCI jobs. There was also extensive evidence at trial of payments made by clients of Global that were deposited into PCI's bank account, of PCI's expenses being paid from Global's bank account, of Pyke transferring money from Global's account to himself and to PCI, and of Pyke treating a Global bank account as an asset of PCI.

By the end of January 2007, Pyke stopped returning Stuckert's calls and would not talk to him. Relations between Stuckert and Ciotti had also become strained. Stuckert had complained about Ciotti's son, whom Ciotti had hired. The two also had a

disagreement about whether to give part-time employees a day off with pay around Christmas.

In March 2007, Ciotti and Pyke decided to terminate Stuckert's relationship with Global. According to Ciotti, he wanted to terminate Stuckert because "it was becoming difficult to move forward with the attitude that Mr. Stuckert had." By this, Ciotti explained that he was referring to the personality conflict between Stuckert and Pyke.

When Stuckert appeared for what he thought was going to be a VFT meeting, Epstein informed him that he had been terminated and presented him with a buy-out offer. In essence, Ciotti and Pyke offered Stuckert $96,000. However, Stuckert would still be liable for the $300,000 debt to Three-Way and for payments ARL owed to Gephart.

Two weeks later, Stuckert rejected the offer and presented a counteroffer in which he sought $1,754,824. Ciotti and Pyke did not respond to the counteroffer.

Stuckert commenced this litigation in May 2007.[5] He filed the controlling pleading, a second amended complaint, in May 2008. It included 20 causes of action, styled as follows: (1) involuntary dissolution; (2) breach of fiduciary duty; (3) conversion; (4) breach of contract; (5) breach of implied covenant of good faith and fair dealing; (6) common counts; (7) unjust enrichment; (8) constructive trust; (9) fraud; (10) negligent misrepresentation; (11) intentional interference with economic relations and

[5] We grant appellants' request to take judicial notice of the superior court's docket sheet in this case. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

prospective economic advantage; (12) negligent interference with economic relations and prospective economic advantage; (13) fraudulent transfers; (14) violations of the Labor Code; (15) unfair business practices; (16) declaratory relief; (17) injunctive relief; (18) wrongful termination and retaliation in violation of public policy; (19) appointment of a receiver; and (20) slander.

A jury returned special verdicts awarding Stuckert $2,090,962 on his breach of contract claim, including $75,000 for the unpaid loan Stuckert made to ARL to fund the settlement with Three-Way. The jury also awarded Stuckert an additional $50,000 on his breach of fiduciary duty claim (against Pyke and Ciotti) and an additional $50,000 for violation of the Uniform Fraudulent Transfers Act (against Pyke). (The manner in which the jury filled out the special verdict forms on other causes of action is a subject of this appeal and will be discussed below.)

In a bifurcated trial, the jury awarded Stuckert $750,000 in punitive damages against Pyke and Ciotti. Finally, the trial court awarded Stuckert an additional $231,141 in attorney fees and $133,732.62 in prejudgment interest.

Pyke and Ciottia appealed.[6]

[6] The judgment in Stuckert's favor was entered against Pyke, Ciotti, Global, PCI, and ARL. Only Pyke and Ciotti appealed.

III. DISCUSSION

A. *Interpretation of Special Verdicts*

Appellants contend the judgment includes an erroneous interpretation of the special verdict forms as to damages that requires either the judgment be modified or that a new trial be held on the issue of damages. Stuckert responds by asserting that "[t]he trial court interpreted the verdict perfectly," and argues that appellants' argument is barred by the doctrines of invited error and waiver. He further argues that appellants have failed to argue or demonstrate that the alleged error was prejudicial.

1. Factual and Procedural Background

The court instructed the jury in accordance with CACI No. 361 as follows: "Alex Stuckert has made claims against [Global, Ciotti, and Pyke] for breach of contract and [other] claims for conversion, intentional misrepresentation, negligent misrepresentation, breach of fiduciary duty and fraudulent transfers. If you decide that Alex Stuckert has proved all claims, the same damages that resulted from all claims can be awarded only once."

During closing argument, Stuckert's counsel told the jury: "Now, one of the things that the jury instructions tell you is that you can't recover duplicate damages for the same thing. That's absolutely true. We're not seeking to recover duplicate damages for the same thing. So when you see the same questions over and over again, you've got to figure out a way to show that you think it's the same answer as the prior question. [¶] So what I would suggest you do—and the other side is welcome to give you their

suggestion on this as well—but if you've already answered the form and you've filled in a dollar amount for a particular kind of damages, for example, the deferred wages, and you get to that same question again on a subsequent form, we don't get it twice. We're not asking for it twice, but we do need to have a complete record of what your findings are. So what I would suggest you do is instead of writing in a dollar amount, just write in 'same as number whatever it is.' [¶] So for example, on the wage issue, if you conclude, for example, that the wage issue is [$]79,038, as Mr. Stuckert is seeking, and you write that on . . . form V. F. 303 and you come to a later question where you think it's the same answer, just write 'same as V. F. 303'. That way when the lawyers and judge are going through these forms later and trying to figure out what it all means, we'll understand exactly what you meant by that and there won't be any confusion."

There was no objection to these statements by Stuckert's counsel and defense counsel offered no alternative suggestion for filling out the verdict forms.

Regarding the cause of action for breach of contract, the jury filled out the special verdict form indicating that the parties had entered into a contract, that the appellants failed to perform their obligations under the contract, and that Stuckert was thereby harmed. When asked to specify Stuckert's damages, the jury responded as follows:

"Unpaid wages	$ 79,038
"Unpaid loan balance	$ 75,000
"One-half of ARL equipment	$ 0
"One-third of profits on Global jobs through March 31, 2007	$ 146,602

"One-third of profits on Global jobs after March 31, 2007	$ 583,225
"Past wage loss	$ 322,079
"Future wage loss	$ 0
"Value of Alex Stuckert's interest in Global going forward	$ 885,018
"TOTAL	$2,090,962"

For Stuckert's defamation claims, the jury found the elements of defamation, but concluded that Stuckert had not been harmed. In accordance with the instructions on the forms, the jury then skipped over the question regarding Stuckert's actual damages (leaving the spaces for the amounts empty), then awarded Stuckert $1 for the "assumed harm to his reputation and for shame, mortification, or hurt feelings[.]"

On the special verdict forms for the causes of action for intentional misrepresentation, false promise, negligent misrepresentation, and wrongful discharge in violation of public policy, the jury found the elements for each of these causes of action, including harm to Stuckert caused by appellants' wrongful conduct. The verdict forms for these claims then called for the jury to specify damages. The jury wrote "$0" in the spaces provided for total past economic damages, total future economic damages, and "TOTAL." On each of these verdict forms, the phrase "refer to VF-303" is handwritten in the margin adjacent to where the jury indicated "$0" damages.

On the verdict form for the cause of action for conversion, the jury found that Ciotti and Pyke had taken, without Stuckert's consent: Stuckert's share of money available for distribution from ARL and Global; money owed to Stuckert for wages and

loans; one-half of the trucks, trailers, and other tangible assets of ARL; Stuckert's one-half interest in ARL and one-third interest in Global; and/or Stuckert's personal credit. The jury indicated the following as to Stuckert's damages:

"One-third of profits on Global jobs through March 31, 2007	$____0_
"One-third of profits on Global jobs after March 31, 2007	$____0_
"Unpaid wages	$____0_
"Unpaid loan balance	$____0_
"One-half of ARL equipment	$____0_
"Value of Alex Stuckert's interest in Global going forward	$____0_
"Loss of value of Stuckert's personal credit	$____0_
"TOTAL	$____0"

Handwritten in the margin next to these items is a curly bracket, or brace (i.e., "}") drawn to encompass each of the items of damages except for the last two lines: "Loss of value of Stuckert's personal credit" and the total. The bracket points to the handwritten phrase, "refer to vf-303."[7]

The verdict form for the breach of implied covenant of good faith and fair dealing indicates that the jury found the elements of that cause of action, including harm to Stuckert. The space for itemizing Stuckert's damages provides:

"One-third of profits on Global jobs through March 31, 2007 $_____

[7] The copy of this form in the clerk's transcript appears to have cutoff from the copy the final "3," showing only "vf-30." We assume it said "vf-303."

"One-third of profits on Global jobs after March 31, 2007	$_____
"Unpaid wages	$_____
"Unpaid loan balance	$_____
"One-half of ARL equipment	$_____
"Value of Alex Stuckert's interest in Global going forward	$_____
"TOTAL	$_____0"

In the margin next to the empty spaces for specifying the dollar amounts is the handwritten phrase, "refer to VF-303."

On the claim for nonpayment of wages under Labor Code sections 201, 202, and 218, the jury found that Global owed Stuckert for unpaid wages, then filled in the space provided for the amount of unpaid wages with "$0," next to the phrase "refer to VF - 303."

On the verdict forms for Stuckert's causes of action for breach of fiduciary duty as to Ciotti and Pyke and violation of the Uniform Fraudulent Transfers Act as to Pyke, the jury wrote "$50,000" in the space provided for damages. There is no handwritten note in the margin of these forms.

On the verdict forms for the causes of action for defamation, intentional misrepresentation, false promise, conversion, wrongful discharge in violation of public policy, and breach of fiduciary duty, the jury found that the wrongful conduct supporting those claims was committed with malice, oppression, or fraud.

In her reading of the verdict in open court, the clerk read the comments in the margins of the verdict forms.

No one made any objection to or sought any clarification regarding the jury's specification of zero damages or the comments in the verdict form margins.

The punitive damages phase of the trial began more than three months later.[8] At its conclusion, the jury awarded Stuckert punitive damages against Ciotti, Pyke, and PCI in the amount of $750,000.

The judgment entered by the court, prepared by Stuckert's counsel, includes the following: "In summary, the jury found that [Stuckert] suffered damages of $2,090,962.00 as a result of breach of contract by [Pyke, Ciotti, Global, and PCI]. The jury also found that [Stuckert] was harmed as a result of intentional misrepresentation, false promise, negligent misrepresentation, conversion, breach of the implied covenant of good faith and fair dealing, wrongful termination in violation of public policy, and non-payment of wages, by [Pyke, Ciotti, Global, PCI, and ARL], and *the jury incorporated its damage award from the breach of contract special verdict form (VF-303) into its special verdict findings on each of those other causes of action, as specifically requested by [Stuckert's] counsel during his closing argument.*" (Italics added.)

The judgment then orders, adjudges, and decrees, among other things, that: (1) Stuckert shall recover from Pyke $2,940,963, with interest, of which $2,090,962 shall be

[8] The delay was due to the bankruptcy proceedings involving Ciotti and Pyke. The punitive damages phase of the trial began after relief from the stay was obtained.

a joint and several obligation of all defendants; (2) Stuckert shall recover from Ciotti $2,890,963, with interest, of which $2,090,962 shall be a joint and several obligation of all defendants.

Four weeks after the entry of judgment, Pyke filed a motion to modify and vacate the judgment pursuant to Code of Civil Procedure section 663. Among other relief, Pyke requested that the language in the judgment that we italicized above be deleted and replaced with the words, "but the jury awarded [Stuckert] no damages on any of these causes of action." Ciotti filed a "joinder" in Pyke's motion. Stuckert opposed the motion.

Following a hearing, the court denied the motion to modify and vacate the judgment and found "Ciotti's untimely joinder to be moot."

2. Discussion

(a) *Identifying the Issue*

Initially, we must determine the issue or issues raised by the parties. In appellants' opening brief, they state the argumentative heading: "[T]he judgment's interpretation of the special verdict forms as to damages is error requiring the judgment be either modified or remanded for a new trial limited to damages." (Capitalization omitted.) In the body of their argument, appellants quote Stuckert's counsel's argument to the jury as to how they should fill out the verdict forms, then comment that "[t]here are serious problems with this procedure," and that the "method was flawed." Appellants also criticize the use of CACI No. 361, which "'may be used only with a general verdict.'" (Quoting *Singh v.*

Southland Stone, U.S.A., Inc. (2010) 186 Cal.App.4th 338, 360-361.)[9] They further contend that the verdicts are inconsistent and legally unjustifiable.

Stuckert responded by asserting that appellants' argument as to CACI No. 361 was barred by the doctrine of invited error, and that appellants waived, forfeited, or are estopped from asserting arguments concerning the jury instruction, counsel's closing argument, or ambiguities in the special verdicts. In support of these arguments, Stuckert points to the fact that appellants never objected to the instruction or counsel's argument, and never sought any correction or clarification of the verdict despite the passage of more than three months between the jury's verdicts and the discharge of the jury. (See, e.g., *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456; *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 530 [Fourth Dist., Div. Two].)

In their reply brief, appellants argue that Stuckert's invited error and waiver arguments "misapprehend Appellants' points. Appellants do not assert that [Stuckert's] proposed procedure nor the special verdicts themselves nor the giving of CACI [No.] 361 were error." Appellants further make clear they are not asserting that the special verdicts are ambiguous, and therefore there was no need for them to have sought clarification of

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[9] In an opinion issued after the trial in this case, the court in *Singh v. Southland Stone, U.S.A., Inc., supra,* 186 Cal.App.4th at page 360, held that CACI No. 361 should not be given when special verdicts are used. The "better practice," that court explained, "is to instruct the jury to consider each question separately and that its answer to one question should not affect its answer to any other question, except as directed in the verdict form. The jury should be instructed that if it reaches more than one question concerning the amount of damages, the same damages may be included in more than one answer, and that the court, rather than the jury, will resolve any concerns regarding duplication of damages." (*Id.* at pp. 360-361, fn. omitted.)

the verdicts: "Here, there *is no ambiguity*. . . . The jury wrote $0. There is nothing ambiguous about this award, and no need for this Court to go deeper. '$0' *means* '$0.'" They add that they "do not now object to the verdict forms. [They] object *only* to the blatantly incorrect statement of the jury's verdict forms stated in the judgment." Appellants did, they point out, object to the judgment by way of their motion to modify the judgment.

These statements clarify the issues for review. As we understand appellants' arguments, we need not consider whether CACI No. 361 should have been given, whether Stuckert's counsel's argument to the jury regarding the verdict forms was improper, or even whether the jury's verdicts were ambiguous. Thus, the giving of CACI No. 361, counsel's statements, and the verdict forms (ambiguous or not) merely supply part of the factual background for the following issues to be reviewed: (1) whether the trial court erred by stating in the judgment that "the jury incorporated its damage award from the breach of contract special verdict form (VF-303) into its special verdict findings on each of [the] other causes of action"; and (2) if this statement was error, whether we should either modify the judgment or remand for a new trial on damages, as appellants request. We conclude that while the challenged statement in the judgment is not precisely accurate and a modification to that language is appropriate, we can modify the judgment to correct the error and, as corrected, conclude there is no prejudicial error that requires a new trial.

(b) *Interpretation of the Verdicts: When "$0" Does Not Mean $0*

When, as here, there is no objection to the jury's verdicts "before the jury is discharged, it falls to 'the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.' [Citations.] Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation. [Citations.] If the verdict is hopelessly ambiguous, a reversal is required, although retrial may be limited to the issue of damages." (*Woodcock v. Fontana Scaffolding & Equip. Co., supra,* 69 Cal.2d at pp. 456-457.)

Appellants challenge the statement in the judgment that "the jury incorporated its damage award from the breach of contract special verdict form (VF-303) into its special verdict findings on each of those other causes of action . . . ." According to appellants, this is error because, based on the "plain language" of the verdicts, wherever the jury wrote $0 for damages, the jury awarded no damages for such claims; "$0," they argue, "*means* '$0.'" It is therefore incorrect, they contend, to state that the jury incorporated the amounts set forth on verdict form 303.

We reject this argument. "$0," we conclude, does *not* always mean $0—at least not when "$0" is accompanied by a direction to refer to another verdict form that includes positive dollar amounts.

Although the jury wrote "$0" in the spaces provided for the amount of damages, it also directed the court to "refer to" the damage amounts set forth in verdict form 303

regarding breach of contract. As both sides agree, we cannot ignore or disregard that direction. Perhaps significantly, the jury did not precisely follow Stuckert's counsel's suggestion about filling in the verdict forms; instead of writing "same as," they wrote "*refer to*," verdict form 303. (Italics added.) Appellants argue that if the jury had written "same as," then the incorporation language in the judgment would be reasonable. But, appellants point out, the jury did not.

Appellants further argue that the jury used the words "refer to" to indicate that they were awarding Stuckert damages on his breach of contract claim, *not* on the tort causes of action. That is, the jury awarded no damages on the tort claims and used the "refer to" note as a way of explaining that this was because they had awarded damages on the contract claim. We reject this argument. As to each of the pertinent causes of action, the jury found every element necessary to establish appellants' liability, *including harm to Stuckert*. Additionally, as to the causes of action for which an award of punitive damages was permitted, the jury awarded $750,000 in such damages. It is not reasonable to believe that the jury found that Stuckert suffered actual harm as a result of appellants' tortious conduct and that appellants' conduct was sufficiently malicious, oppressive, or fraudulent as to justify a substantial punitive damage award, and yet found that Stuckert was entitled to no compensatory damages for such harm.

We agree, however, with appellants that the challenged statement in the judgment—"the jury incorporated its damage award from the breach of contract special verdict form (VF-303) into its special verdict findings on each of those other causes of

action"—is not quite correct. The direction to "refer to" verdict form 303 indicates that the jury did not intend to necessarily *incorporate* the amounts from the breach of contract verdict form into the other forms.

The incorporation language also presents a practical problem. As appellants point out, the categories of damages described in some of the verdict forms differ from the categories in verdict form 303. For example, while the jury designated amounts for specific items of damages (i.e., unpaid wages, unpaid loan balance, one-half of ARL equipment, one-third of profits on Global jobs through March 31, 2007, one-third of profits on Global jobs after March 31, 2007, past wage loss, and the value of Stuckert's interest in Global going forward), the verdict forms for some of the tort claims call for past and future lost earnings, past and future lost profits, and other economic loss. How, for example, does the dollar amount attributed to Stuckert's interest in Global translate, if at all, to past or future earnings or profits? The incongruity of the two verdict forms makes incorporation difficult, if not impossible.

Moreover, although the jury effectively indicated that, as to those claims to which the jurors wrote "$0" with the marginal direction, no *additional* damages would be awarded beyond the amount set forth on verdict form 303, it is possible that a smaller award was appropriate for particular claims. This is most obvious with respect to the claim for unpaid wages under Labor Code sections 201, 202, and 218. The verdict form for this claim provides space for one item: "unpaid wages." We agree with appellants that there is no construction of "unpaid wages" that would include most of the items of

damages specified on verdict form 303.[10] Thus, while the jury's use of "$0" effectively places a maximum on the amount of damages, it does not mean that appellants are entitled to that maximum on each of the challenged claims.

In light of the foregoing considerations and based on the unique circumstances in this case—including the use of CACI No. 361, Stuckert's counsel's suggestion about the jury filling out the verdict forms, and our review of the forms, we construe the jury's specification of $0 damages, combined with the note to refer to verdict form 303, as indicating the jury's intent to award compensatory damages on such claims, but not any *additional* damages beyond the amount stated on verdict form 303. So construed, the jury did not "incorporate" the damages award in verdict form 303 into the other verdict forms. We will therefore modify the judgment such that the offending sentence in the judgment reads: "The jury also found that [Stuckert] was harmed as a result of intentional misrepresentation, false promise, negligent misrepresentation, conversion, breach of the implied covenant of good faith and fair dealing, wrongful termination in violation of public policy, and non-payment of wages, by Robert Pyke, Jon Ciotti, Global Equipment Logistics, Pyke Construction, Inc., and Advanced Rigging Logistics, LLC, and, in determining damages for such claims, the jury referred the court to its damage award from the breach of contract special verdict form (VF-303)."

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[10] Verdict form 303 does, however, include "[u]npaid wages" as one item of damages; the identical phrase used on the verdict form for the Labor Code claim for unpaid wages. By directing the court to refer to verdict form 303, it seems clear that the jury indicated that the $79,038 in unpaid wages on verdict form 303 are the same unpaid wages called for in the verdict form for the Labor Code claim.

(c) *Failure to Establish Prejudicial Error That Would Justify a New Trial*

If zero damages does not reflect the jury's decision, and the numbers in verdict form 303 do not precisely correspond to the spaces in the other verdict forms and cannot be readily incorporated into the other forms, what numbers *do* belong in the other verdict forms? What, exactly, is the court supposed to do after it "refer[s] to" verdict form 303? For the reasons that follow, we need not answer these questions or attempt to translate the amounts set forth in verdict form 303 into the other verdict forms.

Initially, we note that no one has requested that we attempt such a translation; appellants request that we correct the trial court's interpretation of the verdicts such that "'$0' means '$0'" and modify the judgment to indicate that the jury awarded no damages wherever the jury awarded $0 damages. Indeed, as discussed above, appellants, in response to the argument that they have waived any objection to the verdict forms, have insisted that the verdict forms are clear and "there *is no ambiguity*." Consistent with this position, appellants have not suggested that we undertake the task of rewriting the verdict forms.

More importantly, effective enforcement of the judgment does not require us to specify the amount of damages applicable to each cause of action. The language in the judgment that concerns appellants is in an introduction, or preface, to the court's actual orders. This prefatory portion of the judgment describes such matters as how the matter came on for trial, who appeared through which counsel, that witnesses were sworn and

testified, and a description of the verdicts reached by the jury. It is in the characterization of the verdicts that the offending language is found.

The prefatory part of the judgment is followed by its substance, beginning with: "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED." Following these words are the court's orders directing that Stuckert "shall have and recover" from appellants a certain amount expressed as one, all-inclusive sum. The sum is equal to the amount set forth on verdict form 303, plus: $1 for nominal damages on the defamation claim; the additional amounts awarded on the claims for breach of fiduciary duty and the Uniform Fraudulent Transfers Act; and the amount of punitive damages. The sum does not include any additional amount that was or might have been awarded on any claim for which the jury indicated "$0."

Significantly, appellants do not challenge any portion of the language of the court's actual orders or contend that there needs to be any change to such orders. Thus, even if we agreed with appellants that the jury actually awarded zero dollars in damages on the verdict forms in which it wrote "$0" (and directed the court to refer to verdict form 303), the amount of the judgment would not change. For the same reason, if we were to translate the amounts on verdict form 303, in whole or in part, onto the other verdict forms, the amount of the judgment would not change.

Quite simply, once we modify the judgment as set forth above, we perceive no error in the judgment that requires further attention by this court.

Nevertheless, appellants request a new trial on the issue of damages. Unlike our modification of the judgment, which can be accomplished while affirming the judgment (as modified), we cannot reverse a judgment and order a new trial unless there has been a "miscarriage of justice," or *prejudicial* error. (Cal. Const., art. VI, § 13; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) Such prejudice is never presumed, and will "'be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.] 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' [Citation.]" (*Cassim v. Allstate Ins. Co., supra,* at pp. 800-802.) The party asserting error has the burden of establishing such error on appeal. (*Hoffman Street, LLC v. City of West Hollywood* (2009) 179 Cal.App.4th 754, 772.)

In their opening brief on appeal, appellants acknowledge the requirement of showing prejudice, but do not explain how the alleged error or the failure to obtain a new trial on damages is prejudicial in this case. Stuckert, in his respondent's brief, makes much of this failure. He correctly points out that appellants' argument "has no impact on the *amount* of damages awarded; only the manner in which those damages are characterized or classified. . . . However, Appellants never explain why it makes any difference."

Appellants offer two responses in their reply brief. First, they assert the error is not subject to harmless error analysis because the judgment is unsupported by substantial evidence. He points to the claim for unpaid wages, which could not exceed $79,038, and yet the judgment, by "incorporat[ing]" the damage award from the breach of contract claim into all other verdicts, appears to state that Stuckert was awarded $2,090,962 on the unpaid damages claim. There are two problems with this. One, we will correct the judgment by modifying it as explained above; the offensive language of incorporation is thus removed. Second, appellants' argument does not explain how a new trial on the issue of damages could possibly lead to any favorable change in the actual judgment. Even if a new jury returns a verdict on the wage claim, for example, that $79,038 is owed for unpaid wages, the amount of the judgment debt will be unchanged.

The second reason given by appellants is that the judgment in its current form prejudices them in litigation between the parties pending in federal bankruptcy court. Pyke and Ciotti, it appears, have filed bankruptcy petitions.[11] In the bankruptcy proceedings, Stuckert has filed complaints against appellants to have the bankruptcy court determine that the judgment debts in this case are nondischargeable. According to appellants, in order to establish that the judgment debts are nondischargeable, Stuckert is required to prove that the debt was obtained by fraud or willful and malicious injury.

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[11] Appellants request that we take judicial notice of the complaints and amended complaints to determine nondischargability of debt in Pyke's and Ciotti's bankruptcy cases. Because the bankruptcy pleadings are records of a court of the United States, we grant the request. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

(See 11 U.S.C., § 523(a).) Put simply—and at the risk of oversimplifying the issues in the bankruptcy case—appellants' judgment debts may be discharged in bankruptcy to the extent they are for *contract* damages, but nondischargeable to the extent they are owed on the *fraud* claims. Appellants further assert that Stuckert is relying on the "incorporation" language in the judgment in this case to show that the entire debt is attributable to the nondischargeable fraud claims.

This explains why appellants desire to have the verdicts on the fraud claims interpreted to mean the jury awarded zero dollars on those counts: If "$0" means $0, none of the $2,090,962 set forth on verdict form 303 is attributed to the fraud counts, and at least that amount would be dischargeable as a debt on the contract claim. A new trial on the amount of damages for the fraud counts might also benefit appellants in the bankruptcy proceedings if a new jury returned verdicts on those counts for amounts less than $2,090,962.

Appellants have thus explained how a new trial on the issue of damages on the tort claims might aid their defense in the bankruptcy litigation. We do not believe, however, that the potential future benefit for appellants in collateral litigation renders the judgment in this case (as modified) either erroneous or a miscarriage of justice. As explained above, once the incorporation language in the judgment is replaced, there is no error in the judgment except for the errors discussed. Although the miscarriage of justice standard for prejudice has been applied in countless cases since it was announced more than 50 years ago (see *People v. Watson* (1956) 46 Cal.2d 818, 836), appellants have not

referred us to any authority that supports its application to a situation where a new trial on damages could not provide a more favorable outcome to the appealing party *in the case on review*, but could prove beneficial to them in some other case. We decline to extend the concept of prejudice in this manner. Accordingly, we reject appellants' request to remand this case for a new trial on the issue of compensation.

B. *Jury's Determination of Stuckert's Interest in Global*

Of the $2,090,962 in damages awarded to Stuckert on his breach of contract claim, $885,018 was for the value of "Stuckert's interest in Global going forward." Appellants contend that this valuation is erroneous because it was "based on Stuckert's faulty analysis rather th[a]n the binding buy-sell agreement." (Capitalization omitted.) Before addressing the merits of this argument, we consider Stuckert's contention that appellants have waived this argument by failing to file a motion for new trial.

As Stuckert points out, a "failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court." (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719.) This rule is based on the rationale that evidence and issues of credibility should be raised first in and resolved by the trial court. (*Ibid.*) "Consequently, if ascertainment of the amount of damages turns on the credibility of witnesses, conflicting evidence, or other factual questions, the award may not be challenged for inadequacy or excessiveness for the first time on appeal." (*Id.* at pp. 719-720.)

However, "'the failure to move for a new trial does not preclude a party from asserting error in the trial of damages issues—e.g., erroneous evidentiary rulings, instructional errors, or *failure to apply the proper measure of damages*. [Citations.]' [Citation.]" (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759, italics added.)

Here, appellants raise Stuckert's lack of "'any sophisticated knowledge of accounting or financial statements'" and assert that "Stuckert's valuation was transparently self-serving" in support of their argument. These are credibility issues that are properly addressed to the trial court in the first instance. (See *Jamison, supra,* 164 Cal.App.4th at p. 719.) However, appellants' argument is also based on the purported need to enforce the terms of the written buy-sell agreement. According to them, there is no "legal justification for the jury's departure from applying the methodology of the valid, binding Buy-Sell to determine the value of Stuckert's interest in Global." To this extent, the argument is a legal argument that does not turn on the credibility of witnesses, conflicting evidence, or other factual questions. We will therefore consider the argument in that context.

Appellants assert that Stuckert's interest in Global must be based on paragraph 8.2 of the buy-sell agreement. This paragraph provides the following formula: "Three (3) times the average earnings of the most recent past three (3) years earnings EBTIDA. The value of each share shall be the total derived from afore said formula divided equally by

all outstanding shares."[12] According to appellants, if this formula is applied, the value of Stuckert's interest in Global is $63,230.

We do not agree with appellants that the jury was required to apply the valuation formula in the buy-sell agreement. The valuation formula has specific purposes set forth in the buy-sell agreement. In particular, it is relevant to determining the price for purchasing the shares of a terminated shareholder when the remaining shareholders exercise an option to purchase the shares.[13] Under the agreement, Global's secretary is to give notice of a proposed sale of the terminated shareholder's shares; a purchasing shareholder must deliver a written election setting forth the number of shares that shareholder desires to purchase; the secretary then informs the purchasing shareholder of the number of shares being purchased; the purchaser then buys, and the terminated shareholder sells, the designated number of shares within 90 days after receipt of the secretary's notice. If a terminated (i.e., selling) shareholder fails to deliver the certificates for the purchased stock, the purchasing shareholder's tender of the purchase price to the secretary shall effectively transfer title to the shares to the purchasing shareholder on the books of the corporation.

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[12] EBTIDA was described by Stuckert as earnings before taxes, interest, depreciation, and amortization.

[13] The valuation provision is also relevant to provisions in the buy-sell agreement pertaining to a right of first refusal, an option to purchase in the event of a shareholder bankruptcy, and the death, disability, or voluntary withdrawal of a shareholder.

Stuckert's breach of contract cause of action, as pleaded in the second amended complaint, is based upon breaches of the oral merger agreement, not the buy-sell agreement. Indeed, Stuckert testified at trial that his dispute with appellants was not related to the buy-sell agreement. Under the usual rule for recovering damages for breach of contract, Stuckert was entitled to recover an amount that will compensate him "for all the detriment proximately caused thereby, or which, in the ordinary course of things, (would be likely to result therefrom." (Civ. Code, § 3300.) The jury was instructed based on this general rule.[14] There is nothing in the buy-sell agreement or elsewhere in the record that appears to limit the recoverability of damages for breach of the oral merger agreement to the formula for pricing the purchase option under the buy-sell agreement. In the context of Stuckert's breach of contract claim, we see no error in allowing the jury to consider a different valuation analysis.

Moreover, there is no evidence in our record or argument made on appeal that appellants ever initiated or followed the procedure for exercising the purchase option under the buy-sell agreement. Its application, therefore, appears to never have been triggered. To the extent the letter informing Stuckert of his termination could constitute an exercise of such an option, it is not included in our record and is therefore impossible to interpret.

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[14] The jury was instructed that to recover damages for breach of contract, Stuckert must prove: "1. That the harm was likely to arise in the ordinary course of events from the breach of the contract; or [¶] 2. That when the contract was made, both parties could have reasonably foreseen the harm as the probable result of the breach."

Nevertheless, Stuckert testified at trial that his valuation of Global was "loosely based on the buy-sell agreement."[15] He arguably deviated from the agreement by, for example, including the earnings of ARL and PCI in his estimate of Global's value. Moreover, although Ciotti and Pyke terminated him in March 2007, Stuckert used earnings for the three years preceding the 2009 trial: 2006, 2007, and 2008. Ciotti and Pyke also complain that Stuckert improperly added back certain items that had been deducted from earnings in financial statements, such as the corporation's legal expense for defending this lawsuit and income distributed to the owners.

As for Stuckert's inclusion of ARL's and PCI's earnings in determining Global's valuation, appellants point out that the buy-sell agreement "never references any company besides Global." Therefore, they contend that the jury should not have considered "any other entity." Under the circumstances in this case, it was not improper for the jury to consider the finances of the other entities. First, Stuckert alleged that under the merger agreement all business activity of the three entities would be consolidated into Global, and that appellants allegedly breached the agreement by "diverting monies belonging to Global or ARL into [PCI], and by continuing to conduct

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[15] Our review of the record regarding Stuckert's analysis is hampered by the failure of the parties to make a clear record at trial. Stuckert's trial testimony regarding his valuation analysis was aided to a large extent by numerous charts, diagrams, and other documents. Many of counsel's questions and Stuckert's answers assume the ability to see these documents, which the jury undoubtedly could. Yet, the documents are not included in, or sufficiently described in, the record on appeal. It is, of course, appellants' burden to provide an adequate record for review. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

business under [PCI]." Indeed, there was substantial evidence at trial that the parties agreed to consolidate their businesses and but for Pyke's actions (e.g., continuing to seek new work for PCI) and omissions (Pyke's failure to transfer his contractor's license to Global) and Ciotti's decision to terminate Stuckert, they would have completed the consolidation. Considering the finances of the three entities for purposes of determining the value of what should have been one entity is not improper.

Second, there was ample evidence that Pyke had transferred money to PCI that was due to Global, and that Pyke had so commingled the funds belonging to the different entities that it was impossible to know whether information on PCI's financial statements was attributable to Global jobs or PCI jobs. If, for example, Pyke deposited money from a Global job into PCI's account, the earnings of both entities would be misstated; Global would appear to be poorer than it is and PCI richer. If Stuckert was limited to a calculation based solely on Global's stated earnings under this scenario, Pyke would clearly be benefitting from his own wrong. (See Civ. Code, § 3517 ["No one can take advantage of his own wrong."].) In light of these factual issues, it was not improper to let the jury decide whether and to what extent ARL's and PCI's earnings should be included in determining the value of Global.

Nor was it error to permit the jury to consider the businesses' financial records for 2006, 2007, and 2008. These were the three most recent years prior to trial. To the extent that a different time period might have provided a better basis for valuing Global, appellants had the opportunity to make that argument to the jury. Likewise, questions as

to whether the valuation of Global should take into consideration the various items Stuckert included or excluded in his analysis are factual issues for the jury to decide.

C. *Sufficiency of the Evidence to Support the Award of $75,000 for a Loan Balance Due from ARL*

In its special verdict on Stuckert's breach of contract claim, the jury awarded Stuckert $75,000 for "Unpaid loan balance." The unpaid loan is a loan Stuckert made to ARL. ARL used the loan to pay off a portion of a bank loan that had been taken out to fund the settlement with Three-Way. Appellants contend they cannot be liable for this loan because it is a debt owed by ARL; neither Ciotti nor Pyke were ever obligated to repay this loan to Stuckert and cannot be held liable for it now. We agree.

Stuckert acknowledges that the $75,000 debt was owed by ARL and points to no evidence that appellants had ever assumed that debt. Nor does he challenge appellants' assertion that Stuckert failed to allege that appellants are liable for the debt under an alter ego theory.

Stuckert's primary argument is that appellants' breaches of contract "resulted in the loan not being repaid." ARL would have had the money to repay its debt, he asserts, "but for Appellants looting the business of all available cash." If there was money available to ARL, he continues, "it was promptly transferred to Appellants' personal bank account[s] or personal investment accounts . . . ." This raises the question whether a creditor, under a breach of contract claim, can recover the amount of his debt from a third party who has deprived the debtor of the ability to pay. Although this scenario might be

encompassed by a tort claim for intentional interference with contract,[16] Stuckert offers no authority for such relief under a breach of contract theory.

Because there is no evidence that appellants were obligated to pay the ARL debt and we find no legal basis to justify the recovery from Ciotti or Pyke of that debt, we will reduce the judgment against appellants by the erroneous amount.[17] (See *Behr v. Redmond, supra,* 193 Cal.App.4th at p. 533.)

D. *Sufficiency of the Evidence to Support the Punitive Damages Awards*

Appellants contend the evidence was insufficient to support the jury's award of $750,000 in punitive damages against each of them.[18] Pyke requests that we either strike the punitive damages award against him entirely or reduce it to $175,000. Ciotti requests

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[16] The elements of intentional interference with contract are: "(1) a valid contract between plaintiff and a third party; (2) defendants' knowledge of the contract; (3) defendants' intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239.)

[17] The judgment against ARL also includes the unpaid loan balance. Because ARL did not appeal from the judgment, our opinion does not affect ARL's liability for the debt.

[18] Stuckert argues that appellants have waived their arguments regarding the punitive award by failing to move for a new trial in the trial court. We reject this argument. (See *Adams v. Murakami* (1991) 54 Cal.3d 105, 115, fn. 5 (*Adams*) [court has discretion to decide punitive damages issue because the public interest in the award cannot "be thwarted by a defendant's oversight or trial tactics"]; *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1282 [evidence of a defendant's financial condition "is a requirement imposed as a matter of public policy and hence not subject to waiver by the failure of an inattentive defendant to object or otherwise call attention to the inadequacy of plaintiff's proof"].)

that we strike the award entirely. Because we conclude that the award of $750,000 against Pyke is grossly excessive, we will vacate that award and direct that a new trial be held as to punitive damages unless Stuckert consents to a punitive damages award of $175,000. Because there is no substantial evidence of Ciotti's financial condition, we will vacate the award of punitive damages as to him.

1. Legal Principles

"In a civil case not arising from the breach of a contractual obligation, the jury may award punitive damages 'where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.' (Civ. Code, § 3294, subd. (a).)" (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712.) In reviewing a challenge to an award of punitive damages, courts traditionally "determine whether the award is excessive as a matter of law or raises a presumption that it is the product of passion or prejudice." (*Adams, supra,* 54 Cal.3d at pp. 109-110.) To make this determination, courts consider three factors: (1) the degree of reprehensibility of the defendant's conduct; (2) the amount of compensatory damages awarded; and (3) the defendant's financial condition or wealth. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928; *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 690, fn. 18.)

Appellants do not raise any issue on appeal with respect to the evidence of their conduct or the relationship between the compensatory damages and the award of punitive damages. They challenge only the evidentiary showing regarding their financial condition.

A punitive damages award cannot be sustained absent meaningful evidence of the defendant's financial condition. (*Adams, supra*, 54 Cal.3d at p. 109; *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680.) Indeed, "[b]ecause the important question is whether the punitive damages will have the deterrent effect without being excessive, an award that is reasonable in light of the first two factors, reprehensibility of the defendant's conduct and injury to the victims, may nevertheless 'be so disproportionate to the defendant's ability to pay that the award is excessive' for that reason alone. [Citation.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 620.) The plaintiff has the burden of presenting evidence and the burden of proof regarding the defendant's financial condition. (*Adams, supra,* at p. 123; *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 83, fn. 9.)

The evaluation of a defendant's financial condition must be considered in light of the purposes of punitive damages: to punish the defendant and deter the commission of wrongful acts. (*Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928, fn. 13.) These policies are not served if the defendant's wealth allows him to absorb the award with little or no discomfort. (*Id.* at p. 928.) The "'wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective.' [Citation.]" (*Adams, supra,* 54 Cal.3d at p. 110.) Conversely, "'the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.'" (*Ibid.*; see also *Rufo v. Simpson, supra,* 86 Cal.App.4th at p. 620.)

There is no established method or standard for determining a defendant's financial condition when evaluating an award of punitive damages. (*Bankhead v. ArvinMeritor, Inc., supra,* 205 Cal.App.4th at p. 79.) Although the defendant's net worth is commonly used in assessing punitive damages, it is not the exclusive measure. (*Rufo v. Simpson, supra,* 86 Cal.App.4th at p. 621.) However, evidence of the defendant's annual income or of the profits wrongfully obtained by the defendant, standing alone, is inadequate. (*Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1152.) To obtain a meaningful understanding of the defendant's wealth, evidence of liabilities should normally "accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter v. Peterson, supra,* 150 Cal.App.4th at p. 680; see also *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 57.) Ultimately, "'[w]hat is required is evidence of the defendant's ability to pay the damage award.'" (*Baxter v. Peterson, supra,* at p. 680; see also *Adams, supra,* 54 Cal.3d at p. 112.) The defendant's wealth is to be measured as of the time of the trial on punitive damages. (*Washington v. Farlice* (1991) 1 Cal.App.4th 766, 777; *Zhadan v. Downtown Los Angeles Motor Distributors, Inc.* (1979) 100 Cal.App.3d 821, 839.)

2. Analysis of Punitive Damages Award Against Pyke

The punitive damages phase of the trial took place in March 2010. Stuckert introduced a "Legal & Vesting Report" showing that Pyke owns a residence in Rolling Hills, California, with an assessed value of $789,430 for property tax purposes. Stuckert testified that he had seen "listings" for properties in the area around Pyke's residence

"starting somewhere at [$]1.2 million up to . . . three and $4,000,000." He also produced flyers for two "comps" in the area advertising listing prices of $2.195 million and $1.295 million.[19]

The report submitted by Stuckert reveals a mortgage against the property in the amount of $995,000. Pyke testified that there is a balance owing of $986,000.

Stuckert also presented evidence of two commercial properties owned in part by Pyke. One of these is in Long Beach and owned by Pyke and the Pyke family trust. It has a tax-assessed value of $1.467 million. According to a report submitted by Stuckert, it is subject to mortgages totaling $1,329,550. Based on these numbers, there is $137,450 of equity in the property.

The other commercial property is in Signal Hill and is owned by Pyke and his wife. It has a tax-assessed value of $657,389. A report submitted by Stuckert indicates that the property is subject to a mortgage debt of $301,500. Stuckert produced evidence of an e-mail from Pyke, sent in January 2010, in which Pyke sought loans that would be secured by a deed of trust on the Signal Hill property. In the e-mail, Pyke represented that the property "would appraise at just under $1 million" and could "very possibly go for much higher." If the property is worth $1 million and has a $301,500 mortgage against it, there is $698,500 of equity in the property.

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[19] Pyke and Ciotti were not represented by counsel at the punitive damages phase of the trial and, with one exception, they made no objections to Stuckert's evidence. The one exception was an objection by Pyke to an e-mail on attorney-client privilege grounds, which was overruled.

Stuckert introduced evidence of Pyke's bank statements for three months: (1) December 23, 2008-January 26, 2009; (2) June 23, 2009-July 22, 2009; and (3) September 24, 2009-October 23, 2009. Total deposits for these months were $47,068.26, $55,976.52, and $15,959.10, respectively. Total withdrawals for the same periods were $63,928.44, $46,854.04, and $169,292.21, respectively. On the most recent statement, the ending cash balance on the account was $11,068.32.

Finally, Stuckert also produced evidence that (1) Pyke owns "an interest in a vacation home in Idaho" (but offered no evidence of its value); (2) Pyke sold a business called EcoVantage to certain employees in 2008 for $50,000; (3) Pyke started a new company called Integrated Construction Management (ICM); and (4) PCI is involved in a "$2.1 million job" building a Jewish private school. There was no evidence as to whether that school construction was profitable or, if so, how profitable it was.

Pyke testified and produced documents, including his bankruptcy schedules, indicating he has assets of $5,152,545.03 and liabilities of $5,516,356.81, which results in a negative net worth of -$363,811.78.[20] His cash and funds in savings, checking, and other financial accounts are stated to be $42,015.24. Other than $12,864.79 in a Roth retirement account, Pyke has no securities or brokerage accounts. His largest financial assets are life insurance policies valued at approximately $2.5 million.

[20] Among the liabilities is the judgment debt (before the punitive damages award) owed to Stuckert in this case for $2.2 million. He also includes a claim asserted by PCI in the amount of $619,767.

Regarding his home, Pyke listed its value at $1.2 million, and testified that a house "down the street" from his had recently sold for $1 million. After accounting for the mortgage and selling expenses, he said "the house is pretty much at break even." Regarding the commercial property in Long Beach, Pyke testified he is "upside down about [$]600,000." He lists property in Idaho, owned jointly with his wife, with a value of $199,000 and no mortgage against it. He represented that his 100 percent interest in PCI and his 33 percent interest in Global are both worth nothing.

According to his bankruptcy schedules, Pyke has received no income from any source during the six months preceding March 3, 2010. He estimates an average or projected monthly gross income of $18,567, monthly expenses of $16,653, and monthly net income of $1,914.

Pyke testified that the large deposits and withdrawals shown on the 2009 bank statements submitted by Stuckert were related to the sale of his children's education fund. At that time, he said, they "were down to not having two nickels to rub together," and he transferred the education funds to his personal bank account, then withdrew funds to pay his employees and other expenses.

On appeal, Pyke calculates his net worth for purposes of his argument based solely on the evidence presented by Stuckert (and giving Stuckert "several benefits of the doubt"), and assumes that his evidence was rejected by the jury. By doing so, he arrives at a net worth of $1,763,407.32. Because the $750,000 punitive damage award is more than 40 percent of this net worth, Pyke asserts that the award is excessive. Courts, he

contends, generally do not allow punitive damages awards to exceed 10 percent of the defendant's net worth. (See, e.g., *Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1596.)

Stuckert's primary response is that Pyke's calculation of net worth "ignores the fact that [he and Ciotti] remain in complete[] control of a business which the jury found was worth millions of dollars and which was shown to generate approximately $1 million per year in free cash flow."[21] Stuckert is referring to appellants' control of Global and the recently created ICM.

Stuckert's reliance on appellants' control of Global is unpersuasive. Although the jury did find that Stuckert's one-third interest in Global was worth $885,018 (implying a total valuation of $2,655,054), that value was based on earnings from 2006 through 2008. The jury's valuation of the business for purposes of compensating Stuckert for his loss does not necessarily reflect the actual value of the business in the context of determining whether the business can contribute to Pyke's ability to pay the punitive damages award in 2010. Indeed, it appears from the record that Global effectively stopped conducting business. As of the time of the punitive damages phase of the trial, both Pyke and Ciotti listed the value of Global as zero in their bankruptcy schedules, and there was no contrary evidence.[22] Although Stuckert asserts that such statements merely confirm that

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[21] Stuckert also states that appellants "waived the right to assert lack of financial condition evidence by failing to produce financial records despite a trial court order to do so . . . ." However, Stuckert's brief does not elaborate on this point and the assertion does not appear to be supported by his citations to the record.

[footnote continued on next page]

appellants are "willing to lie to the bankruptcy court," Stuckert offered no evidence of Global's value as of the punitive damages trial or even that Global had ongoing business. In his closing argument to the jury at the punitive damages phase, Stuckert's counsel did not mention Global or rely on its value as a factor contributing to appellants' net worth. Indeed, he implicitly acknowledged Global's demise when he told the jury that the appellants "have destroyed this company."

Stuckert contends, however, that Pyke and Ciotti merely continued Global's business under ICM. Stuckert produced evidence that in December 2009 Pyke and Ciotti planned to transfer the assets of ARL and PCI into ICM. Pyke obtained a taxpayer identification number and opened a bank account for the new business. An e-mail was sent to PCI's health insurance carrier informing the carrier that PCI would "need to change our business name to Integrated Construction Management." A bank account statement for ICM for the month of January 2010 shows an opening deposit into ICM's account of $21,439.34, the payment of two checks totaling $11,375, and other withdrawals totaling $154.72. The ending balance is $9,909.62. Stuckert also produced ICM's bank reconciliation, general ledger, and check register reflecting similar numbers. The one deposit into ICM's account is from the "Scott Family Trust." There is no

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[footnote continued from previous page]

22 Stuckert argues that the evidence that supported the jury's determination that Global was worth more than $2.5 million is evidence of its value for purposes of punitive damages. As stated above, however, the defendant's wealth must be measured as of the time of the trial on punitive damages. If, as Stuckert's counsel conceded, Global was destroyed by the time of the punitive damages trial, its predestruction value has little relevance.

evidence regarding the nature of the Scott Family Trust and nothing to suggest that the deposit reflects a transfer of an asset from Global. The bank records indicate that ICM was a fictitious business name used by Pyke, individually. Finally, Stuckert submitted a proposal for a construction project on letterhead showing the names of both "Pyke Construction, Inc." and "Integrated Construction Management."[23]

Stuckert's counsel asked Pyke whether he was doing jobs through ICM that Pyke had started under PCI. Pyke answered, "Not at this time." Pyke was not asked any questions about the assets, liabilities, net worth, income, expenses, legal status, or ownership interests in ICM. Ciotti was asked only whether he participated in trying to move Global's and ARL's assets to ICM, which Ciotti denied. Ciotti further stated that he is "in no way an owner" of ICM.

Viewing the evidence regarding ICM favorably to Stuckert, it appears that ICM is a fictitious business name used by Pyke; although Pyke and Ciotti apparently discussed a plan in December 2009 to transfer assets from Global to ICM, there is no evidence that any assets were actually transferred; and ICM's bank account has less than $10,000 in it. Significantly, there is no evidence that ICM has performed any work, entered into any contracts for work, had any income (other than the deposit from the Scott Family Trust), has any assets above $10,000, or has more than a nominal net worth. The evidence

[23] Stuckert also refers us to evidence concerning a question among Global personnel as to whether certain equipment used in connection with work performed for a client belonged to Global or to the client. The equipment was ultimately transferred to the client. It is not clear from this evidence or Stuckert's argument whether or how this evidence has any bearing on the issue of Pyke's wealth.

regarding ICM, therefore, does not meaningfully enhance Pyke's financial condition or his ability to pay a punitive damages award.

We also believe that Pyke is too generous in accepting all of Stuckert's evidence. Although the substantial evidence standard is deferential to the factfinder, "this does not mean we must blindly seize any evidence in support of [Stuckert] in order to affirm the judgment. . . . '[I]f the word "substantial" [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value . . . .' [Citation.]" (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

Here, Stuckert submitted flyers from real estate brokers advertising the listing of two houses for sale. One was for a house offered for sale at $2.195 million, the other for $1.295 million. There was no evidence that these houses sold or, if they were sold, at what price they sold; they are not evidence of the value of the houses advertised, let alone evidence of the value of Pyke's house. Even if those houses sold at their advertised prices, there is no basis for inferring from such sales that Pyke's house had a similar market value. The listing flyers, we conclude, are not substantial evidence of the value of Pyke's house. If these flyers are not considered, the evidence of Pyke's house includes the "Legal & Vesting Report" showing a tax-assessed value of $789,430 and the valuation set forth on Pyke's bankruptcy schedules of $1.2 million.

The evidence that Pyke received $50,000 for the sale of EcoVantage in 2008, without more, is not meaningful evidence of his ability to pay the punitive damages award. The punitive damages phase of the trial took place in March 2010—two years after the EcoVantage sale. For purposes of evaluating Pyke's ability to pay, there is no reason to treat this $50,000 in income any different from other income Pyke received in recent years. The payment was a single, one-time payment, and there is no evidence that the funds were being held outside the bank account discussed at trial. The $50,000, like other income Pyke received, has either been spent or is still in Pyke's bank account. The relevant amount, therefore, is the amount of cash in Pyke's financial accounts at the time of the punitive damages trial. That amount is either the $11,068.32 set forth on his most recent bank statement or the amount of $54,880.03, which is the sum of his cash, financial, and Roth IRA accounts as listed in his bankruptcy schedules.

If Pyke's valuation of $1.2 million for his house is used and the $50,000 received for EcoVantage is not considered, and undisputed evidence of other assets and liabilities set forth in Pyke's bankruptcy schedules are considered, Pyke's net worth is approximately $961,218.[24] The punitive damages award of $750,000 is approximately 78 percent of this amount.

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[24] This is based on: $214,000 equity in the Rolling Hills home ($1.2 million minus $986,000); $137,450 equity in the Long Beach property ($1.467 million minus $1,329,550); $355,888 equity in the Signal Hill property ($657,388 minus $301,500); $199,000 in equity in the Idaho property, and $54,880 in cash, bank accounts, and Pyke's Roth IRA account. We note that the value of other assets and liabilities identified in Pyke's bankruptcy schedules, such as the value of his life insurance policies and the amount of unsecured claims against him roughly cancel each other out.

As discussed above, net worth is not the only criteria for evaluating the financial condition or wealth of a defendant for punitive damages purposes. Here, Pyke's available financial assets and income are relevant considerations. The evidence of cash and financial assets available to Pyke is: (1) his October 2009 bank statement showing a cash balance of $11,068.32, and (2) his bankruptcy schedules showing $54,880.03 in cash, savings, checking, Roth retirement account, and other financial accounts.

As for income, Stuckert offered certain statements from Pyke's bank account, the most recent of which showed deposits for the months of September 24 through October 23, 2009 of $15,959.10 and withdrawals for the same period totaling $169,292.21. Pyke was not asked about the source or purpose of these funds. However, he testified that the large deposit and withdrawal amounts were due to the sale of his children's education accounts, the transfer of those funds into his bank account, and the use of the funds to pay expenses. Although Pyke agreed with Stuckert's counsel that the pending construction of a Jewish school was "a $2.1 million job," there was no evidence of what, if any, profit the job was expected to produce. Pyke's bankruptcy schedules indicate that he has received no income from any source during the six months preceding the punitive damages phase of the trial, and he estimates a projected gross income of $18,567 and net income of $1,914 per month. The $750,000 punitive damages award is equal to approximately 392 months (or approximately 32 and one-half years) of Pyke's net income.

In light of the foregoing, we believe that the award of $750,000 in punitive damages against Pyke is excessive as a matter of law. Regardless of whether Pyke's

financial condition is measured by his net worth, available funds, or income, $750,000 is grossly disproportionate to Pyke's ability to pay the award. Imposing such an award would merely serve the purpose of financially destroying Pyke, not the proper policy goals of punishment and deterrence. (See *Adams, supra,* 54 Cal.3d at p. 112 ["the purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy."].) Based on our review of the evidence in the record, an award of more than $175,000 would be excessive.

Because the first and second factors for arriving at a punitive damages award—the reprehensibility of Pyke's conduct and substantial award of compensatory damages—are not challenged by Pyke, and there is substantial evidence of *some* wealth on the part of Pyke, we cannot say there is no substantial evidence to support *any* award of punitive damages. It is the *amount* of punitive damages that is erroneous, not the award per se. In this situation, the appropriate remedy is to vacate the award of punitive damages and remand for a new trial, unless Stuckert consents to a reduction of the award to $175,000. (See *Cunningham v. Simpson* (1969), 1 Cal.3d 301, 310; *Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 753; *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 470 [Fourth Dist., Div. Two].)

3. Analysis of Punitive Damages Award Against Ciotti

The analysis of the punitive damages award against Ciotti is simpler. Stuckert offered no meaningful evidence of Ciotti's financial condition. In his case-in-chief at the punitive damages phase, Stuckert's counsel focused almost entirely on Pyke and Pyke's

financial condition. Ciotti's financial condition was not discussed until Ciotti testified in his defense. Then, Ciotti testified that he is unemployed and his mortgage is in default. He explained that he is 56 years old and must now "start all over again."

Ciotti submitted his bankruptcy schedules, which disclose assets of $331,625 and liabilities of $2,886,814.87. His house has a value of $299,000 and is subject to mortgage debts totaling $527,029.33. He has less than $5,000 in cash and financial accounts, and no securities or brokerage accounts. He has had no income over the preceding six months. He estimates a negative projected monthly net income of $3,023.60. There was no contrary evidence of Ciotti's net worth, assets, or income.

Stuckert failed to introduce any substantial evidence of Ciotti's financial condition or wealth that could support an award of punitive damages. Accordingly, we will vacate that portion of the judgment.

IV. DISPOSITION

The court is directed to enter an amended judgment as to Ciotti and, following a new trial on the issue of punitive damages if necessary, as to Pyke. The amended judgment shall omit the following language on page 2 of the judgment filed on May 25, 2010: "and the jury incorporated its damage award from the breach of contract special verdict form (VF-303) into its special verdict findings on each of those other causes of action, as specifically requested by [Stuckert's] counsel during his closing argument." In its place, the following language shall be inserted into the amended judgment: "and, in

determining damages for such claims, the jury referred the court to its damage award from the breach of contract special verdict form (VF-303)."

The compensatory damages awarded to Stuckert and against Pyke and Ciotti is reduced by $75,000 as to each of them. The total compensatory damages awarded to Stuckert against Ciotti is $2,065,963. The total compensatory damages awarded to Stuckert against Pyke is $2,115,963.

The award of punitive damages against Ciotti is reversed.

Because of the reduction of compensatory damages and the reversal of the punitive damages award as to Ciotti, the amended judgment as to Ciotti shall omit the language in paragraph 2 on page 4 of the judgment filed on May 25, 2010, and include the following in its place: "Plaintiff Alex 'Bud' Stuckert, Jr. shall have and recover from Defendant Jon A. Ciotti the sum of two million, sixty-five thousand, nine hundred sixty-three dollars ($2,065,963.00), with interest thereon at the rate of ten percent (10%) per annum from the date of the entry of this judgment until paid, of which $2,015,962.00 shall be a joint and several obligation of all defendants herein."

The award of $750,000 in punitive damages against Pyke is reversed with directions to conduct a new trial on the issue of punitive damages as to Pyke only, unless Stuckert, prior to the time this decision becomes final, serves and files with the clerk of this court two copies of a consent to a reduction of the punitive damages award to the sum of $175,000, in which event the reduced punitive damages award shall be affirmed. (See rule 8.264(d) of the California Rules of Court.) If Stuckert timely files and serves

such a written consent, the amended judgment as to Pyke shall omit the language in paragraph 1 on page 4 of the judgment filed on May 25, 2010, and include the following in its place: "Plaintiff Alex 'Bud' Stuckert, Jr. shall have and recover from Defendant Robert M. Pyke the sum of two million, two hundred ninety thousand, nine hundred sixty-three dollars ($2,290,963.00), with interest thereon at the rate of ten percent (10%) per annum from the date of the entry of this judgment until paid, of which $2,015,962.00 shall be a joint and several obligation of all defendants herein."

Each party shall bear their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RICHLI
Acting P. J.

CODRINGTON
J.