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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SANDRA CORRALES FAVILA, as Executor, etc., Plaintiff and Respondent, v. RALEIGH SOUTHER et al., Defendants and Appellants.	B230264 (Los Angeles County Super. Ct. No. BC379462)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed in part, reversed in part and remanded.

Law Offices of Carlos F. Negrete and Carlos F. Negrete for Defendants and Appellants.

James K. Cameron & Associates and James K. Cameron; Gary R. Wallace; and Christopher E. Maggard for Plaintiff and Respondent.

Following a lengthy bench trial Raleigh Souther and Get Flipped, Inc. were found liable to the Estate of Richard Corrales (Estate), through its executor Sandra Corrales Favila, for breach of contract, conversion, fraud and breach of fiduciary duty. The court awarded the Estate $1,700,191 in compensatory damages, $2,125,238.70 in punitive damages and prejudgment interest of $177,882. The court also imposed a constructive and resulting trust in favor of the Estate on all assets of Motion Graphix, Inc., a company jointly owned by Souther and Corrales, that Souther had transferred to Get Flipped. On appeal Souther and Get Flipped primarily contend the Estate lacked standing to pursue its claims in a direct action, rather than a derivative lawsuit on behalf of Motion Graphix; rulings by the court improperly deprived them of an advice-of-counsel defense; the court erroneously imposed a constructive/resulting trust on 100 percent of the assets improperly transferred to Get Flipped; and the evidence is insufficient to support the court's findings. Because the Estate is not entitled to both damages to compensate it for the loss of assets improperly transferred to Get Flipped and a constructive or resulting trust on those same assets, we reverse that portion of the judgment and remand for a determination whether the Estate has elected a remedy and for further proceedings consistent with that determination. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Sale of Motion Graphix's Assets to Get Flipped*

a. *The origin of Motion Graphix*

Corrales, a photographer and inventor, and Souther met in 1990 when they both worked for the Los Angeles Times. In February 2000 they incorporated Motion Graphix to license and sell photographic and imaging technologies Corrales had developed or improved for the creation of animated lenticular images.[1] In May 2010 the company,

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[1] Popularized in the 1940s, lenticular imaging interlaces two photographs into a single image that, when covered with a prismatic lens, displays each photograph separately depending on the angle by which the image is viewed and creates the illusion of motion. As described in a 2002 press release, Motion Graphix offered a turnkey hardware and software system allowing users, such as theme parks, in a matter of seconds and for very low cost, to capture images from any source, add artwork and print animated

authorized by Corrales as the sole initial director, issued 51 percent of its 1,000 shares of common stock to Corrales (510 shares) and 49 percent (490 shares) to Souther. Corrales was elected president and chief financial officer; Souther secretary.[2] The company also adopted bylaws requiring the approval of a majority of the shares represented and voting to validate actions taken by the company unless a greater number was required by law.[3]

In August 2001 Corrales assigned to Motion Graphix his rights in a pending patent application for $1.[4] Souther subsequently abandoned the patent application. However, in March 2003 Motion Graphix obtained a copyright for a software program named Galileo, which had been part of the patent application.[5] In October 2003 Motion Graphix obtained a copyright for an updated version of Galileo named Photobooth. According to a profit and loss statement for 2004, Motion Graphix's gross income was $319,000; gross profit $178,088; and its net income $51,055.

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lenticular souvenir cards or security identification badges that were impossible to duplicate or falsify.

2 The trial court found no evidence had been introduced that any corporate action was ever taken to make Souther a director of Motion Graphix.

3 Article II, section 8 of the bylaws states in part, "If a quorum is present . . . , the affirmative vote of a majority of the shares represented and voting, provided such shares voting affirmatively also constitute a majority of the number of shares required for a quorum, shall be the act of the shareholders unless the vote of a greater number or voting by classes is required by law or by the articles of incorporation." Section 6 defines a quorum for the transaction of business as, "The presence in person or by proxy of the holders of a majority of the shares entitled to vote at any meeting of the shareholders . . . ."

4 The title of the patent application was "Methods, Apparatus, and Article of Manufacture for Creating Three-Dimensional and Animated Images with Lenticular and Anaglyph Viewing Devices."

5 The Galileo software precisely sliced photographs into individual lines that were spliced together to create the animated images.

b. *The dispute between Corrales and Souther; the ratification and release agreement*

According to Souther, in January 2005 he learned Corrales had surreptitiously licensed Motion Graphix software for his own personal gain, earning several thousand dollars. Soon thereafter Souther began pressuring Corrales to restructure ownership of the company so Souther would become the majority shareholder of Motion Graphix. Under the terms of a document dated February 4, 2005, Corrales would sell back to Motion Graphix 80 percent of his shares in the company (410 shares), but continue to have access to the Photobooth software code and be allowed to continue to contact several Motion Graphix customers. Corrales signed the document on February 8, 2005, but, as explained in an email sent on February 11, 2005, withdrew his signature as the relationship between the two men continued to deteriorate: "After you have put undo [*sic*] pressure on me to sign a deal giving you a percentage of Motion Graphix, while at the same time giving me full usage of the code we have developed, and allowing me to retain a percentage of Motion Graphix, you refuse to sign the document you sent me on the Motion Graphix fax on February 4, 2005. [¶] Because you have both refused to return my calls, and have not given me updates on our customers as requested, I am withdrawing my signature on the February 4, 2005 document. Even with my signature on this document, you are still obligated to inform me of customer status and have my signature on the checking account."

Souther, who had directed the bank to remove Corrales's name from the company's checking account in late January 2005, did not put Corrales back on the account. Additionally, in March 2005, about the time Corrales began showing signs of illness related to stomach cancer, Souther stopped paying Corrales's health insurance.[6] In April 2005 Souther told Motion Graphix's accountant, Joan Green, who also prepared tax

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6 Souther testified Corrales had agreed as part of the February 4, 2005 stock transaction he would not receive health benefits beginning on March 1, 2005. Souther also said he did not learn Corrales had stomach cancer until September 2005.

returns for Souther personally, that Corrales did not have the right to see any financial statements after the period ending December 30, 2004.

For the next several months, while the two exchanged heated emails, Souther took steps to divest Corrales of Motion Graphix and start his own company, Get Flipped, which was a trademark owned by Motion Graphix. In May 2005 Souther signed the February 4, 2005 document from which Corrales had withdrawn his consent and filed a statement of information with the California Secretary of State designating himself as Motion Graphix's chief operating officer and adding his wife, Helena Pasquerella, as chief financial officer. In June 2005 he filed a fictitious business name statement for Get Flipped and opened a bank account in its name. Souther also cancelled Corrales's health insurance policy.[7]

In early August 2005 Gavin Galimi, then an attorney at Katten Muchin Rosenman LLP (Katten Muchin), Motion Graphix's corporate counsel,[8] drafted a ratification and release agreement providing Motion Graphix would repurchase most of Corrales's stock. The agreement incorporated the "terms of the resignation" set forth in the February 4, 2005 document, including Corrales would have access to the software code for Photobooth, would be entitled to enter into or retain contracts with certain clients and would "receive 20% of gross profits after the first year, and still retain[] a silent 20% ownership."[9] On August 6, 2005 Souther sent Corrales an email, with a copy to Galimi, not so subtly threatening to report Corrales to various government agencies for purported

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7 Favila testified Corrales was not able to obtain a new health insurance policy until August 2005 and did not seek medical treatment while he lacked insurance. He had his stomach removed on September 1, 2005.

8 Katten Muchin had been retained in August 2004 by Motion Graphix.

9 The February 4, 2005 document stated Corrales would sell 410 shares of stock; however, a stock assignment certificate Corrales signed on August 11, 2005 provided for the sale and transfer to Motion Graphix of 310 shares, which would have given Corrales a 28.98 percent interest.

misdeeds—called "wild accusations" by Corrales— if he failed to sign the ratification and release agreement.[10]

Corrales signed the agreement on August 11, 2005. However, on August 18, 2005 Corrales informed Galimi he had not been provided access to the full software code as promised and had not received any explanation from Souther. In September 2005 Motion Graphix obtained a copyright for the software program Get Flipped!™ Pro Studio.[11] In November 2005 Corrales died, and his shares in Motion Graphix passed to the Estate. On December 1, 2005 Souther sent Favila a letter offering to buy the Estate's shares in Motion Graphix: "Finally, I am willing to place all of [Corrales's] current shares against the remaining legal bills which remain outstanding to date. Total legal expenses $21,744, half of which are due and payable from Rick's estate, $10,872. [¶] Currently, the company will offer $2,000 for the remaining 200 shares."

c. *The incorporation of Get Flipped and dissolution of Motion Graphix*

On February 24, 2006 Souther sent an email to Galimi and Green, who was now the accountant for Get Flipped, stating Get Flipped should be incorporated as soon as possible and acknowledging the possibility of a lawsuit by the Estate:

> "Well, I'm sorry to get everyone's hope's [*sic*] up last night regarding Get Flipped's standing. Reviewing the documents, my mindset at the time was to keep Get Flipped under the MG umbrella until I could get control of the company, it is also using the same Fed tax id number . . . . Regrettably, my

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10 The email stated, "You've acknowledged in an earlier email that the document we both signe[d] is legitimate. I'm holding to that. . . . [¶] . . . [¶] Shall we both sue each other and see what comes out in discovery? . . . [¶] . . . [¶] Breaking Federal law, I wonder what the IRS has to say about your non-filing of taxes. I wonder what the LAPD would do if they discovered your dealing in drugs at your property? I wonder what OSHA would say about your dangerous work environment and the obvious fire danger to the hills."

11 Souther testified during his deposition that Get Flipped!™ Pro Studio is very similar to Galileo except, "It's a little faster and a little more efficient." He also explained, Get Flipped!™ Pro Studio "was a new name for the Photobooth program" that they had begun using in early November 2004.

thinking also was liability for our event photography, our insurance policy was under the MG name. In my mind, however, the two we're [*sic*] entirely separate, but this doesn't do us much good at the moment.

"Also, I found the 2000 corporate tax return, and unfortunately we made more money than I thought, actually $156,000 for that year, so going back to the first year wouldn't work. If we took the actually first full year the company was in business, 2001 we only made $61,200 for that year but I'm sure that wouldn't fly.

"So, damn the torpedoes, let's incorporate Get Flipped™ Inc and sell the MG assets over and dissolve MG as quick as possible. As far as [Corrales's] estate wanting the 20% gross, gross of what we can say. I think if we can use Joan's [the accountant's] valuation for the shares at the time [Corrales] signed them over, we can offer that up as payment for his share after we dissolve the company.

"I realize this doesn't get me out of a possible personal lawsuit with the Corrales estate, but that nasty business can be dealt with after we dissolve the company. I think as a settlement incentive we'd need to have the Corrales estate be willing to take payment for the shares and agree to not sue by accepting payment. [¶] . . . [¶]

"I'll follow with a list of assets I want GF to purchase from M.G. Wish I had better news guys. Thanks very much for your efforts last night."

In March 2006 Souther incorporated Get Flipped. Stock certificates signed by Souther indicate he owned nine shares of stock and Pasquerella one share. Souther was Get Flipped's sole officer and director.

Souther testified he called Favila several times in December 2006 to provide notice of Motion Graphix's intent to sell its assets and thereafter dissolve, but did not

receive a response. On February 7, 2007 Souther, as president of Motion Graphix, sent the Estate a letter stating a majority of Motion Graphix's shareholders had voted to sell the company's assets to Get Flipped.[12] According to Souther, he did not receive a response or objection from the Estate; so, on February 27, 2007 he executed a "Quitclaim Assignment" transferring Motion Graphix's assets to Get Flipped for $5,000. Souther testified the price was for hardware, and no value was placed on customers, product, software or work in process. In March 2007 Souther signed "confirmatory assignment[s]" in his capacity as president of Motion Graphix assigning the Get Flipped trademark to Get Flipped as well as the copyrights to Galileo, Photobooth and Get Flipped!™ Pro Studio.

In a letter dated March 26, 2007 the Estate was informed "that the Board of Directors and the holders of a majority of the outstanding shares of Motion Graphix . . . have acted by written consent . . . to approve the winding up and dissolution of the Corporation." On April 20, 2007 Motion Graphix was dissolved. Subsequently, Souther withdrew the $5,000 that had been deposited into Motion Graphix's checking account for the purchase of its assets by Get Flipped and deposited it into Get Flipped's account.

2. *The Individual (Direct) Action*

a. *The initial complaint against Souther and Get Flipped*

On October 30, 2007 the Estate filed a complaint asserting causes of action for conversion, breach of fiduciary duty, fraud, breach of contract and breach of the implied covenant of good faith and fair dealing against Souther, Get Flipped and fictitiously named Doe defendants. The complaint alleged Corrales still owned 51 percent of the

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12 The letter stated, "This letter is to provide you with notice that the holders of a majority of the outstanding shares of Motion Graphix, Inc., a California corporation (the 'Company') have acted by written consent pursuant to Section 603(a) of the California Corporations Code to (1) enter into a Quitclaim Assignment (the 'Assignment') by and between the Company, as Assignor, and Get Flipped, Inc., a California corporation, as Assignee, pursuant to which the Company will sell, transfer, convey, assign and quitclaim to Assignee all right, title and interest in and to 100% of the assets of Assignor as set forth therein (the 'Asset Sale'), and (2) take all other action necessary to consummate the Asset Sale. [¶] A copy of the shareholder written consent is enclosed."

shares of Motion Graphix when he died, those shares passed to the Estate, the Estate never approved the sale of Motion Graphix's assets to Get Flipped or the company's dissolution, the fair market value of Motion Graphix's intellectual property was between $8 and $12 million and Souther had engaged in wrongdoing, including violating the Corporations Code, by orchestrating the fraudulent and unauthorized sale of Motion Graphix's assets to Get Flipped for $5,000. In addition to damages the complaint sought imposition of constructive and resulting trusts. In April 2008 the Estate amended the complaint to name Pasquarella as an additional defendant.[13]

b. *The motions for summary judgment*

On June 13, 2008 Souther, Get Flipped and Pasquarella moved for summary judgment. The trial court granted Pasquarella's motion and granted summary adjudication in favor of Souther and Get Flipped on the Estate's claim for breach of the implied covenant of good faith and fair dealing. However, the court rejected Souther and Get Flipped's principal argument the Estate lacked standing to bring an individual suit: "Defendant Souther asserts that most of the causes of action must be brought as a derivative suit on the corporation's behalf. However, the corporation, MGI, was dissolved by [Souther] in April, 2007. [Souther] does not provide authority for bringing a derivative suit on behalf of a dissolved corporation." Citing *Jara v. Supreme Meats, Inc.* (2004) 121 Cal.App.4th 1238 (*Jara*), the court also explained, "In closely held corporations with only a few shareholders, harmful acts allegedly done by one shareholder may directly impact the other shareholders, [and] an individual suit may be brought by a minority shareholder."

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13 In May 2007 the Estate had petitioned for court intervention and supervision of Motion Graphix's wind up, making many of the same allegations of wrongdoing. The Estate dismissed the petition after Souther, Get Flipped and Pasquarella moved for sanctions on the ground the petition lacked merit because Motion Graphix had already been voluntarily dissolved.

c. *The Estate's attempt to amend the complaint to assert causes of action against the attorneys*

On June 23, 2008, after learning during discovery about the significant role of Katten Muchin attorneys in the asset sale and dissolution of Motion Graphix and incorporation of Get Flipped, the Estate amended the complaint by substituting Galimi for one of the fictitiously named Doe defendants; on July 14, 2008 it filed another Doe amendment naming Katten Muchin. Galimi demurred on July 28, 2008, primarily contending he had left Katten Muchin in November 2006, months before the allegedly fraudulent asset sale took place, and thus could not be liable. On August 13, 2008, Katten Muchin also demurred, contending the complaint lacked any specific allegations against Galimi or the firm.

At a hearing on September 5, 2008 the trial court sustained both demurrers without leave to amend but without prejudice to the Estate filing a petition under Civil Code section 1714.10, subdivision (a), which requires a court order before a plaintiff may file a complaint with a "cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client . . . ." Although the initial complaint did not include a conspiracy claim, the court explained, "It is clear that [the Estate is] inferring that defendant acted as the attorney for Souther or Get Flipped at the time of the subject transaction and conspired with him, even though no conspiracy is alleged as a cause of action. And the requirements of [section] 1714.10 need to be fulfilled."

On December 17, 2008 the Estate filed a petition for an order allowing it to file a first amended complaint asserting a conspiracy claim against the attorneys. The proposed new pleading alleged, in essence, that Souther and Galimi formulated a scheme to defraud the Estate by incorporating Get Flipped and selling Motion Graphix's assets to it for a price grossly below their market value, as evidenced by the February 2006 damn-the-torpedoes email from Souther to Galimi and the accountant. In furtherance of that fraudulent scheme the February 2007 letter to the Estate falsely stated a majority of

shareholders had approved the sale. Contrary to that representation, the Estate, which did not approve the sale, was the majority shareholder even though Corrales and Souther had signed the ratification and release agreement because Corrales never received the software code or payment he was entitled to under the terms of the agreement. The proposed complaint alternatively alleged, even if the stock transfer was effective and Corrales was only a 20 percent shareholder, the sale violated two provisions of the Corporations Code: section 1001, subdivision (d), which requires the sale of all or substantially all of a company's assets be approved by 90 percent of the shares entitled to vote; and section 310, subdivision (a), which prohibited Souther from voting to approve the asset sale because he had a material financial interest in the transaction.

On January 28, 2009 the trial court denied the petition and motion. The court ruled section 1714.10 was applicable and the Estate had not met its burden to establish a reasonable probability it would prevail in the action. The Estate timely appealed the order pursuant to Civil Code section 1714.10, subdivision (d).

3. *The Derivative Action*

On October 3, 2008, while the Estate's petition for leave to file an amended complaint was pending in the individual action, the Estate filed a separate action against Galimi, James Thompson, another attorney at Katten Muchin, and the law firm itself, asserting causes of action for legal malpractice and breach of fiduciary duty arising out of their representation of Motion Graphix. The attorneys demurred on grounds including the lack of any duty to Corrales or the Estate. On December 29, 2008 the Estate amended the complaint to allege a shareholder derivative action on behalf of Motion Graphix and added a claim for unjust enrichment. The derivative action also named Souther and Get Flipped and asserted claims against them including for breach of fiduciary duty, conversion and fraud.

On March 4, 2009 the trial court sustained the attorneys' demurrer to the derivative action with leave to amend, ruling the Estate lacked standing to bring a derivative action on behalf of a dissolved corporation under Corporations Code section 800, subdivision (b), which requires the shareholder to own stock during the pendency of

the litigation. The court explained, "[Motion Graphix] is a dissolved corporation; thus, [the Estate] ceased being a shareholder when the dissolution occurred." Although Corporations Code section 2010, subdivision (a), provides a dissolved corporation continues to exist after dissolution for the purpose of winding up its affairs and prosecuting and defending actions against it, the court found that section "enables a dissolved corporation, not its shareholders, to prosecute actions against it. [The Estate] has not provided this court with any authority to the effect that Corporations Code, section 800 and 2010 together enable a shareholder of a dissolved corporation to bring a derivative suit."

The trial court further ruled, even if the Estate had standing, it was nevertheless precluded from pursuing the action against outside corporate counsel in the absence of a waiver of Motion Graphix's lawyer-client privilege. (See *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 381 [derivative legal malpractice action against outside corporate counsel not permitted; "in the absence of a waiver by the corporate client, the third party attorney is effectively foreclosed from mounting any meaningful defense"].) The Estate did not amend the complaint. On April 21, 2009, pursuant to the attorneys' ex parte application, the court dismissed the derivative action as to the attorneys. The Estate filed a timely notice of appeal. Subsequently, Souther and Get Flipped were dismissed from the derivative action.

4. *The Trial*

A bench trial on the Estate's claims against Souther and Get Flipped started in May 2009. However, in June 2009 Souther and Get Flipped filed for bankruptcy protection, and the individual action was stayed pursuant to title 11 United States Code section 362. The Estate obtained relief from the automatic stay, and trial resumed in December 2009, continuing through February 2010 with 17 days of testimony. (Souther testified on 10 of those days.)

In support of its damages claim the Estate presented the opinion testimony of certified public accountant Michael Sovik. Sovik, who has experience with the purchase and sale of corporate assets, acknowledged he is not a business valuation expert. Rather,

as he did in this case, he works with Bill Horsfall, a valuation expert at his firm, when a valuation is required. The trial court overruled Souther's objection Sovik was not qualified to opine on the value of Motion Graphix.

Sovik testified his computation of damages in the event Souther and Get Flipped were found liable for improperly transferring and utilizing Motion Graphix's assets had two basic elements: a valuation of the ongoing business itself (what he referred to as the "fair value" of the company) and a calculation of the income generated by the business from which Corrales and the Estate had been excluded. To determine these numbers, Sovik reviewed the financial records and tax returns for Motion Graphix, Get Flipped and Souther from 2004 and 2008. Based on that review he opined the Estate was entitled to compensatory damages of $1,700,191, comprised of 51 percent of the net income that Souther had diverted from Motion Graphix to Get Flipped plus 10 percent interest ($1,169,514) and 51 percent of a four-year average fair value derived by applying a multiple of four to Motion Graphix and Get Flipped's earnings before interest, tax, depreciation and amortization (EBITDA), discounted by 25 percent for the lack of marketability of Motion Graphix ($530,677). Sovik's calculation of diverted net income included salaries paid to Souther and Pasquerella, rent for office space and business expenses that exceeded the amount paid by Motion Graphix in 2004.

In Souther and Get Flipped's defense Souther testified he and Corrales had agreed to go their own separate ways with both permitted to use Motion Graphix's software to compete with each other; Corrales had freely entered into the ratification and release agreement, the terms of which were ratified in part by Corrales's performance; and, after Souther became the majority shareholder, he used his business judgment in deciding to sell Motion Graphix's assets for $5,000 and dissolve the company. Souther also testified, notwithstanding Get Flipped had purchased all Motion Graphix's assets in 2007, the software licensed by Get Flipped is distinct from the software that had been licensed by Motion Graphix, having been revised almost 100 times since the asset sale. Souther and Get Flipped argued the Estate failed to present evidence or expert testimony that Get Flipped's software was similar to or derived from Motion Graphix's version.

5. *The Proposed Statement of Decision*

After closing arguments the parties filed proposed statements of decisions. Souther and Get Flipped's proposed statement included the finding the Estate lacked standing to sue them directly for conversion and breach of fiduciary duty because it never owned the assets transferred to Get Flipped. On August 9, 2010, after considering the parties' objections and supplemental briefing on the standing issue, the court issued a 54-page proposed statement of decision finding in favor of the Estate and awarding $4,003,311.70 in damages, comprised of $1,700,191 in compensatory damages, $2,125,238.70 in punitive damages and $177,882 in prejudgment interest.[14] The proposed statement of decision also indicated both a constructive trust and resulting trust would be imposed in favor of the Estate on all the assets fraudulently transferred to Get Flipped including computer equipment, software code, trademarks, copyrights and license agreements.

Central to the court's analysis and findings was its determination that Souther was not a credible witness. The court explained at the outset of its proposed statement of decision, "[The Estate] pursued the somewhat unusual trial strategy of beginning its case in chief by playing, for two days, the entire videotaped deposition of defendant Raleigh Souther. Souther's demeanor was evasive and less than credible. Souther demonstrated an evasive and less than credible demeanor during his live testimony . . . at trial. Souther's lack of credibility and evasiveness was also demonstrated during [the Estate's]

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14 As discussed, Sovik's damages computation included a 10 percent interest factor on the net income he opined Souther had diverted from Motion Graphix to Get Flipped. Sovik calculated total interest of $348,788; the Estate's 51 percent share is $177,881.88. Thus, the additional award of prejudgment interest appears to be duplicative. However, Souther and Get Flipped apparently made no objection on this basis in the trial court and in this court have not challenged either Sovik's damage calculations, focusing on only his purported lack of valuation experience, or the court's prejudgment interest award. (See generally *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417 [issues not raised in trial court cannot be raised for the first time on appeal]; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 ["[c]ourts will ordinarily treat the appellant's failure to raise an issue in his or her opening brief as a waiver of that challenge"]; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466 [same].)

examination of Souther on his income tax returns and bankruptcy schedules. [The Estate] showed numerous instances in which Souther failed to report income on his tax returns and omitted important information from his bankruptcy schedules."[15]

Based in large part on that credibility determination, and after analyzing each transaction leading to the sale and dissolution of Motion Graphix, including documentation the court characterized as "even more tenuous when one considers that a law firm assisted Mr. Souther," the trial court found the ratification and release agreement was void, the purported stock redemption was void and the sale of Motion Graphix's assets and dissolution of the company were unauthorized, failed to comply with the Corporations Code and fraudulently conducted by Souther. The court rejected Souther and Get Flipped's standing argument, reiterating the principle it had articulated when it denied Souther and Get Flipped's motion for summary judgment that courts "are more willing to allow direct actions" in cases involving "corporations with only a few shareholders" in which "harmful acts by one officer/shareholder may directly impact the other shareholders." Souther and Get Flipped filed objections to the court's proposed statement of decision, the Estate filed an opposition to their objection, and a hearing was set for September 14, 2010.

6. *This Court's Decision in Favila; the Remand to the Trial Court*

On September 3, 2010 this court decided *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189 (*Favila*), reversing the order denying the Estate's petition to add the attorney defendants in the individual (direct) action and the order dismissing the derivative action as to them. With respect to the direct action we held Civil Code section 1714.10's requirement the Estate establish a reasonable probability it would prevail in the action before being permitted to assert a civil claim against the attorneys was inapplicable

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15 In addition to Souther's mid-trial bankruptcy, he had filed for bankruptcy protection in 2003. The court's reference to Souther's omission of critical information from his bankruptcy filings was in connection with the 2003 bankruptcy. For example, the court found Souther had not listed his claimed stock ownership in Motion Graphix or disclosed income he had received from the company.

because the attorneys had an independent legal duty not to defraud the Estate. (*Favila*, at p. 210.) We further held the proposed first amended complaint stated sufficient facts to allege a claim against the attorneys for conspiracy to commit fraud and remanded the matter to permit the Estate to file a revised first amended complaint. (*Id.* at pp. 198, 211-212.)

As to the derivative action we held a dissolved corporation's shareholders' may bring a shareholder derivative action. We explained, "Although the trial court correctly observed there is no California authority directly supporting a dissolved corporation's shareholders' right to pursue a derivative action, there similarly is no authority precluding such a proceeding; and, as a matter of public policy, since the shareholders may be responsible for postdissolution claims against the corporation, there is no reason to deny them the right to bring a derivative action, which may benefit them postdissolution, as long as the requirements of Corporations Code section 800 are met." (*Favila*, *supra*, 188 Cal.App.4th at p. 215.) We also held it was premature for the court to have concluded the lawyer-client privilege prevented the attorneys from meaningfully defending the action and remanded the derivative action with directions to redetermine the issue after the individual action against Souther and Get Flipped had been finally resolved. (*Id.* at pp. 220-221.)

7. *The Statement of Decision and Judgment*

At the hearing on September 14, 2010 Souther and Get Flipped argued a mistrial should be declared and a new trial held because our decision in *Favila* permitting the Estate to file an amended complaint alleging a conspiracy claim against the attorneys had significant ramifications for their defense to the Estate's claims and the proof presented at trial. The trial court ordered the parties to file proposed judgments consistent with the proposed statement of decision, objections thereto and briefing on any issues potentially raised by *Favila* that might affect entry of judgment. In their briefs Souther and Get Flipped renewed their argument the causes of action against them should have been asserted in a derivative action. They also contended *Favila* rendered the attorneys indispensable parties requiring retrial, arguing they would now be "able to raise new and

different defenses and claims, such as who was responsible for the facts that Plaintiff claims in its conspiracy count."

After additional briefing and hearings, on November 22, 2010 the trial court adopted and filed its proposed statement of decision and judgment was entered. On December 15, 2011 the court consolidated the individual and derivative actions against the attorneys and stayed the case pending resolution of this appeal.

CONTENTIONS

Souther contends the Estate lacked standing to assert a direct action because its injury, devaluation of its shares in Motion Graphix, was only incidental to the injury to the company itself; in light of *Favila*, the trial court's denial of the Estate's repeated requests to join the attorneys as necessary defendants effectively deprived Souther of an advice-of-counsel defense; Sovik was not qualified to offer his valuation opinion; the court's legal rulings and factual findings are not supported by substantial evidence; punitive damages were improperly awarded; the court erroneously imposed a constructive/resulting trust on 100 percent of the assets improperly transferred to Get Flipped; and the trial court's bias and prejudice denied Souther and Get Flipped a fair trial.

DISCUSSION

1. *The Estate Had Standing To Pursue Its Claims in a Direct Action*

a. *The law generally governing derivative and direct actions*

A shareholder derivative action seeks to recover on behalf of the corporation (and all its shareholders) for injury to the corporation for which it has failed or refused to seek redress. (See *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106 (*Jones*) ["'action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets'"].) Although the corporation is joined as a nominal defendant in the derivative action, it '"is the real plaintiff and it alone benefits from the decree; the stockholders derive no benefit therefrom except the indirect benefit

resulting from a realization upon the corporation's assets.'" (*Id.* at p. 107; see, e.g., *Avikian v. WTC Financial Corp.* (2002) 98 Cal.App.4th 1108, 1115-1116 [claim officers and directors mismanaged corporation and "entered into self-serving deals" to sell company assets was derivative because it "amount[ed] to a claim of injury to [corporation] itself"; shareholders "own damages, the loss in value of their investments in [corporation], were merely incidental to the alleged harm inflicted upon [corporation] and *all its shareholders*"]; *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 125 ["[b]ecause all of the acts alleged to have caused Nelson's injury amount to alleged misfeasance or negligence in managing the corporation's business, causing the business to be a total failure, any obligations so violated were duties owed directly and immediately to the corporation"].) The need for the equitable mechanism of a derivative suit arises from the fact "a corporation exists as separate legal entity, [and] the shareholders have no direct cause of action or right of recovery against those who have harmed it." (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108; see generally 2 Marsh's Cal. Corporation Law (4th ed. 2012 supp.) § 15.11, p. 15-58.)

In contrast, a shareholder's individual suit or direct action seeks to enforce against the corporation and/or its officers and directors a right the shareholder possesses as an individual. (*Jones, supra*, 1 Cal.3d at p. 107.) Although a shareholder may not assert an individual action for a wrong that "'is merely incidental to the wrong suffered by the corporation and affects all stockholders alike,'" "[i]f the injury is not incidental to an injury to the corporation, an individual cause of action exists[]" even if the complaint alleges the value of the plaintiff's stock has been diminished. (*Ibid.*) Thus, in *Jones* a minority shareholder in a savings and loan association was permitted to bring a direct action for breach of fiduciary duty against the majority shareholders based on allegations they had incorporated a holding company, exchanged their shares in the association for those in the holding company, took action that created a viable market for the holding company stock and then offered to purchase or exchange the minority shareholders' stock in the association for holding company stock for a low price, justifying the price on the ground the association stock was not marketable. (*Id.* at p. 105.) The Supreme Court

held, "It is clear . . . that [the minority shareholder] does not seek to recover on behalf of the corporation for injury done to the corporation by the defendants. Although she does allege that the value of her stock has been diminished by [the majority shareholders'] actions, she does not contend that the diminished value reflects an injury to the corporation and resultant depreciation in the value of the stock. Thus the gravamen of her cause of action is injury to herself and the other minority shareholders." (*Id.* at p. 107; see *Smith v. Tele-Communication, Inc.* (1982) 134 Cal.App.3d 338, 343 [minority shareholder permitted to assert individual action for fraud and breach of fiduciary duty based on allegations majority shareholder filed consolidated tax return with subsidiary while liquidating it to appropriate tax benefit in which minority shareholder did not share; "the gravamen of the causes of action is injury to Smith as the only minority shareholder"].)

Although the distinction between derivative and direct actions may be succinctly articulated, in practice determining whether a shareholder's claim is properly asserted derivatively or directly is often difficult; and fully reconciling the case law involving closely held corporations is not possible. (See *Jara*, *supra*, 121 Cal.App.4th at p. 1255; see generally 2 Marsh's Cal. Corporation Law, *supra*, § 15.11[A] at pp. 15-59 to 15-71, Distinction Between Derivative and Individual Actions.) In *Jara* the court thoroughly analyzed the cases, concluding, *Jones*, *supra*, 1 Cal.3d 93 "represents controlling authority" and "allow[s] a minority shareholder to bring a personal action alleging 'a majority stockholders' breach of a fiduciary duty to minority stockholders, which resulted in the majority stockholders retaining a disproportionate share of the corporation's ongoing value.'" (*Jara*, at pp. 1257-1258.) The *Jara* court found further support for its conclusion a direct action was proper where the minority shareholder alleged "he was deprived of a fair share of the corporation's profits as a result of the [the majority shareholders'] generous payment of executive compensation to themselves" "in the absence of any policy considerations favoring derivative actions in the procedural context of the . . . case. As explained in a leading treatise, the traditional justification for requiring a derivative action is that 'it is designed to prevent a multiplicity of actions by

each individual shareholder and a preference of some more diligent shareholders over others, and to protect the creditors who have first call on the corporate assets . . . ." (*Id*. at p. 1258.)

b. *The trial court properly concluded the Estate had standing to assert a direct action*

Souther and Get Flipped contend the Estate lacked standing to assert a direct action because it "locates its injury solely in share devaluation," an injury incidental to Motion Graphix that affected Souther's shares as much as the Estate's. This argument fundamentally misapprehends both the nature of the Estate's damage claims and the gravamen of its lawsuit. (See *Nelson v. Anderson, supra*, 72 Cal.App.4th at p. 124 ["it is the gravamen of the wrong alleged in the pleadings, not simply the resulting injury, which determines whether an individual action lies"].) Although one aspect of its damage calculations involved assessing the fair value of Motion Graphix and Get Flipped, principally the Estate sought to recover, not for any diminution in the value of Motion Graphix itself, but for benefits, including diverted net income, misappropriated by Souther in which the Estate should have shared.

Simply put, the gravamen of the instant action, as pleaded by the Estate and found by the court, was not that Souther had mismanaged Motion Graphix or exercised poor business judgment in undervaluing its assets, thus affecting both shareholders, but that he had deliberately and methodically executed a scheme to steal Motion Graphix's assets to benefit himself and Get Flipped at the expense of the Estate. Part of that scheme included wrongfully depriving the Estate of its majority interest in Motion Graphix, the basis for the conversion cause of action,[16] which sought to vindicate only the Estate's

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16 Souther and Get Flipped speciously challenge the trial court's finding they engaged in conversion by mischaracterizing the claim as one for stealing intellectual property, rather than the Estate's interest in Motion Graphix, and then arguing intellectual property is not subject to conversion because it is too indefinite, intangible and uncertain. (See, e.g., *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119-126 [misappropriating shares of stock recognized as proper basis for conversion action whether or not share certificates were converted].)

right to control or ownership of its shares in Motion Graphix, not any right of Motion Graphix itself. (See *Haro v. Ibarra* (2009) 180 Cal.App.4th 823, 835 [explaining in individual action for conversion, "'[i]t is the uniform rule of law that shares of stock in a company are subject to an action in conversion'"; elements are """"'the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages'""""].) Damages awarded the Estate were predicated on restoring it to a 51 percent ownership interest.

To be sure, the Estate's claims for breach of fiduciary duty and fraud implicate injury to Motion Graphix itself; its assets were undervalued before sale and income had been diverted. Nonetheless, we agree with the *Jara* court that, even though *Jones*, *supra*, 1 Cal.3d 93 is factually distinguishable because there was no injury to the corporation, the case stands for the broader proposition an individual action may be appropriate when a majority shareholder—the capacity in which Souther purported to act— engages in conduct resulting in his or her retention of a disproportionate share of the corporation's value or net income. (See *Jara*, *supra*, 121 Cal.App.4th at p. 1258 ["[w]e recognize that the present case represents a closer case than *Jones* with respect to possible injury to the corporation itself"].)[17] Similar to the facts in *Jara*, the Estate's damages here included income Souther had diverted to himself and Pasquarella in the form of salaries. (See *ibid.* ["[T]he corporation paid bonuses to defendants with the objective of reducing the amount

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17 Souther and Get Flipped contend *Jones* is distinguishable because the facts "involve majority shareholders who intentionally created a situation in which their shares were more valuable. It does not address a situation in which the only two shareholders of a corporation *agreed* to go their separate ways and after shares of the minority shareholder had passed to his Estate, the majority shareholder voted to dissolve (and sell the assets) *without objection* from the new shareholder, who then later claimed direct injury. In *Jones*, the imbalance of value created by the majority shareholder fiduciaries damaged plaintiff and her fellow minority shareholders directly. It is that direct injury alone which merits an individual action and which is absent here." This argument, however, is predicated on a version of the facts dramatically at odds with the trial court's findings.

of profit in the corporation that had to be paid to Jara, Sr. These payments gave rise to an injury to Jara, Sr., as an individual."]; cf. *Smith v. Tele-Communications, Inc.*, *supra*, 134 Cal.App.3d at p. 343.)

Finally, as in *Jara*, our conclusion an individual action is proper here is reinforced by the absence of any policy considerations favoring a derivative action. There were only two shareholders of Motion Graphix. Thus, there is no risk there will be multiple lawsuits by different shareholders with the attendant complications that would pose or any risk to the rights of creditors of the company. (See *Jara*, *supra*, 121 Cal.App.4th at p. 1258.)[18] Indeed, policy considerations weigh heavily in favor of affirming the trial court's ruling the Estate has standing to assert an individual action. Early in the case the trial court denied Souther's motion for summary judgment on standing grounds because there was no California authority directly supporting a dissolved corporation's shareholder's right to pursue a derivative action. As we explained in *Favila*, *supra*, 188 Cal.App.4th at page 215, the trial court's observation was correct; *Favila* was the first decision to hold shareholders of a dissolved corporation could do so.[19] Inasmuch as the court had a valid basis for its conclusion, to unwind almost three years of extensive litigation to have the same causes of action retried in an action denominated derivative with no showing it would have any effect on the issues or the outcome would undermine the strong interest in judicial economy and unduly burden the Estate. (Cf. *Haro v. Ibarra*, *supra*, 180 Cal.App.4th at p. 837 [equitable considerations warranted exception to continuous ownership requirement for asserting a derivative action].)

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18 Souther and Get Flipped ignore the preclusive effect of res judicata when they argue, if an individual, direct action is permitted, future beneficiaries of the Estate could relitigate claims asserted by Favila as executor. (See *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 814.)

19 Although we held shareholders of a dissolved corporation could pursue a derivative action under the Corporations Code, we in no way suggested the Estate's claims against Souther and Get Flipped, which were not before us, had to be pursued derivatively.

2. *Souther Was Not Denied the Ability To Present an Advice-of-Counsel Defense*

Souther contends the trial court improperly deprived him of the ability to present an advice-of-counsel defense by denying his motion for mistrial and failing to determine the status of Motion Graphix's lawyer-client privilege in light of our remand directions in *Favila, supra*, 188 Cal.App.4th 189. Souther explains he was originally prevented from cross-complaining or joining the attorneys as cross-defendants because Katten Muchin was representing him in the litigation and, by the time Souther's present counsel substituted into the case, the trial court had already ruled the Estate's proposed causes of action against the attorneys could not proceed. Under these circumstances, he argues, the trial court should have determined Katten Muchin and its attorneys were indispensable parties and retried the case with all potentially liable parties present.

Souther's attempt to blame the trial court for his failure to timely present an advice-of-counsel defense is as shameless as it is misguided.[20] Katten Muchin's presence as a party in the lawsuit was entirely unnecessary for Souther and Get Flipped to attempt to defend their own actions as based in good faith on the advice of their lawyers. (Cf. *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725-726 [insurer entitled to present evidence it acted reasonably and with proper cause based on advice of counsel in response to plaintiff's allegations of bad faith and malice even though advice of counsel was not specifically alleged; attorney not party to lawsuit].) Moreover, Souther was not required to retain Katten Muchin to defend him when the lawsuit was initially filed. He could have hired a different law firm and cross-claimed against the attorneys if he, in fact, acted based on their advice.

Finally, nothing, including the trial court's orders directed to the Estate's claims against the attorneys, prevented Souther as the purported majority shareholder and chief operating officer from seeking to waive the lawyer-client privilege on Motion Graphix's behalf. (See *Favila, supra*, 188 Cal.App.4th at p. 219 ["it would appear the persons

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20 Souther characterizes the court as "conveniently [finding] another excuse to prevent Katten's joinder so that it could pin the weight of a matter if finds fraudulent only on the extant defendants."

authorized to act on the dissolved corporation's behalf during the windup process—its ongoing management personnel—should be able to assert the privilege, at least until all matters involving the company have been fully resolved and no further proceedings are contemplated"].) Contrary to Souther's contention, it was not the trial court that insisted on upholding Motion Graphix's privilege, thus "barr[ing] relevant documents and information critical to Souther's defense from ever being allowed in court"; it was Souther. In fact, our decision in *Favila* contemplated Souther might ultimately waive the privilege during trial in connection with his defense. (*Id.* at p. 222.)

Even when Katten Muchin was no longer purportedly exerting undue influence over him, Souther chose not to assert the advice-of-counsel defense or attempt to waive Motion Graphix's privilege. Indeed, this litigation has consumed a significant amount of time and resources because of Souther's decision not to waive the privilege. It is only with an adverse judgment that unequivocally demonstrates his strategy has backfired that Souther attempts to mischaracterize *Favila* as requiring the trial court to determine whether Motion Graphix's privilege "could be waived" and the attorneys joined as indispensable parties in the causes of action that have already been extensively litigated. It is now too late to change tactics. (Cf. *Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 842 [developer acquiesced in Coastal Commission's exercise of jurisdiction by providing information to Commission in response to several requests]; *California Coastal Com. v. Tahmassebi* (1998) 69 Cal.App.4th 255, 260 ["'[i]t is settled that where a party by his conduct induces the commission of an error, under the doctrine of invited error he is estopped from asserting the alleged error as grounds for reversal'"].)[21] Nothing in Code of Civil Procedure section 389 governing joinder compels a different conclusion. (See *Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 Cal.App.4th 785, 796-797 ["'it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit'"; "'a tortfeasor with the usual "joint-and-

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21 Our conclusion Souther may not essentially use this litigation as a trial run does not leave him without a remedy. As Souther noted in his brief, he has filed a malpractice action against Katten Muchin.

several" liability is merely a *permissive* party to an action against another with like liability'"].)

3. *The Trial Court Did Not Abuse Its Discretion in Admitting Sovik's Valuation Opinion*

The trial court has broad discretion to determine whether a witness is competent and qualified as an expert; its determination will not be disturbed on appeal unless "a manifest abuse of discretion" is shown. (*Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 701.) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) "However, work in a particular field is not an absolute prerequisite to qualification as an expert in that field." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 274; see, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 131-132 ["[b]ecause of the dramatic growth of diverse interdisciplinary studies in recent times, often individuals of different nonphysician professions are called upon to give medical opinions or at least opinions involving some medical expertise"]; *Brown v. Colm* (1974) 11 Cal.3d 639, 645.) The determinative factor is whether the expert "has sufficient skill or experience in the field so that his [or her] testimony would be likely to assist the jury in the search for the truth." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38; see *Howard v. Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1115 ["foundation required to establish the expert's qualifications is a showing that the expert has the requisite knowledge of, or was familiar with, or was involved in a sufficient number of transactions involving the subject matter of the opinion"].)

An expert may base an opinion on hearsay and other inadmissible matter. (*In re Fields* (1990) 51 Cal.3d 1063, 1070; *Howard Entertainment, Inc. v. Kudrow, supra*, 208 Cal.App.4th at p. 1115.) "But that matter relied upon must 'provide a reasonable basis for the particular opinion offered.' [Citation.] An expert opinion may not be based on conjectural or speculative matters. [Citation.] Whether the matter used by an expert 'is of a type on which an expert reasonably may rely . . . the factors of *necessity* and

relative *reliability* [should] be given strong consideration.'" (*Howard Entertainment, Inc.*, at p. 1115.) "Finally, although qualified experts may rely upon and testify to the sources on which they base their opinions, including hearsay of a type reasonably relied upon by professionals in their field [citation], they may not relate the out-of-court statement of another as independent proof of the facts asserted in the out-of-court statement [citation]." (*People v. Baker* (2012) 204 Cal.App.4th 1234, 1246.)

The trial court did not abuse its broad discretion in admitting Sovik's opinion regarding the value of Motion Graphix in the period 2004 through 2007 even though he was not himself a valuation expert and had relied in part on the analysis of his partner Horsfall. (See *People v. Farnam* (2002) 28 Cal.4th 107, 162 ["[e]rror regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness '"'*clearly lacks* qualification as an expert'"'"].) Sovik established he had ample experience with, and knowledge about, business valuation, testifying he had worked on approximately 20 transactions involving the purchase and sale of corporate assets during his almost 24-year career as a certified public accountant.[22] He described in general the methodology he selected, which applies a multiplier to historic earnings figures: "[A]n EBITDA calculation is an indicator of a business's ability to pay back the purchase price whether it's financed or paid in cash. And a purchaser will use it to figure out how long it will take them to recover their investment." Sovik then explained in detail how he applied the methodology here, including identifying the documents he reviewed (for example, tax returns, general ledgers and invoices). With respect to selecting the multiplier of four and discount rate of 25 percent, Sovik did so with Horsfall's guidance,

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[22] In challenging Sovik's qualifications Souther and Get Flipped emphasize his admission on cross-examination that, although he had been involved with 20 corporate asset purchase transactions, the valuations in those cases had been calculated by outside firms, not his own. Sovik explained, however, "I have seen many business valuations. I'm very closely tied to a business valuation firm that our firm uses for our clients, because Mr. Horsfall can't do a business valuation for our clients because of independence reasons, so we typically hire two or three different business valuation firms. We work very closely with them when they value our company for a sale or have them look at an appraisal that was done if our client is purchasing another company."

which included a review of a range of multipliers for companies like Motion Graphix. According to Sovik, although multipliers are typically higher than four, he conservatively used four because of the poor state of Motion Graphix's business records.

Sovik also explained business valuations by his firm were usually developed through a collaborative process: Sovik calculated EBITDA, something he was fully qualified to do as a certified public accountant familiar with earning statements and balance sheets; and Horsfall determined the appropriate multiple and discount rate to be applied to extrapolate the value based on EBITDA.

Sovik did testify there are a variety of recognized business valuation methodologies in addition to the EBITDA analysis he used, including discounted cash flow, multiples of gross revenue and balance sheet evaluations. He also acknowledged that several methodologies are generally utilized before determining the appropriate valuation for a particular company, while only the EBITDA valuation was calculated in this case. He explained that decision, "The other three would be very time consuming to calculate, we would need more data than we have. The data from the company is poor. So the easiest calculation we could do was EBITDA, just based on what we know."

If a valuation expert employs an unsanctioned methodology, the opinion may be excluded in the discretion of the trial court. (*City of Stockton v. Albert Brocchini Farms, Inc.* (2001) 92 Cal.App.4th 193, 198.) However, Souther and Get Flipped do not contend the EBITDA approach used by Sovik was improper; and his decision to rely on that single valuation methodology goes to the weight to be accorded his opinion, not its admissibility. (See *People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1084-1086.) As discussed, the EBITDA calculation itself was squarely within Sovik's expertise. Horsfall's input for Sovik's consideration was limited to the multiplier and discount rate, not complicated factors on this record; and Sovik's reliance on Horsfall's evaluation was reasonable. (See *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 294 [expert may base his or her opinion on hearsay not otherwise admissible if it may reasonably be relied

upon for that purpose]; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523-1524 [same].)

Souther and Get Flipped also argue the court abused its discretion in adopting Sovik's opinion the Estate owned 51 percent of Motion Graphix and was, therefore, entitled to recover 51 percent of the diverted net income and asset value he calculated. They stress that Sovik admitted certain tax documents reflected Souther owned a majority of Motion Graphix and he was unable to obtain clarification from Green. Thus, they contend, Sovik's opinion regarding the Estate's ownership interest was based on speculation and conjecture.

This argument is wholly without merit. The court's damage award was not based on Sovik's opinion regarding share ownership, but, as is clear from the statement of decision, its own thorough and detailed analysis of the transactions at issue. The damages award reflects the court's legal conclusion the share repurchase agreement was void, there was no buyout agreement and Souther was guilty of extreme misconduct.

4. *Souther and Get Flipped's Arguments Challenging the Sufficiency of the Evidence Have Been Forfeited*

Parties challenging a trial court decision for insufficient evidence "'are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) For this complicated case, extensively litigated with 17 days of testimony, more than 400 admitted exhibits, countless hearings and hundreds of pages of briefs, Souther and Get Flipped present a sparse three-page statement of facts, which virtually ignores the trial court's factual findings and analysis of the Estate's causes of action.

The argument portions of their brief do not remedy this deficiency. For example, in their opening brief their challenge to the breach of contract cause of action is a one-paragraph recitation of the elements and a two-sentence argument the Estate did not establish any written contract between Souther and Corrales, ignoring the trial court had found Souther had breached the Motion Graphix bylaws. Similarly, in connection with

their challenge to the fraud claim, they simply recite the elements of fraud and argue in one sentence, "In this case, there are only general references to fraud, but none satisfying the required elements." Then, in response to the Estate's contention they have forfeited their challenges to the sufficiency of the evidence, Souther and Get Flipped disingenuously contend the Estate "has not pointed to the record to demonstrate the presentation of substantial evidence upholding the trial court's findings." Of course, it is not the Estate's obligation to demonstrate the absence of error, it is Souther and Get Flipped's burden to establish a proper basis for reversal of the judgment. (See *Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881 ["'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.] Defendants' contention herein 'requires defendants to demonstrate that there is *no* substantial evidence to support the challenged findings.'"].)

Souther and Get Flipped's right to challenge the sufficiency of the evidence to support the court's conclusions has been forfeited. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 ["an attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent"]; *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97 ["[f]ailure to set forth the material evidence on an issue waives a claim of insufficiency of the evidence"].) They have failed to make even a minimum showing warranting consideration. (See *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 ["it is counsel's duty to point out portions of the record that support the position taken on appeal"; "[t]he appellate court is not required to search the record on its own seeking error"]; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546 [it is not the proper function of Court of Appeal to search the record on behalf of appellants or to serve as "backup appellate counsel"].)

5. *The Trial Court Did Not Err in Awarding Punitive Damages*

Souther and Get Flipped contend the Estate failed to establish they had acted with oppression, malice or fraud as required by Civil Code section 3294, subdivision (a), for an award of punitive damages. This argument suffers from the same fatal defect as their

challenge to the sufficiency of the evidence to support the court's liability findings, discussed in the prior section. Because their briefs fail to present all the material evidence on this issue, the argument has been forfeited.

Souther and Get Flipped additionally contend punitive damages were improperly awarded because there was no evidence at trial of their financial condition or worth. (See generally *Adams v. Murakami* (1991) 54 Cal.3d 105, 110 [evidence of the defendant's financial condition is a prerequisite to a punitive damages award; the burden of producing that evidence is properly placed on the plaintiff].) However, the Supreme Court has "decline[d] . . . to prescribe any rigid standard for measuring a defendant's ability to pay." (*Id.* at p. 116, fn. 7 ["[w]e cannot conclude on the record before us that any particular measure of ability to pay is superior to all others or that a single standard is appropriate in all cases"]; accord, *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 74 ["there is no legal requirement that punitive damages must be measured against a defendant's net worth"]; see *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 621, 624-625 [evidence that defendant was "a wealthy man, with prospects to gain more wealth in the future"].) "'[W]hat is required is evidence of the defendant's ability to pay the damage award.'" (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680.)

The record in this case is replete with information regarding Souther's financial condition, including tax returns, bank statements and bankruptcy schedules, as well as tax returns, income statements and balance sheets for both Motion Graphix and Get Flipped. This information was expressly considered by the trial court, as reflected on pages 45 through 47 of its statement of decision, in evaluating the appropriate level of punitive damages to award. Nothing more was required.

6. *The Estate Is Not Entitled to Both Damages To Compensate It for the Improper Transfer of Assets to Get Flipped and a Constructive or Resulting Trust on Those Same Assets*

A constructive trust is an equitable remedy to compel a person to return property that he or she does not rightfully possess. (See *Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 160; *Taylor v. Polackwich* (1983) 145 Cal.App.3d 1014, 1022

["constructive trust is a remedial device created primarily to prevent unjust enrichment"]; see also Civ. Code, §§ 2223, 2224.) Three conditions must be satisfied for imposition of a constructive trust: "(1) the existence of a *res* (property or some interest in property); (2) the *right* of a complaining party to that res; and (3) some *wrongful* acquisition or detention of the res by another party who is not entitled to it." (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990.) "Fraud or intentional misrepresentation is not required for a constructive trust to be imposed. [Citation.] A breach of contract or intentional interference with contract can make the offending party a constructive trustee." (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 878.)

Properly recognizing that a constructive trust may be used as a remedy for conversion or when property has been obtained by fraud or through a violation of fiduciary duty and that a plaintiff's entitlement to a constructive trust does not depend on the lack of an adequate legal remedy (*Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119, 134), the trial court imposed a constructive trust on all assets that Souther had fraudulently transferred from Motion Graphix to Get Flipped. The court also imposed a resulting trust, which is not intended to rectify fraud, but to enforce the intentions of the parties. (See *Fidelity National Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 848 ["'[t]he resulting trust carries out the inferred intent of the parties; the constructive trust defeats or prevents the wrongful act of one of them'"].)

Souther and Get Flipped contend the trial court abused its discretion in imposing a constructive trust in favor of the Estate on all assets wrongfully diverted from Motion Graphix because it essentially ignored Souther's ownership interest in the company. At most, they argue, the Estate was entitled to 51 percent of the transferred assets.

Souther and Get Flipped are correct, but there exists a more fundamental problem with the use of this equitable remedy in this case:[23] Imposition of a constructive trust is

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23 We invited the parties to submit supplemental briefs addressing this issue. In response the Estate has argued Souther and Get Flipped forfeited this issue by failing to raise it either in the trial court or in their briefs in this court. To be sure, a defendant's failure to timely assert a plaintiff has made a binding election to pursue one particular

an alternative to the recovery of a money judgment. (See *Alder v. Drudis* (1947) 30 Cal.2d 372, 383 ["[d]amages and restitution are alternative remedies and an election to pursue one is a bar to invoking the other"]; *Weightman v. Hadley* (1952) 113 Cal.App.2d 598, 607.) After obtaining an award of compensatory damages predicated in part on its loss of a 51 percent interest in the value of Motion Graphix, it would be an improper windfall (a double recovery) to the Estate to also receive the assets themselves. That is, the res was, in essence, sold to Souther and Get Flipped by virtue of the damage award. (See *Fowler v. Fowler* (1964) 227 Cal.App.2d 741, 745 [plaintiff "cannot have a judgment declaring the defendant to be a constructive trustee *and* a personal judgment for money invested in the subject property"]; cf. *DuBarry International, Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 564 [""[i]f a given state of facts entitles one to recover damages upon the theory of tort, and the same state of facts entitles him to recovery upon the theory of contract, it would seem plain that recovery could not be twice had simply because the facts would support recovery upon either theory""].)

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remedy may forfeit an objection to the subsequent pursuit of an alternative, inconsistent remedy. (See, e.g., *Roam v. Koop* (1974) 41 Cal.App.3d 1035, 1044.) But that is a far cry from insisting, as the Estate does, that absent an objection the trial court may award, and the plaintiff may enforce, a double recovery for the same substantive wrong. (See generally 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 180, p. 261 ["Modern writers have contended that the only sound explanation for a doctrine of election of 'remedies' is that, in some situations, there may be a required choice of two substantive rights. Thus, no person would be entitled to claim two inconsistent rights [citation], but a person would be free to select and change his or her alternative remedies or legal theories of recovery, by amending the complaint or by filing a new action, until such time as one of the inconsistent rights was finally vindicated by the satisfaction of a judgment or by the application of the doctrine of res judicata or estoppel."].) Because the fundamental purpose of a constructive trust is to prevent unjust enrichment, we simply cannot ignore this basic issue in assessing Souther and Get Flipped's somewhat different challenge to the propriety of the constructive trust imposed by the court—that the court failed to recognize Souther's ownership interest in Motion Graphix and thus in the underlying assets.

Because the judgment provides for damages for the value of the wrongfully transferred assets as well as imposition of a constructive trust on those same assets, the Estate must elect a remedy. "Broadly speaking, election of remedies is the act of choosing between two or more concurrent but inconsistent remedies based upon the same state of facts. Ordinarily a plaintiff need not elect, and cannot be compelled to elect, between inconsistent remedies during the course of trial prior to judgment." (*Roam v. Koop* (1974) 41 Cal.App.3d 1035, 1039.) "Indeed, one line of authority declares that an election should not be compelled *prior to satisfaction of judgment*, unless the plaintiff has gained some other benefit that would make it inequitable to permit continued pursuit of an otherwise available remedy." (*Denevi v. LGCC* (2004) 121 Cal.App.4th 1211, 1221.) Souther and Get Flipped contend the Estate has impliedly elected a constructive trust because it has proceeded with seizure of the property; the Estate contends Souther and Get Flipped have retained the assets. On this record, it is for the trial court to determine whether an election of remedies has been made.[24]

Although, as discussed, there are differences between the requirements for imposition of a constructive trust and a resulting trust, both are equitable remedies designed to return property to its rightful and intended owner. For the same reasons it was improper to award damages for the lost value of the Estate's interest and to impose a constructive trust as to those assets in favor of the Estate, it was also an abuse of discretion to impose a resulting trust.

7. *Souther Has Forfeited His Statutory Challenge of Bias*

A trial judge shall be disqualified when "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial" and may be disqualified if the judge demonstrates "[b]ias or prejudice toward a lawyer in the

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[24] If the trial court determines the Estate has elected a constructive trust, or, if the Estate has not yet made an election but subsequently chooses that remedy, then the trial court is instructed to allocate 51 percent of the assets to the Estate. There is simply no basis for the court's finding all the wrongfully acquired assets should be awarded to the Estate.

proceeding . . . ." (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii), (B).) To seek disqualification, "any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the grounds of disqualification of the judge. The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (Code Civ. Proc., § 170.3, subd. (c)(1).) "This promptness requirement is not to be taken lightly, especially when the party delays in challenging the judge until after judgment. Otherwise, a defendant can sit through a first trial hoping for an acquittal, secure in the knowledge that he can invalidate the trial later if it does not net a favorable result." (*In re Steven O.* (1991) 229 Cal.App.3d 46, 55.) "Thus, when a statement of objection is untimely filed, it is appropriate for the trial court to order it stricken." (*Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337.)

Citing these statutory provisions, Souther contends for the first time on appeal the trial court judge "continuously exhibited a prejudicial state of mind toward Souther and Souther's attorney such that a reasonable person would worry that Souther could not have and did not have a fair trial before her."[25] In support of his argument, Souther provides a series of citations to the record with the first alleged incident occurring when the court admonished him for making a gesture and sound just after the Estate began its opening statement. At this instant Souther may not have suspected the trial court was exhibiting prejudicial bias. Nevertheless, based upon his citations to the record, at least by mid-trial he had enough information to object to continued proceedings. Indeed, even after the last example of alleged bias occurred during closing arguments, Souther failed to seek disqualification during the nine months of extensive posttrial briefing and hearings.

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25 "'A fair trial in a fair tribunal is a basic requirement of due process.'" (*People v. Freeman* (2010) 47 Cal.4th 993, 1000.) Reversal of the judgment in a civil case based on judicial bias is required where there exists "'the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.'" (*Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 877 [129 S.Ct. 2252, 2257, 173 L.Ed. 1208].) Souther presents no constitutional claim, relying entirely on the disqualification provisions of Code of Civil Procedure section 170.1.

Thus, having waited until an adverse judgment was entered, Souther has forfeited the argument. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1207 [when party knew facts supporting disqualification four months before trial commenced, it was "too late to raise the issue for the first time on appeal"; """[i]t would seem . . . intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not"""].)

Even if not forfeited, Souther's argument is entirely without merit. "Potential bias and prejudice must clearly be established [citation] and statutes authorizing disqualification of a judge on grounds of bias must be applied with restraint. [Citation.] 'Bias or prejudice consists of a "mental attitude or disposition of the judge towards [or against] a party to the litigation . . . ."' [Citations.] Neither strained relations between a judge and an attorney for a party nor '[e]xpressions of opinion uttered by a judge, in what he conceived to be a discharge of his official duties, are . . . evidence of bias or prejudice.'" (*Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 724.) Thus, a party cannot premise a claim of bias on a judge's statements made in his or her official capacity (*Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1031); a judge's substantive opinion on the evidence (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312); or the judge's ruling—even erroneously—against him (*McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, 11).

The "singular example, of which there are many" recounted by Souther, presumably the most egregious, is an exchange during closing argument in which the trial court questioned Souther's counsel's contention Souther had "tendered" $5,000 to the Estate to pay for Motion Graphix's assets:

"The Court: And how did he do that? How did he tender that $5,000 to the Estate? Is it in his letter in the exhibits in the 300's?

"Mr. Negrete: No, I don't believe so Your Honor.

"The Court: Okay. Ended up in his pocket, you that that's okay too.

"Mr. Negrete: When you say 'his,' I believe it was [Get Flipped's], not Souther's.

"The Court: His company. You think that's okay?"

Read in context, the portion excerpted by Souther does not demonstrate bias. Clearly, the court, having observed Souther testify during two days of deposition played to the court and several days of examination during trial, was commenting on the evidence and Souther's credibility. This is not grounds for disqualification. (See *Fishbaugh v. Fishbaugh* (1940) 15 Cal.2d 445, 456 [judge's statements at conclusion of trial that appellant "misrepresented his financial condition" to his former wife and "took the law into his own hands" did not demonstrate bias; "Judge Knight was acting as the finder of the facts, and if the evidence introduced before him was in conflict, he had the right and it was his duty to believe the testimony of the party who it appeared to him was telling the truth"].)

DISPOSITION

The judgment is reversed to the extent it both awards damages and imposes a constructive and resulting trust for the improper transfer of assets to Get Flipped. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings not inconsistent with this opinion. The Estate is to recover its costs on appeal.[26]

PERLUSS, P. J.

We concur:

ZELON, J. JACKSON, J.

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26 The Estate's motion for sanctions in the amount of $16,008.86 brought on the ground Souther and Get Flipped failed to provide a complete record on appeal as required by California Rules of Court, rule 8.124(b)(1)(b), is denied. We have awarded costs on appeal to the Estate notwithstanding Souther and Get Flipped's limited success on the constructive/resulting trust issue. Further relief in the form of monetary sanctions to reimburse the Estate for the costs of preparing an adequate record is not warranted.