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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| LE KUN WU, Individually and as Trustee, etc., et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>MAGNUS SUNHILL GROUP, LLC, et al.,<br><br>Defendants and Appellants. | B252430<br><br>(Los Angeles County Super. Ct. No. GC045340) |

APPEAL from a judgment of the Superior Court of Los Angeles County, David S. Milton, Judge. Modified and, as modified, affirmed.

Lipeles Law Group, Kevin A. Lipeles, Thomas H. Schelly and Stephen L. Bucklin for Defendants and Appellants David Wan and Si Lau.

Carlton Fields Jorden Burt; Law Office of Thomas H. Godwin; THG Law Corporation and Thomas H. Godwin for Plaintiffs and Respondents Le Kun Wu and Katherine Wu.

Plaintiffs and appellants Le Kun Wu and Katherine Wu sued, among others, defendants and appellants David Wan and Si Lau to recover money plaintiffs loaned to develop a project in Monterey Park. A jury rendered a special verdict in plaintiffs' favor on contract and tort causes of action. Wan and Lau appeal, raising numerous issues concerning sufficiency of the evidence, instructional error, and excessiveness of the damages award. Because there was an error concerning the punitive damages awarded, we modify the judgment to correct it. We also clarify the amount of damages the jury awarded. We otherwise affirm the judgment as modified.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Factual background

A. *Wu loans money*.

In approximately 2002, David Tsai, an architect and construction contractor, wanted to build the Monterey Park Towne Center, a proposed mixed use development consisting of retail space and condominiums in Monterey Park. The project involved a high degree of risk, requiring, for example, acquisition of six parcels of property and a significant construction loan. And although Tsai had an exclusive negotiation agreement with Monterey Park, he did not have an exclusive right to develop the project. Land use entitlements and an owner participation agreement from the redevelopment agency were also needed.

To develop the project, Tsai formed Magnus Sunhill Group (Magnus), a limited liability company. David Wan, a real estate broker, invested in the project through his company, Mountainfield Properties. Si Lau, an accountant, was also a manager of Mountainfield, and he too invested in the project.

In March 2004, an existing investor introduced Le Kun Wu and her husband, Dr. Wei Jung Wu, to Tsai, Lau and Wan. At that time, Dr. Wu was suffering from cancer, which over the years required multiple surgeries and debilitated him.[1] The Wus were told their money would be used to satisfy an equity requirement to get a construction loan, and they would get their money back in two to three years, when the project would be completed, plus 10 percent interest. A 50 percent return could be expected on their membership interest. Le Kun Wu, however, was not told that Tsai, Wan and Lau would be compensated for architectural, brokerage and other work. Rather, she was told that managers would not be paid for services until the project was completed. Nor was she informed there was a risk Magnus would have to acquire the needed sites by eminent domain, in which case the project would be substantially delayed and expenses increased.

Based on the representations, the Wus, on March 23, 2004, signed the Monterey Park Towne Centre Investment Agreement (the Investment Agreement) with "Magnus/Sunhill Group,"[2] under which they agreed to "invest" $600,000 "in return for a pro-rata share of" of the Investors' share of income and profits.[3] According to the Investment Agreement, Magnus expected the

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[1] Dr. Wu died in 2011.

[2] It is unclear who entered into the Investor Agreement. Wei Jung Wu/Le Kun Wu signed the Investment Agreement, and "Wei Jung Wu & Le Kun Wu as cotrustees of the Wu Living Trust dated 10-06-97" was listed next to "Company."

[3] Although the Investment Agreement stated that Wu invested $500,000 under it, Wu invested $600,000.

project's financial requirements to be "met with a construction loan from a lending institution and paid-in capital from the Investor" in the amount of $6.5 million, which represented the equity required by the lending institution. In return for "investment of the paid-in capital" of $6.5 million, the "Investor will hold" a 70 percent ownership in the project and "will be repaid the total investment" plus 10 percent annual interest on "a preferred return basis, until the investment has been repaid."

Le Kun Wu's understanding was that her $600,000 was a loan, payable before April 2007 plus a percentage profit and accrued interest. According to Tsai, this money was an investment, although he conceded it was treated as a loan for "tax purposes." According to Eric Sussman, plaintiffs' expert witness, the money the Wus put into Magnus via the Investment Agreement was "a loan with an equity component" known as a "mezzanine loan" or a "mezzanine debt."

After the Wus signed the Investment Agreement in 2004, Magnus's Operating Agreement was executed in 2005, and the Wu Living Trust became a member of Magnus.[4] Tsai, Wan and Lau were three of Magnus's initial managers. Wan, but not Lau, was also a member.

After the Wus paid the last installment due under the Investment Agreement, Magnus announced that members needed to contribute more money so that the company could get a

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[4] Although Tsai took steps to form Magnus on March 22, 2004 by filing articles of incorporation, the Operating Agreement was not executed until March 2005. Over Magnus's counsel's objection, the trial court instructed the jury that Magnus was formed on March 22, 2004, when the articles of incorporation were filed.

bigger construction loan, which, as of the time of trial, had still not been obtained. Le Kun Wu was not told, however, that Magnus tried but failed to get the needed sites by private agreement; about problems that might impact its ability to get a construction loan; and that it had paid commissions or finders' fees in connection with acquiring the sites. Unaware of these problems, Le Kun Wu decided to loan $600,000 more to Magnus in November 2006, funding it with money from the "Wu Family Fund."

To evidence the loan, Magnus executed three promissory notes, each in the amount of $200,000, for a total of $600,000. Wan and Lau, as Magnus's managers, signed the notes. One note was payable to the Wus as cotrustees of the Wu Trust. The second note was payable to Katherine, the Wus' daughter.[5] The third note was payable to Le Kun Wu. Interest accrued on the notes at 2 percent "per month simple interest until the Principal Amount and interest have been repaid."

Although the notes were due in November 2007, Wan admitted that at the time he executed the promissory notes he had no idea if Magnus would be able to repay the loan in one year.[6] But he did know that Magnus still needed to acquire five of the six parcels of land and that Magnus could not get a construction loan until it owned all parcels.

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[5] Le Kun Wu explained that she put one of the notes in Katherine's name because the money came from the Trust, which they'd established for college.

[6] Lau classified the notes on a balance sheet as " 'pay in capital' " so that a bank from which Magnus was seeking a loan wouldn't know it was a loan.

The notes were not paid on time in 2007. Upset, Le Kun Wu spoke to Nelson Huang, who had contributed $1.4 million to Magnus and had become a new member and manager. Huang too was upset because he believed that his investment was diverted to Lau, Wan and Tsai, with Lau getting $64,000 and Wan's company getting $252,222. Huang, however, persuaded Wu not to sue Magnus. Instead, Magnus agreed, on November 4, 2008, to make a $100,000 payment immediately on Katherine's note and to pay the remainder of the notes by March 31, 2009. The $100,000, however, was not immediately forthcoming, which "humiliated" Le Kun Wu, although it was eventually paid.

In November 2009, Le Kun Wu and Magnus entered into an agreement under which Magnus agreed to commence an action, in which Le Kun Wu would take part, against wrongdoers in or associated with Magnus. In turn, Le Kun Wu agreed not to sue for collection on the promissory notes. Teng Huang, who became an investor in 2009, gave Wu $100,000 in February 2009. At trial, Wu claimed the money was to cover legal expenses for that lawsuit and not a payment on her notes, although this was disputed.

B. *Evidence of self-dealing and tortious conduct*

Evidence was introduced that Wan and Lau and others personally profited from the project. Lau, for example, was paid $5,000 per month for accounting services beginning in 2005, although the Operating Agreement provided that compensation for managers "shall be approved by a supermajority vote in interest of LLC members . . . ." Richard Chen was also paid $1,000 per month for bookkeeping.

Appellants also profited from acquisition of the sites needed to develop the project. As of 2004, Magnus did not own or control

these sites. Five sites were privately owned, and the City owned the sixth (a parking lot). Magnus eventually acquired them as follows:

**100 East Garvey.** Magnus acquired it in August 2006. A $57,000 finder's fee was paid to Wan, and a $142,500 finder's fee was paid to a Simon Cheng.

**114 East Garvey**. Magnus acquired it in September 2007. Magnus paid a $118,140 commission to Mandarin Realty, which was co-owned by Wan.

**120 South Garfield**. Third parties owned 120 South Garfield. They agreed to exchange it for 318 North Garfield. Wan and Lau (acting through their partnership 330 Partnership) bought 318 North Garfield and exchanged it for 120 South Garfield, at a loss of $460,000 to Magnus. In connection with the sale of 318 North Garfield, Wan received a $138,000 commission; Simon Cheng received a $103,000 commission and a $120,000 finder's fee; Peter Lam of Mandarin Realty received $27,000; and Angela Tam received $8,000. Dr. Wei Wang, a member of Magnus, believed that Lau and Wan "jacked up" the price to get a bigger commission.

**150 South Garfield:** Magnus acquired 150 South Garfield in late 2007 or early 2008. Mandarin Realty got a $235,800 commission, and Lau got a $15,000 guarantor's fee.

**City parking lot:** Magnus acquired it in 2012.

C. *Plaintiffs' damages*

Jon Riddle, an economist, testified as an expert for plaintiffs. As of March 25, 2013, the total amount of damages due under the Investment Agreement was $250,000 (50 percent of the loan) plus $469,682.82 in interest plus $670,951.50 return of principal, for a total of $1,390,634.32 or, as of the date he was

testifying, $1,396,880. On the November 2006 promissory notes, as of March 25, 2013, $1,312,640 was due. Total damages for both the Investment Agreement and the promissory notes were $2,703,274.32.[7]

## II. Procedural background

### A. *The lawsuits*

In connection with these events, three lawsuits were filed and, in 2012, they were consolidated.[8] When the matter went to trial in 2013, a fourth amended complaint was filed according to proof.[9] That operative pleading named Le Kun Wu, individually

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[7] Riddle offered alternative damage figures. Assuming that $200,000 was paid on the 2006 promissory notes, total damages would be $2,603,274.32. At a lower interest rate of 10 percent interest on the promissory notes, total damages would be $2,182,880.

[8] The first, filed in June 2010, was on behalf of Gary Wang, Magnus, and Le Kun Wu (individually and as trustee of the Wu Trust and derivatively on behalf of Magnus) (case No. GC045340). The second, filed in November 2010 by the Wus, individually and as trustees of the Wu Trust, and Katherine was against WWDT Enterprises, Inc. and Wei Wang (case No. BC450144). The third, filed in August 2011 by Le Kun Wu, individually and as trustee, and Katherine was against Magnus (case No. BC466955). Because appellants make no reasoned argument about these prior pleadings and any relevancy they might have to the filing of the fourth amended complaint at trial, we do not address them.

[9] The fourth amended complaint alleged causes of action for breach of fiduciary duty; fraud by intentional misrepresentation, concealment and false promises; negligent misrepresentation; constructive fraud; and breach of contract, i.e., the Operating

and as trustee of the Wu Trust, and Katherine as plaintiffs. In addition to Magnus, plaintiffs sued the "management defendants" (Tsai, Tsai & Associates, Lau and Wan).[10] In that lengthy operative pleading, plaintiffs alleged they loaned over $1.2 million to Magnus based on Tsai, Lau's and Wan's misrepresentations about the project. The money, instead of funding the project, benefitted the management defendants personally.

B. *Trial and special verdict*

Trial by a jury began on April 9, 2013 against Magnus, Tsai, Wan and Lau. The cause was submitted to the jury on causes of action for breach of contract; breach of fiduciary duty; fraud by intentional misrepresentation, concealment and/or false promise; negligent misrepresentation; and constructive fraud. On May 8, 2013, the jury rendered its special verdict, finding for plaintiffs on all causes of action. Specifically, the jury found for plaintiffs and against all defendants on the breach of contract claim in the amount of $478,000 for Le Kun Wu; $478,000 for the "Wu Trust"; and $144,000 for Katherine. On each of the tort causes of action, the jury awarded $1.1 million in economic damages and $75,000 in noneconomic damages. The jury also found that Wan and Lau—but not Magnus and Tsai—were guilty of oppression, fraud or malice.

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Agreement and the promissory notes. A cause of action under the unfair competition law was ultimately dismissed.

[10] Although the pleading named "enterprise defendants" (Mountainfield, Mandarin Realty and Mildred Properties), they were not parties at trial.

C. *The punitive damages phase*

The matter then proceeded to the punitive damages trial against Wan and Lau. Plaintiffs' case-in-chief rested on exhibit 519, which was an e-mail from Lau attaching financial statements or balance sheets for, among others, Wan, Lau, Kitty Lau, and Mountainfield.[11] According to that exhibit, Lau's net worth was $11,400,032 and Wan's was $23,760,000.

In their defense, Lau and Wan testified that their financial situations dramatically changed since exhibit 519 was prepared. Lau inflated incomes reflected on exhibit 519 to show the bank "how strong we are as a borrower, as a group." He therefore included his percentage interest in partnerships or investments for which there was no "Wall Street value." His true net worth was much less than he'd represented to the banks also because his situation had changed. He, for example, never bought real estate previously listed as an asset; he had listed his wife's separate property and property his brother owned to bolster the showing to the bank; his loans increased due to refinancing; he makes $6,000 per month from his job with the state but his CPA practice brings in only about $2,000 per month; and his rental income from a warehouse decreased to $7,250 from $10,000, although other rental incomes went up.

Lau thus had $4.2 million in assets but $4.6 million in liabilities. He had $25,000 cash in a joint account with his wife; $17,000 in an IRA; $100,000 in "private trader stock"; a life insurance policy with a cash value of $52,700; and a $380,000 promissory note from Magnus. He has a second trust deed from Magnus of which his pro rata share is $110,000. His two cars are

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11 We have not found exhibit 519 in the record.

an Acura worth $18,000, but which has a note of $14,500, and a Dodge valued at $8,000.

Lau also has the following interests in real property: a family home worth $950,000 but carrying a $918,000 mortgage; 50 percent ownership of a warehouse valued at $1.1 million but which has a $1,117,000 mortgage; a duplex valued at $470,000 with a $424,000 mortgage; a second duplex valued at $430,000 with a $284,000 mortgage; 50 percent ownership of a triplex valued at $260,000 with a $250,000 mortgage;[12] and 50 percent ownership of another property valued at $270,000.

Lau has outstanding loans in the amount of $1,370,000. He owes "possibly" $3,000 on his credit cards and he has an outstanding accounts payable of $500,000 for attorney fees. He guaranteed an $8 million loan for Magnus.

Wan also testified. For trial, Wan prepared a personal financial statement showing a negative net worth of $8 million. He has an outstanding $11,000 car loan, and he owns a home which he bought for $1.4 million and which has a $500,000 mortgage. He previously valued the house at $3 million. A partnership in which Wan has a 1 percent share owns real estate. He owes $260,000 in attorney fees, and he guaranteed an $8 million loan for Magnus. Mandarin Realty hasn't paid him in three or four years.

On May 9, 2013, the jury awarded plaintiffs punitive damages of $350,000 against Lau and $650,000 against Wan.

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[12] Although Lau said he only owned 50 percent of the property, he claimed that 100 percent of the mortgage was his responsibility "because I'm the one that borrowed it."

D. *The judgment*

On September 12, 2013, the trial court entered judgment as follows: $1.1 million on the breach of contract cause of action; $1,175,000 on the breach of fiduciary duty cause of action; $1,175,000 on the fraud cause of action; $1,175,000 on the negligent misrepresentation cause of action;[13] and $1,175,000 on the constructive fraud cause of action. The judgment also entered the $650,000 punitive damage award against Wan and an *incorrect* punitive damage award of $450,000 against Lau. Plaintiffs filed an abstract of judgment in the amount of $2,175,000. The court clerk rejected it because the judgment "amount does not match our records."

**PRINCIPLES OF APPELLATE REVIEW**

Appellants Wan and Lau raise numerous contentions about, for example, plaintiffs' standing to sue, whether they can be liable for breach of contract, sufficiency of the evidence, instructional error, and the propriety of the damage and punitive damage awards. Our ability to engage in a meaningful review of those contentions, however, is hampered by appellants' failure to comply with some basic principles of appellate procedure. One principle is that it's appellants' burden to provide an adequate record for review. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003 & fn. 2.) Without a proper record, the evidence is conclusively presumed to support the judgment. (*Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1102.) Even with an

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[13] The judgment contains a typographical error because it also states that the judgment on the negligent misrepresentation cause of action was $1.1 million.

adequate record, appellants must support contentions with reasoned argument and citations to authority and to the record; otherwise, contentions are forfeited. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*); *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 [points perfunctorily raised on appeal, without adequate analysis and authority, may be treated as abandoned]; Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).) When a party fails to make a reasoned argument, stating instead a bare conclusion without supporting that conclusion in the context of the record and authority, we do not make arguments for parties.

As we explain, application of these standards of review compels us, notwithstanding some troubling aspects of this case, to reject many of appellants' contentions.

## DISCUSSION

### I. Plaintiffs had standing.

Wan and Lau contend that plaintiffs lacked standing because, first, the action is derivative in nature and, second, the Wu Trust could not sue. We reject both contentions.

First, an action is derivative 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.' [Citations.]" (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106-107.) " 'The stockholder's individual suit, on the other hand, is a suit to enforce a right against the corporation which the stockholder possesses as an individual.' " (*Id.* at p. 107.) Plaintiffs here were not suing solely for a diminution in value of

any ownership interest in Magnus. (See, e.g., *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964-965 [essence of plaintiffs' claim was company assets were fraudulently transferred without compensation paid to company; injury was to company itself].) Rather, the gravamen of plaintiffs' lawsuit—and certainly their position at trial—was they were defrauded into loaning money to support the project. (See, e.g., *Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211 [plaintiff could make an individual claim he was defrauded into transferring purchase rights to property to company].) Plaintiffs therefore sued under, for example, two agreements specific to them: the 2004 Investment Agreement and the 2006 promissory notes.[14]

Wan's and Lau's second contention is the Wu Trust had no standing to sue. That may be true. (See generally *Presta v. Tepper* (2009) 179 Cal.App.4th 909, 914.) But it is of no moment because the action was brought by Le Kun Wu, individually and *as trustee* of the Trust. The trustee of a trust has standing to sue because the trustee holds title to the assets contained in the trust on behalf of the beneficiaries. (*Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787; see also *Estate of Bowles* (2008) 169 Cal.App.4th 684, 691.)

## II. Jury instructions

Wan and Lau contend that jury instructions improperly used "or" instead of "and," which compelled the jury to find *all*

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[14] Appellants' argument under the heading, "Wu did not suffer any individual damage," appears to be no different substantively than their argument that plaintiffs' action was derivative in nature rather than direct. We therefore do not separately address that argument.

defendants liable even if it believed only one was liable. The record is inadequate for us to address any instructional error and, to the extent we can address any specific challenge, we reject it on the merits.

First, it is appellants' burden to provide an adequate record to establish error. (*Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362.) It is not clear—either from the reporter's transcript or from the appellants' appendix—what instructions were given to the jury. On Thursday, May 2, 2013, instructions were read to the jury but not reported.[15] Two other instructions, apparently regarding conspiracy, were read to the jury on Friday, May 3, but the reporter's transcript from that day is not part of the record on appeal. The reporter's transcript therefore does not contain the instructions as read to the jury.

This would not necessarily hinder our review if the appellants' appendix contained the instructions given to the jury. But it doesn't—or at least it is unclear if it does. The appellants' appendix contains two file-stamped documents dated May 8—five days *after* instructions were read to the jury.[16] The first document is the top tear off portion from form jury instructions. Although bearing Judge Milton's stamp, no box is checked to indicate whether each instruction was given, refused or given as modified. The second document contains, among other things, the bottom portion of form instructions, which would appear to be

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[15] The record on appeal also does not contain the May 2 minute order.

[16] The better practice is for the court clerk to file-stamp the written copy of instructions the *same* day they are read to the jury.

what was actually read to the jury. But the matter is further muddied by the way in which the appellants' appendix was put together. According to the index, the jury instructions are at page 2041 of volume 8 to page 2314 of volume 9. Interspersed between those pages are documents that are clearly not jury instructions; for example, Magnus's statement to be read to the jury regarding conspiracy instructions, a copy of Corporations Code section 16404; and proposed special jury instructions, some bearing handwritten changes or redactions. Because of this disarray, we cannot say with certainty what instructions were given to the jury. The record is therefore inadequate to evaluate appellants' contentions regarding the instructions. (See generally *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 [appellate court cannot evaluate contentions absent transcript or settled statement; party challenging judgment has burden to show reversible error]; *Cosenza v. Kramer*, *supra*, 152 Cal.App.3d 1100.)

Notwithstanding the inadequacy of the record, we find unpersuasive appellants' argument that instructions, by using "or" rather than "and," permitted the jury to improperly " 'shift around' " which defendant was liable for any breach, "irrespective of which defendant was actually liable" and making the defendants "jointly liable without any legal basis for doing so." This argument is backwards. Had instructions used the conjunctive "and" instead of the disjunctive "or," then appellants' argument *might* make sense. But the instructions used the disjunctive "or," which suggests defendant's liability was not collective.

More to the point, the special verdict asked the jury to answer "yes" or "no" as to each defendant (Magnus, Tsai, Wan

and Lau) separately. There is, therefore, no reasonable probability the jury believed that if it found one defendant liable it had to find all defendants liable.

Wan and Lau also cite numerous instructions (at pages 52 to 58 of their opening brief) regarding, for example, damages, that they claim were prejudicial. Because they fail to provide any reasoned argument why these instructions were prejudicial, the issue is forfeited for this reason as well. (See generally *Landry v. Berryessa Union School Dist.*, *supra*, 39 Cal.App.4th at pp. 699-700 [points perfunctorily raised on appeal, without adequate analysis and authority, may be treated as abandoned]; *Badie*, *supra*, 67 Cal.App.4th at pp. 784-785; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

**III. Sufficiency of the evidence**

To the extent appellants intended to raise sufficiency of the evidence to support the judgment generally and the finding of malice, oppression and fraud specifically, the contention has been forfeited. The substantial evidence standard of review requires us to examine the evidence as a whole, including evidence which does not support the appellants' version of events: " ' "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." ' [Citations.] ' "[W]e have no power to judge of [*sic*] the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." ' [Citations.] Our role is limited to determining whether the evidence before the trier of fact

supports its findings." (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) A party challenging the sufficiency of evidence to support a finding must summarize the evidence on that point, both favorable and unfavorable, and show how and why it is insufficient. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.)

Appellants fail to comply with this standard of review. The failure is particularly significant in a case such as this, involving a lawsuit concerning transactions going back to 2004, a complex litigation history, approximately 21 days of trial, 11 volumes of reporter's transcript, 10 volumes of appellants' appendix, and 28 volumes of respondents' appendix. (See, e.g., *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290 [burden to provide fair summary of evidence "grows with the complexity of the record"].) In making their argument there is insufficient evidence to support the jury's judgment on, for example, the fraud causes of action, appellants cursorily state in their opening brief, "There were no intentional misrepresentations, concealment and/or false promises by Mr. Wan or Mr. Lau, as set forth above. No representations were made to Katherine Wu at all." Similarly, in making their argument there is insufficient evidence to support the malice, oppression or fraud finding, they state, "This is a dispute regarding an ongoing Project between investors. Mr. Wan and Mr. Lau loaned money to Magnus and guaranteed Magnus' loans. There was no evidence of malice, oppression or fraud." These brief, conclusory statements are unadorned by either citations to record and law or to a discussion of the evidence, such as Le Kun Wu's testimony that appellants failed to disclose material facts about the project and the profit

Wan and Lau made from commissions and/or finder's fees. Thus, where, as here, appellants fail to adhere to appellate practice, we consider the issue forfeited.

## IV. The special verdict and damages

Wan and Lau next argue that the damages awarded to plaintiffs on all causes of action were excessive or duplicative. Notwithstanding our ultimate rejection of this argument, the special verdict and judgment thereon are unusual. Specifically, on the breach of contract cause of action, the jury awarded economic damages totaling $1.1 million. On each of the four tort causes of action, the jury awarded damages of $1,175,000 ($1.1 million economic and $75,000 noneconomic). The trial court then entered a judgment awarding damages on *each and every* cause of action.[17]

Considering the judgment in isolation, it therefore might be open to varying interpretations. Under one interpretation, the judgment is for $6.8 million ($1.1 million for breach of contract plus $1,175,000 times four for each of the four tort causes of action plus $1 million in punitive damages). Under a second interpretation, the judgment is for $2,175,000 ($1.1 million in economic damages plus $75,000 in noneconomic damages plus $1 million in punitive damages).

But we need not consider the judgment in isolation, because plaintiffs conceded that the judgment is for $2,175,000; that is, one award of $1.1 million in economic damages, plus one

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[17] Plaintiffs submitted a proposed judgment, but other than an objection to the punitive damage amount awarded against Lau, it does not appear that Wan and Lau or any other defendant objected to the proposed judgment on the ground it awarded duplicative damages.

award of $75,000 in noneconomic damages, plus $1 million in punitive damages. Plaintiffs made this concession when they submitted an abstract of judgment in the amount of $2,175,000. They made this concession in their respondent's brief, which states multiple times that the jury awarded only $1.1 million in total economic damages. Plaintiffs' counsel, in his closing rebuttal statement at trial, conceded his clients couldn't recover duplicative damages.[18] Finally, plaintiffs' appellate counsel

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[18] He said: "For every claim in there you're going to have a question about damages at the very end. And, essentially, in order to answer the damages question, you have to start with economic damages in the case which we've been over. [¶] And then for three of the claims you would add non-economic damages and those – it's available on three claims; that's breach of fiduciary duty, fraud and constructive fraud. And so all you would do is take the economic damages and include whatever is awarded for the non-economic. You will get a total number and that will be your total damages answer for that particular claim. [¶] And you're going to be asked to answer for every claim how much damages did Mrs. Wu suffer. And, essentially, what that means is Mrs. Wu is entitled to a determination for each claim, what's the total damages, and it should be essentially the same amount for every answer, because Mrs. Wu, as you'll note from the instruction, she doesn't get duplicative damages or triplicate damages. [¶] And so just because you're writing in a particular number for each answer, it doesn't mean they're all going to get added up at the end. It's just going to be one amount, which the court will determine to make sure it's not duplicative or triplicate or what have you. [¶] So for breach of contract the answer ought to be 2 million – for example, for negligent misrepresentation, there's non-economic damages there. So economics would be 2,723,146.80. [¶] For the verdict form on breach of contract, you're asked to do an allocation, which is how much is owed to each party. Mrs. Wu and the Trust really are one and the same,

conceded at oral argument before this court that the jury awarded $2,175,000 in total damages.

This concession is well-taken. The $1.1 million in economic damages is well within the range of economic damages plaintiffs' expert testified they suffered. He said damages for the promissory notes was approximately $1.3 million and approximately $1.3 million for the Investment Agreement, for a total of approximately $2.7 million. There was no evidence the Wus suffered more than that in economic damages. Also, plaintiffs' counsel told the jury his clients were entitled only to "one amount" of economic damages and that they would not recover duplicative damages.

The Wus' counsel's response to this evidence and the concessions is that appellants' failure to object to the special verdict and judgment entitles plaintiffs to take advantage of any ambiguity therein by claiming a judgment significantly greater than the one they admit the jury awarded. We reject this position. It is, first, wholly unclear under what scenario plaintiffs would be entitled to recover $1,175,000 on *each* of the four tort causes of action. (See *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 702-703; *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158-1159; *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 360-361; *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552.) Second, although it would have behooved the parties either to clarify the special verdict before the jury was discharged or to clarify the

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because trustee is considered the Trust. And so the answer to that question is going to be the same amount for each of them. And, again, they're not added together at the end. It's just one amount."

proposed judgment before it was entered, a judgment of $2,175,00 is, as we have said, easily reconciled with the evidence and with plaintiffs' theory of the case and statements to the jury. (See generally *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092 [special verdict is inconsistent if there is no possibility of reconciling its findings].) We therefore conclude that the total damages awarded to plaintiffs is $2,175,000.

Although this conclusion dispenses with some of appellants' arguments about alleged ambiguities in the special verdict, they make additional arguments. First, they argue that the breach of contract damages are duplicative. On the breach of contract cause of action, the jury awarded $478,000 to Le Kun Wu, $478,000 to the Wu Trust, and $144,000 to Katherine, for a total of $1.1 million. Appellants suggest that the $478,000 to the Wu Trust was improper and excessive because it was duplicative of the $478,000 to Le Kun Wu, and therefore the maximum contract damages should have been $622,000 (one award of $478,000 plus the $144,000 to Katherine). Appellants' argument appears to rest on a presumption that the contract damages arise solely from the promissory notes. Assuming, for the moment, the correctness of that presumption,[19] we see nothing duplicative in the damages award. Although one promissory note was payable to Le Kun Wu individually, a second was payable to the Wus as cotrustees of the Wu Trust. Le Kun Wu, individually, therefore did not receive a duplicative recovery.

Appellants, however, also attack the contract damages based on a different presumption, i.e., the contract breached was

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[19] The presumption is most certainly correct at least as to Katherine.

the Operating Agreement, which, they argue, they were not parties to. Appellants' varying presumptions about the contract or contracts at issue perhaps arises from the special verdict's general reference to plaintiffs' "claim for breach of *contract*" and failure to otherwise specify which contract or contracts were at issue. (Italics added.) Although Wan and Lau suggest that the only agreement at issue was the Operating Agreement, that is not so. Plaintiffs sought to recover damages under the Investment Agreement and the promissory notes. The jury therefore could have awarded contract damages under any of those agreements. But appellants make no argument about their liability under the Investment Agreement and the promissory notes. (See generally Corp. Code, § 17703.04; *People v. Pacific Landmark, LLC* (2005) 129 Cal.App.4th 1203, 1212-1213 ["whereas managers of limited liability companies may not be held liable for the wrongful conduct of the companies *merely* because of the managers' status, they may nonetheless be held accountable under Corporations Code [former] section 17158, subdivision (a) for their personal participation in tortious or criminal conduct, even when performing their duties as manager"].) Because appellants do not address those agreements, any issue concerning their liability under them is forfeited. (See generally *Badie*, *supra*, 67 Cal.App.4th at pp. 784-785; *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564.)

Not only are we unable to ascertain with certainty under which agreement or agreements the jury awarded damages, we also cannot tell with certainty that the contract damages awarded arose *solely* from the promissory notes. The special verdict did not ask the jury to allocate damages between

contracts.[20] Although the $144,000 to Katherine must have been based on her note because that note was her sole connection to this case,[21] the matter is less clear as to the $478,000 awarded each to the Wu Trust and to Le Kun Wu. Although it seems likely that the $478,000 figure were based on the promissory notes, it is unclear how the jury reached that amount.

Nor does the record on appeal show that appellants asked for a special verdict containing such specifications. Instead, according to the May 3, 2013 minute order, the parties and trial court conferred regarding the verdict form, and defense counsel was to make changes to the form "as discussed." The record does not contain the May 3 reporter's transcript,[22] and we therefore do not know the substance of those discussions and what, if any, objections appellants raised to the form. The next court day, May 6, the court looked at defendant's proposed special verdict and said it looked "appropriate," except that economic and noneconomic losses should be "broken down." A final form was

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[20] This failure of the verdict to differentiate between the contracts was a deliberate strategic decision on at least the part of Magnus. During discussions about jury instructions, plaintiffs' counsel suggested that the instructions specify which contracts were at issue but Magnus's counsel said that the instructions should just refer to "contracts" and "let [plaintiffs' counsel] argue what those are."

[21] According to a damages chart prepared by plaintiff's expert economist, $144,000 in principal and interest was due on Katherine's note as of November 2009.

[22] The May 3 reporter's transcript would have included plaintiffs' initial closing statement and a portion of Magnus's closing statement.

submitted to the court, who asked whether the revised verdict form could be finalized. Plaintiffs' counsel said it looked like all changes had been made. Appellants' counsel didn't object.

Thus, on this record, there is no showing appellants asked for damages to be allocated between specified contracts. Any issue regarding allocation of breach of contract damages therefore was not preserved for appeal. (See *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158 ["To preserve for appeal a challenge to separate components of a plaintiff's damage award, a defendant must request a special verdict form that segregates the elements of damages. . . . The reason for this rule is simple. Without a special verdict separating the various damage components, 'we have no way of determining what portion—if any' of an award was attributable to a particular category of damages challenged on appeal."]; *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053.)

To the extent appellants intended to raise any argument that the contract damages were otherwise unsupported by the evidence, they do not explain why. They do not, for example, mention Riddle's (plaintiffs' expert) testimony that plaintiffs were owed over $1.3 million under the Investment Agreement and over $1.3 million under the promissory notes, for damages totaling $2,703,274.32. The total contract damages awarded of $1.1 million was well within those figures. The failure to address this evidence constitutes a forfeiture of the issue. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.)

For a similar reason, we reject appellants' related argument about Katherine. Wan and Lau argue they did not owe a fiduciary or other tort duty to Katherine, to whom no representations were made and who did not testify at trial but

was a party because one promissory note was in her name. Although the point may be well-taken, appellants have failed to show it is a ground for reversal. The special verdict form as to the tort causes of action referred generally to "plaintiffs" and did not, unlike the breach of contract cause of action, ask the jury to allocate damages between plaintiffs. In the absence of an allocation specifically designating that Katherine was awarded damages on the tort causes of action, no prejudicial error has been shown. (See generally *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1038; *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 [burden is on the appellant to show that claimed error is prejudicial; i.e., that it resulted in a miscarriage of justice]; Cal. Const., art. VI, § 13.)

Also, if any failure to allocate damages between the plaintiffs can be considered a "defect" in the special verdict form, then any error is waived or forfeited. (See *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 263-265 [failure to object to verdict before discharging jury and to request clarification or further deliberation precludes party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected]; *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1240; *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 529-530.)

Finally, appellants challenge the $75,000 award of noneconomic damages with this sentence: "[T]he [trial] court stated there was insufficient evidence of emotional distress." By this, appellants imply there was an express finding there was no evidence to support noneconomic damages. Although the court's statements about noneconomic damages indicate some befuddlement about the law, the court did not make any express

finding precluding such damages. To the contrary, the court said there was evidence of anxiety, inconvenience and humiliation. We therefore do not agree that the court found there was insufficient evidence to support noneconomic damages. Whether there in fact was sufficient evidence to support noneconomic damages is not an issue we reach, because appellants do not raise it.

**V. The discovery sanction instruction**

In the liability phase of the trial, after the jury had been instructed (except for concluding instructions) and plaintiffs' counsel had begun his *rebuttal* closing statement, plaintiffs asked for an instruction about defendants' discovery violations. Although the trial court agreed it was problematic to give such an instruction at that point in time, the court insisted on giving this instruction: "The plaintiffs in this case obtained three separate court orders against the defendants, which compelled production of documents, which pertained to this case. The defendants did not comply with those orders. Because of the defendants' failures, the plaintiff was significantly disadvantaged during this lawsuit." The court allowed defense counsel to reopen their closing statements to address the discovery issue.

Again, appellants do little to help us determine the propriety of the instruction. Nonetheless, we glean the following from the record. On May 4, 2012, the trial court (Judge John Doyle) directed defendants to provide supplemental responses to discovery requests, including bank and accounting records. They didn't comply with the order, claiming to have produced all material. Wan, however, then produced additional documents, although Lau, Mountainfield and Mandarin did not. Lau apparently claimed that he hadn't searched for responsive

documents and his account had been destroyed and he had " 'a lot of things to do.' "

A second discovery order was issued on or about August 31, 2012,[23] around which time Wan and Lau stated that all documents had been produced. The court ordered them to " 'search for and produce emails' " " 'responsive to any document request that [Mrs.] Wu propounded upon Mountainfield Properties, LLC, Mandarin Realty I Corporation for the time period between January 1, 2004 to the present.' " In response to the order, defense counsel represented that defendants had searched for but not found documents. But defense counsel thereafter, in January 2013, produced 1,422 pages of documents by e-mail.

Plaintiffs then brought a motion for sanctions against Wan, Lau, Mountainfield and Mandarin Realty. Relying on those two prior orders, the trial court (Judge Milton), on March 22, 2013, "ordered that these defendants are precluded from supporting or opposing claims or defenses with any material not provided to plaintiff. The court will advise the jury of a party's discovery responsibilities, that there was a failure by these defendants which resulted in delay in the preparation of plaintiff's case."

In sum, three orders were issued compelling Wan and Lau, among others, to respond to discovery, but they didn't comply. We therefore cannot conclude, on this record, that giving the instruction was error or, moreover, prejudicial, given the absence of reasoned argument on prejudice.

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[23] The parties do not cite where in the voluminous record the August 31, 2012 order may be found. We note that more than half of the 28 volumes of respondents' appendix concerns discovery-related issues.

Although we cannot find that giving the discovery sanction instruction was error in the liability phase, the issue is more complicated in the punitive damages proceedings, during which the trial court gave a similar instruction. At the outset of those proceedings, plaintiffs argued that Wan and Lau failed to produce discovery regarding their personal financial information. Wan and Lau responded, correctly, that plaintiffs never moved to discover their *personal* financial condition under Civil Code sections 3294 and 3295. Rather, plaintiffs' motion to compel discovery did not cite those Civil Code sections or make the showing required to obtain such discovery, i.e., a substantial probability of prevailing on the claim. (Civ. Code, § 3295, subd. (c).)

Also, the May 4, 2012 order granting that motion ordered Wan and Lau to provide supplemental discovery responses, including "[b]ank records" and "[a]ccounting records," but it made no mention of the Civil Code sections. Instead, the order is reasonably clear that the records at issue concerned the underlying transactions and *corporate* records, not Wan's and Lau's *personal* financials. The trial court therefore was incorrect that Wan and Lau had been ordered to produce such information.

The trial court, however, instructed the jury: " 'I'll instruct you further that the defendants have violated three court orders in this case compelling the production of documents relating to banking and accounting records and failed to produce any financial information. [¶] You need not consider the lack of such wealth evidence in your deliberations regarding the amount of the punitive damages award.' " Although this instruction might have been technically correct in that Wan and Lau violated discovery orders, it was incorrect to the extent it implied they

failed to produce documents relevant to their personal financial information.

The issue therefore becomes one of prejudice, which, as we explain, we cannot find. Plaintiffs' counsel did argue in closing that the jury should consider the failure to produce discovery.[24] But the instruction, although awkwardly worded, essentially said the jury needn't conclude from the absence of evidence of appellants' wealth that appellants in fact had *no* wealth. To that extent, the instruction was meaningless, because plaintiffs didn't rest their case on any failure of Wan and Lau to produce personal financial information. (See generally *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 609 [once the trier of fact has determined liability, court need not follow procedure in Civ. Code, § 3295 and instead may simply allow the defendant sufficient time to collect financial records].) Instead, plaintiffs introduced exhibit 519 to evidence appellants' net worth, which apparently was in the millions. In response, Lau and Wan testified they inflated their net worth on exhibit 519 to obtain a bank loan, and they argued that the personal financial statements produced at trial more accurately reflected their negative net worth. They therefore were asking the jury to believe that they had lied on

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[24] He argued that appellants claimed to be broke but "they didn't give us any information at all to allow us to test out those resources. We haven't seen a single document. We can't show you that, cause we don't have them." "Next factor is financial condition. We don't know anything aside from what they publish before there was a lawsuit, and they had an interest in having you believe that they don't have any money. Because of that, because they never gave us any information, that's a factor you don't even consider in this particular analysis."

exhibit 519 but were telling the truth now. Given that this was more than sufficient evidence to support the punitive damages award, and given that appellants fail to discuss the evidence in the context of whether the instructional error was prejudicial, there is no cause for reversal on this ground.

Moreover, because plaintiffs fail to discuss the evidence, we reject their related argument that the amount of punitive damages is disproportionate to compensatory damages. Under these circumstances and based on the evidence, we see nothing excessive or unconstitutional in the awards. (See generally *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927-928; *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68; *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 558.)

**VI. The punitive damage award must be modified.**

The jury awarded punitive damages in the amount of $350,000 against Lau. The judgment, however, incorrectly states that the jury awarded $450,000. The judgment must be modified to reflect the correct amount of damages.

**VII. Plaintiffs' protective cross-appeal is moot.**

Plaintiffs filed a protective cross-appeal from an order denying their motion for terminating sanctions. In view of our affirmance of the judgment, as modified, the cross-appeal is moot.

## DISPOSITION

The judgment is modified to reflect that the jury awarded $350,000 in punitive damages against Lau. The total judgment is $2,175,000. Broken down as to these defendants, the judgment against Lau is $1,525,000 ($1.1 million in economic damages plus $75,000 in noneconomic damages plus $350,000 in punitive damages). The judgment against Wan is $1,825,000 ($1.1 million in economic damages plus $75,000 in noneconomic damages plus $650,000 in punitive damages). The judgment is otherwise affirmed as modified. The parties are to bear their own costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

EDMON, P. J.

GOSWAMI, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.