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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

BUSINESS TO BUSINESS MARKETS, INC., Plaintiff and Appellant, v. KSHEMA TECHNOLOGIES LTD., Defendant and Respondent.	B227382 (Los Angeles County Super. Ct. No. BC280932)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Reversed and remanded with directions.

Gibson Robb & Lindh and Joshua E. Kirsch; Esner, Chang & Boyer and Stuart B. Esner for Appellant.

The Cronin Law Group, Timothy C. Cronin and Dennis J. Byrne for Respondent.

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INTRODUCTION

Appellant and plaintiff Business to Business Markets, Inc. (B2B) appeals a judgment in favor of defendant and respondent Kshema Technologies Ltd. (Kshema) after a jury trial. We reverse and remand the matter for a new trial.

FACTS

1. *The Tricon Contract*

In the late 1990's, Ted Kohan conceived of a business plan to create a website for auction style bidding in the textile, apparel and furniture businesses using electronic catalogs. In 1999, Kohan formed B2B to pursue this business.

B2B solicited bids from United States companies to construct its website. The bids ranged from $500,000 to a few million dollars. B2B did not have the capital to pay that amount.

B2B then sought bids from Indian companies because the cost of website development services there was less expensive. In September 2000, B2B entered into a contract (Tricon Contract) with Tricon Infotech PVT, Ltd. (Tricon), an Indian company. Under the Tricon Contract, Tricon agreed to deliver a website to B2B in return for $30,000 and a one percent interest in B2B.

According to Kohan, Tricon breached the Tricon Contract. Out of the 22 to 25 modules it was required to complete, it had not even begun five or six of them within the time period contemplated by the contract, and the remaining modules were only 20 to 60 percent complete. Tricon stopped working on B2B's website some time before November 2001.

2. *The Majoris Bid*

On November 30, 2001, an Indian company called Majoris Systems Pvt. Ltd. (Majoris) submitted a proposal to B2B to complete the website Tricon had started to develop. The written proposal stated that Majoris would charge $536,480 for the work described in the document, plus an estimated $150,000 for additional work not stated therein, for a total of $686,480.

3. *Tricon Action*

In September 2001, B2B filed a complaint against Tricon and two of its officers for breach of the Tricon Contract and other causes of action in Orange County Superior Court. A default was entered against Tricon in March 2002.

In its papers supporting a default judgment, B2B sought a judgment in the amount of $922,480, which including B2B's "cost to have another company complete the project [i.e. B2B's website], in the amount of $686,480 . . . ." On August 22, 2002, the superior court entered a default judgment in favor of B2B and against Tricon in the amount of $922,480.

4. *The Agreement Between B2B and Kshema*

After Tricon stopped working on B2B's website, B2B hired a company called Net Galactic. Net Galactic produced a document (the Gap Report) that identified the additional work needed to complete Tricon's work.

B2B then began negotiations with Kshema, an Indian company, for a contract to complete B2B's website. During negotiations, B2B and Kshema created a document called the "Not Working List" that itemized the things that were not working on B2B's website. The Not Working List was a 13-page, single-spaced document consisting of bullet points. As way of example, the first entry stated the following: "SIC/NAICS and other codes are not searchable. The system must allow suppliers to provide catalog products with the above codes and others as specified in the Gap document." Another bullet point stated: "External news selection is not working."

On January 21, 2002, B2B and Kshema executed a Web Site Development Agreement (the Agreement) dated January 19, 2002. The Agreement stated that it consisted of the "instant" 14-page, single-spaced written document, numerous lengthy exhibits, including the Gap Report, "B2B Architecture document," "the supply chain *_new_f*eature document," and the Not Working List, "as well as the entire Tricon Handover documents (including and not limited to the Mock site, information architecture documentations, HLDD, Architecture documents, Use Case document phase one and phase two, test plans, codes and others as prepared by [B2B] and/or Tricon)

delivered to [Kshema] by [B2B] on or before December 7, 2001, [B2B's] current site as delivered by Tricon in its current condition and the Exhibits, Schedules and other Documents attached to this Agreement, incorporated herein and made a part hereof by reference."[1]

The Agreement provided that the project would be completed in two phases. Exhibit E to the Agreement set forth a list of 17 modules for Phase I and 13 modules for Phase 2. The modules were identified by name, such as "Billing," "Book Mark" and "GUI." Next to each module the number of "Mandays" required to do the work was listed. Exhibit E also provided that Kshema was required to deliver Phase I within five weeks from the date of the Agreement, and Phase II within 10 weeks of the execution of the Agreement. B2B was required to pay Kshema $41,344 for Phase I and $49,011.50 for Phase II, for a total of $90,355.50.

The Agreement provided very lengthy descriptions of the work Kshema was to perform, the design process, the responsibilities of the parties, and other matters. Kshema was required to deliver a "fully functional, flexible, scalable and extendible" website, free of "bugs" and "defects."[2]

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[1] The entire Agreement is not in the record. We are missing, inter alia, (1) the Gap Report, (2) the B2B Architecture document, (3) the supply chain_*new_f*eature document, (4) the Tricon Handover documents, and (5) B2B's "current site."

[2] The Agreement provided, inter alia, the following: "[B2B] desires to make [B2B's] existing Web Site in a functional condition available on a global computer communications network known as the Internet. The work to be developed and deployed for [B2B] pursuant to each phased deliveries as described in **Exhibit E**, consists of a technology solution and ultimately a fully functional Web site delivering automated, end to end, business transactions and supply chain management automating business transactions between many companies currently and in real time, with all the services needed to support such a site, including generally the confidential and/or complete User Interface, public exchange of data, sourcing, purchasing and sales automation functions and integration with suppliers, buyers and service providers, among many other features (as described in [B2B's] current Web site, [B2B's] Hand over documents, Net Galactic Gap report and all other documents provided to [Kshema]). The final delivery shall be one, which will incorporate terms mentioned in this Agreement, with detailed customization on design and specification specifically for the textile, apparel and

Paragraph 9 of the Agreement provided:

"**9. <u>FINANCIAL ARRANGEMENTS</u>**

"Time is of the essence in final delivery of the Web Site. The damages suffered by [B2B] for late delivery are uncertain. [¶] A. Both Parties agree that should [Kshema] fail to deliver pursuant to this agreement, that [B2B] shall at its sole and absolute discretion undertake the task of completing the project by a U.S. company/developer and no longer have the project done in India and by an Indian company."

The meaning of Paragraph 9 is vigorously disputed by the parties and was a central issue at trial. B2B contends that under this paragraph, if Kshema fails to deliver a website as required by the Agreement, B2B may have the site completed by a United States company, *and Kshema must pay for the cost of such work*. Kshema contends that Paragraph 9 sets forth a condition precedent for quantifying damages. According to Kshema, unless and until B2B retains a United States company to complete the website, it cannot quantify its damages as a result of Kshema's alleged breach of the Agreement.

5. *Commencement of This Action*

After the Agreement was executed, Kshema commenced work on B2B's website. B2B was not satisfied with Kshema's work, and did not make any payments to Kshema for its services.

In September 2002, B2B commenced this action against Kshema. A year later, in September 2003, B2B filed its first amended complaint (FAC), the operative pleading. The FAC set forth breach of contract, negligence and conversion causes of action. Only the breach of contract cause of action would ultimately be submitted to the jury.

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furniture industries as described by [B2B's] current site, the Gap report, the Tricon Handover documents in their entirety and [Kshema's] recommendations and recommended additional features. The technology solution/Web site contemplated by this Agreement must be free of all bugs and defects, fully functional, flexible, scalable and extendible and designed in a way to add additional industries without additional programming but with simply customizing for those new industries."

6. *Zurich Action*

At some point in 2002 or 2003, after obtaining a default judgment in the Tricon Action, B2B commenced an action in Los Angeles County Superior Court (the Zurich Action) against Zurich Specialties London Limited (Zurich), Hoyla Insurance Group, Inc. (Hoyla), Professional Liability Insurance Services (PLIS) and others. In the Zurich Action, B2B alleged that Hoyla, a retail insurance broker, and PLIS, a surplus lines insurance broker, obtained an insurance policy from Zurich for Tricon, but this policy excluded coverage for any claims arising from or related to work performed in India. (See *Business to Business Markets, Inc. v. Zurich Specialties London Limited* (2005) 135 Cal.App.4th 165, 167.) B2B claimed that Hoyla and PLIS breached their duty of care to B2B, and sought damages in the amount of $922,840—the amount of the default judgment in the Tricon Action—plus interest and attorney fees.

In August 2007, B2B settled the Zurich Action with Hoyla and PLIS. Under the settlement agreement, Hoyla agreed to pay B2B $950,000, and PLIS agreed to pay B2B $150,000, for a total of $1.1 million. The settlement agreement recited that B2B's claims amounted to $1,534,941.15, including damages for "$684,480 for cost of completion of work under the Tricon contract (per Majoris bid) . . . ." Pursuant to the settlement, B2B was paid $1.1 million.

7. *Previous Opinions of This Court*

Before the trial in this case we issued unpublished opinions in August 2005 (Case No. B174691) and November 2008 (Case No. B202622), which we shall refer to as *B2B I* and *B2B II*, respectively.

In *B2B I*, we reversed, in part, a judgment entered in favor of Kshema after the trial court granted its motion for summary judgment. The motion was based on the ground that B2B could not prove damages.

In the opinion, we noted that B2B was pursuing two kinds of damages. First, it sought to recover the cost B2B allegedly would incur to complete its website. Second, B2B alleged that it sustained damages in connection with an investment agreement it had with Iraj Yazdanpanah and Hamed Yazdanpanah. Under the investment agreement, the

Yazdanpanahs agreed to pay B2B certain sums of money upon the completion of its website and on an annual basis once it was fully functional.

We concluded that "B2B raised a triable issue of material fact that the termination of the investment agreement was caused by Kshema's alleged conduct and caused B2B to sustain actual damages." We did not address whether there was a triable issue of material fact regarding B2B's alleged damages related to the cost of completing its website. The case was remanded to the trial court for further proceedings.

In *B2B II*, we again reversed a judgment in favor of Kshema after the trial court granted Kshema's motion for summary judgment. We concluded that the trial court erroneously found that the *B2B I* opinion "found the 'sole' triable issue as to B2B's damages was investment agreement damages." This was incorrect because the *B2B I* opinion "expressly made no determination of the existence or non-existence of a triable issue of fact as to cost of completion damages." We further concluded that B2B provided evidence creating a triable issue of fact as to investment agreement damages. The case was again remanded to the trial court.

8. *Trial*

The case was tried before a jury in April and May 2010. At trial, B2B only pursued cost of completion damages and did not pursue investment agreement damages.

a. *Kohan's Testimony Regarding the Agreement's Terms, Kshema's Alleged Breach, Paragraph 9 and the "Evolving" Nature of the Design Process*

B2B's principal, Ted Kohan, was the main witness for plaintiff. He testified, inter alia, about his understanding of various terms in the Agreement, including the meaning of the words "fully functional flexible, scaleable, and extendable" website. He also testified at length regarding Paragraph 9 of the Agreement. According to Kohan, this paragraph was inserted because Kshema refused to include a clause requiring it to obtain insurance. Kohan further testified that Kshema "conceded that . . . as part of my damages if something happens that I am entitled to get the work done in the United States, because I couldn't just continue to go back to India . . . ."

Kohan testified that there were still "bugs" and defects in the website in the summer of 2002, despite Kshema's work on the project for more than six months. When he was asked how he would compare the way the website worked in August 2002 with how it worked at the time Tricon had last done work on it, he responded: "The experience was the same. The frustrations were the same. It wasn't working. So comparing it, they were very comparable. The extent of the bugs and defects and problems we had were as much, maybe even more, especially with notifications that as of June we were still getting problems with notifications."

Kohan testified that working with Kshema to design the website was an "evolving" process. He explained: "Remember that requirement gathering process is an evolving process meaning that while we all knew the scope of the project, we knew that we were going to have an auction module as a way of an example, but we didn't know the color of certain page or the text on certain page, or the design of a button on that certain page. [¶] That portion was evolving." He further testified: "The contract wasn't evolving. It was the design process that's evolving."

b. *Kohan's Testimony Regarding Kevin Nikhoo*

During the trial, B2B advised the court that it wanted to call Kevin Nikhoo as a witness even though Nikhoo was not on the witness list and had not been identified as an expert. B2B claimed that Kohan had talked to Nikhoo about obtaining a United States company to complete the website and that Nikhoo said it would cost B2B several million to retain a U.S. firm to do the job. Kshema objected to allowing Nikhoo to testify.

Outside the presence of the jury, the court and counsel for the parties discussed at length the possibility of Nikhoo's testimony, and Kohan's testimony regarding Nikhoo. The trial court expressly admonished Kohan not to discuss the "numbers" Nikhoo had estimated a U.S. firm would charge to complete the website because "that would be hearsay, and it would be offered for the truth of the matter . . . ."

After this admonishment, B2B's lawyer asked Kohan in the presence of the jury the following question: "Q . . . Now, without giving us a number, did he [Nikhoo] give

you any kind of estimate about how much it would cost?" In response, Kohan stated, "Several millions."

The trial court and counsel then held another conference outside the presence of the jury. The court found that Kohan's testimony was a "willful, deliberate violation of the court's order." Kshema moved for a mistrial. The court denied that motion. But the court (1) ordered the entirety of Kohan's testimony concerning Nikhoo stricken; (2) advised the jury that Kohan had disobeyed an order of the court;[3] and (3) prohibited Kohan from testifying about his communications with Nikhoo.[4] B2B also agreed not to call Nikhoo as a witness.

Subsequently, during cross-examination, Kohan was asked: "Did you reach out to any US company or developer and solicit a bid for the cost of completion?" After B2B's objection to this question was overruled, Kohan answered, "No." B2B contends that Kohan gave this answer because he had been ordered to "lie" by the trial court. Kshema disputes that contention.

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[3] After the trial court advised the parties it was going to tell the jury that Kohan disobeyed a court order, B2B stated that it did not oppose Kshema's motion for a mistrial because B2B believed it would be unfairly prejudiced. The court nonetheless denied Kshema's motion for a mistrial.

[4] Outside the presence of the jury, the court and Kohan had the following dialogue: "The Court: . . . so Mr. Kohan, if you are asked an open-ended question, you are not, not, to refer to Mr. Nikhoo or any work that he may have done by or on his behalf." [¶] "The Witness: So if he [Kshema's lawyer] asks me have you done anything my answer is? [¶] The Court: Your answer does not refer to anything with Mr. Nikhoo. [¶] The Witness: Then in that case I will have I cannot say yes or no truthfully. [¶] Both of them are untruthful. [¶] The Court: All right, sir. [¶] Then you have got a problem because you are in this bind. [¶] The question implicitly will ask other than Mr. Nikhoo, although we won't say other than Mr. Nikhoo, and you can answer that truthfully. Okay. [¶] . . . [¶] He will ask have you done anything I assume, and if he asks you have you done anything your answer must exclude Mr. Nikhoo. [¶] The Witness: Is that a no? My answer is a no? [¶] The Court: I don't know I."

c. *B2B's Experts*

B2B's damages expert, Raymond MaDachy, testified that Indian website development firms were paid about 20 percent of what United States firms were paid. He further testified that the cost of completing B2B's website inside the United States was almost $9 million—about 100 times the amount B2B had agreed to pay Kshema pursuant to the Agreement.

Another B2B expert, Michael Elliott, testified that Kshema's work was "low quality," and that some of the work consisted of "very beginning level programming."

d. *Kshema's Sole Witness, Murali Rajagopalan*

Kshema's sole witness was Murali Rajagopalan, who was a sales supervisor at Kshema from 1999 to 2004. Rajagopalan testified that he was not involved in negotiating the Agreement, and that he merely skimmed the Agreement without reading the entire document. Rajagopalan further testified that Kshema believed that it had completed all of the work required by the Agreement, but B2B nonetheless failed to pay for its services.

9. *Special Verdict*

The jury was presented a special verdict form consisting of 11 questions. The record does not clearly indicate which party presented to the court the various questions on the special verdict form. Although B2B raised concerns about Question No. 1, it did not object to any of the other questions, including Question No. 2.

Question No. 1 asked: "Did [B2B] and [Kshema] enter into a contract?" The jury answered, "Yes." This was not surprising because the trial court had instructed the jury that "it is undisputed that these parties entered into a contract[.]"[5]

Question No. 2 stated: "Were the contract terms clear enough so that the parties could understand what each was required to do?" The jury responded, "No." Question No. 2 instructed the jury: "If you answered no, stop here, answer no further questions,

[5] During the discussion about the special verdict form outside the presence of the jury, counsel for both parties agreed that the jury's response to Question No. 1 would be "automatic."

and have the presiding juror sign and date this form." In compliance with that instruction, the jury did not answer any further questions, and rendered a verdict.

Before the jury was discharged, B2B did not request the special verdict be corrected by the jury pursuant to Code of Civil Procedure section 619.[6]

10. *Motion for New Trial*

B2B filed a motion for a new trial arguing, inter alia, that there was insufficient evidence for the special verdict, and that the trial court improperly compelled Kohan to testify falsely. B2B did not argue, as it does here, that the special verdict was inconsistent, or that Question No. 2 was regarding an issue that the court should have decided as a matter of law. The trial court denied the motion for new trial.

A judgment was entered in favor of Kshema and against B2B in accordance with the special verdict. B2B filed a timely appeal of the judgment.

CONTENTIONS

B2B challenges the jury's response to Question No. 2 of the special verdict on a number of grounds. First, it contends that the issue of whether a writing is sufficiently clear to constitute a binding contract is a question of law for the court to determine. B2B also argues the jury's responses to Question No. 1 and Question No. 2 are inherently inconsistent. It further argues the trial court failed to give the jury instructions regarding how to answer Question No. 2. Finally, B2B argues that as a matter of law the Agreement was sufficiently clear. Based on these arguments, B2B requests the judgment be reversed and the matter remanded for a new trial.

Kshema argues the trial court properly allowed the jury to determine the certainty of the contract terms because the Agreement was not integrated, and extrinsic evidence was admissible.[7] It also contends that B2B failed to satisfy its burden of proving it was

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[6] This statute provides: "When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the Court, or the jury may be again sent out."

[7] The Agreement contains an integration clause, which provides: "This Agreement, together with the Exhibits, Schedules and other material attached hereto, which are

entitled to the relief it sought. Specifically, Kshema contends that B2B's arguments regarding the meaning of the Agreement were based on Kohan's testimony and, because Kohan lacked credibility, the jury could have rejected B2B's arguments relating to Question No. 2.

Kshema further argues that the special verdict was not inconsistent. It also contends B2B waived its argument that the trial court failed to instruct the jury regarding Question No. 2 because B2B offered no such instructions. Finally, Kshema argues that we should affirm the judgment because as a matter of law, B2B suffered no damages. According to Kshema, B2B is barred under the doctrines of judicial estoppel and collateral estoppel from seeking cost of completion damages in light of the default judgment it obtained in the Tricon Action and the $1.1 million payment it received as a result of the settlement of the Zurich Action.

B2B argues that Kohan's credibility has nothing to do with the issue of whether the Agreement was sufficiently clear. In any event, B2B contends, any credibility determination by the jury was "infected" by the trial court's erroneous order requiring Kohan to falsely testify about whether B2B solicited a bid from a United States company

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incorporated by reference, constitute the complete and exclusive statement of all mutual understandings between the parties with respect to the subject matter hereof, superseding all prior or contemporaneous proposals, communications and understandings, oral or written." Nonetheless, the Agreement is not a fully integrated writing because it contemplates future agreements between the parties regarding the work to be performed by Kshema. The Agreement provides: "[Kshema] shall prepare and from time to time amend a clarification document, herein referred to as 'Additional customer requirements document' or 'ACRD.' The ACRD . . . shall include all features and functionalities that [Kshema] requires to implement [B2B's] contemplated project as well as other areas [Kshema] requires clarification and or all bugs and issues [Kshema] shall fix prior to final delivery of each phase. The ACRD shall become a part of this Agreement as and when it is prepared. This document shall further clarify the Gap report where and if necessary." This provision, however, has nothing to do with Paragraph 9 of the Agreement. Accordingly, the Agreement is integrated with respect to Paragraph 9. (See *Haggard v. Kimberly Quality Care, Inc.* (1995) 39 Cal.App.4th 508, 517 [" 'An integration may be partial' . . . . If only part of the agreement is integrated, the parol evidence rule applies to that part"].)

to complete its website. Kshema argues that the court did not force Kohan to testify falsely and that it merely fashioned a reasonable remedy for Kohan's willful violation of a court order.

DISCUSSION

1. *The Judgment Must Be Reversed Because the Special Verdict Is Irreconcilably Inconsistent*

When the findings of a special verdict are irreconcilably inconsistent or hopelessly ambiguous, and the correct determination of the findings is necessary to sustain the judgment, we must reverse the judgment and remand the matter to the trial court for a new trial. (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 457 (*Woodcock*); *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092 (*Zagami*); *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682; *Lambert v. General* Motors (1998) 67 Cal.App.4th 1179, 1186 (*Lambert*); *Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 100 (*Cavallaro*); *Morris v. McCauley's Quality Transmission Service* (1976) 60 Cal.App.3d 964, 973.) Whether a special verdict is defective is a matter of law that we review de novo. (*Zagami*, at p. 1092.)

Here, Question No. 1 of the special verdict asked the jury to determine whether the parties did, in fact, "enter into a contract." This question relates to the first element of a breach of contract cause of action, which is the "existence of the contract." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) By answering Question No. 1 in the affirmative, the jury effectively found that an enforceable contract existed.

The jury's response to Question No. 2 is inconsistent with this finding. Question No. 2 asked whether the contract terms are "clear enough so that the parties could understand what each was required to do."[8] This question relates to whether the terms of

[8] Whether the contract terms were clear enough so that the parties could understand what each was required to do is one of several matters that must be considered in determining whether the parties entered into a contract. (See CACI No. 302; CACI

the contract are "reasonably certain." "The phrase 'reasonably certain' means the terms 'provide a basis for determining the existence of a breach and for giving an appropriate remedy.' " (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141.) " 'Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable. [Citation.]' " (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770 (*Ladas*).) Thus, by answering Question No. 2 in the negative, the jury effectively found that the parties did not enter into an enforceable contract.

The jury's findings that the parties (1) entered into a contract and (2) did not enter into a contract are inconsistent. Moreover, the jury's finding that the contract was not reasonably certain—i.e. that the parties did not enter into a contract—was the basis for the judgment in Kshema's favor.

We cannot choose between inconsistent answers and make inferences in favor of the prevailing party. (*Zagami, supra*, 160 Cal.App.4th at p. 1092.) " 'Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law.' " (*Ibid.*)

If we can interpret the special verdict in light of the pleadings, evidence and jury instructions to reconcile an *ambiguity*, we must do so. (*Woodcock, supra*, 69 Cal.2d at p. 456-457.) In this case, unfortunately, the special verdict was not merely ambiguous, it was completely inconsistent.

Kshema argues that B2B forfeited its argument about the inconsistency of the special verdict by not raising the issue in the trial court. "A party forfeits his or her right to attack error by implicitly agreeing or acquiescing at trial to the procedure objected to on appeal." (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1408.) There are very good policy reasons for the forfeiture rule. The rule deters gamesmanship and

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No. VF-303.) Question No. 2 should not have been presented to the jury once the parties stipulated that they indeed entered into a contract.

encourages parties to bring errors to the attention of the trial court, so that they can be corrected and avoided. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264 (*Keener*).)

The forfeiture rule applies when a party fails to object to the *form* of a special verdict. (*Zagami*, *supra*, 160 Cal.App.4th at p. 1093, fn. 6 ["if the *form* of a verdict is defective, the complaining party must object or risk waiver on appeal of any such defect"]; accord *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131; *Moore v. Preventative Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 746; *Brown v. Regan* (1938) 10 Cal.2d 519, 524.) As a general rule, however, a party is not required to object to a "fatally inconsistent" verdict to preserve the issue on appeal. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 530; accord *Woodcock*, *supra*, 69 Cal.2d at p. 457;[9] *Zagami*, *supra*, 160 Cal.App.4th at p. 1093, fn. 6 ["inconsistent jury findings in a special verdict are not subject to waiver by a party"]; *Lambert*, *supra*, 67 Cal.App.4th at 1182 [defendant was not required to object to inconsistent verdicts before jury was discharged to preserve the issue for review]; *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 187 ["when a complaint is made that verdicts are inconsistent, no objection is required to preserve the issue for appeal"]; *Cavallaro*, *supra*, 96 Cal.App.3d at p. 105 ["No objection pursuant to Code of Civil Procedure section 619 was required to preserve the issue for appeal"]; *Remy v. Exley Produce Express, Inc.* (1957)

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[9] In *Woodcock*, the California Supreme Court held that the verdict was *not* ambiguous in light of the jury instructions. (*Woodcock*, *supra*, 69 Cal.2d at p. 459.) Despite having arrived at this decision, the court stated, in dictum, that if a verdict is "hopelessly ambiguous, a reversal is required, although retrial may be limited to the issue of damages." (*Id.* at p. 457; see also *Keener*, *supra*, 46 Cal.4th at pp. 269-270 [discussing *Woodcock*].) The court further observed in a footnote: "Frequently, failure to object to the form of a verdict before the jury is discharged has been held to be a waiver of any defect. [Citations.] However, waiver is not automatic, and there are many exceptions. [Citations.] [¶] Waiver is not found where the record indicates that the failure to object was not the result of a desire to reap a 'technical advantage' or engage in a 'litigious strategy.' " (*Woodcock*, *supra*, 69 Cal.2d at p. 456, fn. 2.) The waiver rule discussed in *Woodcock* does not apply here because there is no evidence that B2B failed to object to the special verdict in order to reap a technical advantage or as part of a litigation strategy. Further, unlike *Woodcock*, this case involves an inconsistent verdict that cannot be saved by reference to the jury instructions, evidence, or pleadings.

148 Cal.App.2d 550, 555 [“there was no requirement that the inconsistency of the two verdicts be first called to the attention of the trial judge in order to raise the question on appeal”].)

The one exception to this general rule is invited error. (*Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117, 120-122 (*Jentick*); *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685 (*Mesecher*)). “ ‘Under the doctrine of invited error, where a party, by his conduct, induces the commission of an error, he is estopped from asserting it as grounds for reversal.’ ” (*Id.* at p. 1685.) In *Jentick*, the inconsistent verdicts resulted from an erroneous jury instruction given at the appellant’s request. The court held that the appellant “cannot attack a verdict result from an erroneous instruction which it prompted.” (*Jentick*, at p. 121.) Similarly, in *Mesecher*, as part of its trial strategy, the appellant offered two special verdict questions that allowed inconsistent answers. (*Mesecher*, at pp. 1686-1687.) No similar facts exist here. There is no evidence that B2B’s conduct induced the trial court to erroneously give the jury special verdict Question No. 2 after it responded affirmatively to Question No. 1. B2B therefore is not estopped from challenging the judgment based on an inconsistent verdict.

2. *Paragraph 9 of the Agreement Was Unenforceable Because It Was Not Reasonably Certain*

Because we are remanding the case for a third time and hope to avoid a fourth appeal in this matter, we shall provide some guidance for the trial court beyond what is absolutely necessary to resolve this appeal. (Code Civ. Proc., § 43.) A main issue in the trial was the meaning of Paragraph 9 of the Agreement. We conclude that this paragraph is unenforceable because it was not reasonably certain.

Not only can an entire contract be held void for uncertainty, a particular promise or term of a contract can be void for the same reason. (*Ladas, supra*, 19 Cal.App.4th at p. 770.) “To be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.” (*Ibid*; accord Rest.2d Contracts, § 33, subd. (2) [“The terms of a contract are reasonably certain if they provide

a basis for determining the existence of a breach and for giving an appropriate remedy"].) "Whether a contract term is sufficiently definite to be enforceable is a question of law for the court." (*Ladas*, at p. 770, fn. 2.)

In *Ladas*, the plaintiffs were three insurance sales representatives employed by defendant California State Automobile Insurance Association (CSAA). The plaintiffs alleged that CSAA breached a contractual obligation requiring it to compensate them at levels "comparable" to what sales agents were earning at other insurance companies, which meant paying the plaintiffs salaries that met "industry standards." (*Ladas*, *supra*, 19 Cal.App.4th at pp. 767-768.) The plaintiffs conceded that the contract only provided that CSAA "consider" paying the sales representations according to industry standards. (*Id*. at p. 770.)

The court found that the promise to "consider" what employees at other companies were earning "cannot rise to the level of a contractual duty." (*Ladas*, *supra*, 19 Cal.App.4th at p. 771.) Additionally, the court found that the promise to pay the plaintiffs "comparable" compensation according to "industry standards" was too amorphous to enforce. The court stated: "What would be the relevant market on which such a duty would be predicated? CSAA's four major competitors? All insurers in the state? Eighty companies nationwide? How would 'damages' be calculated? By totalling up all yearly commissions earned by other agents, averaging them and subtracting the difference? By coming up with an 'industry standard' factor and increasing CSAA's unit value ratio by that factor? The nature of the obligation asserted provides no rational method for determining breach or computing damages." (*Ibid*.)

Likewise, Paragraph 9 of the Agreement is too uncertain to enforce. As stated *ante*, this paragraph provided: "Time is of the essence in the final delivery of the Web Site. The damages suffered by [B2B] for late delivery are uncertain. [¶] A. Both Parties agree that should [Kshema] fail to deliver pursuant to this agreement, that [B2B] shall at its sole and absolute discretion undertake the task of completing the project by a U.S. company/developer and no longer have the project done in India and by an Indian company."

The Agreement does not define the "project." Assuming the "project" constitutes the work to be performed by Kshema, the nature of the promise remains vague. It is difficult to determine exactly when a "fully functional, flexible, scalable and extendible" website, "free of all bugs and defects," is completed. Further, Paragraph 9 does *not* state that if Kshema fails to complete the project, it must compensate B2B for the cost of doing so in the United States. Rather, it simply states that B2B in its discretion may hire a United States company rather than an Indian company to complete the project should Kshema be unable to do so.[10]

Moreover, Paragraph 9 does not indicate the type of "U.S. company/developer" B2B may hire. Website developers in the United States range from sole proprietorships to publicly traded corporations. The evidence indicates that the cost of completing B2B's website in the United States would vary dramatically depending on the company or individual B2B hired. The estimates for this work ranged from about $500,000 to $9 million, the high estimate being about 18 times greater than the low estimate.[11] If, as B2B alleges, Paragraph 9 was some sort of damages provision, what exactly did Kshema agree to pay? Did Kshema agree to pay as damages the cost of completing the website in United States regardless of how expensive that might be and regardless of whether B2B actually paid that amount to complete the project? [12]

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[10] At trial Ted Kohan testified that Paragraph 9 was meant as a damages provision. Assuming without deciding that this testimony was not barred by the parol evidence rule (see fn. 7, *ante*), it does not save Paragraph 9. Our conclusion that Paragraph 9 is not reasonably certain does not depend on the absence of an express provision regarding B2B's purported right to collect damages.

[11] B2B initially received estimates from United States companies to build the website from scratch starting as low as $500,000. In opposition to Kshema's summary judgment motion, B2B's expert estimated that it would cost in excess of $1 million to complete the website in the United States, based in part on bids in the amounts of $536,480 and $571,160. At trial, B2B's expert estimated that the cost would be almost $9 million.

[12] We have great reservations interpreting the Agreement to mean that Kshema agreed to compensate B2B up to $9 million if Kshema breached the contract. This would

As a matter of law, Paragraph 9 is too uncertain to enforce as a damages provision. This conclusion, however, does not require us to declare the entire agreement unenforceable. The Agreement has a severance clause that allows the remaining provisions to be saved in the event one provision is deemed unenforceable.[13] Moreover, without an express contract provision, the measure of damages can be determined pursuant to Civil Code section 3300[14] and the cases interpreting that statute.

3. *We Cannot Conclude That B2B Did Not Suffer Damages as a Matter of Law*

Kshema argues that, as a matter of law, B2B did not sustain damages. At this point, B2B is only seeking cost of completion damages. It appears that B2B was compensated, at least in part, for those damages when it received the settlement payment in the Zurich Action. We cannot, however, determine whether as a matter of law B2B has been *fully* compensated for at least two reasons.

The first is that it is unclear whether the "cost of completion" damages referred to in the settlement agreement and the cost of completion damages B2B seeks against Kshema are exactly the same thing. Ted Kohan testified at trial that the bugs and defects in B2B's website were "maybe even more" extensive when Kshema completed its work than at the time Tricon completed its work. This opens a small crack in the door for B2B. It can plausibly argue that the cost of completion damages resulting from Kshema's

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require Kshema to pay B2B about 100 times the amount Kshema was to be paid for its work. Far from merely compensating B2B for Kshema's alleged breach, such damages would amount to a penalty. Penalty clauses in contracts are generally void as against public policy. (*Freedman v. The Rector* (1951) 37 Cal.2d 16, 21-22.)

[13] The clause states: "*Severability*. If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable."

[14] Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

breach of the Agreement were greater than the cost of completion damages resulting from Tricon's breach of the Tricon Contract.

The second problem with Kshema's argument is that the settlement agreement does not on its face fully compensate B2B for its alleged cost of completion damages arising from Tricon's breach of contract. The agreement provides:

"Plaintiff's [B2B's] claims against Hoyla/PLIS consist of the following amounts: (1) The judgment against Tricon and related parties . . . in the amount of $922,480, consisting of the following damages: (a) $686,480 for cost of completion work under the Tricon contract (per Majoris bid);[15] (b) $20,000 for Gap Report preparation; (c) $110,000 for plaintiff's internal costs to complete the work under the Tricon contract; (d) $76,000 for plaintiff's overhead in assisting work done by Tricon; and (e) $30,0000 payment made to Tricon under the contract; (2) 10% post-judgment interest on the Tricon judgment compounded annually for five years from August 22, 2002 to August 22, 2007, amounting to $563,183; (3) costs in the amount of $2,290.66 in this action; (4) attorneys' fees in this action of $23,975; and (5) $22,941.49 to satisfy the Ford Law firm's lien for cost. Plaintiff's total claim in this action thus amounts to $1,534,941.15. This settlement of $1,100,000 is intended as a payment applied first to attorney's fees and legal costs in this action [$49,207.15], next to items 1(b) through 1(e) above [$236,000], including interest thereon [$144,079.10], next to interest on item 1(a) above [$419,103.90],[16] and finally any residual amounts applied as a compromise payment of the principal amount of $686,480 listed in 1(a) of this paragraph [$251,609.85]."

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15 The trier of fact can find that the cost of completion damages are considerably less than the $686,480 amount stated in the Majoris bid. It is worth noting that B2B never actually hired Majoris to complete the website for that amount. Although it used the Majoris bid in litigation against Tricon, Hoyla and PLIS, it hired Kshema to do the same work for about $90,000.

16 We prorated the total amount of interest ($563,183) on the basis of the proportion of 1(a) damages (74.417 percent) and 1(b) to 1(e) damages (25.583 percent).

Although the trier of fact is not bound by the allocation of the $1.1 million settlement amount in the settlement agreement, we cannot say that as a matter of law B2B has been fully compensated for its cost of completion damages. Assuming (1) the cost of completing the website in India was $686,480, (2) the $1.1 million settlement only paid for $251,609.85 of that cost, and (3) the cost of completing the website after Kshema stopped working on the project was equal to or greater than the cost of completing the website on the date Tricon completed its work, B2B sustained damages in the amount of $434,870.15.

Kshema argues that B2B is judicially estopped and collaterally estopped from claiming it has not been fully compensated for cost of completion damages. The doctrine of judicial estoppel applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.)

The doctrine of collateral estoppel precludes litigation of issues argued and decided in prior proceedings. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) The doctrine applies when (1) the issue in the current proceeding is identical to the issue decided in the former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the issue was decided on the merits; and (5) the party against whom preclusion is sought is the same, or in privity with, the party to the former proceeding. (*Ibid.*)

With respect to judicial estoppel, Kshema contends that B2B has taken two "positions" on cost of completion damages. In the Tricon Action and Zurich Action it claimed that the damages were $686,480. In this action, B2B claims the damages are nearly $9 million. With respect to collateral estoppel, Kshema argues the "issue" actually litigated and necessarily decided in the former proceedings was the cost of completion damages.

The fatal flaw with B2B's judicial estoppel and collateral estoppel arguments is that B2B erroneously assumes the measure of damages for Tricon's breach is precisely the same as the measure of damages for Kshema's alleged breach. As we discussed *ante*, we cannot as a matter of law make that assumption, though a trier of fact may conclude the measure of damages is the same. Accordingly, we cannot conclude that as a matter of law B2B is barred from seeking cost of completion damages under the doctrines of judicial and collateral estoppel.

4. *Remaining Issues*

Because we find that the judgment must be reversed in light of the inconsistent special verdict, we do not reach the remaining issues raised by the parties.

DISPOSITION

The judgment is reversed and remanded to the trial court for a new trial in accordance with this opinion. In the interests of justice, each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.