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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

DAVID K. GOTTLIEB, as Trustee in Bankruptcy, etc., et al.,

Plaintiffs and Appellants,

v.

GARY ISKOWITZ et al.,

Defendants and Respondents.

AND RELATED CROSS-ACTION.

B216029 consolidated w/B219558

(Los Angeles County
Super. Ct. Nos. BC384493 & BC385790)

APPEALS from an order and judgment of the Superior Court of Los Angeles County, Elizabeth A. White, Judge. Reversed in part, affirmed in part and remanded with directions.

Pachulski Stang Ziehl & Jones, Jeremy V. Richards and Ellen M. Bender for Plaintiff and Appellant David K. Gottlieb.

Hill, Farrer & Burrill, Dean E. Dennis, Daniel J. McCarthy and Paul M. Porter for Plaintiffs and Appellants Georges Marciano individually and in his capacity as trustee for Georges Marciano Trust, M.D.; Marciano 1987 Investment Trust; Georges Marciano Gift Trust FBO Matthew; Georges Marciano Gift Trust FBO Scott; Scott Marciano - 1988

Investment Trust; Georges Marciano Gift Trust II FBO Kevin; Georges Marciano Gift Trust II FBO Matthew; Georges Marciano Gift Trust II FBO Scott; Georges Marciano Gift Trust II FBO Chloe; Georges Marciano 1994 Investment Trust FBO Kevin; Georges Marciano 1994 Investment Trust FBO Scott; Georges Marciano 1994 Investment Trust FBO Matthew; Georges Marciano 1994 Investment Trust FBO Chloe; Beverly Wilshire Properties; Beverly Hills Antiques, Inc.; MSK Realty, Inc.; Kevinair, LLC; Fox Properties, Inc.; Georges Marciano Holdings, Inc.; Georges Marciano Finance, Inc.; Go Jeans USA; Just Jeans, Inc.; and 9521 Sunset LLC.

Garrett & Tully, Stephen J. Tully, Efren A. Compeán; Greines, Martin, Stein & Richland, Irving H. Greines, Robert A. Olson and Marc J. Poster for Defendants and Respondents.

Georges Marciano (Marciano) and his various entitles (Marciano entities)[1] (sometimes collectively referred to as Marciano), appeal a judgment in favor of Marciano's former accountants, Gary Iskowitz (Gary), Gary's accounting firm Gary Iskowitz & Co., LLP (the Iskowitz firm), Gary's accounting partner, Carolyn Malkus (Carolyn), and Gary's spouse, Theresa Iskowitz (Theresa), also an accountant with the firm (sometimes collectively referred to as Iskowitz).[2] [3]

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[1] In addition to Marciano individually, the plaintiffs were as follows: Marciano as trustee for Georges Marciano Trust, M.D., Marciano 1987 Investment Trust, Georges Marciano Gift Trust FBO Matthew, Georges Marciano Gift Trust FBO Scott, Scott Marciano - 1988 Investment Trust, Georges Marciano Gift Trust II FBO Kevin, Georges Marciano Gift Trust II FBO Matthew, Georges Marciano Gift Trust II FBO Scott, Georges Marciano Gift Trust II FBO Chloe, Georges Marciano 1994 Investment Trust FBO Kevin, Georges Marciano 1994 Investment Trust FBO Scott, Georges Marciano 1994 Investment Trust FBO Matthew, Georges Marciano 1994 Investment Trust FBO Chloe, Beverly Wilshire Properties, Beverly Hills Antiques, MSK Properties, Kevinair, Fox Properties, Georges Marciano Holdings, Inc., Georges Marciano Finance, Inc., Go Jeans USA, Just Jeans, Inc., and 9521 Sunset LLC.

[2] For clarity, we refer to the individual Iskowitz parties by their first names.

In these consolidated cross-actions (L.A. Super. Court, case Nos. BC384493 & BC385790), the trial court imposed terminating sanctions against Marciano for discovery abuse. The trial court dismissed Marciano's complaint against Iskowitz and struck Marciano's answer and entered his default on the Iskowitz cross-complaint, which resulted in a $55 million judgment against Marciano pursuant to a default proveup.

The essential issues presented include whether the trial court abused its discretion in imposing terminating sanctions against Marciano for noncompliance with discovery, and whether the trial court awarded excessive damages on the default proveup.

Based on our review of the record, we perceive no abuse of discretion in the imposition of terminating sanctions, which resulted in the dismissal of Marciano's complaint against Iskowitz and the entry of Marciano's default on the Iskowitz cross-complaint. However, on the record presented, the amount of the damages which were awarded on the default proveup is excessive. Therefore, the judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The consolidated actions*.

a. *The initial case: the Marciano action*.

On January 28, 2008, Marciano and various entities (Marciano entities) sued the Iskowitz firm, as well as Gary and Carolyn (LASC No. BC384493) (the Marciano action). Gary and his firm handled Marciano's personal and business accounting and tax matters for over 20 years. Carolyn was a partner in the Iskowitz firm who worked on Marciano's account.

Marciano alleged defendants misappropriated Marciano's money and were liable for malpractice, deceit, misrepresentation, conversion and breach of fiduciary duty.

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3 On October 6, 2011, this court granted the motion of David K. Gottlieb, trustee in the Chapter 11 bankruptcy case of Georges Marciano, to be substituted in this matter in place of Georges Marciano. The substitution of parties pertains solely to appellant Georges Marciano and does not apply to the various Marciano entities.

b. *The Iskowitz action.*

On February 20, 2008, Gary, Carolyn and Theresa filed a separate action against Marciano, individually, LASC No. BC385790 (the Iskowitz action). Gary sought damages for libel per se, intentional infliction of emotional distress and conspiracy to commit libel per se, while Carolyn and Theresa pled a cause of action for libel per se.

The Iskowitz lawsuit alleged, inter alia, that beginning in 2006, Marciano had engaged in a deliberate campaign to harass, intimidate and spread vicious lies about Gary for the express purpose of ruining him, and that Marciano engaged in a course of conduct that included numerous malicious acts and libels which was intended to ruin Gary, including making false utterances to Gary and third parties that Gary was part of a "team of crooks," was a liar, was "cooking my books and records," and had embezzled from him.

On June 23, 2008, the trial court consolidated the Marciano action with the Iskowitz action, with the Iskowitz action being deemed a cross-complaint.

On October 14, 2008, the Iskowitz firm also filed a cross-complaint in the Marciano action alleging one cause of action for "Willful Filing of Fraudulent Tax Information Return."

c. *Marciano's noncompliance with discovery; trial court granted 14 motions to compel discovery and imposed monetary sanctions each time.*

Iskowitz propounded discovery to Marciano, who resisted Iskowitz's discovery efforts.

On 14 occasions in the six-month period between June and December of 2008, Iskowitz was forced to move for orders compelling responses and further responses to discovery.

Iskowitz prevailed on its discovery motions. The trial court granted 14 motions by Iskowitz to compel discovery and ordered Marciano to comply with discovery. On all 14 occasions, the trial court imposed monetary sanctions against Marciano, in the total sum of $35,955.

d. *Motion for terminating sanctions.*

On December 24, 2008, Iskowitz filed a motion (1) for terminating sanctions in the Marciano action, seeking dismissal of Marciano's second amended complaint, and (2) for terminating sanctions in the Iskowitz action by striking Marciano's answer and entering his default. Alternatively, Iskowitz requested evidentiary sanctions.

The moving papers specified four discovery order violations from the four pertinent discovery motions, to wit: (1) failure to provide appropriate supplemental responses to defendants' first set of special interrogatories, without objection, in violation of a July 25, 2008 order; (2) failure to provide adequate further supplemental responses to form interrogatories, set one, by December 15, 2008, in violation of a November 24, 2008 order; (3) failure to provide adequate further supplemental responses to the first set of special interrogatories, without objection by December 15, 2008, in violation of a November 24, 2008 order; and (4) failure to produce all documents responsive to a first request for production of documents by December 11, 2008, in violation of a December 11, 2008 order.

e. *Trial court's ruling*.

On February 25, 2009, the trial court entered an order granting Iskowitz's motion (1) for an order imposing terminating sanctions against all plaintiffs in the Marciano action by dismissing their second amended complaint with prejudice; and (2) for an order imposing terminating sanctions against Marciano in the Iskowitz action by striking Marciano's answer and entering his default. The February 25, 2009 order states in pertinent part:

"Having considered the motion, the papers filed in support thereof, the opposition and the reply, the oral argument of counsel, the record of discovery motions and hearings in this matter, and good cause appearing therefor, the Court makes the following findings:

"1. The case law is replete with holdings which provide that so long as there is a prior court order requiring a party to comply with discovery, that that party is aware of

the court's order, and, yet, still willfully fails to comply, the court may issue terminating sanctions. The instant case speaks volumes to that situation.

"2. The Court doubts that if it were to look in the annals of jurisprudence it would find a case that even comes close to the discovery violations that the Court has seen in this particular case. Plaintiffs Georges Marciano and the Marciano Entities and defendant Georges Marciano (collectively, the 'Marciano Parties') have engaged in a consistent pattern of failure to cooperate with discovery. The court takes judicial notice of a complete record of the discovery violations as documented by the Iskowitz parties in the within motion.

"3. The Marciano Parties have asserted objections in responses when the Court ordered them not to. The Marciano Parties served further responses which were not verified, which are the equivalent of no response at all. The Marciano Parties served further responses which were not signed, which were, again, the equivalent of no responses at all. The Marciano Parties served supplemental responses, but they were unchanged from the original responses.

"4. The Marciano Parties have taken the word processing system to new heights by simply duplicating and copying responses to discovery multiple times over. The record before the Court is replete with violations.

"5. Plaintiffs failed to provide appropriate supplemental responses to defendants' first set of special interrogatories, without objection, in violation of the Court's order dated July 25, 2008, when they twice served unverified responses that merely repeated the allegations of their pleadings and that continued to assert unmeritorious objections, The violation of this order by plaintiffs was willful.

"6. Plaintiffs failed to provide adequate further supplemental responses to form interrogatories, set one, by December 15, 2008, in violation of the Court's order dated November 24, 2008, when they instead provided only unverified, meaningless responses. The violation of this order by plaintiff was willful.

"7. Defendant Georges Marciano failed to provide adequate further supplemental responses to cross-complainants' first set of special interrogatories, without objection, by

December 15, 2008, in violation of the Court's order dated November 24, 2008, when he provided only unverified, meaningless responses. The violation of this order by Georges Marciano was willful.

"8. Defendant Georges Marciano failed to produce all documents responsive to cross-complainants' first request for production of documents by December 11, 2008, in violation of the Court's order dated December 11, 2008, when he provided millions of pages of disorganized and largely irrelevant documents purportedly in response to the Iskowitz Parties' document requests. The violation of this order by Georges Marciano was willful.

"9. Defendant Georges Marciano failed to provide adequate further supplemental responses to cross-complainants' first set of special interrogatories, without objection, by December 31, 2008, in violation of the Court's order dated December 11, 2008, when he provided only unverified, unsigned, meaningless, repetitive responses that were the equivalent of no responses at all. The violation of this order by Georges Marciano was wilful.

"10. The Marciano Parties' failure to comply with this Court's orders compelling discovery has interfered, and continues to interfere, with the Iskowitz Parties' efforts to complete the discovery necessary in this matter in order to defend themselves against plaintiffs' claims and for cross-complainants to prosecute their claims against cross-defendant Georges Marciano."

Based on the above, the trial court granted Iskowitz's motion for an order imposing terminating sanctions. On February 25, 2009, the trial court issued an order dismissing Marciano's second amended complaint with prejudice, struck Marciano's answer to the Iskowitz cross-complaint and entered Marciano's default on said cross-complaint.

Notice of entry of the order was served on March 6, 2009. On May 5, 2009, Marciano and the Marciano entities filed notice of appeal from the February 25, 2009 dismissal order imposing terminating sanctions. (2d Civ. No. B216029.)

f. *Default proveup proceedings on the Iskowitz cross-complaint against Marciano, individually*.

(1) *Liability phase*

On July 17, 2009, the trial court conducted a default prove-up hearing on liability issues. The court heard testimony from Carolyn and Theresa, and received the declarations of Gary, Miriam Choi, Camille Abat, Alex Gilinets, Christopher Kirkwood, Stephen J. Tully, Tafiana V. Wallace, John Greene and Claudette Lussier, along with supporting exhibits.

On August 18, 2009, the trial court entered an order determining Marciano was liable for libel per se and intentional infliction of emotional distress.

(2) *Damages phase*

On August 26, 2009, the trial court conducted a default prove-up hearing on damages. After hearing the evidence and arguments of counsel, the trial court awarded damages of $55 million. The damages which were awarded were identical to the damages requested by Gary, Theresa and Carolyn in their respective statements of damages.

The breakdown of damages is as follows: to Gary, $10 million for "emotional distress," $5 million for loss of professional and personal reputation, $10 million for "shame, mortification and hurt feelings," and $20 million for punitive damages, for a total award to Gary of $45 million; to Theresa, $1 million for "emotional distress," $1 million for loss of professional and personal reputation, $1 million for "shame, mortification and hurt feelings," and $2 million for punitive damages, for a total award to Theresa of $5 million; and to Carolyn, $1 million for "emotional distress," $1 million for loss of professional and personal reputation, $1 million for "shame, mortification and hurt feelings," and $2 million for punitive damages, for a total award to Carolyn of $5 million.

g. *Subsequent proceedings.*

On October 15, 2009, the trial court denied Marciano's motion for a new trial, stating "the court finds the damages reasonable."

On October 7, 2009, Marciano filed a timely notice of appeal from the August 26, 2009 judgment. (2d Civ. No. B219558.) The two appeals were consolidated under No. B216029.

CONTENTIONS

Marciano contends: the trial court abused its discretion in imposing terminating sanctions; the trial court failed to act as gatekeeper to protect Marciano's statutory and constitutional rights; the compensatory damages were unproven and excessive in any event; there was insufficient evidence of Marciano's financial condition to support punitive damages; and Judge White's bias deprived Marciano of his due process right to an impartial judge.[4]

DISCUSSION

1. *Trial court acted within its discretion in imposing terminating sanctions.*

a. *Propriety of a terminating sanction; standard of appellate review.*

" 'The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should " 'attempt[] to tailor the sanction to the harm caused by the withheld discovery.' " [Citation.] The trial court cannot impose sanctions for misuse of the discovery process as a punishment.' [Citation.] ' "Discovery sanctions 'should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.' " [Citation.] If a lesser sanction fails to curb abuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher

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[4] The record on appeal is massive. It includes a 58 volume appellant's appendix, which consists largely of discovery motions preceding the motion for terminating sanctions. However, given the scope of Marciano's contentions on appeal, the key portions of the record are the papers relating to the motion for terminating sanctions and the default proveup proceeding.

sanctions until the sanction is reached that will cure the abuse. "A decision to order terminating sanctions should not be made lightly. But where a violation is willful,[5] preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with discovery rules, the trial court is justified in imposing the ultimate sanction." ' [Citation.]" (*Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516 (*Van Sickle*).)

Imposition of discovery sanctions " 'lies within the trial court's discretion, and is reviewed only for abuse.' [Citation.] 'Sanction orders are "subject to reversal only for arbitrary, capricious or whimsical action." ' [Citation.]" (*Van Sickle, supra,* 196 Cal.App.4th at p. 1516.) The "question before this court is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose. (*Laguna Auto Body v. Farmers Ins. Exchange* [(1991)] 231 Cal.App.3d [481,] 491.)" (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36-37.)

b. *History of the discovery dispute with respect to Iskowitz's request for production of documents, set one.*

On March 25, 2008, Marciano filed an answer to the Iskowitz cross-complaint, in which Marciano asserted 35 separate affirmative defenses, ranging from assumption of the risk, laches and estoppel, to the assertion that imposition of punitive damages would violate his right to substantive due process and equal protection.

On April 11, 2008, Iskowitz served a request for production of documents, set one (Nos. 1 through 40), based almost verbatim on the affirmative defenses pled in Marciano's answer.

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5 Compare *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272 (*Reedy*), "not[ing] that willfulness is no longer a requirement for the imposition of discovery sanctions. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 260.) That requirement was dropped from Code of Civil Procedure former section 2023, subdivision (b), as part of the former Civil Discovery Act of 1986. (*Kohan v. Cohan* (1991) 229 Cal.App.3d 967, 971.)" (*Reedy, supra,* 148 Cal.App.4th at p. 1291.)

On May 19, 2008, Marciano served his responses to the request for production of documents. Despite the fact Iskowitz's discovery request was based upon Marciano's own affirmative defenses as pled in his answer, Marciano's responses consisted solely of objections. Marciano did not produce a single document.

On June 25, 2008, Iskowitz moved for an order compelling Marciano to provide further responses to Iskowitz's first request for production of documents.

On July 25, 2008, the matter came on for hearing. The trial court granted Iskowitz's motion to compel further responses to the request for production of documents and sanctioned Marciano in the sum of $1,890. The July 25, 2008 order directed Marciano to serve "further verified responses *without objection* to requests for production Nos. 1 through 40 that are the subject of this motion, *by no later than [August 4], 2008*." (Italics added.)

On July 24, 2008, one day before the hearing on the motion to compel, Marciano served by mail his supplemental responses to the first request for production of documents. In the supplemental responses, Marciano again objected to the discovery requests and his responses to requests Nos. 1 through 20 and 29 through 40 stated, "[u]nder the provisions of an appropriate protective order, Responding Party will make available for inspection and photocopying his non-privileged responsive documents."

On July 28, 2008, the trial court signed a stipulation for a protective order regarding Marciano's documents.

On August 12, 2008, Iskowitz's counsel sent a letter to Marciano's counsel concerning Marciano's supplemental responses to the first request for production of documents. The letter stated in pertinent part: "[Marciano's] supplemental responses to the Document Request continue to assert a series of identical boilerplate objections to each request. The court's order dated July 25, 2008 specifically states that [Marciano] shall serve further verified responses without objection by August 4, 2008. *Accordingly, please withdraw the objections and provide complete responses without objection*." (Italics added.) The letter further stated: "In response to Request Nos. 1 through 20 and 29 through 40, [Marciano] [stated] that '[u]nder the provision of an appropriate protective

order . . . .' he 'will make available for inspection and copying his non-privileged responsive documents.' As you know, a stipulated protective order was signed by Judge White on July 28, 2008. Please let me know when [Marciano's] responsive documents will be available for inspection and copying."

Marciano's counsel did not respond to the August 12, 2008 letter.

On October 21, 2008, Iskowitz's counsel followed up with another letter to Marciano's attorney, again seeking Marciano's responses to the first request for production of documents. This letter reiterated, "we previously requested that Mr. Marciano produce the requested documents in a letter dated August 12, 2008 to Mr. Marciano's prior counsel, Luan Phan, Esq. *No documents were ever produced*. Please produce the requested documents as indicated in Mr. Marciano's responses by October 24, 2008, or we will have no choice but to file a motion to compel." (Italics added.)

On October 23, 2008, Marciano's counsel requested an extension to October 31, 2008 for Marciano to produce the requested documents. Via email, Iskowitz's counsel agreed to this extension.

On November 10, 2008, Iskowitz filed a motion to compel Marciano's compliance with Iskowitz's first request for production of documents. As of the date of the filing of said motion to compel, Marciano had not provided documents in compliance with the first request for production of documents.

On December 11, 2008, the trial court heard and granted Iskowitz's motion to compel responses to request for production of documents, set one. It ruled, "All documents will be produced today (December 11, 2008), except for Bank of America documents which will be later produced."

On December 10 and 11, Marciano produced 185 CDs of documents, containing over 15 million pages of documents. This "document dump" purported to be responsive to Iskowitz's requests for production.

However, with respect to the content of Marciano's production of documents, the declaration of Tatiana Wallace, counsel for Iskowitz, stated: "I have spent over 30 hours

and reviewed approximately 10% of the documents produced by [Marciano]. The documents were not Bates-labeled, were produced without any corresponding index and did not appear to be in any particular order. None of the documents were segregated to respond to any of the specific requests for production propounded to [Marciano]. None of the records appear to have been reviewed prior to their production as they contain massive amounts of personal, private and privileged information, including communications with counsel, social security numbers, account numbers, login names and passwords. [¶] In the course of my review of plaintiffs' records, I did not encounter a single document which supported any of [Marciano's] allegations against any of the [Iskowitz Parties]. Approximately 70% of the records reviewed wore not only non-responsive to the Iskowitz Parties' requests, but were entirely irrelevant to the pending litigation. For example, included in plaintiffs' recent production were documents dating back to the 1980s and 1990s; architectural/interior design plans and over 500 pages of movie lists for Mr. Marciano's airplane; Mr. Marciano's online shopping spree for personal items, such as men's sweaters, lamps, carpets, tables, etc.; records regarding Mr. Marciano's search for contractors and property managers, including multiple candidate resumes; personal e-mails unrelated to this matter; various pleadings from unrelated cases and many others."

On December 24, 2008, Iskowitz filed the motion for terminating sanctions, based in part on Marciano's failure to produce all documents responsive to a first request for production of documents by December 11, 2008, in violation of the December 11, 2008 order.

c. *No abuse of discretion in imposition of terminating sanctions; Marciano's willful failure to produce documents supportive of his affirmative defenses was sufficient to warrant terminating sanctions.*

With respect to the trial court's finding that Marciano had not complied with the court's order to produce all documents responsive to Iskowitz's first request for production of documents, Marciano's contention is as follows:

"The December 11 Minute Order required Marciano to produce all documents by December 11. Marciano complied by producing 185 CDs of documents on December 10 and 11. But the trial court found inadequate compliance because the documents were 'disorganized and largely irrelevant.' The finding was based on the declaration of [Iskowitz's] counsel stating that she had reviewed 'approximately 10% of the documents produced.' *Although 90% were not reviewed, the court found the production 'largely irrelevant.'* " (Italics added.)

We reject Marciano's claim that he fulfilled his discovery obligations by dumping 15 million pages of uncategorized documents on Iskowitz over a two-day period, eight months after Iskowitz propounded the discovery request. Marciano emphasizes Iskowitz's counsel only reviewed about 10 percent of the 15 million documents before declaring the production largely irrelevant. However, Marciano cites no authority for the proposition that opposing counsel was required to pore over the 15 million documents in their entirety in order to ascertain Marciano's compliance with his discovery obligations. Based on the 10 percent sample reviewed by Iskowitz's counsel, the trial court reasonably could infer the remaining documents were similarly nonresponsive.

A dump of disorganized documents by definition is noncompliant. Code of Civil Procedure section 2031.280 states at subdivision (a): "Any documents produced in response to a demand for inspection, copying, testing, or sampling *shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand*." (Italics added.) Marciano has neither argued, nor shown, that his document dump complied with said statutory requirement.

In sum, the record abundantly supports the following finding by the trial court on the motion for terminating sanctions: "8. Defendant Georges Marciano failed to produce all documents responsive to cross-complainants' first request for production of documents by December 11, 2008, in violation of the Court's order dated December 11, 2008, when he provided millions of pages of disorganized and largely irrelevant documents purportedly in response to the Iskowitz Parties' document requests. The violation of this order by Georges Marciano was willful."

As discussed, "where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with discovery rules, the trial court is justified in imposing the ultimate sanction." ' [Citation.]" (*Van Sickle, supra*, 196 Cal.App.4th at p. 1516.)

Marciano engaged in a persistent course of discovery abuse, resulting in 14 orders compelling discovery and 14 orders imposing monetary sanctions. Our focus here has been on Marciano's willful failure to produce *any* documents to support his 35 affirmative defenses to the Iskowitz cross-complaint, which necessitated *two* motions to compel the production of those documents and two orders compelling production, and then culminating in a dump of 15 million pages of disorganized documents. Marciano's discovery abuse with respect to Iskowitz's first request for production of documents, was sufficient, in and of itself, to warrant terminating sanctions. Therefore, we need not address the other discovery violations underlying the trial court's imposition of terminating sanctions.

We also reject Marciano's contention the terminating sanctions were excessive and that a lesser sanction should have been imposed. Early on, at a hearing on July 7, 2008, the trial court admonished Marciano that if he were "unable to provide substantive responses to interrogatories which are so very focused on [Marciano's] allegations, then it is going to appear to the trier of fact, ultimately, or to the court on a subsequent motion, that in fact there are no supporting documents; there is no evidentiary support; and *we are going to quickly get to a point where we are either going to be at summary judgment or a motion for terminating sanctions*." (Italics added.) Further, prior to imposing terminating sanctions, the trial court imposed monetary sanctions on 14 occasions over a six-month period, to no avail. The trial court did not act hastily in imposing a terminating sanction.

In sum, given the egregious circumstances in this case, we cannot say the trial court abused its discretion in selecting a terminating sanction. (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns, supra*, 7 Cal.App.4th at p. 36.)

2. *Contentions relating to Iskowitz's statement of damages.*

a. *Timing of service of statement of damages.*

Marciano contends the default judgment violated due process because the statement of damages was served only days before the default and well after the conduct giving rise to the default. The argument is unavailing.

By way of background, the relief granted to a plaintiff against a defaulting defendant cannot exceed that demanded in the complaint, in the statement required by Code of Civil Procedure section 425.11 [applicable to personal injury damages], or in the statement provided for by Code of Civil Procedure section 425.115 [punitive damages]. (Code Civ. Proc., § 580, subd. (a).) The statement of damages must be served "before a default may be taken." (*Id*., § 425.11, subd. (c), § 425.115, subd. (f).) A defendant is entitled to actual notice of the liability to which he or she may be subjected, "a reasonable period of time before default may be entered." (*Schwab v. Rondel Homes, Inc*. (1991) 53 Cal.3d 428, 435.)

Case law has held that service of a statement of damages 15 days before entry of default satisfies the reasonable notice requirement (*Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1323), as does service of the statement of damages *concurrently* with a motion for terminating sanctions. (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1178 (*Electronic*) ["Plaintiffs served their notice of punitive damages concurrently with their motion for terminating sanctions. Because service occurred before the entry of default, the notice of punitive damages was timely"].)

Here, Gary, Theresa and Carolyn served their requests for statement of damages on January 27, 2009, which was 29 days before the trial court imposed terminating sanctions and entered Marciano's default on February 25, 2009. On this record, the Iskowitz parties' statements of damages were timely.

As for Marciano's contention he was entitled to notice sufficient to provide him with an opportunity to alter his discovery behavior, *Electronic, supra,* 134 Cal.App.4th 1161, is on point. There, the defendants complained that service of notice of punitive

damages *concurrently* with the motion for terminating sanctions "violated their due process rights because the first formal notice of the amount of punitive damages occurred *after they had made the decision to 'redact' the computer hard drives*. In other words, defendants argue[d] they would not have misused the discovery process had they known their liability could reach $24 million. The argument implicitly suggests that had they received proper notice and chosen not to participate in the lawsuit, they also had the option to destroy the evidence requested in discovery. We reject this contention." (*Id*. at p. 1178, italics added, fn. omitted.)

In sum, Marciano's challenges to the timing of the service of statements of damages are meritless.

b. *The statements of damages did not bear the wrong case number*.

Marciano contends the statements of damages were void because they bore the wrong case number, in that the statements of damages were served bearing only the case number of Marciano's action (No. BC384493) and did not show the case number of the action in which the Iskowitz parties were seeking damages (No. BC385790). Marciano also argues the statement of damages improperly identified the Iskowitz parties as "cross-complainants" when they were in fact plaintiffs.

These arguments are meritless. Marciano could not possibly have been confused by the statements of damages. Case No. BC384493 was consolidated with case No. BC385790 and in the consolidated litigation, the trial court deemed Gary, Carolyn and Theresa the cross-complainants. Further, the three statements of damages clearly advised Marciano that Gary, Carolyn and Theresa were seeking compensatory and punitive damages against Marciano on their claims against Marciano. Marciano's contention in this regard is devoid of merit.

3. *Contentions relating to the pleadings.*

a. *No merit to Marciano's contention the cross-complaint was not well pled.*

Marciano contends the default judgment relies on a legally defective cross-complaint because many of the allegedly libelous statements are barred by the statute of limitations, were nonactionable opinion or were privileged. However, Marciano's

argument fails to differentiate between the essential elements of the tort of libel and affirmative defenses thereto.

Libel is defined by statute as "a *false and unprivileged* publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45, italics added.)

However, the one-year statute of limitations for libel (Code Civ. Proc., § 340, subd. (c)), which Marciano now invokes, is merely an affirmative defense, not an element of the cause of action. Likewise, privilege is pled as an affirmative defense, as was the case here (Marciano's 15th affirmative defense), unless the existence of privilege is shown on the face of the complaint. (*Cameron v. Wernick* (1967) 251 Cal.App.2d 890, 894-895; *Pavlovsky v. Board of Trade* (1959) 171 Cal.App.2d 110, 113.) Also, Marciano's answer pled (in the 5th affirmative defense) that some or all of the allegedly libelous statements constituted subjective statements of opinion.[6]

The imposition of terminating sanctions, by which the trial court struck Marciano's answer to the Iskowitz cross-complaint and entered his default, eliminated all of Marciano's affirmative defenses. A judgment by default "is said to 'confess' the material facts alleged by the plaintiff, i.e., the defendant's failure to answer has the same effect as an express admission of the matters well pleaded in the complaint." (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 823 [default entered as terminating sanction for discovery violations].) The entry of Marciano's default operated as an admission by him of the allegations of the cross-complaint by Gary, Theresa and Carolyn. (*Id*. at p. 823.) The affirmative defenses on which Marciano is relying to attack

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[6] An opinion or legal conclusion is actionable " 'if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false." ' [Citation.] Thus, an opinion based on implied, undisclosed facts is actionable if the speaker has no factual basis for the opinion. [Citation.]" (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1471.)

the sufficiency of the cross-complaint have no bearing on whether the cross-complaint was well pled.

b. *Marciano's contention the default judgment was based on allegations beyond the cross-complaint.*

Marciano contends the default judgment must be set aside because on the default proveup, Gary, Theresa and Carolyn departed from the claims alleged in their cross-complaint.

It is settled that the "complaint delimits the legal theories a plaintiff may pursue and the nature of the evidence which is admissible. [Citation.] 'The court cannot allow a plaintiff to prove different claims or different damages at a default hearing than those pled in the complaint.' [Citation.]" (*Electronic, supra*, 134 Cal.App.4th at p. 1182.)

Because this matter is being remanded for a new proveup hearing due to excessive damages (see Discussion § 4, *post*), it is unnecessary to address whether the trial court awarded damages based on allegations which were not pled in the complaint. For the guidance of the trial court on remand (Code Civ. Proc., § 43), we simply reiterate the principle that the complaint delimits the claims a plaintiff may pursue at a default proveup hearing.

4. *Excessiveness of damages awarded on default proveup requires reversal and remand for a new default proveup hearing before a different judge.*

a. *Standard of appellate review of damages awarded on default proveup.*

A defaulting defendant may attack the amount of a default judgment on appeal on the ground it is excessive as a matter of law. (*Uva v. Evans* (1978) 83 Cal.App.3d 356, 362-364.) *Uva* sets forth the applicable standard: "The power of an appellate court to review the trier of fact's determination of damages is severely circumscribed. An appellate court may interfere with that determination only where the sum awarded is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption [citations] or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court. [Citations.]" (*Id*. at pp. 363-364.) The *Uva* court examined the evidence presented at a default

proveup hearing to determine if the damages awarded were "totally unconscionable and without evidentiary justification." (*Id*. at p. 364.)

b. *Damages for injury to reputation were excessive*.

A statement which is defamatory on its face, such as a statement that tends to injure plaintiff in his or her occupation, is libelous per se and actionable without proof of special damage. (Civ. Code, § 45; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 541, p. 794.) However, a plaintiff's failure to prove special damages is a factor in concluding that damages for injury to reputation are excessive. (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1014.)

Here, the trial court awarded $5 million to Gary, and $1 million each to Theresa and Carolyn, for loss of professional and personal reputation.

Although Gary, Theresa and Carolyn claimed that Marciano injured their professional reputation, they did not present any evidence of lost clients or lost revenue. They made no attempt to quantify how the injury to their reputation affected their earnings. There was no showing as to how Marciano's conduct impaired their earnings.

The only specificity was in the following testimony by Gary: "I got a call from a CPA in New York with a large accounting firm. . . . [¶] And he said, 'Gary, I've heard about this Marciano thing, *and you got to tell me what's going on before I refer you to this potential client.*' " (Italics added.) However, Gary did *not* testify as to whether he landed that potential client.

Another witness at the default proveup hearing was Murray Lugash, a client who had known Gary for 12 years. In the past, Lugash had referred friends or associates to Gary. With respect to the impact of Marciano's attacks on Gary's reputation, Lugash testified as follows:

"Q And have you observed any reluctance on the part of people to become involved with [Gary] in light of these attacks?

"A *I don't know*, and I didn't think it was appropriate for me to ask them, so I just let it lie.

"Q Did any of them hire [Gary]?

"A *I don't know*." (Italics added.)

With respect to his own business involvement with Gary, Lugash only testified he had put some things "on hold" because Gary was so preoccupied with the Marciano matter. To wit:

"Q Now, in view of the amount of attention and time that [Gary] has had to put into dealing with and defending himself against Marciano's attacks, has that affected any decisions you might make with respect to your business involving [Gary]?

"A *Only to the extent that we've put a lot of things on hold because we didn't feel that we were getting his full attention*, especially over the last year." (Italics added.)

Lynne Doll, the president of a public relations agency and head of its risk management crisis communications practice, developed a five-year "reputation repair and management plan" to repair the damage to the reputations of Gary and his firm. The projected cost of the public relations campaign was $1,945,000.

On this record, in view of the absence of any evidence of loss of clients, loss of potential clients, or loss of revenue, the evidence does not begin to support the $7 million awarded to Gary, Theresa and Carolyn as damages for injury to reputation.

c. *Excessiveness of emotional distress damages.*

As indicated, the trial court awarded Gary, Theresa and Carolyn a total of *$24 million* in emotional distress damages. The trial court allocated those damages as follows: to Gary, $10 million for "emotional distress" and $10 million for "shame, mortification and hurt feelings;" to Theresa, $1 million for "emotional distress" and $1 million for "shame, mortification and hurt feelings;" and to Carolyn, $1 million for "emotional distress" and $1 million for "shame, mortification and hurt feelings." Despite the enormity of the award for emotional distress, neither Gary, Theresa nor Carolyn's emotional distress was sufficiently severe to compel them to seek out psychotherapeutic treatment. With respect to the issue of damages, the testimony was minimal. We summarize the brief testimony as follows:

(1) *Expert testimony*.

Saul J. Faerstein, M.D., is a psychiatrist who examined Gary, Theresa and Carolyn, solely for the purpose of determining the injuries they suffered as a result of Marciano's conduct, and in order to make recommendations for their future treatment.

With respect to Gary, Dr. Faerstein opined the Marciano matter touched every aspect of Gary's life, and caused him "emotional distress symptoms, anxiety, . . . sleep problems." For the first time in 2006, Gary was diagnosed with high blood pressure, which had to be treated with medication. Gary's self-image also suffered because his good name had been vilified. Gary feared for his own and his family's safety and became hypervigilant, which is a symptom of post-traumatic stress syndrome. Gary's physical manifestations included a stress-related skin rash in 2008, as well as hair loss, a loss of appetite, and more frequent sinus infections.

Dr. Faerstein opined Gary "*would benefit from talking to somebody*" and "*medication might also be important*." (Italics added.) "Through most of this, *his therapist was [Theresa],* . . . they leaned on each other for support and help." (Italics added.)

With respect to Theresa's damages, Dr. Faerstein testified Gary's emotional distress was "infectious" and Gary and Theresa's domestic life was impacted. Theresa also suffered sleeplessness, suffered from anxiety and somatic symptoms, and felt afraid and isolated, as Gary became more withdrawn. Dr. Faerstein diagnosed Theresa as suffering from "adjustment disorder with anxiety and depression." He opined Theresa also would benefit from supportive therapy and medication to deal with the damage caused by Marciano.

As for Carolyn, Dr. Faerstein testified she felt she was being singled out by Marciano and felt helpless, worried and isolated. She began having physical symptoms, including heart palpitations, cried frequently, had headaches, was hypervigilant, and had hyperventilation. Carolyn was so worried she consulted a cardiologist, who reassured her there was nothing wrong with her heart and that it was stress related. Dr. Faerstein diagnosed Carolyn as having an "an adjustment disorder with mixed emotional features[,]

. . . meaning depression and anxiety." Dr. Faerstein recommended Carolyn "seek treatment and to have somebody evaluate with a medication, when necessary."

(2) *Other testimony.*

At the default proveup, Gary testified that Marciano's attacks caused him the following physical reactions: stress, high blood pressure, skin problems, sinus infections, sleeplessness, hair loss, and aggravated his asthma. Gary further testified that his wife, Theresa, also suffered from stress and sleeplessness.

Alfred Hibdon, a CPA and attorney who has known Gary for 36 years, testified that in the past three years, Marciano's attacks on Gary had taken their toll, so that "every conversation was about Marciano, every minute all the time." The situation had affected Gary mentally as well as physically, "and it's really sad to say, but [Gary] has aged over 10 years in my opinion. He's gone totally white-headed. And I know he doesn't like [to] hear this, but he's lost a lot of his hair."

Carolyn and Theresa did not testify at the August 26, 2009 default proveup hearing on damages, but the trial court took judicial notice of their testimony during the July 17, 2009 default prove-up hearing on liability issues.

In substance, Carolyn's testimony at the earlier hearing was that she felt shock, disbelief and anger at Marciano's attacks. "This was just so offensive and it was frustrating, because I couldn't do anything about it. It was all false, and I had no way of answering it so I was very upset."

As for Theresa, at the earlier hearing she testified she felt "embarrassed and humiliated" at Marciano's attacks, and felt "sick to [her] stomach." She began fearing for her personal safety because Marciano had been relentless.

(3) *Award of $24 million for emotional distress must be reversed as excessive*.

On review of the trial court's award of damages on a default proveup, the award is reversible if "the award is so out of proportion to the evidence that it shocks the conscience of the appellate court." (*Uva v. Evans, supra*, 83 Cal.App.3d at p. 364.) The emotional distress damages awarded here, $20 million to Gary and $2 million apiece

to Theresa and Carolyn, readily meet that standard. It is sufficient to note that neither Gary, Theresa, nor Carolyn obtained psychotherapeutic treatment to cope with Marciano's attacks. A plaintiff may recover damages for emotional distress without having undergone psychotherapy. However, it stands to reason that severe emotional distress which would warrant an award of $24 million in damages would be supported by substantial damages incurred to treat such severe emotional distress.

(4) *Trial court awarded duplicative damages for emotional distress.*

Moreover, the $24 million award of emotional distress damages was duplicative.

On his statement of damages, on the line for general damages, Gary entered $10 million on the "Emotional Distress" line. Then, on the line for other general damages, Gary again entered $10 million and wrote "shame, mortification and hurt feelings." Similarly, Carolyn and Theresa, on their statements of damages, each requested $1 million for "emotional distress" and another $1 million for "shame, mortification and hurt feelings." The trial court awarded damages to Gary, Carolyn and Theresa exactly as they had requested.

"The range of mental or emotional injury subsumed within the rubric 'emotional distress' and for which damages are presently recoverable 'includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain.' [Citation.]" (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 648-649.) Therefore, subsumed within the request for general damages for emotional distress was the request for the subspecies of damages denominated "shame, mortification and hurt feelings."

Further, there was no attempt at the default proveup to differentiate between emotional distress, shame, mortification and hurt feelings. Moreover, "[r]egardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158-1159.)

The duplicative nature of the emotional distress damages which were awarded by the trial court is an additional basis for reversal of the judgment.

c. *Punitive damages award of $24 million also must be redetermined on remand*.

Because punitive damages must bear a reasonable relationship to compensatory damages or to the actual or potential harm to the plaintiff (*Bullock v. Philip Morris USA, Inc*. (2011) 198 Cal.App.4th 543, 563), the reversal of the compensatory damage awards also requires reversal of the punitive damage awards for a new determination in that regard.

5. *Judicial assignment issues*.

a. *Reassignment to a different judge on remand*.

Code of Civil Procedure section 170.1, subdivision (c) states: "At the request of a party *or on its own motion* an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court." (Italics added.) Said provision "was sponsored by the State Bar of California and, according to the report of the Senate Committee on the Judiciary, '[t]he reason for the change is that a judge who has had his determinations reversed might not undertake a retrial with total objectivity.' (Sen. Com. on Judiciary, Rep. on Sen. Bill No. 1633, Disqualification of Judges, p. 8.)" (*People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1562.)

Here, the enormous damages assessed by Judge White against Marciano, resting on the limited evidentiary showing made by the Iskowitz cross-complainants in support of their default proveup request, weigh in favor of directing that proceedings on remand should be heard before a different judge.

We make the further observation that Judge White repeatedly personalized the issue of damages, stating: "I would not have wanted to go through" what each of the Iskowitz parties went through, and "I would not have wanted to have a career that I had worked 30-plus years to maintain destroyed by some guy who thought it was amusing." It is "improper for the jury to attempt to measure the damage occasioned by the injury

and the sufferings attendant upon it, by asking themselves what sum they would take to endure what plaintiff has endured, and must endure." (*Horn v. Atchison, T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 609.) Where, as here, the trial judge sits as the trier of fact, the trial judge is subject to the same rules as the jury. (*Martin v. Martin* (1947) 79 Cal.App.2d 409, 410.)

Further, the trial court was mindful of Marciano's picketing the courthouse and repeatedly mentioned that fact at the default proveup. The trial court stated: "I am being asked to make the determination of damages in this case. I can well imagine what it must have been like to live through this, knowing as I do of Mr. Marciano's wealth, knowing as I do of Mr. Marciano's tendency to flaunt [*sic*] the judicial proceedings in this case. He stops at nothing, *including picketing the courthouse for months on end, which I feel I must mention*. [¶] I'm sure that he would say that I am not unbiased, but after having given him every opportunity to provide me with evidence and after having tried again and again and again to require him to produce the evidence, and having him flaunt [*sic*] the judicial proceedings, having him flaunt [*sic*] this court, *and having picketed the courthouse for months on end*, I feel no pity for Mr. Marciano." (Italics added.)

For all these reasons, it would be appropriate for the default proveup on remand to be heard by a different judge.

b. *Unnecessary to address Marciano's challenge to Judge White.*

Marciano contends Judge White's bias deprived him of his constitutional due process right to an impartial judge, and because an impartial judge is a basic requirement of due process, his bias claim is not barred by his decision not to seek a writ of mandate under Code of Civil Procedure section 170.3, subdivision (d), after Judge White refused to disqualify herself.

By way of background, on February 25, 2009, the trial court imposed terminating sanctions against Marciano. On July 23, 2009, prior to the default proveup hearing on damages, Marciano filed a verified statement of disqualification against Judge White, who ordered the statement stricken as untimely. Thereafter, the trial court proceeded with the default proveup.

In view of our determination that a different judge should hear the matter on remand, it is unnecessary to address whether Judge White erred in striking the statement of disqualification, or any related issues.

DISPOSITION

The February 25, 2009 order of dismissal is affirmed. The judgment entered August 26, 2009 is reversed only with respect to the award of damages against Georges Marciano, individually. In all other respects, the judgment is affirmed; the entry of default against Marciano is undisturbed. The matter is remanded for a new default proveup hearing on damages. On remand, the Presiding Judge of the Los Angeles Superior Court shall assign the case to a different trial judge (Code Civ. Proc., § 170.1, subd. (c)), who shall conduct a new damages proveup hearing to determine the amount of Gary, Theresa and Carolyn's damages on their cross-complaint. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.