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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICHAEL CHUNG,  
Plaintiff and Appellant,

v.

STEVEN BOOKSPAN et al.,  
Defendants and Respondents.

No. B236479  
(Los Angeles County  
Super. Ct. No. BC392047)

MICHAEL CHUNG,  
Plaintiff and Respondent,

v.

STEVEN BOOKSPAN,  
Defendant and Appellant.

No. B238058  
(Los Angeles County  
Super. Ct. No. BC392047)

APPEALS from a judgment and order of the Superior Court of Los Angeles County.  
Alan S. Rosenfield, Judge. Affirmed.

Henry M. Lee Law Corporation, Henry M. Lee and Michelle P. Tran for Plaintiff,  
Appellant and Respondent Michael Chung.

Law Offices of Lottie Cohen, Lottie Cohen and H. Michael Yuen for Defendant,  
Respondent and Appellant Steven Bookspan and Defendant and Respondent Hahn Kim.

Plaintiff Michael Chung appeals from a judgment entered after the trial court granted defendants Steven Bookspan and Hahn Kim's motion for judgment under Code of Civil Procedure section 631.8.<sup>1</sup> Chung contends the trial court abused its discretion in denying his motion to reopen his case after the court granted defendants' motion for judgment. Chung also contends the judgment is not supported by substantial evidence. We affirm the judgment.

Defendant Steven Bookspan appeals from a postjudgment order denying his motion for attorney fees under section 2033.420. We affirm.

### **BACKGROUND**

In June 2008, Chung filed this fraud action regarding a \$1 million investment he made in a company called Brainrush, Inc. He sued three individuals who were affiliated with Brainrush (Keith Kim, Douglas Park and Steven Bookspan) and three Brainrush entities (Brainrush, Inc., Brainrush Ventures, LLC and Brainrush Ventures Management, LLC). Out of these six defendants Chung originally sued, the matter went to trial against Bookspan only. Chung requested entry of default against the other five defendants. The matter also went to trial against Hahn Kim, who was substituted in for a Doe defendant in February 2011, two months before trial was set to commence.

#### **The Pleadings**

In the operative first amended complaint, filed May 11, 2009, Chung alleged he made a \$1 million investment in Brainrush, Inc. (hereafter, Brainrush) in late 1999, after his friend, Keith Kim,<sup>2</sup> the chief executive officer, director and majority shareholder of Brainrush, told Chung about his success with another business venture, introduced Chung to Brainrush management and provided Chung with an "executive summary" for Brainrush. According to the allegations of the first amended complaint, Brainrush "invested in several other companies to assist and incubate those companies for operation

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<sup>1</sup> Statutory references are to the Code of Civil Procedure unless otherwise indicated.

<sup>2</sup> Keith Kim is not a party to this appeal. He is one of the defendants who defaulted.

and profit, sale of the company, and/or public offering.”<sup>3</sup> In late 2000, Chung read an article stating Brainrush was set to receive approximately \$70 million from the sale of one of the incubated companies called mySimon.com.<sup>4</sup> Chung asked Keith Kim when he would receive his share of the profits. Keith Kim told Chung “all investors would have to wait a few months for the company to prepare financial statements and records to document the transaction and revenues.” Chung “made several requests for the status of the financial records” and Keith Kim told him “the accounting had not yet been completed and to wait.” In mid-2001, Keith Kim told Chung “there were no profits from the \$70 million transaction” because Brainrush “had suffered significant losses and the funds were used to offset those losses, so there was nothing from the transaction left to distribute as profits to the investors.” When Chung asked to review records documenting the losses and distribution of the \$70 million, Keith Kim told Chung Brainrush’s chief financial officer, defendant Steven Bookspan, “had lost the financial records.” Chung alleged Keith Kim “did provide piecemeal documents,” but those “documents were simply a few pages of bank information, and prepared financial statement[s] that had no supporting documents.”

Chung asked Douglas Park about “the missing money.” According to the allegations of the first amended complaint, Park was an officer, director and majority shareholder of Brainrush. Park allegedly told Chung that Keith Kim “had personally taken money” from Brainrush to pay Park on a personal loan Keith Kim took from Park. Keith Kim denied Park’s accusation.<sup>5</sup>

As alleged in the first amended complaint, Chung told Keith Kim he was going to sue him if Keith Kim “continued to withhold documents from him.” Keith Kim “responded that he was currently being investigated by the SEC for insider trading

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<sup>3</sup> At trial, defendant Bookspan described Brainrush as “an incubator of baby dot-coms, with the hopes of growing and selling them to third parties at huge gain.”

<sup>4</sup> At trial, defendant Bookspan described mySimon.com as a “comparison shopping” website for consumers.

<sup>5</sup> Park is not a party to this appeal. He is also one of the defendants who defaulted.

securities law violations and begged [Chung] not to sue him.” He represented he would return Chung’s \$1 million investment. According to Chung, Keith Kim “offered that if [Chung] agreed not to sue [him] at that time, [Keith Kim] would give [Chung] a promissory note, personally agreeing to repay [Chung] his entire investment in full within five years.” On November 1, 2002, Chung and Keith Kim executed the promissory note requiring Keith Kim to pay Chung \$1 million by December 31, 2007. Chung attached the promissory note to his first amended complaint.

According to the allegations of the first amended complaint, Keith Kim contacted Chung in 2005 and told Chung he wanted to invest in Chung’s real estate financing business. Keith Kim invested \$750,000 in Chung’s business. A few months later, Keith Kim asked Chung to return the money. Chung returned \$500,000, and Keith Kim agreed Chung could keep the other \$250,00 as a partial payment of the obligation due under the promissory note. In December 2007, when Chung asked Keith Kim to pay the \$750,000 balance due under the promissory note, Keith Kim asked Chung to “just forget the debt.” Chung declined to forgive the debt. In the first amended complaint, Chung asserted a first cause of action against Keith Kim and the Doe defendants for breach of the promissory note.

Chung asserted a second cause of action against all defendants for fraud/intentional misrepresentation. Chung alleged Keith Kim made misrepresentations about (1) the status of the financial records documenting the \$70 million transaction, (2) Bookspan’s loss of the financial records, (3) the lack of profits from the transaction because the funds were used to offset Brainrush’s losses, and (4) his intention to return Chung’s investment if Chung agreed to delay suing him, among other misrepresentations. Chung claimed Bookspan and Park also made these same misrepresentations “through” Keith Kim, who was their agent, representative and coconspirator. Chung alleged he relied on defendants’ misrepresentation to his detriment and was damaged in the amount of “\$750,000, lost interest, and lost profits from the \$70 million transaction.” Chung also sought punitive damages.

Chung asserted a third cause of action against all defendants for fraud/failure to disclose material facts. Chung alleged defendants “owed [him] a fiduciary duty to disclose all material facts relating to [his] investment and further duty to avoid acting in a manner which would personally benefit themselves or their related entities at [his] expense.” Chung claimed: “Defendants failed to disclose that one of the BRAINRUSH assets was going to be sold, failed to disclose the terms of the sale, failed to disclose the monies received from sale, failed to disclose the accounting for the sales [sic] proceeds, failed to disclose financial information as to the sale transaction and as to the entire company, failed to disclose that Defendants and each of them, had personally taken all or a portion of the sales [sic] proceeds and/or proceeds from [Chung]’s investments, failed to disclose that an officer was being investigated for securities fraud, failed to disclose that an officer was being sued/pursued for engaging in fraudulent transactions involving the sale of an unrelated business entity, failed to disclose their true intent not to return [Chung]’s investment, failed to disclose their true intent to delay [Chung] from filing his lawsuit in order to hide, destroy, alter, destroy [sic] evidence of Defendants’ fraudulent conduct as [Chung] was waiting for payment on his note.”

Chung alleged he would not have invested in Brainrush if he had known about Keith Kim’s “securities violations.” He also alleged he would not have executed the promissory note and delayed filing a civil action if he had known Keith Kim, Bookspan and Park “intended to delay [Chung] with the promissory [note] and had no true intent to repay [Chung].” Chung sought the same categories of damages as those set forth in his second cause of action for fraud/intentional misrepresentation.

Chung asserted a fourth cause of action against Keith Kim and the Doe defendants for fraud/false promise based on “the representations made to induce [Chung] to delay filing a civil lawsuit by way of the promissory note.”

Finally, Chung asserted a fifth cause of action against all defendants for securities violations. Chung alleged that Keith Kim, Bookspan and Park “had access to material information” about Brainrush, “which information would have materially affected [Chung]’s decision to purchase and to retain the securities at issue.” Chung also alleged

he would not have invested in Brainrush if he had known “Defendants and each of them had personal obligations between them that would be satisfied from BRAINRUSH assets, income, revenues, [and] profits.” Chung claimed he was entitled to rescission of his purchase of securities and to restitution of his investment, based on his reliance on defendants’ material misrepresentations and omissions of material fact.

On September 21, 2009, Bookspan filed his answer to Chung’s first amended complaint. He denied the allegations in the complaint and asserted numerous affirmative defenses, including a fourth affirmative defense alleging intervening and superseding causes of loss.

Trial was set for April 22, 2011. On February 17, 2011, Chung substituted Hahn Kim, Keith Kim’s brother, for Doe 1. The trial court continued the April 22, 2011 trial date. On April 27, 2011, Hahn Kim filed his answer to Chung’s first amended complaint. He denied the allegations in the complaint and asserted numerous affirmative defenses, including a fourth affirmative defense alleging intervening and superseding causes of loss. As an example of such a superseding cause, Hahn Kim alleged in his answer, “Keith Kim had a novation of [Chung]’s investment, which is a superseding event.”

### **The Trial**

The court trial began on May 5, 2011, with Bookspan and Hahn Kim as the only appearing defendants. Bookspan and Hahn Kim submitted a trial brief on the first day of trial. In their brief, they argued a novation of Chung’s \$1 million investment in Brainrush occurred in November 2002 when Chung and Keith Kim executed the promissory note. They also argued they could not be held liable for civil conspiracy based on actions of other defendants where they had no continuing relationship with Chung after 2001. Bookspan and Hahn Kim maintained Chung failed to state any valid cause of action against them. In their opening statement, Bookspan and Hahn Kim stated these same theories of the case, including novation.

Chung called Bookspan as an adverse party witness under Evidence Code section 776. Defendants reserved their examination of Bookspan until their case. Chung also testified. Defendants reserved their cross-examination of Chung.

Chung testified he made the \$1 million investment in Brainrush primarily because he believed mySimon was an asset of Brainrush. His friend, Keith Kim, represented Brainrush owned mySimon and provided Chung with documents indicating the same. Chung conceded—in opposing the motion for judgment made at the close of his case—that neither Bookspan nor Hahn Kim made any representations to induce Chung to invest in Brainrush.

### **Chung’s evidence regarding Bookspan**

Chung’s theory of liability against Bookspan was that, after mySimon was acquired by a company called CNET, Inc. in January 2000, Bookspan (1) delayed in providing financial documentation to Chung about the transaction after Chung requested the information, and (2) eventually provided “confusing and misleading” documentation indicating CNET shares were an asset of Brainrush when in fact they were not.

Evidence Chung presented at trial demonstrated, at or around the end of 1999, Bookspan became the chief financial officer (CFO) of Brainrush. He left his employment with Brainrush on March 2, 2001. He continued to communicate with Keith Kim about Brainrush business until the summer of 2001. Bookspan moved out of California on October 5, 2002.<sup>6</sup> He had not moved back to California at any time prior to trial.

Bookspan testified Brainrush never had any interest in mySimon. According to Bookspan, Keith Kim personally owned mySimon stock. When CNET acquired mySimon, Keith Kim received shares of CNET in exchange for his shares of mySimon. Bookspan testified, although Keith Kim did not place the CNET shares in a Brainrush account, he “pledged to put every dollar that he could from the CNET transaction into Brainrush as necessary.” Brainrush’s April 30, 2000 balance sheet, which Bookspan reviewed and approved in his capacity as Brainrush’s CFO, listed as an asset of Brainrush

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<sup>6</sup> The trial court concluded Bookspan’s move out of state tolled the statute of limitations on Chung’s causes of action against him, pursuant to section 351, which provides in pertinent part, “if, after the cause of action accrues, he [defendant] departs from the State, the time of his absence is not part of the time limited for commencement of the action.”

“marketable securities” valued at \$21,451,395. These “marketable securities” were the CNET shares Keith Kim received in exchange for his mySimon shares. According to Bookspan, Brainrush “had access to” these CNET shares, which were held in an account in Keith Kim’s name.

During a face-to-face meeting in early 2000, after CNET acquired mySimon, Chung asked Bookspan to provide him with financial statements for Brainrush. Bookspan gave Chung the April 30, 2000 balance sheet referenced above and a Brainrush income statement for the period October 1, 1999 through April 30, 2000. Bookspan prepared the balance sheet in response to Chung’s request for information. Bookspan testified he needed authorization from Keith Kim before he could release Brainrush financial information to anyone. Keith Kim authorized Bookspan to release the April 30, 2000 financial statements to Chung. That was the only time Keith Kim authorized Bookspan to release Brainrush financial records to Chung. Bookspan explained to Chung Keith Kim’s policy that all requests for Brainrush financial information had to go through Keith Kim. Bookspan did not recall Chung ever expressing to Bookspan (1) that he was upset because he was unable to obtain Brainrush financial information or (2) that he was thinking about suing Bookspan.

In September 2000, Chung sent a letter to Bookspan requesting updated financial statements for Brainrush. According to Chung’s trial testimony, Bookspan stated “[i]t would take some time” for Bookspan to get the documents to Chung because there were “many companies under Brainrush.” In early 2001, Chung made multiple requests to Bookspan for Brainrush financial information, and Bookspan told him the documents “were not ready.”

Chung testified, at or around the end of the first quarter of 2001, he informed Bookspan he was concerned about the delay and excuses regarding the Brainrush financial information and he was going to sue Bookspan, Brainrush and Brainrush management if he did not get the documents. According to Chung, Bookspan told him not to sue because Keith Kim would resolve the issue. Chung contacted Keith Kim who told him to be patient because Brainrush was “short-staffed” and “behind” on its



paperwork. The next time Chung contacted Brainrush in an effort to obtain financial information, he learned Bookspan had left the company.

Throughout 2001, Chung continued to ask Keith Kim to provide him with Brainrush financial information. Keith Kim assured Chung he would repay the \$1 million Chung had invested in Brainrush. Keith Kim represented Brainrush did not have any profit, but he would sell Brainrush assets to get the money to pay Chung. Keith Kim also stated he did not have the financial records because Bookspan had left the company and there was “some missing documentation[.]”

As discussed above, on November 1, 2002, Chung and Keith Kim executed a promissory note requiring Keith Kim to pay Chung \$1 million by December 31, 2007. At the time Chung filed this action, Keith Kim still owed \$750,000 under the promissory note.

### **Chung’s evidence regarding Hahn Kim**

Chung’s theory of liability against Hahn Kim was that Hahn Kim was “an unauthorized beneficiary of the \$1 million transaction between Chung and Brainrush.”

According to Bookspan, Hahn Kim was not an employee of Brainrush, but he was a “50 percent shareholder” of Brainrush. At trial, Bookspan testified about a “\$1 million pass-through investment . . . for the benefit of Hahn Kim.” According to Bookspan, Hahn Kim invested \$1 million in a company called MindStack, one of the Brainrush incubated companies. The funds were deposited into a Brainrush account and then transferred to a MindStack account. Hahn Kim made his investment some time in 2000.

According to Bookspan, shortly before trial, Keith Kim and Hahn Kim told Bookspan the source of the funds for Hahn Kim’s investment in MindStack was Hahn Kim’s own money. Chung claimed the funds for Hahn Kim’s investment in MindStack came from Chung’s \$1 million investment in Brainrush, and not from Hahn Kim’s own money.

### **Motion for Judgment and Motion to Reopen Case**

On May 9, 2011, at the close of Chung's evidence as to Bookspan and Hahn,<sup>7</sup> these two defendants made an oral motion for judgment under section 631.8. After hearing oral argument by the parties, the trial court granted the motion. The court concluded Chung did not prove any cause of action against Bookspan or Hahn Kim. As an alternative ground for granting judgment in favor of Bookspan and Hahn Kim, the court concluded the promissory note between Chung and Keith Kim constituted a novation which released Bookspan and Hahn Kim from any liability regarding Chung's investment in Brainrush.

On May 20, 2011, Chung made a written motion to reopen his case to introduce additional evidence. He claimed he was surprised at trial by defendants' assertion of a novation defense. He sought to introduce evidence to rebut defendants' claim of a novation. Chung wanted to introduce his own testimony (1) "that he never intended the promissory note to be a novation," (2) "that he never intended to waive any claims against Bookspan," (3) "that Keith Kim told [him] that if the promissory note was breached, [Chung] could still sue," and (4) "that he never knew that Hahn J. Kim had received any benefits from Defendants in this case until January 2011." (Underlining omitted.) He also wanted to introduce Bookspan's answer and response to form interrogatories, "which all show that [Bookspan] never disclosed his novation defense." Chung further asked the court to admit into evidence documents which were marked for identification at trial "relating to Brainrush's ownership of my[S]imon." (Boldface omitted.) Finally, Chung asked the court to allow him to "present evidence to impeach Bookspan's testimony" that he disclosed certain information to Chung. Chung argued he "was unable to present evidence earlier for impeachment because Bookspan testified at deposition that he did not provide ANY financials to Plaintiff." (Boldface omitted.) Bookspan and Hahn Kim opposed Chung's motion to reopen the case.

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<sup>7</sup> Chung rested his case as to Bookspan and Hahn Kim, but still intended to present additional evidence to prove-up the defaults.

On June 3, 2011, the trial court heard oral argument on Chung’s motion to reopen his case and denied the motion. The court noted the novation defense was asserted in Hahn Kim’s answer and also was raised in Bookspan and Hahn Kim’s trial brief which was submitted the first day of trial. Even if there was not a novation, the court stated Chung did not prove any cause of action against Bookspan or Hahn Kim. Finally, the court commented it did not believe the motion to reopen the trial was timely.

On June 30, 2011, the trial court issued its statement of decision. On August 17, 2011, the court entered judgment in favor of Bookspan and Hahn Kim.

## **DISCUSSION**

### **I. Chung’s Appeal, Case No. B236479**

#### **A. Denial of motion to reopen case**

Chung contends the trial court erred in denying his motion to reopen his case. “Trial courts have broad discretion in deciding whether to reopen the evidence. [Citation.] We review a court’s denial of a motion to reopen evidence for an abuse of discretion. [Citation.] The appropriate test for abuse of discretion is whether the trial court’s decision exceeded the bounds of reason.” (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208-209.) “A trial court does not abuse its discretion when it refuses to reopen a case for new evidence that will not produce a different result. [Citations.] A motion to reopen is also subject to a diligence requirement.” (*Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1222.)

Chung asserts the trial court should have granted his motion to reopen his case because he was surprised by the novation defense asserted by Bookspan and Hahn Kim at trial. Chung attached the promissory note—the agreement which defendants argued was a novation—to his first amended complaint. Hahn Kim alleged there was a novation in his answer to the first amended complaint filed shortly before trial on April 27, 2011.<sup>8</sup> Bookspan and Hahn Kim argued the promissory note constituted a novation in their trial

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<sup>8</sup> As set forth above, Hahn Kim was substituted in for a Doe defendant in February 2011. Before he answered the first amended complaint, he brought a motion to dismiss, which was denied.

brief submitted on May 5, 2011, the first day of trial. In her opening statement at trial, the attorney who represented Bookspan and Hahn Kim stated the promissory note was a novation. Chung did not object to defendants raising the novation issue at trial. When the trial court granted the motion for judgment on May 9, 2011, at the close of Chung's case, Chung did not ask the court to allow him to present additional evidence.<sup>9</sup> He waited 11 days, until May 20, 2011, before making his motion to reopen his case. The court did not abuse its discretion in finding surprise was not a valid ground for Chung's motion to reopen his case.

In any event, Chung's evidence regarding novation would not lead to a different result. The trial court concluded, regardless of whether there was a novation, Chung did not prove any cause of action against Bookspan or Hahn Kim. As discussed below, substantial evidence supports this conclusion.

Chung also argues the trial court should have granted his motion to reopen his case and allowed him to present evidence to impeach Bookspan's testimony that Bookspan disclosed certain information to Chung. Chung claims he "did not have a chance to present this evidence earlier for impeachment because Respondent Bookspan testified at deposition that he did not provide ANY financials to Chung." (Boldface omitted.) Chung did not reveal in his motion, and he does not reveal on appeal, what evidence he would like to present to impeach Bookspan's testimony and why he could not gather this information in time to present it at trial.<sup>10</sup> Moreover, he has not explained why he rested his case without informing the court there was additional evidence he wanted to present, and why he failed to mention this additional evidence at the time the court granted the motion for judgment. The trial court did not abuse its discretion in declining to reopen

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<sup>9</sup> Chung points out the trial court cut off his counsel's argument on the novation issue during the hearing on the motion for judgment. But the court did not refuse to allow Chung to present additional evidence on the novation issue because Chung never asked to present additional evidence on the novation issue.

<sup>10</sup> Chung used the transcript from Bookspan's deposition to impeach Bookspan's trial testimony relating to other issues, so it appears the deposition transcript is not the additional evidence Chung is referring to here.

Chung's case based on Chung's assertion he wanted to impeach Bookspan with unspecified evidence.

In his motion to reopen his case, Chung further asked the trial court to admit into evidence documents which were marked for identification at trial "relating to Brainrush's ownership of my[S]imon." (Boldface omitted.) Chung does not explain why he failed to move these documents into evidence before he rested his case and why he did not bring this issue to the court's attention at the time the court granted the motion for judgment. Chung has not demonstrated he was diligent in seeking to have this evidence admitted.

**B. Sufficiency of evidence supporting judgment**

Under section 631.8, subdivision (a), "After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in Sections 632 and 634, or may decline to render any judgment until the close of all the evidence. *The court may consider all evidence received, provided, however, that the party against whom the motion for judgment has been made shall have had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him, and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party. . . .*" (Italics added.)

As a threshold matter, Chung argues the trial court improperly granted the motion for judgment under section 631.8 because the court did not "give Chung the opportunity to present additional evidence to rebut any evidence that is adverse to him." He references the italicized language above from subdivision (a) of section 631.8 regarding the opposing party's opportunity to present additional evidence. As discussed previously, at the time defendants made their motion for judgment and the trial court granted it, Chung did not ask the court to present additional evidence. Thus, he cannot show the trial court failed to comply with section 631.8.

Chung contends the judgment is not supported by substantial evidence. “The findings of a trial court made after granting a motion for judgment pursuant to . . . section 631.8 are entitled to the same respect on appeal as are any other findings of a trial court, and are not erroneous if supported by substantial evidence. [Citations.] Where two or more inferences reasonably can be drawn from the facts, an appellate court is without power to substitute its deductions for those of the trial court. [Citations.] The rules applying to appellate review of a nonsuit granted in a jury trial are not applicable. [Citation.] We treat the court’s findings made pursuant to granting a motion under . . . section 631.8 as though made after a trial in which evidence was produced by both sides; thus the evidence is viewed in the light most favorable to respondents. [Citation.]” (*Charles C. Chapman Building Co. v. California Mart* (1969) 2 Cal.App.3d 846, 853.)

### **Bookspan**

Chung contends the trial court erred in granting the motion for judgment as to Bookspan because he proved causes of action for fraud, misrepresentation and breach of fiduciary duty. Chung argues the evidence he presented at trial shows (1) Bookspan delayed in providing him with Brainrush financial documents and (2) Bookspan provided him with a balance sheet which was “confusing and misleading” in that it indicated CNET shares were an asset of Brainrush when in fact they were not. Based on this evidence, Chung asserts Bookspan “intentionally defrauded Chung into believing Brainrush had marketable securities by misrepresenting the assets of Brainrush in furtherance of that fraud.” Chung also asserts Bookspan “perpetuated Keith Kim’s misrepresentation and fraud”—that Brainrush owned mySimon prior to the sale to CNET—“by failing to produce financial records for the company and delegating his duties as Chief Financial Officer” in deferring Chung’s requests for financial records to Keith Kim. Chung maintains the evidence shows “collusion amongst [defendants] to hide information from Chung.”

Substantial evidence supports the judgment in favor of Bookspan. Chung conceded Bookspan did not make any representation to induce Chung to invest in Brainrush. Chung did not present evidence demonstrating Bookspan was aware of Keith

Kim's representation to Chung that Brainrush owned mySimon at the time Chung invested in Brainrush.

Chung has not stated what financial records he believes Bookspan was obligated to provide, but did not provide, to him. There is no evidence Chung ever asked Bookspan for an explanation regarding the "marketable securities" item listed on the Brainrush balance sheet Bookspan prepared. Chung has not established Bookspan improperly listed the marketable securities on Brainrush's balance sheet. Bookspan testified the CNET shares in Keith Kim's account were available for Brainrush's use if necessary. In ruling on the motion for judgment, the trial court stated: "It depends upon your accounting interpretation of that. If the shares are pledged, it can be an asset." The propriety of information listed on the balance sheet is not "common knowledge," as Chung asserts. As the trial court noted in its statement of decision, Chung "presented no forensic expert as to Steven Bookspan's standard of care as Brainrush's CFO, or to interpret the financial statements prepared by Steven Bookspan for internal corporate use."

Assuming Bookspan breached his fiduciary duty or committed fraud in failing to provide unspecified financial documentation and in preparing the balance sheet, Chung has not shown how this caused him any damage. As set forth above, Chung has conceded Bookspan did not do anything to induce Chung to invest in Brainrush. Chung first asked Bookspan for Brainrush financial records in early 2000 and Bookspan left Brainrush in March 2001. It is not clear what would have been different if, sometime between early 2000 and March 2001, Bookspan had told Chung Brainrush never owned mySimon and had given Chung additional Brainrush financial records. There is no evidence indicating Chung would have been able to get his money back at that point.

Substantial evidence supports the judgment in favor of Bookspan based on the trial court's conclusion Chung did not prove any cause of action against Bookspan.

### **Hahn Kim**

Chung contends the trial court erred in granting the motion for judgment as to Hahn Kim because he "presented overwhelming evidence to show that [Hahn] Kim was a

beneficiary of misappropriated funds from the \$1 million dollar transaction.” (Boldface and initial capitals omitted.) Chung asserts the \$1 million Chung invested in Brainrush was transferred to MindStack for the benefit of Hahn Kim. Chung’s assertion is based on speculation. He did not present evidence showing the \$1 million pass-through investment for Hahn Kim had any connection with Chung’s investment in Brainrush.

Chung does not articulate any other basis for liability on the part of Hahn Kim.

## **II. Bookspan’s Appeal, Case No. B238058**

After the trial court entered judgment in his favor, Bookspan brought a motion for attorney fees against Chung. Bookspan appeals from the order denying his motion for attorney fees.

### **Proceedings below**

Bookspan brought his motion pursuant to section 2033.420, based on Chung’s denial of 21 requests for admissions Bookspan propounded to Chung. In all, Bookspan propounded 33 requests for admission to Chung.

By his motion, Bookspan sought to recover attorney fees for Chung’s failure to admit: (1) that Bookspan did not breach any agreement with Chung, (2) that Bookspan did not breach any duty to Chung, (3) that Bookspan is not liable for any losses suffered by Chung, (4) that Bookspan did not conspire with the other defendants to defraud Chung, (5) that Bookspan did not make any misrepresentations to Chung, (6) that Bookspan was not negligent in the ways alleged by Chung, (7) that Bookspan is not personally liable for any debts, liabilities and losses of Brainrush, (8) that Bookspan is not personally liable to Chung, (9) that Bookspan did not lose corporate documents, (10) that Bookspan did not approve the acts of the other defendants, (11) that Chung invested in Brainrush in reliance on representations made by Keith Kim only, (12) that all of Chung’s dealings were directly with Keith Kim, (13) that Chung never dealt directly with Bookspan, (14) that Bookspan never represented to Chung that Bookspan lost corporate documents, (15) that Bookspan never fabricated any stories to Chung as Chung alleged, (16) that Bookspan did not benefit from such fabricated stories as Chung alleged, (17) that Bookspan was not a majority shareholder of Brainrush, (18) that Bookspan did



not control Brainrush, (19) that Bookspan was not the alter ego of Brainrush, (20) that the agreement between Chung and Keith Kim was a novation of any preexisting debt, and (21) that Bookspan never made any direct misrepresentation to Chung. The majority of these requests for admissions asked Chung to admit legal conclusions, not facts.

Bookspan sought all attorney fees he incurred from the inception of the case through judgment, which amounted to \$86,782.20. Bookspan attached to his motion an 11-page chart listing the task performed by the attorney, the amount of time spent, the attorney's billable rate, and the fees incurred, for each of the five attorneys in the office who performed legal services on his behalf in this action.

Section 2033.420 provides:

“(a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

“(b) The court shall make this order unless it finds any of the following:

“(1) An objection to the request was sustained or a response to it was waived under Section 2033.290.

“(2) The admission sought was of no substantial importance.

“(3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter.

“(4) There was other good reason for the failure to admit.”

Chung opposed Bookspan's motion for attorney fees. Chung argued Bookspan was not entitled to attorney fees under section 2033.420 because Bookspan did not prove the truth of any of the matters at issue in the requests for admissions. Chung pointed out Bookspan did not present his case at trial. According to Chung, the trial court entered judgment in favor of Bookspan because Chung did not present sufficient evidence to prove his case and the court concluded a novation released Bookspan from any liability

regarding Chung's investment in Brainrush. Chung also argued he had reasonable grounds for maintaining the promissory note did not constitute a novation, for denying the other requests for admissions, and for believing he would prevail on these matters at trial.

In his opposition, Chung further challenged the amount of attorney fees Bookspan requested. Chung argued, to the extent Bookspan was entitled to any fees under section 2033.420, he was not entitled to fees incurred before January 27, 2010, the date Chung served his response to Bookspan's requests for admission, or fees incurred after May 9, 2011, the date the trial concluded and the court granted the motion for judgment. The fees incurred before January 27, 2010 amounted to \$27,395.70, and the fees incurred after May 9, 2011 amounted to \$13,396.50, leaving \$45,990 incurred between those two dates. Chung also argued Bookspan failed to demonstrate the requested fees were reasonable and necessary in that Bookspan "fail[ed] to describe or explain what work was done and how the time spent was related to proving [Chung]'s denials." Chung urged the trial court to deny Bookspan's motion for attorney fees in its entirety based on Bookspan's "attempt[] to recover all of his fees incurred in this case, rather than only those fees permitted under C.C.P. section 2033.420."

After hearing oral argument, the trial court denied Bookspan's motion for attorney fees. The court found Bookspan's request "is inflated and puts things in that are nonrecoverable," and that is a basis to deny the motion in its entirety. The court also indicated Chung had reasonable grounds for denying the promissory note constituted a novation. The court commented: "Of course, the term novation probably is in the mind of the beholder, I suppose, at the point in time when you're looking at it." The court also noted Chung failed to prove his case at trial and Bookspan was not required to put on a defense. The court concluded its ruling with the following comments: "On the state of this entire record and the court's discretion being exercised here, I don't feel that attorneys fees are warranted. The motion is basically to try to get attorneys fees for everything, and it's not warranted. It's excessive. So the motion is denied."

## Analysis

As set forth above, under section 2033.420, “a party that denies a request for admission may be ordered to pay the costs and fees incurred by the requesting party in proving that matter. The court ‘shall’ order the payment of such fees and costs unless it finds: (1) that an objection to the request was sustained or a response to the request was waived; (2) the admission sought was of no substantial importance; (3) the party failing to make the admission had reasonable ground to believe that the party would prevail on the matter; or (4) there was other good reason for the failure to admit the request.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1276.) “We review the court’s ruling for an abuse of discretion.” (*Id.* at pp. 1275-1276.)

In denying Bookspan’s motion for attorney fees in its entirety, the trial court did not abuse its discretion. Bookspan improperly tried to use section 2033.420 as a means of recovering all attorney fees he incurred from the inception of the case through judgment. He made no attempt to show how the fees he sought were incurred in proving the truth of the matters covered by the 21 requests for admission at issue. He provided the trial court with no means of fashioning a reasonable fee award in the event the court determined Chung improperly denied a particular request for admission. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 635 [“A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.”].) Moreover, Bookspan cannot demonstrate Chung improperly denied the legal conclusions Bookspan asked Chung to admit more than a year before trial (e.g., that Bookspan did not breach any duty to Chung, that Bookspan was not negligent, that the promissory note constituted a novation, etc.)<sup>11</sup>

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<sup>11</sup> We reject Bookspan’s request for attorney fees on appeal, as Bookspan has not shown he is entitled to any attorney fees, let alone fees incurred on appeal.

### **DISPOSITION**

The judgment and order are affirmed. Hahn Kim is entitled to recover costs on appeal. Michael Chung and Steven Bookspan are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.