NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CAL AGRI PRODUCTS, LLC, et al., Plaintiffs and Respondents, v. RICHARD STECKLER et al., Defendants and Appellants.	B263366 (Los Angeles County Super. Ct. No. SC121606)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed.

Richard Steckler, Noriko Nakada and Todd Steckler, each in pro. per., for Defendants and Appellants.

Law Offices of Kirk M. Hallam, Kirk M. Hallam and Nicholas J. Hoffman for Plaintiffs and Respondents.

Appellant Richard Steckler, a long-time business associate of respondent R. Bruce Kemper, and Steckler's wife and son, the latter of whom was also de facto in-house counsel for respondent Cal Agri Products, LLC, a firm Kemper and Richard Steckler formed in 1997, worked together for several years to illegally divert sales of Cal Agri's patented pesticide products to their own secretly formed, competing companies. We conclude that, due to material deficiencies in their brief, and a complete failure to adhere to standards of appellate procedure, appellants forfeited their claims of trial court error. Independently, we also conclude that appellants' affirmative defenses and substantive claims fail on the merits.

PROCEDURAL HISTORY

On November 4, 2013, plaintiffs and respondents Cal Agri and Kemper (then 91 years old) initiated this action, alleging 13 causes of action against defendants and appellants Richard Steckler (Richard), Richard's son, Todd Steckler (Todd), Dr. Brook Murphy, CAI Patent Holding, LLC, a Delaware limited liability company (CAIPH),[1] and CAI America, LLC. A second amended complaint (SAC), adding appellant Noriko Nakada, Richard's wife, as a defendant was filed in February 2014.

The operative third amended complaint (TAC), as to which respondents sought and received leave to file after trial to conform to proof alleges the following 10 causes of action, designated by number: (1) and (2) Breach of Fiduciary Duty and Fraud (by both plaintiffs against Richard and Todd); (3), (4) and (10) Misappropriation of Trade Secrets, Conversion and Declaratory

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1 The trial court frequently referred to CAIPH as "the Delaware Entity."

Relief (by both plaintiffs against all defendants); (5) and (7) Intentional Interference with Prospective Economic Advantage and Unfair Competition (by Cal Agri against all defendants); (6) Breach of Contract (by Cal Agri against Nakada); (8) Breach of Promissory Notes (by both plaintiffs against Richard); and (9) Elder Financial Abuse (by Kemper against Richard and Todd).

An 11-day bench trial was conducted during May 2014. Closing arguments were made in August 2014. Soon after trial, respondents sought discovery sanctions based on newly discovered evidence that appellants had violated a pre-trial discovery order.[2] On January 12, 2015, after additional briefing, the trial court granted issue sanctions in respondents' favor. After considering the parties' objections to a proposed version, the court issued a Statement of Decision (SOD) on February 2, 2015. Judgment in favor of respondent was entered on February 9, 2015.

FACTUAL BACKGROUND

Kemper and Richard Form Cal Agri and Develop the Company's Pesticide Products

In 1997, Kemper, an entrepreneur and investor, and Richard established Organic Solutions LLC, to develop and market an innovative

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2 On April 25, 2014, the court granted Cal Agri a preliminary injunction, preventing appellants from manipulating the patent rights contained within CAIPH, and ordering them to turn over all indicia of ownership and product sales of CAIPH. Appellants did not comply with that order. The trial court granted respondents' motion to compel, and ordered appellants to produce all documents relating to the sale of pesticide products through CAIPH and two other companies.

group of agricultural pesticide products. The company, renamed Cal Agri in 2000, was capitalized almost entirely by Kemper, its "managing member" and headquartered in West Los Angeles. Richard, the "operational manager," was responsible for traveling around the world in an effort to locate researchers and distributors.

Between 1997 and 2000, Cal Agri scientists—led by the company's chief scientist, defendant Dr. Brook Murphy (Murphy)—developed a new pesticide formulation.[3] That formulation, the "Physical Mode of Action Pesticide," [PMA Pesticide] is the underlying essence of the patent rights at issue here, i.e., "Agri-50," or the "017 Patent Family." Agri-50, Cal Agri's initial group of products, included pesticides that were more both effective at killing certain crop-destroying pests and insects, and less toxic to humans and livestock.[4]

Todd Becomes Cal Agri's In-House Counsel, Designated Contact for the Company's Patent Counsel and a Co-Inventor of the Patent

From 2000 to 2008, Todd, a New York practitioner not licensed to practice law in California (a fact revealed for the first time at trial), served as Cal Agri's de facto in-house counsel in California and performed legal services on its behalf. From early 2000 through 2001, Todd collaborated with Murphy in an effort to discover "an efficacious formulation" in the development of Cal Agri's pesticide formulation. During that same period, Todd also became a

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3 Murphy is not a party to this appeal.

4 Cal Agri filed for and obtained United States and foreign patents for other products including Agri-Terra, Agri-NF and Agri-Colle.

member of Cal Agri, and received a six percent ownership stake in the company as "sweat equity."

In 2003, Cal Agri retained a New York law firm, Hedman & Costigan (Hedman firm), as patent counsel. Attorneys Ken Florek and his associate Mathew Solow were Cal Agri's primary contacts at the Hedman firm. Todd was Cal Agri's "designated contact for all discussions, details and necessary information on [the] patent process."

In June 2003, the Hedman firm filed the first patent application for Cal Agri's pesticide formulation, which eventually was registered as Patent No. 7,579,017 ("017 Patent") for a PMA Pesticide. Todd instructed Florek to identify him and Murphy, the latter acting as an employee on Cal Agri's behalf (which owned the rights), as co-inventors on the patent application. By doing so, two undivided ownership interests in Cal Agri's proprietary pesticide formulation were created.

Todd Does Not Assign His Patent Rights to Cal Agri

In or about 2003, Todd led Kemper—who had no knowledge of patent law and trusted Todd and the company's outside patent attorneys to act in Cal Agri's best interest—to believe that Cal Agri was the sole owner of the patents. From 2003 to 2009, all fees related to the patent prosecution for the 017 Patent Family were paid by Cal Agri.[5] Todd testified that during those years, he did not inform, nor did he ever consider informing, Kemper of any

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5 Cal Agri (not appellants) paid the Hedman firm through July 2009. Even after July 2009, the trial court found that, although appellants paid the Hedman firm, they did so using funds generated by unlawfully exploiting Cal Agri patents.

actual or potential conflicts inherent in the fact that he (Todd) served as Cal Agri's counsel at the same time he held an equity interest in the company and had instructed its counsel to identify him as co-inventor of a company patent. Indeed, when Kemper learned Todd had been identified as a co-inventor on Cal Agri's patent application, Todd wrote a November 23, 2004, legal opinion assuring Kemper the patent rights belonged to Cal Agri, and that Todd's assignment of his patent interest to Cal Agri was a mere formality and "consideration for [his] ownership interest in the company."

Despite his representations to Kemper, as early as 2002, Todd informed Cal Agri's patent counsel he had no intention of assigning his rights in the patent, and continued refusing to do so through 2007 each time counsel submitted an assignment for his signature. Todd's refusal to assign his patent rights was never disclosed to Kemper or Cal Agri by the company's patent attorneys, nor were Kemper or Cal Agri informed about the actual or potential conflict of interest created by Todd's unwillingness to execute an assignment. Todd testified contradictorily at trial that he both intended never to assign his patent rights to Cal Agri under any circumstances, and that, at times, he was willing to do so. Todd concealed his conflict of interest for about six years, and acknowledged that it wasn't until 2009 that he told Cal Agri he "might not" assign his patent rights.

Appellants' Surreptitious Efforts to Gain Control of the Patents

In January 2007, unbeknownst to Kemper or other members of Cal Agri, appellants and Cal Agri's patent counsel filed a patent application for Cal Agri's pesticide formulation. Nakada's name was inserted as inventor in Murphy's stead, and Florek began communicating with her as to patent-related matters.

Todd was still providing in-house legal services to Cal Agri in March 2007. He did not disclose to Kemper or Cal Agri that he or the company's patent counsel were filing or had filed a patent application for Cal Agri's invention which he knew, would deprive Cal Agri of its ownership interest in the patent. Appellants' effort to gain control of Cal Agri's pesticide formulation in 2007 were thwarted when the Patent Office noticed that the new formulation was covered by the existing 017 patent, and the application was withdrawn.

In 2009, Todd pressured Kemper and Cal Agri to accept an offer orchestrated by Richard for an $8 million buy-out of Cal Agri and its patents by a Chinese company. On April 14, 2009, after Cal Agri refused the offer, Todd sent an email[6] to Kemper. Todd said he believed the company was no longer operational, and announced that he was "left no choice but to consider legal action to dissolve Cal Agri in the hope that there is still something to be salvaged."[7] Todd testified that his purpose in sending the email was to inform Kemper that Todd would no longer be involved with Cal Agri in any way, that he believed Cal Agri had "ended its term of doing business or running anything," and that he "[had his] patent rights and . . . intend[ed] to use them." In Todd's opinion, his April 14, 2009 email terminated his attorney-client relationship with Cal Agri.

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6 This email was the focus of a significant amount of testimony at trial, and evidence (Ex. 159) on which the court explicitly relied in concluding that Todd breached his fiduciary duty to Cal Agri. Both parties refer to the document; neither included a copy of the actual exhibit in its appendix.

7 By this point, Kemper had invested between $12 million and $13 million in Cal Agri. Richard had invested $5,100; Todd invested nothing.

Appellants Create CAIPH in an Effort to Gain Control of the Patents

In May 2009, Richard and Nakada unilaterally removed all other members of the Cal Agri board from its Asian subsidiary, freeing them to use the subsidiary's Hong Kong bank account to continue paying Florek's legal fees using Cal Agri funds. In July 2009, Richard, Todd and Nakada met with Florek and agreed to pay his firm's legal fees. Florek did not know or care whether he was paid with funds from Cal Agri's Hong Kong account, or money from under Richard's mattress. In July 2009, Florek filed another patent application for an 017 Patent. Todd and Murphy were named as co-inventors, even though Murphy had explicitly instructed Florek that no applications or filings in his name were to be made without his consent. After July 2009, Florek's loyalty was to appellants, and all of his communications regarding the 017 Patent Family were directed to them. The trial court found Florek had conspired with appellants to "reroute" Cal Agri's patent rights to CAIPH.

In June 2010, Richard asked the Hedman firm to release Cal Agri's files to another law firm to which Florek had moved. Florek informed Jim Costigan, a partner at the Hedman firm, that Cal Agri no longer owned the 017 Patent because Cal Agri had not paid its legal fees, and thus had abandoned them. This was a novel theory to Costigan, who had practiced patent law for 40 years. Florek also said that Todd claimed an ownership interest in the 017 Patent Family. In Costigan's view, if the patents had truly been abandoned, they "should be turned over to the State of New York," and any ownership claims should be resolved in an abandoned property proceeding. The Hedman firm rejected the notion that Cal Agri lacked a right to the 017 Patent Family.

In July 2012, Todd created CAIPH, listing the residence of his father and Nakada in North Carolina as its place of business. Richard, falsely representing himself as Cal Agri's Managing Director, transferred title of Murphy's inventorship rights from Cal Agri to CAIPH. Florek was directed to send all CAIPH documents to Nakada's home. Todd instructed Solow to assign Murphy's foreign patent rights to CAIPH.

In January 2009, appellants filed another patent application naming CAIPH as assignee of Todd's and Murphy's patent rights. They did not tell Kemper or Cal Agri that its patent rights had been transferred or that CAIPH existed. As a result, appellants were secretly able to gain control of Cal Agri's patents.[8]

Richard Breaches Promissory Notes and Secretly Competes with Cal Agri

When Cal Agri was founded in 1997, Kemper and Richard agreed to contribute equal amounts of capital. By 2008, Kemper had invested up to $13 million in the company; Richard had invested $5,100. From 1999 to 2008, Richard used Kemper's and Cal Agri's funds to subsidize his life and expenses, including his living and travel expenses, vacations, divorce, wedding and relocation to Hong Kong. By January 17, 2006, Richard owed Kemper and/or Cal Agri over $2.5 million, an amount memorialized in three

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8 Appellants concealed this scheme until after this litigation was filed. Initially, counsel purported to represent CAIPH against Cal Agri, and demurred on behalf of that entity. Later, appellants reversed course, claiming that CAIPH had always owned by Cal Agri. However, they produced no documents in response to a court order to produce evidence confirming their claim that the sole member of CAIPH was Cal Agri.

promissory notes. Each note became due on January 1, 2009. No payment had been made on any promissory notes.

By 2006, Cal Agri was in a dire financial state. In 2007 and 2008, Richard experienced "difficulty in obtaining funds" from Cal Agri and Kemper.

In early September 2008, Richard falsely told the principals of Bioplanet (one of Cal Agri's largest distributors) that Cal Agri was "reorganiz[ing]," and he and Nakada were in the process of buying Kemper out. He later repeated this in an undated email to Bioplanet's principal, claiming:

> "The product has now proved itself throughout the world and now is the time to take the business to the next level. There are more products in the pipeline. [Kemper] has certainly contributed to the success with his financial and emotional help, but time has caught up to him, and I have to move the business forward. He has agreed to permit my group to buy out the majority share of the company and go ahead with the plans for the future."

In January 2009, Richard again falsely claimed he was "close to finishing the deal with [Kemper]" and asked Bioplanet to commit to ordering product exclusively from Richard's new company. A month later, Richard and Todd presented Kemper and Cal Agri a "buy out" offer from an unidentified Chinese company, and pressured him to accept it. Kemper was wary of the offer for several reasons: (1) few details were available, and Richard refused to further clarify the offer's terms; (2) there was a one-week deadline for acceptance; (3) Richard had negotiated a kickback for himself in (at least) the form of continued employment; (4) Richard falsely claimed the offer came from a company that was actually only the broker; and (5) the deal would repay Cal Agri's investors only a fraction of the $12-13 million they had invested in the company.

Appellants Start CAI Limited, Divert Cal Agri Business and Seek EPA Registration for Cal Agri's Formulation

Before Todd purportedly "disassociated" from Cal Agri in 2009, Richard was already working on a plan to start a foreign company of his own, called CAI Limited, and sell replicates of Cal Agri products. He and Nakada moved to Tokyo for two years to run the business. In 2011, CAI Limited began selling pesticides under the name "Agri-Trap." Those products were advertised as "patented," and Richard conceded at trial that was a reference to the 017 Patent Family. In a website created for CAI Limited, Richard posted Cal Agri's research data as his own and used the Cal Agri "Agri Terra" registered trademark. Nakada testified that distributors understood the "CAI" in CAI Limited to refer to "Cal Agri International." Richard acknowledged that all his business contacts and relationships in the pesticide business were developed before March 2009 while he was with Cal Agri. After that, he secretly co-opted Cal Agri's customers and business opportunities, and used them to establish a competing business, representing himself as a "Managing Director" or "Member" of Cal Agri.

In 2012, appellants established CAI America, LLC, a domestic version of CAI Limited, to sell replicates of Cal Agri pesticides in the United States. CAI America filed trademarks for "Agri-Trap," a product Richard also conceded was in the 017 Patent Family.[9]

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9 After trial appellants revealed that appellants had concealed applications filed by CAI America seeking EPA registration for Cal Agri's pesticide formulation. The trial court took judicial notice of the EPA. applications, which are listed on the Federal Register.

DISCUSSION

Appellants contend that the trial court erred in virtually every respect, arguing that its 42-page thoughtful and well-constructed Statement of Decision (SOD) is a "rambling diatribe" replete with "multiple internal inconsistencies," and "wholly unsupported" misstatements of fact and law. They maintain that the judgment "is not supported by the evidence or the law, goes far beyond any relief that could be granted and should be stricken in its entirety."

I. *Appellants Have Forfeited the Issue of Substantial Evidence by Their Failure to Comply with Appellate Standards*

Appellants fail to identify, let alone tailor, their arguments to the applicable standard of review. This is a fundamental error. The "threshold issue" in every appeal is the governing standard of review. (*Clothesrigger, Inc. v. GTE Cor*p. (1987) 191 Cal.App.3d 605, 611.) Although appellants make a tepid effort to couch their arguments in terms of preclusion as a matter of law, the essence of their claims of error is a challenge to the sufficiency of the evidence supporting the trial court's findings. (See *Wickham v. Southland Corp*. (1985) 168 Cal.App.3d 49, 54 [contention that evidence establishes a fact as a matter of law when fact finder has determined that fact otherwise is simply another way to assert the finding lacks sufficient evidentiary support].)

An appeal involving a claim of insufficient evidence begins from the premise that the judgment is correct. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 (*Cahill*).) We consider the evidentiary record in the light most favorable to the prevailing party, accept as true all evidence and reasonable inferences therefrom tending to establish the correctness of the trial court's findings, and resolve any conflicts in favor of the judgment. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 369; *Cahill, supra,* 194 Cal.App.4th at p. 956.) "'Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment.' [Citation.]" (*Baxter Healthcare, supra,* 120 Cal.App.4th at p. 369; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman & Clark*).) "We must presume that the evidence supports the court's factual findings unless the appellant affirmatively demonstrates to the contrary. [Citation.]" (*Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 80.) We liberally construe the trial court's findings of facts, express or implied, and do not reweigh evidentiary conflicts or redetermine witness credibility. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.) The testimony of a single witness is sufficient if believed by the factfinder (*ibid*; Evid. Code, § 411), and the court may believe parts of a witness's testimony and disbelieve others. (*Citizens Business Bank v. Gevorgian, supra*, 218 Cal.App.4th at p. 613.)

A necessary corollary to the presumption of correctness on appeal is that an appellant must provide an adequate record to the court establishing error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.) Appellants must set forth all material evidence bearing on an issue, not merely evidence that favors them, and must demonstrate how that evidence falls short of supporting a challenged finding. (*Foreman & Clark, supra,* 3 Cal.3d at p. 881; *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.) The appellant must also support its assertions with accurate record references. (*American Indian Model Schools v. Oakland Unified School Dist*. (2014) 227 Cal.App.4th 258, 284; Cal. Rules of Court, rule 8.204(a)(1)(C).) Failure to comply with these requirements and present an accurate evidentiary record forfeits an appellate challenge to the sufficiency of the evidence. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 52–53 (*Clark*).)

"Professional ethics and considerations of credibility in advocacy require that appellants support their arguments with fair and accurate representations of trial court proceedings." (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 745.) The "'burden to provide a fair summary of the evidence "grows with the complexity of the record."'" (*Id*. at p. 739.) An "'appellate court is not required to search the record on its own seeking error.' [Citation.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 (*Nwosu*).)

Nor are appellants exempt from the foregoing rules because they are self-represented.[10] An individual may choose to act as his or her own counsel (*Paradise v. Nowlin* (1948) 86 Cal.App.2d 897, 898), but will "be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]" (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210.) Like attorneys, pro. per. litigants must follow the correct rules of appellate procedure. (*Bistawros v. Green*berg (1987) 189 Cal.App.3d 189, 193 [self-represented party "held to the same restrictive procedural rules as an attorney"].) The record appellants have presented fails these requirements in several respects.

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10 Todd is not a licensed legal practitioner in California.

First, to the extent appellants cite evidence, they focus almost exclusively on evidence that supports their position (or would have done so had it been believed). By doing so, appellants ignore the trial court's adverse credibility rulings and a record that directly contradicts their claims, not to mention issue sanctions the court imposed after finding appellants intentionally concealed relevant, responsive evidence.

Second, appellants fail fairly to identify all relevant evidence. This is especially important here given the size of the record, the complexity of the issues and the inaccuracy of the appellate record. For example, appellants assert that the court erred in granting respondents' post-trial motion to amend to file the operative TAC to conform to proof. However, they chose not to or neglected to include in their appendix any brief or other papers submitted in support of or opposition to that motion. An appendix that lacks a motion at issue or relevant papers is not adequate for review. (*Hernandez v. California Hospital Medical Cen*ter (2000) 78 Cal.App.4th 498, 502.) Similarly, appellants take issue with numerous factual findings made by the trial court, but have chosen not to submit for review the majority of the evidence on which the court based those findings, particularly the exhibits on which the court expressly grounded its findings.[11]

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11 Respondents also maintain that a number of the exhibits appellants did submit in their appendix are not identical to the same exhibit as used at trial. The Rules of Court permit a party to proceed on appeal by way of an appendix rather than a formal clerk's transcript. (Cal. Rules of Court, rule 8.124.) By doing so, however, the party represents that its appendix contains accurate copies of documents in the trial court file, and failure to abide by this rule may be grounds for sanctions. (Cal. Rules of Court, rule 8.124(g).) We cannot assess the accuracy of respondents' assertion. Their appendix

There is no question that appellants did not adhere to appellate rules of procedure. They failed to take the appropriate standard of review into account, their recitation of facts fails to distinguish (or even discuss) evidence pivotal to their contentions, and their claims of insufficiency of the evidence are insufficiently supported by substantial evidence or adequate record citations. An appellant that fails to adhere to these requirements forfeits its challenge based on insufficiency of the evidence. (*Foreman & Clark, supra*, 3 Cal.3d at p. 881; *Nwosu, supra,* 122 Cal.App.4th at pp. 1245–1246.) Here, appellants' failure to fully and accurately summarize the material evidence relevant to the findings with which they take issue forfeits their claims on appeal. In any event, appellants' arguments regarding their substantive defenses, which we now address, lack merit.

II. *The Statutes of Limitation*

We turn first to the trial court's analysis of the statutes of limitations defenses, which appellants dismiss as wholly a "matter of fantasy" that "completely misstates the facts." Appellants challenge the trial court's findings that none of the five claims it deemed viable was time-barred.[12] We address each in turn.

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does not contain copies of the exhibits in appellants' appendix that they claim are inaccurate versions of the same exhibit as admitted at trial.

12 Appellants do not take issue with the trial court's conclusion that California law regarding statutes of limitations governs the claims at issue, or with the court's refusal to address whether tolling provisions of Code of Civil Procedure section 351 assist them based on its conclusion that their limitations defenses fail for independent reasons.

A. *The Six-Year Statute of Limitations of Commercial Code Section 3118, subdivision (a) Governs the Cause of Action for Breach of the Promissory Notes*

With regard to the claim for breach of contract based upon Richard's failure to pay amounts due on the three promissory notes (the eighth cause of action), appellants contend the trial court erred in applying the six-year statute of limitations for negotiable instruments under the California Commercial Code section 3118, subdivision (a), rather than the general four-year statute of limitations for written non-negotiable instruments. (Code Civ. Proc., § 337, subd. (1).) They are mistaken.

The trial court found there was no question that each promissory note was a negotiable instrument. It found the notes satisfy all requirements for a negotiable instrument, and each represents Richard's unconditional promise to pay a fixed amount of money on a specific and undisputed date of maturity. (Cal. U. Com. Code, § 3104, subd. (a) [defining "negotiable instrument" that satisfies certain conditions as an "unconditional promise or order to pay a fixed amount of money"].)[13]

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[13] California Uniform Commercial Code section 3102, subdivision (a), provides that a "note" is a negotiable instrument. Under section 3104, subdivision (a), of that Code, a "negotiable instrument" as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it is all of the following:
"(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder.
"(2) Is payable on demand or at a definite time.
"(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to

The court rejected appellants' assertion that any promissory note is made conditional if it refers to an attached security agreement, pointing out that, by statute, reference to another writing, either by itself, or for a "statement of rights with respect to collateral, prepayment, or acceleration" does not make the promise or order conditional. (Cal. U. Com. Code, § 3106, subds. (a), (b).)

The court rejected as factually unsupported the assertion appellants renew here, that the promissory notes are "assignable and therefore non-negotiable" (and governed by the four-year limitations of Code Civ. Proc., § 337, subd. (1)), because they contain a "conspicuous statement" of non-negotiability. First, as above, the trial court unequivocally and explicitly found the facts to be otherwise: "[T]here is no such clear and conspicuous notice of any such nature, in any manner, on the face of (or elsewhere in) any of the three virtually identical [promissory] notes, and the section of each note claimed as supporting this most dubious of contentions is neither clear nor conspicuous." Further, the statutory definition of "conspicuous" under the Commercial Code refers to "a term . . . so written, displayed, or presented that a reasonable person against whom it is to operate ought to have noticed it." It is for the trial court to decide "[w]hether a term is 'conspicuous' or not."

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give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor."

The court also admitted evidence proving that the promissory notes memorialized specific sums of money previously loaned to Richard, not an uncertain sum as appellants contend. Kemper and Richard each testified to that fact. Kemper explained that Richard actually asked for the three notes to demonstrate specific debts for use in a divorce proceeding.

We assess these findings under the substantial evidence standard, by which our review begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings. The "'test is not the presence or absence of a substantial conflict in the evidence. Rather, it is simply whether there is substantial evidence in favor of the respondent. If this "substantial" evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld. As a general rule, therefore, we will look only at the evidence and reasonable inferences supporting the successful party, and disregard the contrary showing.' [Citation.]" (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 917.)

Here, the necessary factual predicates to application of the statute of limitations were hotly contested and open to controversy. The court decided the question after hearing lengthy testimony from Richard, Kemper and others. Appellants' failure fairly to recite the evidence supporting the trial court's findings or judgment forfeits the issue. (*Clark, supra*, 196 Cal.App.4th at pp. 52–53 [failure to set forth the material evidence on an issue waives a claim of insufficiency of the evidence].)

Second, appellants' assertion that the promissory notes are non-negotiable is premised on what the court correctly found to be a buried, inconspicuous clause providing that the promissory note is not assignable absent the borrower's written consent. After "carefully examining each of these clauses and the documents in which they are contained, and having taken evidence and heard argument on this issue," the trial court concluded that "there is *nothing* about how or where these clauses appear in the [promissory notes] (Trial Exhibits 111 and 112) which makes these clauses conspicuous in any manner." Rather, the clauses in question were found in the middle of multi-paged documents, not written in any different type, color, size or font, as capitalized headings or set off in a contrasting format from the surrounding text. Applying the statutory definition of "conspicuous," as informed by case law (see Cal. U. Com. Code, § 1201, subd. (10); *Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 18–19, the trial court found the promissory notes were negotiable instruments governed by the six-year statute of limitations. Appellants cite no authority to establish their claim that the court erred because the clause in the promissory notes is a conspicuous statement of non-negotiability.

Third, appellants argue that, to the extent there is ambiguity, the promissory notes must be interpreted against respondents, who drafted them. There are two problems with this assertion. First, having failed to raise this factual assertion below, appellants are barred from doing so for the first time on appeal. It is axiomatic that where facts are in dispute, an argument or theory will generally not be considered for the first time on appeal. (*Dillard v. McKnight* (1949) 34 Cal.2d 209, 218–219.)

Second, the facts are in dispute as appellants present no evidence to support their factual assertion that Kemper drafted the promissory notes. Indeed, the record appears to the contrary: Richard asked Kemper for the promissory notes to memorialize specific debts in a divorce proceeding and dictated their contents. Kemper testified he did not draft the promissory notes. Richard has acknowledged he is in debt to Kemper and Cal Agri on the promissory notes. Ignoring the standard of review, appellants also fail to acknowledge the trial court's findings as to credibility. Specifically the trial court prefaced its lengthy and well-reasoned SOD by noting that Richard's trial testimony was "materially false in many important respects and . . .

lack[ed] . . . credibility on material points." Appellants failed to demonstrate error in the trial court's application of the six-year statute of limitations.

B. *Appellants Have Not Shown that the Trial Court Erred in Concluding that the Statutes of Limitation had not Expired as to the Remaining Claims*

With regard to the causes of action it deemed viable, the question is whether the trial court erred in finding appellants failed to satisfy their burden to demonstrate that those claims "accrued" before this action was filed in November 2013. A cause of action accrues when, under applicable substantive law, a wrongful act is done or wrongful result occurs and liability arises. (*Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 397 (*Norgart*).) Here, the court found there was no question that respondents knew or reasonably should have known by spring 2009 that appellants had cut off business relations with them and something was seriously amiss. But the court also found the "clock" had not begun to run on any statute of limitations until respondents discovered and could investigate that they had suffered some injury or damage. (See *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1192; cf., *Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231, 255.) Here, the trial court made the factual finding, that "evidence adduced at trial established that [Kemper and Cal Agri] suffered no damages until 2011 at the earliest."

With regard to the trial court's finding that appellants engaged in a conspiracy, the last overt acts (appellants' transfer of respondents' assets—patent rights owned by Cal Agri—to CAIPH, and the purported transfer to CAIPH of European intellectual property rights derived from Cal Agri's patent) occurred within three years of the filing of this action. The trial court also correctly found that the pleading of conspiracy by certain defendants as to certain claims lengthened the limitations period for those claims, which are analyzed based on the date of the last overt act. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511 (*Applied Equipment*).)

Appellants do not take issue with this conclusion, per se. Rather, they argue that, under *Applied Equipment*, there can be no civil conspiracy if an alleged conspirator, even if a party to the agreement underlying the injury, "'was not personally bound by the duty violated by the wrongdoing.'" (*Applied Equipment, supra,* 7 Cal.4th at p. 512.) As applied here, they argue that the transfer of the patent rights was undertaken solely by Richard (assisted by patent counsel), who owed no duty to Kemper or Cal Agri (because he was merely a member of the board of Cal Agri, not a manager). Accordingly, there is no basis to extend the statute of limitations under a conspiracy theory, because the sole act upon which the trial court relied to justify such an extension—the transfer of patent rights to CAIPH—was done by Richard, who owed respondents no duty.

Appellants are mistaken. The principle on which they rely has no application in a case such as this in which the trial court found they "engaged in a conspiracy to defraud and deprive Cal Agri" of its patent rights. Because "'*everyone* owes a duty not to commit an intentional tort against *anyone*'. . . . there can be liability for conspiring to commit an intentional tort even *absent* any duty." (See *Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 967.) Appellants' actions in 2009 do not bar Cal Agri's right of recovery for wrongdoing in 2012 and 2013 while appellants remained engaged in a conspiracy to convert Cal Agri's patent rights. The court correctly concluded that the "statute of limitations does not begin to run on any part of a plaintiff's claims until the 'last overt act' pursuant to the conspiracy has been completed." (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 786.)

Similarly, with regard to Cal Agri's other claims which rely on appellants' counterfeit sales, the trial court found that Cal Agri did not accrue actual harm until 2011 when appellants' competing business began selling counterfeit pesticide products using Cal Agri's formulation to Cal Agri's distributors. No "actual harm" accrued until sales occurred in 2011. (*Norgart, supra*, 21 Cal.4th at p. 397.) Appellants failed to demonstrate that there is there is insufficient evidence to support the court's findings.

C. *The Trial Court Correctly Applied the Statute of Limitations for Fraud for Misconduct, not Legal Malpractice as to Todd*

Appellants' assertion that the trial court did not find that Todd committed fraud, is flatly rebutted by the SOD which expressly states that the "one year attorney malpractice statute is not applicable as the gravamen of [respondents'] claims against [Todd] are *fraud* and breach of fiduciary duty." (Italics added.) Indeed, the court explicitly relied on Todd and his family's fraudulent conduct as a ground to justify transferring all patents-in-suit to Cal Agri: "[T]he fraudulent conduct of [Todd] and his coconspirators continued well into 2013, thus deflating [appellants'] claims of bar by any of the statutes of limitations they assert." Clearly, the trial court found that the gravamen of the claims against Todd was not legal malpractice, but fraud[14]

14 Appellants' assertion that the SOD is ambiguous as to the trial court's finding of fraud is forfeited for failure to raise it below. Appellants objected to the proposed SOD, including specific objections as to the court's findings on Cal Agri's fraud claim. To the extent they failed also to raise questions as to ambiguities in the SOD, such assertions are forfeited. Further, appellants for which the statute of limitations has been found to be as long four years in the case of breach of fiduciary duty by an attorney. (See *Levin v. Graham & James* (1995) 37 Cal.App.4th 798, 805.) Regardless, the trial court found the conduct by Todd, upon on which the claims against him were predicated, "all occurred less than three years prior to the filing of this litigation"; "well within any statute of limitations."

III. *The Record Supports the Trial Court's Conclusions on the Merits*

A. *Breach of Fiduciary Duty*

"The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. [Citation.]" (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.) Dealings between an attorney and client form a fiduciary relationship. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189.)

The trial court found substantial evidence that, as de facto general counsel for Cal Agri, Todd repeatedly breached his ethical and legal obligations, i.e., his fiduciary duty, to his client and former client. He did so by using information acquired during his representation of Cal Agri for his personal benefit and that of his father and Nakada and, after purportedly terminating his representation of Cal Agri, acting so as to injure his former client in multiple ways. Appellants take issue with the trial court's finding on three points. First, they argue that the court erred because the breach of

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are estopped from arguing the court made "no finding" of fraud here, given their acknowledgement below that such a finding was indeed made. (Code Civ. Proc., § 634; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

fiduciary duty claim is barred by the statute of limitations, a specious claim we have already rejected.

Second, they contend that the fact that the court declined to award monetary damages demonstrates that respondents suffered no compensable injury as a result of Todd's breach of fiduciary duty, and thus a pivotal element of the claim was not established. This assertion ignores the distinction between the injury a person suffers because of a defendant's wrongful conduct, and monetary compensation awarded that person on account of that injury. (*County of Los Angeles v. Superior Court* (2000) 78 Cal.App.4th 212, 222–224.) Again, appellants misrepresent the evidence. The trial court made a definitive finding that respondents had demonstrated an entitlement to monetary damages, albeit on "very limited evidence . . . so incomplete and deficient as to make calculation of the . . . amounts impossible." "[T]here clearly was monetary damage," but "the amount of damage . . . [was] too speculative to justify any award expressed in a numerical amount."[15]

Third, appellants maintain the trial court erred when it found that Todd breached his fiduciary duty by failing or refusing to assign his patent rights, allowing the formation of CAIPH and permitting Richard to transfer Cal Agri's patent rights to CAIPH without notifying Cal Agri. They argue

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15 The Court found that because Richard owed no continuing fiduciary duty to Cal Agri, he was not directly liable as to first or second causes of action.

However, it also found Richard and Nakada liable as aiders and abetters of Todd as to breach of fiduciary duty because each had consciously engaged in tortuous activity by aiding and abetting Todd to secretly establish CAIPH and to transfer Cal Agri's patent to that entity.

expert testimony was necessary to resolve the facts and establish the standard of care against which alleged acts of professional misconduct are measured, because the challenged conduct—here "the standard applicable to an attorney [Todd] where his inventors [*sic*] rights . . . arose prior to his representation of client and the establishment of the attorney-client relationship." They also claim expert testimony was necessary on the issue of allowing Richard to transfer Cal Agri's patent rights to its "wholly owned" subsidiary, CAIPH under the circumstances, because that is not a matter within common knowledge. (*Davis v. Damrell* (1981) 119 Cal.App.3d 883, 887.)

The trial court readily acknowledged that, had the circumstances been as appellants represented them to be, appellants would be correct. They were not. Rather, rejecting the very argument appellants renew on appeal—and which we reject for the same reasons—the court observed:

> "[Appellants] counter that Todd Steckler had the right to prosecute his own inventor's patent rights under United States patent law. While that may be a correct statement of law, here the facts establish this is *not* what he did, and his relationship with Cal Agri placed a *de facto* condition on his right to dispose of or exploit the Patent Rights in any event. Whether Todd Steckler owned an individual interest in the Patents, he still had a fiduciary duty and duty of loyalty to his former client to inform Cal Agri what he and his father were doing in derogation of Cal Agri's rights. And the fact that the [appellants] went to such lengths to create CAIPH, and transfer the Rights of Cal Agri to that Delaware Entity—and to hide what they were doing from Cal Agri (and Kemper)—is compelling evidence that they were not practicing Todd Steckler's patent rights but were illegally converting Cal Agri's Patent Rights. The Court finds completely not credible the testimony that [appellants] simply were practicing Todd Steckler's patent rights and were not seeking to deprive plaintiff Cal Agri of *its* Patent Rights." (Italics in original.)

Further, as did the trial court, we reject appellants' contention that expert evidence was necessary to address this garden variety claim of breach of fiduciary duty. The trial court was well-equipped to address that issue. The scope of an attorney's fiduciary duty is determined according to California Rules of Professional Conduct which, considered in conjunction with applicable statutes and principles, "help define the duty component of the fiduciary duty which an attorney owes to his client." (*Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 45.) Typically, whether an attorney has breached his fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890, disapproved on another ground by *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239.) Expert testimony is admissible to establish the duty and breach elements if they are beyond common knowledge. (*Id.* at pp. 892-893; *Mirabito v. Liccardo, supra,* 4 Cal.App.4th at pp. 45–46.) Nothing about the conduct at issue here was beyond the factfinder's ken. No expert testimony was necessary to establish Todd's fraud and numerous breaches of fiduciary duty to Cal Agri.

B. *Conversion*

Appellants insist the trial court erred in finding respondents established a cause of action for conversion predicated on appellants having conspired to take respondents' assets or property, i.e., their patent rights. They also argue that "fatally to [the] conversion claim, . . . the trial court found . . . the evidence fails to demonstrate that [respondents] suffered any damages whatsoever as a result of the transfer of the patent right to CAIPH." Once again, appellants misstate the evidence.

"""Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages . . . ."" [Citation.]" (*Lee v. Hanley, supra,* 61 Cal.4th at p. 1240.)

Here, the court found that "[w]ith the creation and transfer to . . . [CAIPH] of the Cal Agri patent, [appellants] did convert rights rightfully belonging to Cal Agri to [CAIPH]." There is simply no factual basis for appellants' claim that none "of the [appellants] converted any other property, . . . that [respondents] suffered [no] damage from the patent transfer to CAIPH," or that "CAIPH was and always has been wholly owned by Cal Agri."[16] To the contrary, the court found "the truth [was] that the Stecklers created [CAIPH] as a means to gain complete control of the intellectual

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16 During this litigation appellants asserted for the first time that CAIPH was and since its inception always had been owned by Cal Agri—this despite the fact that the law firm representing appellants in their defense of this action at that time also purported to represent the entity CAIPH against Cal Agri and Kemper. The trial court ordered appellants to produce documentary evidence to substantiate that claim. Appellants failed to place "a single document in evidence [to] support[] that claim," and the court found "false" all testimony by appellants' witnesses to that effect. The court observed that numerous documents were inconsistent with that claim, including "multiple documents in evidence demonstrating that Richard Steckler was the manager of [CAIPH], including but not limited to documents purporting to transfer Cal Agri's patent rights on the official records of the United States Patent and Trademark Office to [CAIPH]."

In the SOD, the court made a point to state at the outset that it had found Richard's trial testimony "materially false in many important respects," and "lacking in credibility on material points." The court also observed that Richard's and Todd's claim that CAIPH had been created to protect Kemper and Cal Agri was no more than a "facile fabrication, created in an effort to avoid liability for the consequences of their attempt to profit from the 'corporate opportunity' of [Cal Agri]," primarily at the expense of Kemper who had long placed his trust in Richard and his son.

property of [Cal Agri]." Then, once sued for that misconduct, they simply claimed Cal Agri actually "owned" CAIPH, a claim that the court found lacked any credibility. The trial court also explicitly found Cal Agri was harmed and incurred monetary damages as a result of appellants' conversion, albeit in an incalculable amount. The only evidence that would save appellants' claim that no conversion was committed is evidence that Cal Agri was the sole owner of CAIPH at all times, and thus suffered no damage by their transfer of patents to CAIPH. However, the only evidence to support this claim is appellants' testimony; evidence the court deemed "not credible," or "false."

Further, the conversion claim, by which Cal Agri sought return of its patents does not require a compensatory damages award. When personal property is converted, a plaintiff may elect either to pursue the remedy of damages to compensate it for the lost property, or an order compelling defendant to return the property. (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 121.) Clearly, Cal Agri was entitled to "specific recovery" of its patent rights in lieu of damages.

Appellants' showing as to the claim of conversion falls far short of satisfying their burden to demonstrate affirmative error. (*Bell v. H.F. Cox, Inc., supra,* 209 Cal.App.4th at p. 80.)

C. *Unfair Competition*

Appellants assert that the evidence does not support the judgment in favor of Cal Agri on the seventh cause of action for Unfair Competition in violation of Business and Professions Code section 17200 (section 17200) because the trial court failed to find Cal Agri entitled to any compensable damages. That is true, but irrelevant. Monetary damages are not available for violation of section 17200; the only remedies are equitable. (Bus. & Prof. Code, § 17203; *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1144.)

Further, as above, appellants make the factually unsupported claim that "Cal Agri was at all time [*sic*] . . . the sole owner of CAIPH," that "the transfer of the patent rights to CAIPH in no way prevented Cal Agri from competing to sell the patented pesticides," and that "there is no evidence to the contrary." We have twice rejected and need not address this assertion again.[17]

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17 Our finding that the trial court did not err when it found appellants liable as to any of the claims addressed above makes it unnecessary for us to address their claim that the court erred further in issuing declaratory relief. (See *Cahill v. San Diego Gas & Electric Co.*, *supra*, 194 Cal.App.4th at p. 956 [in the absence of a cogent legal argument or citations to authority, appellate court may treat a contention as waived].)

In any event, having found that appellants' conduct caused respondents' respective injuries, but that monetary damages were "too speculative" to ascertain, the court acted within its discretion to award declaratory relief—and injunctive relief, with which appellants do not take issue—of the form or forms, and based upon the grounds stated in the SOD and Judgment. (See e.g. *Hicks v. Clayton* (1977) 67 Cal.App.3d 251, 264–65 [legal principle of equitable relief is premised on absence of an adequate legal remedy]; cf., *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 411 [action for equitable injunctive relief is proper when harm suffered cannot easily be quantified].)

IV. *The Trial Court Did Not Err in Permitting Respondents to Amend the Complaint to Conform to Proof*

A. *Controlling Law and Standard of Proof*

"Code of Civil Procedure section 473 gives trial courts discretion to allow a party to amend his or her pleadings 'in furtherance of justice,' while section 576 states that such leave to amend may be granted even after the commencement of trial." (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909 (*Garcia*).) Such amendments, "'if not prejudicial, are favored since their purpose is to do justice and avoid further useless litigation.'" (*Ibid*.) Code of Civil Procedure section 469 governs motions to amend at trial to conform to proof. (*Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31 (*Trafton*).) As stated in *Trafton*:

> "It is of course settled that the allowance of amendments to conform to the proof rests largely in the discretion of the trial court and its determination will not be disturbed on appeal unless it clearly appears that such discretion has been abused. [Citations.] Such amendments have been allowed with great liberality 'and no abuse of discretion is shown unless by permitting the amendment new and substantially different issues are introduced in the case or the rights of the adverse party prejudiced [citation].'" (*Trafton, supra,* 69 Cal.2d at p. 31, italics omitted; see *Garcia, supra,* 173 Cal.App.4th at p. 909.)

But amendment of a pleading to conform to the proof should not be allowed when doing so raises new issues not included an earlier pleading and upon which the adverse lacked an opportunity to defend. (*Garcia, supra,* 173 Cal.App.4th at p. 909.)

"[I]n ruling on a motion to amend a complaint to conform to proof, 'the court is usually guided by whether: [¶] . . . there is a *reasonable excuse* for the delay . . . ; [¶] . . . the change relates to the *facts* or only to legal theories; and [¶] . . . the opposing party will be *prejudiced* by the amendment.'"

(*Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1378–1379.) The question whether facts or legal theories are being changed and whether the opposing party will suffer prejudice "represent[ ] a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory . . . no prejudice can result." (*City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1563; *Garcia, supra,* 173 Cal.App.4th at p. 910.) The basic rule is that "'the amended pleading must be based upon the same general set of facts as those upon which the cause of action . . . as originally pleaded was grounded.' [Citation.]" (*City of Stanton v. Cox, supra*, 207 Cal.App.3d at p. 1563.)

B. *Application*

The SAC was the operative complaint at trial. Appellants take issue with two specific post-trial amendments to the SAC regarding relief sought in the TAC, several months after trial:

> (1) Cal Agri's request for a declaration that it owned any EPA applications appellants filed seeking registration for Cal Agri's pesticide formulation; and
> (2) Cal Agri's request for a declaration that Todd was not authorized to practice law in California, so his attorney fee agreement with the company was void.[18]

Appellants have forfeited this argument on appeal. Apart from unsubstantiated assertions in their brief, for which no pertinent record references are provided, appellants have given us no means by which to

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[18] That agreement gave Todd a six percent equity interest in Cal Agri.

assess the merit of their assertion of error, having chosen not to include either the moving or opposing papers related to respondents' motion to amend the SAC. An appendix that lacks the papers that pertain to the challenged motion is inadequate for review. (*Hernandez v. California Hospital Medical Center, supra*, 78 Cal.App.4th at p. 502.)

Second, even if we were to assume there was merit (where none appears based on the facts established in the SOD) to appellants' claim that they were misled by the amendments, appellants still failed to show they were prejudiced as a result of the court's exercise of its broad discretion in granting leave to file the TAC.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.