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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

M&M SPICE, INC. et al., Plaintiffs and Respondents, v. BRUNO BAIO et al., Defendants and Appellants.	B262014 c/w B263927 (Los Angeles County Super. Ct. No. BC493427)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed in part and remanded with directions.

Matthew Soule for Defendants and Appellants.

Holmes, Taylor & Jones and Matthew D. Taylor for Plaintiffs and Respondents.

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INTRODUCTION

These cases arise out of plaintiffs' purchase of a restaurant in Pasadena. Plaintiffs claim they were induced to purchase the restaurant by defendants' misrepresentations. Following a non-jury trial, judgment was entered in favor of plaintiffs and against the four defendants for fraud and breach of contract. Only two of the defendants appeal from the judgment. In case No. B262014, appellants challenge the judgment on its merits. In case No. B263927, they assert error in the award of attorney fees. We consolidated the cases for argument and opinion. In case No. B262014, we remand for modification of the judgment and otherwise affirm. The disposition of that case also resolves the issues in case No. B263927, which necessitates remand for modification of the attorney fees order.

A. The Parties

Appellants are defendants Bruno Baio (Baio) and Crème De La Crepe Franchising, Inc. (Crème). Non-appealing defendants are Germaine Gillies (Gillies) and her company G3K, Inc. (G3K). Gillies and Baio were engaged and were equal partners in Crème when the key events took place in December 2010. Gillies was the sole owner of G3K, which she created for the purpose of operating a restaurant. Baio was Vice President of G3K.

Respondents are plaintiffs Cindy Baw (Baw) and her company M&M Spice, Inc. (M&M) (collectively plaintiffs or respondents). M&M was formed for the purpose of purchasing the restaurant, and Baw was the Chief Executive Officer. Baw's husband, Sheik Ramessar, was M&M's Chief Financial Officer; Ramessar is not a named party in the litigation.

B. The Pleadings and Trial

Respondents filed their verified complaint on October 9, 2012. It stated causes of action for, among other things, breach of contract, breach of the covenant of good faith and fair dealing, fraud in the inducement, and negligent misrepresentation. The gravamen of plaintiffs' fraud claims was that defendants induced plaintiffs to purchase the restaurant by misrepresenting the financial condition of the restaurant and of the support defendants would provide plaintiffs in its ongoing operation; as a result plaintiffs suffered damages. The breaches of contract and of the covenant of good faith and fair dealing causes of action were based on, among other things, defendants' failure to cooperate with the transfer of the restaurant's beer and wine license to M&M.

G3K and Crème filed separate cross-complaints for breach of contract. Crème also sought injunctive and declaratory relief.

The non-jury trial commenced on February 19, 2014, and proceeded intermittently, ending on August 7, 2014.

On August 7, the trial court orally announced its findings: all defendants fraudulently induced plaintiffs to purchase the restaurant but G3K alone breached the written purchase agreement and an oral agreement by failing to effectuate the transfer of the beer and wine license. It awarded plaintiffs damages of $162,280, comprised of $125,000 for fraud and $37,280 for breach of contract. The court awarded attorney fees to plaintiffs based on an attorney fees provision in the written contract. The amount of fees to be awarded was left to future determination. The trial court also found in favor of plaintiffs (as cross-defendants) on G3K's and Crème's cross-complaints. Plaintiffs' counsel was directed to prepare a draft statement of decision.

C. The Statement of Decision and the Judgment

A statement of decision and judgment were filed on November 24, 2014. In its statement of decision, the trial court expressly found all four defendants jointly and severally liable for the fraud damages ($125,000). Although the breach of contract cause of action was alleged against Gillies, G3K and Crème, the trial court found only that G3K breached the contract. However, the statement of decision did not expressly specify that only G3K was liable for the breach of contract damages ($37,280). The trial court awarded plaintiffs' attorney fees of $27,007.50. The judgment did not specify how liability for the damages award or the attorney fees award was to be apportioned among defendants.

Defendants Baio and Crème (collectively "appellants") appeal from the judgment.

FACTS

We set forth the evidence in accordance with the usual rules on appeal from a civil judgment. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1489.)

A. Negotiations to Purchase the Restaurant

Baw's husband, Ramessar, who became a corporate officer of M&M (the entity formed by Baw to purchase the restaurant), participated in the negotiations leading up to the purchase of the restaurant, which began with Ramessar's receipt of an email from Art Williams on December 14, 2010 (the "Williams's email;" Exhibit No. 9). Ramessar described those negotiations, the execution of a Letter of Intent followed by an Asset Purchase Agreement signed by Gillies and Baw, and subsequent events that led plaintiffs to initiate this litigation.

1. <u>The Williams's Email</u>

In December 2010, Gillies through G3K had been operating the restaurant for some time as part of the Crème franchise even though there was no formal franchise agreement between G3K and Crème. Gillies asked Williams to let people know that she wanted to sell the restaurant. Williams sent an email to about 20 people, including Ramessar, stating the restaurant was for sale and setting forth financial information about the restaurant that he had received from Gillies. The financial information in the email included that the restaurant had monthly revenue of between $50,000 and $60,000 and monthly net profits of $9,000.

2. <u>Discussions on December 15, 17 and 20, 2010</u>

Ramessar and Baw met with Gillies and Baio for about an hour on December 15. Gillies and Baio confirmed that the financial information in the Williams's email was accurate. Based on what he learned at the meeting, Ramessar thought it was a business opportunity worth pursuing. He asked for the restaurant's financial statements, which Gillies promised to provide but never did.

Ramessar and Baw met with Gillies and Baio at the restaurant again on December 17. Gillies and Baio reaffirmed that the financial representations in the Williams's email were accurate. Gillies said another person had invested in the restaurant, but when things did not go well, he recovered his investment. The fact that another investor had recovered his investment gave Ramessar confidence that Gillies and Baio were trustworthy. Ramessar and Baw explained they were not interested in actively managing the restaurant; Baio said he was already running two other successful restaurants and promised to provide plaintiffs an experienced "quality manager" for the kitchen and a manager for the "front of house." Gillies said she and Baio were equal partners in Crème; the restaurant had no franchise agreement with Crème and that Baw and Ramessar could have the same arrangement.

Baio and Gillies both denied that Ramessar showed them the Williams's email on December 15. Gillies testified that she gave Ramessar bank statements, paid bills, and monthly merchant card statements "before the transaction was complete."

On December 20, although Ramessar had not received the requested restaurant financial statements, Gillies and Baio told Ramessar an immediate decision whether to buy the restaurant had to be made because the restaurant was being evicted the next day. Gillies and Baio said the landlord wanted to evict the restaurant because G3K was behind on the rent and because the landlord wanted to operate its own restaurant. During the several hours of negotiations that followed, Baio reduced the purchase price from $205,000 to $175,000; then Gillies reduced it another $25,000, to $150,000. Gillies and Baio characterized the deal as "risk free" because the buyers could sell the place for between $250,000 (according to Baio) and $450,000 (according to Gillies). Gillies said the restaurant equipment was worth $175,000. On December 20, Baw and Gillies signed a handwritten "Letter of Intent," and Baw gave Gillies a $50,000 check.

B. The Asset Purchase Agreement

Plaintiffs took over restaurant operations on January 1, 2011, although the Asset Purchase Agreement was not signed until January 31, 2011. The Asset Purchase Agreement identified G3K as the seller and M&M as the buyer. Gillies signed the agreement on behalf of G3K and Baw signed on behalf of M&M. The agreement also specifies that Baw was signing as an individual as to sections 2.2(a) (working capital contribution), 5.1-5.5 (purchaser's representations and warranties), and 13.3 (purchaser's indemnification); and Gillies was signing as an individual as to sections 4.1-4.12 (seller's representations and warranties), 7.1 (non-competition) and 13.2 (seller's indemnification).

After they took over operations, Ramessar discovered used equipment like that included in the purchase was worth only about $9,336, not the $175,000 represented by Gillies. The Asset Purchase Agreement allocated the $150,000 purchase price among "furniture, fixtures, and equipment" ($9,336) and goodwill ($140,664).

The seller's "Representations and Warranties" included section 4.4, which stated: "Seller warrants that the Financial Statements, including balance sheets, income statements, tax returns of the Company, to be provided to Purchaser upon filing completion as Exhibit F,[[1]] and by reference incorporated herein, to the best of Seller's knowledge are a fair and accurate presentation of the results of the operations of the Company for the period beginning January 1, 2010 and ending December 31, 2010. Seller specifically represents and discloses that Seller's Financial Statements and information, to be provided to Purchaser, are unaudited and have not been reviewed or certified by accounting professionals. Seller makes no representations or warranties as to the present or future financial performance of the Company. Purchaser acknowledges it is not relying on any information, or disclosures, either written or verbal, to be contained in the Financial Statements, in determining the Purchase Price in paragraph 2, hereof."

The "Purchaser's Contingencies" include M&M "obtaining a Temporary/ Permanent Permit for the Beer and Wine Class Liquor License, on or before Closing . . ." (Section 9.2) and M&M "obtaining written authorization from [Crème] for the use of the [Crème] Concept and Business Process (the 'Franchise Agreement'), attached as Exhibit J, on or before Closing. In addition, an addendum to the Franchise Agreement is to be . . . attached as Exhibit K. . . ." (Section 9.5.) Exhibit J states that the parties each possessed a copy of the Franchise Agreement, which was not attached due to its

1 Exhibit F is a list of security deposits. Exhibit G is captioned "Seller Financial Statement" but is a blank page.

“voluminous nature.” Exhibit K is a one page document captioned “Franchise Agreement Addendum.” The undated document is signed by Baio as President of Crème and Baw as President of M&M, the prospective franchisor and franchisee, respectively. It provides in part that plaintiffs would not need to pay any fees to Crème and were to receive unlimited support (i.e. training, assistance, marketing, etc.) for 24 months. At trial, the parties stipulated that no Franchise Agreement was ever executed.

Section 14.3 provided that the prevailing party would be entitled to attorney fees in any litigation arising out of the Agreement. Section 15.1 was an integration clause which stated that the agreement “contains the entire understanding of the parties with regard to the subject matter hereof and no warranties, representations, promises or agreements have been made between the parties other than as expressly herein set forth, and neither Purchaser or Seller shall be nor are they bound by any warranties, representations, promises or agreements not set forth herein. . . .”

C. Plaintiffs Take Over Operation of the Restaurant

As already observed, the Asset Purchase Agreement was not signed until January 31, 2011, but plaintiffs took over restaurant operations, including G3K’s bank account, on January 1, 2011. Plaintiffs paid the restaurant’s bills out of the G3K account until after the Asset Purchase Agreement was signed. Both Baw and Ramessar worked at the restaurant. Ramessar was responsible for accounting and operations, including food purchasing; he worked at the restaurant about three days a week, three to four hours a day. Baw was the General Manager; she dealt with employees and, when necessary, worked as a server; Baw was at the restaurant six to seven hours, three to five days a week. Neither Baw nor Ramessar ever received a salary from the restaurant, and never took out any money except for tips.

Ramessar ascertained what was involved in transferring a beer and wine license and communicated that information to Gillies, providing her with the required forms for her to fill out. But Gillies did nothing to cause the beer and wine license to be transferred to M&M and in May 2012, the restaurant lost its ability to sell beer and wine. M&M

obtained its own beer and wine license in August 2012. Gillies testified that she signed the necessary documents and sent them back to Ramessar in July 2011.

D. Evidence of Damages

Ramessar testified that in December 2011, M&M withheld the last $25,000 payment to Gillies because Gillies had not complied with various provisions of the Asset Purchase Agreement, including transferring the liquor license and having M&M "formally recognized on the lease." (Sections 9.2, 10.1).[2] By that time, in addition to the purchase money already paid to Gillies ($125,000), Baw and Ramessar had invested an additional $70,000 into the restaurant.

Ramessar explained how the loss of the beer and wine license, even for just the few months between May and August 2012, caused the restaurant to lose money. When the restaurant had a liquor license, between 8 and 12 percent of total sales came from beer and wine sales. When the restaurant lost its beer and wine license in May 2012, overall sales fell about 40 percent indicating that the lack of a license hurt food business as well. Ramessar created Exhibit No. 26, which is a compilation of monthly revenue (gross sales) for 2011, 2012 and 2013, based on numbers obtained from the restaurant's Point of Sale (POS) system. The chart reflects the drop in sales during the time the restaurant did not have a beer and wine license.

M&M continued operating the restaurant after the verified complaint was filed on October 9, 2012. The restaurant closed on November 20, 2013, because plaintiffs ran out of money to pay bills. They considered selling the restaurant, but realized there was little to sell – they were not on the lease and there was no franchise agreement. Ramessar could have turned over the keys to the restaurant to Gillies or Baio, but he gave them to the landlord.

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[2] Gillies did not believe the final $25,000 installment payment was contingent on transfer of the beer and wine license.

E. *The Trial Court Allows Plaintiffs to Reopen*

1. <u>The June 27, 2014 proceedings</u>

The parties rested on May 23, 2014 and made their closing arguments on June 27, 2014. During closing arguments, the trial court stated it believed Gillies was the source of the financial information in the Williams's email. Williams would have been a helpful witness, but since no one called him, the trial court assumed both sides must have believed "he would have said something bad because, otherwise, somebody would have called him." Although the Williams's email included a representation that the restaurant had monthly net profits of $9,000, the trial court commented that the imminent eviction would seemingly have made it apparent that the restaurant was "in the hole" at that time. Plaintiffs responded by distinguishing between net profits and paying the bills; plaintiffs could have reasonably believed Gillies' and Baio's representations that the restaurant was profitable but Gillies was taking money from the profitable restaurant and using it to fund other businesses, leaving the restaurant without enough money to pay the rent. The trial court and plaintiffs discussed Exhibit No. 26, the compilation of monthly revenue (gross sales) for 2011, 2012 and 2013, created by Ramessar using the restaurant's POS system, which showed damages in the amount of $37,280.22 from the loss of the liquor license.

Apparently overlooking Exhibit No. 26, the trial court commented that there was no evidence of "how much money M&M Spice actually made over" the relevant time period. Responding to plaintiffs' counsel's statement that there was testimony on that subject, the trial court clarified: "I mean, I don't have – I don't have a single spreadsheet, I don't have a – I don't have a – I mean, I don't have an audit. I don't have a tax return. I don't have – I mean, Mr. Ramessar, our M.B.A. here, is certainly capable of – he was figuring all that out. He could have been doing spreadsheets of the profit and losses that happened over that three-year period. I don't have evidence of that. [¶] I actually don't – I don't recall, my notes don't reflect – I don't have a actual transcript of this, but my notes don't reflect an actual loss amount from the operation of the business. . . ." After further discussion, the trial court stated:

> "It's a court trial. I don't know if there's anything else that you want to produce to the court. Nothing that – nothing – I would not be interested in seeing anything that is made or produced as a result of what I've asked for. If there's any existing evidence. [¶] In a court trial you can reopen and you can put something on that – that is allowable. I see that as gap in the evidence."

Plaintiff's counsel responded: "There's certainly the financial records we could produce for the period at issue. . . ." The trial court commented: "I mean, if you think that you've got something that would be of additional help to the court, then that would be fine." This colloquy followed:

> "THE COURT: . . . I think if you want to reopen, then I think that you should reopen because I don't – I don't have it. . . .
> [PLAINTIFF'S COUNSEL]: By reopen, I would recall a witness? I mean this wouldn't be done via declaration?
> THE COURT: I'm not interested in hearing a witness sit up there and talk. I'm interested in seeing evidence.
> [PLAINTIFF'S COUNSEL]: That's why I'm wondering if you want to see a declaration.
> THE COURT: No, I would want evidence. I would want evidence.
> [PLAINTIFF'S COUNSEL]: No, I understand. I'm talking about attaching these documents to a declaration as opposed to bring Mr. Ramessar to authenticate them live.
> THE COURT: I wouldn't be interested in that.
> [PLAINTIFF'S COUNSEL]: In the live testimony?
> THE COURT: I would, would be interested in live testimony –
> [PLAINTIFF'S COUNSEL]: Okay.
> THE COURT: --With documents to explain what they are. I'm interested in the documents at the restaurant."

Following an unreported discussion, the trial court continued the matter to July 25 to "reopen and put on further testimony." Defense counsel stated: "Just for the record, I'll object to reopening." In response to defense counsel's query, "What are we calling the July 25th date?" the trial court responded, "We'll call it 'trial.' "

On July 21, 2014, defendants received the financial documents plaintiffs intended to introduce into evidence at the continued trial. The next day, defendants filed and served a pleading captioned "Objection to Reopening for Additional Evidence," to be heard on July 25, the day of the continued trial. Defendants argued that plaintiffs were not entitled to reopen their case because they had not shown good cause or reasonable diligence.

2. <u>Continued trial on July 25, 2014</u>

Defendant's objection to reopening was heard on July 25, before evidence was introduced. The trial court observed:

> "I think that's an important thing to have in mind when dealing with this to keep things legally straight because in this case, I don't think that there was a trial tactic. I think there was just simply a gap in the evidence, which could be remedied by documents which the court is being provided. [¶] I don't know whether they'll fill the gap that the court said it needed at the last hearing or not. I'm certainly going to look at it."

Because of plaintiffs' late production of documents prior to reopening, the trial court offered to allow defendants to defer their cross-examination of Ramessar until the final court date which had become necessary because of witness Williams's unavailability. Defendants' counsel declined the offer and cross-examined Ramessar that day.

Because defendants contend on appeal that the trial court erred in allowing plaintiffs to reopen, we set forth in some detail the evidence adduced at the two sessions of the reopened trial. Ramessar testified that Exhibit No. 27 was a 39-page exhibit, comprised of copies of the restaurant's profit and loss statements for 2011, 2012 and 2013, which Ramessar prepared with the assistance of his accountant. Exhibit No. 27 was the supporting documentation for the 2011, 2012 and 2013 tax returns (which were not admitted into evidence). Exhibit No. 27 shows the restaurant incurred a loss of $32,314.57 in 2011; $75,696.77 in 2012; and $78,192.23 in 2013. Exhibit No. 31 was a "stock ledger" that Ramessar created and maintained on an ongoing basis. It reflects all personal cash Ramessar and Baw put into the restaurant in exchange for "stock issuances" and the dates over the investments. It did not reflect when expenses were incurred by the restaurant. Exhibit Nos. 33 through 40 were copies of cashier's checks, deposit receipts, etc. showing deposits into the M&M (i.e. restaurant) account from plaintiffs' personal bank accounts. M&M did not pay any federal corporate taxes in 2011, 2012 or 2013.

Exhibit No. 27 indicates that in 2011, M&M's expenses included $11,965 for "depreciation"; Ramessar assumed it was depreciation of the assets and goodwill they purchased. Ramessar could not recall exactly what expenses were included in the $23,436.15 line item for "direct operating expenses" or the $39,042.77 line item for "general expenses" in 2011. M&M's "loss to date" included $51,000 of legal fees incurred in 2012 and 2013, which were reflected in the line item for "Administrative and General Expenses." Until they lost the liquor license, the restaurant was generating monthly sales of between $38,000 and $40,000. At that level, they were losing money but they could keep the doors open and make payroll. But after they lost the liquor license, profits went down drastically. When they eventually vacated the premises it was because they could not sustain any more losses.

3. Continued trial on August 7, 2014

The last day of testimony was August 7, 2014. Although the original purpose of reopening was to allow plaintiffs to introduce documentary evidence in support of Ramessar's testimony on damages, on this final day of trial plaintiffs were allowed to call Williams, the author of the email, to testify about the source of the financial information contained in that email. At the start of the proceedings, defendants renewed their objection to reopening. The trial court responded: "I mean, this is a one-time thing. Your – your – both sides, your clients deserve to have an answer, okay. They deserve to have all the facts on the table. And this seems to be what would be the last witness. And let's get it right so everybody walks away knowing that they got everything heard."

Williams testified that in late 2010, Gillies asked him to remove the cameras he spent months setting up in the restaurant because she was "not managing that business very well and needed to sell the business immediately, and if I knew anyone that was interested in buying the business that she'd pay me a commission" of 10 percent of the sales price. Over several conversations, Gilles gave Williams the "information she wanted me to pass along to people who might be interested, and I took that information that and I put it into an email and I passed it along to at least 20, maybe 30 people." Ramessar was one of the people to whom Williams sent the email. Williams did not copy Gillies or Baio on the email. All of the financial information in the email was based on what Gillies verbally told him over the course of multiple telephone conversations. Williams thought Gillies may have said she was behind in rent, but not how many months. Williams also testified to the financial arrangements between Gillies and himself.

Baio testified that the statement in Williams's email that the restaurant had monthly net profits of $9,000 was not accurate. Baio had no idea where Williams got that figure. Ramessar lied when he said Gillies and Baio confirmed the profitability information in subsequent conversations. The profitability of a restaurant depends on its management. Before plaintiffs purchased the restaurant, defendants communicated to them that the restaurant was not profitable. Exhibit No. 219 is a seven-page email chain between Baio and Ramessar. In an email to Ramessar dated May 25, 2011 – over two years before the restaurant closed – Baio stated he was worried about the management of the restaurant. Baio testified that he sent the email because he was hearing complaints from customers and employees of the restaurant. In the email, Baio told Ramessar that he was available if needed. Exhibit No. 12 is an email from Gillies to Ramessar dated December 7, 2010, with the subject line "Franchise Agreement." A sample Franchise Agreement was sent as an attachment to that email.

4. The Trial Court's Findings

Following closing arguments on August 7, 2014, the trial court stated its findings on the record. It began with the observation that, even before Williams testified, the trial court believed Gillies was the source of the financial information in the email and that it was that financial information along with "the explanation of Ms. Gillies that caused them to take this leap of faith and invest." The court found defendants misrepresented to plaintiffs that a prior investor had been repaid his $175,000 investment in the restaurant. In addition, "from the very beginning because there was a promise of the liquor license from the beginning, which wasn't even possible. I don't think you can transfer liquor licenses like that. [¶] I didn't have any expert testimony." The trial court concluded, based on all the evidence "there is a very high likelihood, way beyond a preponderance [of the evidence], they wouldn't have done this. Had they known in the beginning what they ended up finding out as time went on . . . ." "Based on the false representations and the breaches, the court finds for the plaintiff."

Regarding the argument that Baio could not be held liable for fraud because he had no ownership interest in G3K, the trial court noted that Baio was "the one who reassured Ms. Baw and Ramessar that the restaurant was worth $250,000." "Mr. Baio was essentially – he was an agent. If anything, he was an agent of Ms. Gillies and he was there to help her close the deal. [¶] He had a lot to do with it. He had a lot to do with the misrepresentations. He had a lot to do with the ultimate closing of the deal that night. So his acts flow through to Ms. Gillies." The finding that Crème and Baio were "in the driver's seat" in the negotiations was based in part on the allegation in Crème's cross-complaint, which stated: "But for the representation by M&M that it would enter a franchise Agreement with [Crème], [Crème] would not have allowed M&M to take over the Pasadena location and use the Crème de la Crepe name, concept, recipes and business plan."

Regarding damages, the trial court stated: "I'm going to award [plaintiffs] $162,280, which is comprised of $125,000 based on the misrepresentations and $37,289 based on the liquor license losses. . . . Attorney fees can be decided on motion after trial. All right. Any questions?"

There followed a somewhat confusing discussion of apportionment. Initially, the trial court said the fraud judgment was against only Gillies, Baio and G3K. But when defense counsel suggested that this made Crème a "prevailing party" the trial court responded: "Which is worth nothing just to give you a heads up on that. I'm just going against him personally because he was there. He was representing Crème de la Crepe. I suppose, actually now that you brought it to my attention, maybe I'm making a mistake. Maybe Crème de la Crepe should be swept into the judgment." The trial court concluded that Crème should be held liable for fraud, reasoning:

> ". . . [A]ll the representations he made of himself as the business owner of many restaurants, his deep involvement in the business, his willingness to allow some of the benefits of the Crème de la Crepe name . . . . He did agree those things were part of it. [¶] Those were actually part of the inducement. He is, actually, from what I can tell here, the only person who would have that kind of authority at Crème de la Crepe. He made that pretty clear in his testimony, too. The judgment would include Crème de la Crepe. You are correct. [¶] . . . He represented Crème de la Crepe. He used the name of Crème de la Crepe in whatever notary that it has. I don't really know. But he used that, and he offered help from there to help Ms. Gillies and G3K fulfill its end of the bargain. If you want to look on it as a coconspirator theory, if you want to. That really the way it all comes together because they were acting together. [¶] . . . What he had invested in, it was the name of Crème de la Crepe. He had let Ms. Gillies use it. . . . He didn't want her to have to pay any fees for Crème de la Crepe. I assume that's because of their relationship. But then they used that to bring in M&M Spice."

There was also this colloquy regarding the attorney fees award:

> "[COUNSEL FOR BAIO]: Are those per the contract per the G3K? The contract is by M&M Spice and G3K. Has that been decided for that portion of what Your Honor stated? That is per the contract, right?
> THE COURT: Yes. That is.
> [PLAINTIFFS' COUNSEL]: Which is only between the corporations.
> THE COURT: Which is only between the corporations.
> [PLAINTIFFS' COUNSEL]: My understanding. That portion of the judgment would be limited to the corporation. The remaining would be against the individuals as well.
> THE COURT: Yes, definitely. . . ."

At the end of the presentation of evidence on August 7, 2014, the trial court directed plaintiffs' counsel to draft a proposed statement of decision. On September 2, 2014, the four defendants filed separate objections to the proposed statement of decision. On November 24, 2014, the trial court filed its statement of decision.

5. <u>The Statement of Decision</u>

As to the fraud cause of action, the trial court found defendants Gillies and Baio, in both their individual capacities and as representatives of G3K (Gillies) and Crème (Gillies and Baio), made false statements to Baw and Ramessar including representations as to the then-current financial performance of the restaurant, the value of the restaurant equipment and that a prior investor had been repaid; these false statements induced plaintiffs to purchase the restaurant; plaintiffs reasonably relied on these statements in making the decision to purchase the restaurant. In making these false representations, "Gillies and Baio were acting within the scope of their agency and employment by G3K, Inc. and Crème de la Crepe, Franchising, Inc., respectively." As a result of defendants' fraud, plaintiffs were damaged in the amount of $125,000 "based on the evidence of their initial investment, their continued struggle with the restaurant and the additional monies that were poured into a losing business which never would have been purchased had the truth not been concealed from them." All four defendants were expressly held "jointly and severably" liable for the fraud damages.

As to the breach of contract causes of action, the trial court found "defendant G3K, Inc. breached the January 31, 2011 Asset Purchase Agreement with M&M Spice, Inc. as well as the covenant of good faith and fair dealing implied in such agreement, by failing to take all reasonable steps necessary to promptly transfer the existing beer and wine license to M&M Spice, Inc. after M&M Spice took over operation of the restaurant in early 2011. The Court also finds that G3K, Inc. and M&M Spice, Inc. had entered into a valid oral agreement regarding the transfer of the beer and wine license, which G3K also breached." It found the failure to transfer the beer and wine license "led directly to lost profit damages in the amount of $37,280. In addition to the fraud damages described above, M&M Spice, Inc. is also awarded damages in the amount of $37,280 from the breach of the Asset Purchase Agreement." The statement of decision also reflected the trial court's rulings against defendants on their cross-complaints.

The court found "M&M Spice, Inc. to be the prevailing party under the Asset Purchase Agreement" and entitled to recover its reasonable attorney fees from G3K.

6. The Judgment

On November 24, 2014, the court signed the judgment which reads as follows: "that judgment is entered in favor of Plaintiffs M&M Spice and Cindy Baw on the complaint in the amount of $162,280.00, plus costs $_______ and attorney fees

$27,007.50. [¶] The Plaintiffs also prevail on the cross-complaint. The Defendants shall take nothing in the cross-complaint."[3]

7. Defendants' Motions for New Trial

On January 22, 2015, the trial court heard defendants' motion for new trial. Again in light of appellants' claim that the trial court erred in allowing plaintiffs to reopen, we recite the trial court's own assessment of the significance of the testimony received post-reopening. Before argument on the motion, the trial court stated:

> "It's interesting reading the motion for new trial, which caused me to go back and reread the argument and testimony, which caused me to realize that actually there was really sufficient evidence that had already been presented by testimony of Mr. Ramessar. So I technically didn't need that additional evidence, but it was presented. And so, anyway, it didn't bear anything out that would cause the court to grant a new trial over that, because the court is free to inquire about evidence that supports a case. [¶] It was a court trial, not a jury trial, and so the court – the defendants' objection to the plaintiffs' reopening of evidence was overruled. The court had the power to do that."

Citing *Horning v. Shilberg* (2005) 130 Cal.App.4th 197 (*Horning*), the trial court found plaintiffs had not made a tactical decision to avoid introducing the omitted evidence and there was good cause to reopen. (*Id.* at p. 209.)

Of the four defendants, only Baio and Crème filed a notice of appeal.

DISCUSSION

Appellants raise the following issues on appeal: (1) the trial court erred in allowing the plaintiffs to reopen their case to present additional evidence of damages; (2) there was insufficient evidence of fraud to support the judgment against appellants (defendants Baio and Crème); (3) the evidence of damages was speculative; (4) Crème was entitled to judgment on its cross-complaint for injunctive and declaratory relief; and (5) the judgment did not accurately reflect the apportionment of liability for damages and

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[3] The motion for attorneys fees was heard on March 12, 2015 at which the time court awarded plaintiffs $27,007.50 in fees. That amount appears to have been inserted in the space on the judgment left blank when filed on November 24, 2014.

attorney fees set forth in the statement of decision. We reject the first four arguments but agree that the judgment must be modified consistent with the statement of decision.

A. Reopening for Additional Evidence

Appellants contend it was an abuse of discretion for the trial court to reopen the trial to allow plaintiffs to present additional evidence. They argue respondents did not show good cause for not introducing the evidence during trial. We find no error.

1. Standard of Review

Determination of a motion to reopen for further evidence " 'rests upon the sound discretion of the trial court.' [Citation.] 'That discretion should not be overturned on appeal absent a clear showing of abuse.' [Citation.]" (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 886 (*Austin B.*); see *In re Marriage of Olson* (1980) 27 Cal.3d 414, 422 ["The decision to reopen a case for the introduction of further evidence lies largely within a trial court's discretion. [Citations.]"].)

2. Governing Legal Principles

The California Constitution gives trial courts the inherent power to control the litigation before them. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377.) A motion to reopen for the taking of additional evidence "is not an unusual or obscure one, but is well recognized." (*Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 320; see *Pedeferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359, 374, fn. 2 [court has "power (and in some instances, duty) to reopen a party's case."].) The party seeking to reopen must make "an offer of proof, describing what additional evidence it could produce and explaining how it would cure the deficiencies." (*Austin B., supra*, 149 Cal.App.4th at p. 886.)

Horning, the case cited by the trial court when it denied the new trial motions, is instructive. The plaintiff was a real estate broker; he sued the defendant for breach of a contract to sell real property. The evidence of damages included the $21,450 broker's commission the defendant agreed to pay the plaintiff, but not the $600 cost of preparing title. The trial court found the defendant breached the contract, but the plaintiff suffered no damages because a broker acting as a principal is not entitled to a commission.

Because the plaintiff suffered no damages, the defendant was awarded attorney fees as the prevailing party. On appeal from that attorney fees award, the plaintiff contended the trial court erred in denying his motion to reopen to present evidence of the cost he incurred to prepare title. The appellate court affirmed, finding denial of the motion was not an abuse of discretion because there was evidence the plaintiff made a tactical decision not to introduce evidence of "minor and incidental expenses." (*Horning*, *supra*, 130 Cal.App.4th at p. 209.) In other words, there was no good cause because plaintiff's failure to introduce evidence earlier was a conscious, tactical decision.

Appellants cite several case for the proposition that good cause must be shown before a trial court allows a party to reopen. None of those cases deal with the issue presented to us – review of a trial court's decision to *grant* reopening. We dispense with the first appellate case in short moment. *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, involved a request for relief from default pursuant to Code of Civil Procedure section 473, which requires a showing of good cause. (See *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 905.) The present case does not involve relief from default.

The procedural posture of appellants' other cases make them distinguishable as well. The issue in *Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 Cal.App.3d 1035, 1052; *Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776; *Cappa v. Oscar C. Holmes, Inc.* (1972) 25 Cal.App.3d 978; and *Stewart v. Cox* (1961) 55 Cal.2d 857, was whether it was an abuse of discretion to *deny* a motion to reopen. In explaining why it was not, those courts referred to the absence of good cause and/or due diligence by the party seeking to reopen. None of those cases stands for the proposition that an express showing of good cause that the evidence could not be introduced during the trial is a prerequisite to *granting* a motion to reopen, and our research has disclosed none.

3. <u>Analysis</u>

We find no abuse of discretion in the trial court's decision to allow plaintiffs to reopen their case.

As will appear, we do not have to decide whether good cause must be articulated when the trial court *grants* a motion to reopen but we assume good cause is required.

Preliminarily, we are not presented with the situation in *Horning* -- whether a party should be allowed to reopen when a tactical decision made during the trial has backfired. *Horning* essentially found that a tactical choice in that context defeats good cause. (See *Horning, supra*, 130 Cal.App.4th at p. 209.) Here, on the issue of damages, plaintiffs had already introduced Exhibit No. 26 which the court eventually recognized was sufficient evidence. Although the trial court allowed plaintiffs to introduce additional evidence on damages, the inference is that plaintiffs did not initially submit all available evidence because plaintiffs believed it would have been duplicative, not for some secret strategic reason. In any event, the reopening was at the behest of the trial court which impliedly found that plaintiffs were not engaged in a tactical venture designed to spring additional evidence on defendants late in the trial. Under these circumstances we find good cause for reopening to permit the trial court to resolve any uncertainties it had found in the evidence already adduced.

For two separate reasons, we also find the decision to reopen caused defendants no prejudice. First, given the extended delay in the trial between June 25th when the parties initially rested and the last day of testimony on August 7th, defendants had ample time to consider and rebut the issues presented in the last two trial sessions. Second, at the hearing on the new trial motion, the trial court expressly found that in hindsight reopening the trial was unnecessary because all the evidence helpful to its decision had been introduced by June 25th. Accordingly, any error in reopening was harmless.[4]

B. Sufficiency of the Evidence of Fraud

Appellants contend there was insufficient evidence to support judgment against them for fraud. They argue: First, the fact that a business loses money is not a basis for fraud liability; there was evidence that plaintiffs knew the investment was not risk free; management training was not included in the franchise agreement; the restaurant made profit during some months; there was no evidence of the restaurant's income prior to the

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4 At oral argument, defendant's counsel said that before the trial court allowed plaintiffs to reopen, the court was inclined to rule for defendants. Nothing in the record suggests any such intention.

purchase or whether plaintiffs could have avoided losing money by following appellants' advice and recommendations. Second, section 5.4 of the Asset Purchase Agreement proves M&M was aware of the risks and formed its own judgment as to the worth of the company. Finally, Baio cannot be held liable for a fraud because he was neither an owner of G3K, nor a signatory to the Asset Purchase Agreement. We find no error.

1. Standard of Review

"Substantial evidence is not ' "synonymous with 'any' evidence. It must be reasonable . . . , credible, and of solid value . . . ." [Citation.]' [Citation.] However, 'the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact].' [Citation.]" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845-846 (*OCM Principal*).)

2. Governing Legal Principles

The elements of a fraud cause of action are well known: (a) a misrepresentation (including a false representation, concealment, or nondisclosure); (b) knowledge that the representation is false; (c) intent to induce the other party to rely on the false representation; (d) justifiable reliance; and (e) resulting damage. (*OCM Principal, supra*, 157 Cal.App.4th at p. 845.) "A single material misrepresentation may establish the tort. [Citation.]" (*Id*. at p. 847.) And "when the defendant purports to convey the 'whole truth' about a subject, ' "misleading half-truths" ' about the subject may constitute positive assertions for the purpose of negligent misrepresentation." (*Ibid*.)

3. Analysis

The trial court found Gillies and Baio knowingly made false statements to induce plaintiffs to purchase the restaurant, plaintiffs reasonably relied on those statements, and plaintiffs suffered damages as a result. The false statements identified by the trial court included: the restaurant had monthly revenue of $50,000 to $60,000; monthly net profits were $9,000; and a prior investor had been repaid. The true facts were that monthly revenues were closer to $40,000, the restaurant was losing money, and that prior investor was never repaid. The trial court also found Gillies and Baio misrepresented the value of the restaurant equipment, as well as the level of support plaintiffs would be receiving from defendants. The trial court found not credible testimony by Gillies and Baio that they made no such representations. The trial court found plaintiffs were damaged in the amount of $125,000 "based on the evidence presented of their initial investment, their continued struggle with the restaurant and additional monies that were poured into a losing business which never should have been purchased had the truth not been concealed from them."

Appellants' argument that liability for fraud cannot be based solely on the fact that a business loses money is beside the point since that was not the basis of the trial court's decision. Liability for fraud was based on evidence of the misrepresentations Gillies and Baio made to induce plaintiffs to purchase the restaurant. Appellants do not contend there was no evidence of misrepresentations. The gist of their argument is that the evidence should not be credited in light of other evidence – that plaintiffs knew the investment was not risk free, that management training was not included in the franchise agreement (which was never signed), and that the restaurant may have made a profit some months. But such conflicts in the evidence were for the trial court to resolve, not us.

Also unavailing is appellants' reliance on section 5.4 of the Asset Purchase Agreement, which states: ". . . Purchaser is fully aware of possible risks, if any, with respect to the Company and has formed its own judgment as to the worth and potential of the Company and the Assets hereunder." A contract provision stating the buyer formed its own judgment as to the worth of the asset being purchased does not absolve the sellers of misrepresentations they made with the intent to induce the buyer to enter into the purchase agreement. (Civ. Code, § 1668 ["All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."]; *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1500 [Civ. Code, § 1668 precludes "a party to a contract . . . from contracting away his or her liability for fraud or deceit based on intentional misrepresentation."].)

Finally, Baio's argument that he should not be held personally liable because he was not an officer of G3K and did not sign any agreements is not persuasive. The verified complaint included an agency allegation. The trial court found Gillies and Baio "were acting within the scope of their agency and employment by GK3, Inc. and Crème de la Crème Franchising, Inc., respectively. As a result, consistent with principles of respondent superior and agency, the Court finds that these corporations should be liable for all damages arising from the fraudulent conduct of Ms. Gillies and Mr. Baio." There was substantial evidence that Baio himself made some of the misrepresentations that induced plaintiffs to enter into the agreement. "Anyone who participates in the commission of a tort is liable for the damages resulting from that tort. [Citation.] Such liability attaches because of the person's conduct, not because they are the corporation's alter ego." (*Filet Menu, Inc. v. C.C.L. & G., Inc.* (2000) 79 Cal.App.4th 852, 866.)

C. Damages

Plaintiffs Baw and M&M were awarded damages of $125,000 for fraud and $37,280 for breach of contract. Appellants contend any damages suffered by plaintiffs were speculative. They argue many of M&M's costs were associated with prosecuting the litigation, M&M was improperly depreciating goodwill and plaintiffs counted the purchase price as an operating expense. But appellants provide no legal authority for their argument (other than a definition of goodwill). As such, we treat the argument as waived. (*Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1301, fn. 2 ["The dearth of true legal analysis in [his] appellate briefs amounts to a waiver of the [contention] and we treat it as such."].)

D. Crème's Cross-Complaint

Appellants contend the trial court erred in denying Crème the relief it sought in its cross-complaint. Appellants argue Crème was "entitled to injunctive and declaratory relief, as the Plaintiffs were still in possession of [Crème] proprietary information, and had not returned it, despite failing to ever sign an agreement authorizing its retention or dissemination thereof." We find no error.

1. <u>The Allegations</u>

On December 11, 2012, Crème filed a cross-complaint for breach of the franchise agreement. At trial, the parties stipulated that there was no written franchise agreement. On February 28, 2013, Crème filed an amended cross-complaint that did not allege breach of contract, but sought injunctive and declaratory relief. According to the amended cross-complaint, M&M was using the " 'Crème de la Crepe' name, without adhering to the high standards contained in the standard franchise agreement, and the operation of the Pasadena location under the name 'Crème de la Crepe' is harmful to all other Crème de la Crepe franchises." The first cause of action, captioned "Temporary Restraining Order and Permanent Injunction," alleged Crème relied on M&M's representation that it would sign the franchise agreement; but for that representation, Crème would not have allowed plaintiffs to take over the Pasadena location. The second cause of action, captioned "Declaratory Relief," alleged plaintiffs filed the complaint alleging Crème was one of the entities "responsible for part or all, of Plaintiff's injuries and damages resulting from the transactions set forth in Plaintiff's complaint. [Crème] denies that it is responsible, at fault or liable in any manner whatsoever for the Plaintiff's alleged injuries and damages, if any." The prayer for relief sought an order preventing plaintiffs from "use of the Crème de la Crepe name; from continuing to operate a restaurant at the Pasadena location; and/or an order that M&M shall make payments to [Crème] according to proof." It also sought a "judicial determination of the parties' rights, obligations and duties."

In its statement of decision, after noting that no franchise agreement was ever executed, the trial court found Crème's "breach of written contract must necessarily fail, as must its claim for declaratory relief since the Court finds that no franchise agreement, either written or oral, was ever formed between [Crème] and [M&M]."

2. Analysis

We find no error in the trial court's conclusion that appellants were not entitled to the relief sought in Crème's cross-complaint. Plaintiffs closed the restaurant and vacated the premises in November 2013. When the trial court made its findings in August 2014, plaintiffs were not "using the Crème de la Crepe name" or operating "a restaurant at the Pasadena location." As such, there was nothing to enjoin. With respect to the declaratory relief cause of action, the parties' rights, obligations and duties were determined adversely to defendants/cross-complainants by the judgment on the complaint.

E. The Form of Judgment

Appellants contend the judgment does not accurately reflect the trial court's actual judgment as detailed in the statement of decision. We agree and conclude the case must be remanded to modify the judgment.

The statement of decision specifies an apportionment of liability among the defendants; the judgment does not. For example, according to the statement of decision, only G3K was liable for breach of contract, but the judgment did not apportion damages for either fraud or breach of contract.

Plaintiffs contend Baio is liable for contract damages. At oral argument counsel's theory was that Baio was responsible because, as president of Crème, he signed the separate Franchise Agreement Addendum that had been incorporated by reference as Exhibit K into the Asset Purchase Agreement. The argument continued that, by agreeing to incorporate the Franchise Agreement Addendum into the Asset Purchase Agreement, Gillies and Baw made Baio a party to the Asset Purchase Agreement. Plaintiffs are incorrect.

Mutual consent is an essential element of an enforceable contract. For consent to be mutual, the parties must all agree on the same thing. Absent evidence the parties have agreed to the same thing, there is no mutual consent to contract and no contract formation. (Civ. Code, §§ 1580,1636; *Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, 732-734.) The rules of incorporation by reference advance the goal of ascertaining mutual intent in cases where the parties to a contract intend to be bound by specific terms that were not mentioned in the contract but are contained in an incorporated agreement. (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 713-714.) Thus, the parties to Contract A can show their intention to be bound by the *terms* of Contract B by incorporating Contract B into Contract A. But the opposite is not true. Incorporation by reference of Contract B into Contract A does not show the intention of the parties to Contract B to be bound by the terms of Contract A.

Here, it was true that Baio was a party to the Franchise Agreement Addendum, the terms of which Baw and Gillies incorporated by reference into the Asset Purchase Agreement as Exhibit K. Doing so did not make Baio a party to the Asset Purchase Agreement which Baio did not sign in any capacity. Although Gillies and Baw agreed in section 10.1 of the Asset Purchase Agreement that it was contingent on, among other things, Gillies and Baio continuing "to personally guarantee the new or assigned Lease, and assume primary liability associated with default on lease . . . ," their agreement was not binding on Baio absent evidence that Baio consented to be bound by it. That Baio signed the Franchise Agreement Addendum, the terms of which were incorporated by reference into the Asset Purchase Agreement as Exhibit K, was not enough.

In case No. B263927, Baio and Crème contend it was error to find them responsible for attorney fees on a contract they did not sign. Much the same for the breach of contract damages, the statement of decision correctly indicates that it is G3K that is responsible for attorney fees as it alone was the party to the agreement. The inclusion of Crème and Baio in the judgment was in error and that judgment must be modified. The judgment shall be modified accordingly.

DISPOSITION

We remand with directions to the trial court to modify the judgment as follows: (1) all four defendants are jointly and severally liable for the $125,000 award for fraud damages; (2) only G3K is liable for the $37,280 award for breach of the Asset Purchase

Agreement and oral argument; and (3) only G3K is liable for the $27,007.50 in attorney fees. In all other respects, the judgment is affirmed. Respondents shall recover their costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.