Filed 4/2/18 Sabadia v. Holland & Knight LLP CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RAHIM SABADIA et al.,

Plaintiffs and Respondents,

v.

HOLLAND & KNIGHT LLP,

Defendant and Appellant.

B242773
(Los Angeles County
Super. Ct. No. BC438701)

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

Horvitz & Levy, David M. Axelrad and Frederic D. Cohen; Klinedinst, John D. Klinedinst and Carey L. Cooper; Gibson, Dunn & Crutcher, Daniel M. Kolkey, Kevin S. Rosen and Bradley J. Hamburger for Defendant and Appellant.

Enenstein & Ribakoff, Ribakoff Law Firm and David Z. Ribakoff; Law Offices of Michelle J. Correll and Michelle J. Correll; Law Office of Bruce Adelstein and Bruce Adelstein for Plaintiffs and Respondents.

In the underlying action, respondents Rahim Sabadia, Nafees El Batool, and Dr. Ishtiaq Khan asserted claims for legal malpractice, breach of fiduciary duty, and fraud against appellant Holland & Knight, LLP (H&K). Respondents alleged the claims as trustees of the Sabadia Family Trust and the Sabadia Family Irrevocable Trust, and Sabadia also alleged the claims as an individual. The claims arose from respondents' participation in real estate investment projects created and managed by M. Shi Shailendra. At trial, respondents offered evidence that respondents made cash investments in the projects, that Sabadia executed personal loan guarantees relating to the projects, and that Shailendra improperly disbursed project funds. Respondents also offered evidence that attorney Reeder Glass, an H&K partner who provided legal services to Shailendra-related entities involved in the projects, also

represented respondents in the course of the projects. Respondents alleged that they incurred damages due to misconduct by H&K, including the concealment of Shailendra's improper disbursements. They sought as damages their net cash investments, the value of Sabadia's outstanding personal loan guarantees, and certain mitigation costs.

Although Glass denied that he acted as counsel for respondents, the jury found that Glass represented them, and that in such capacity he violated professional duties owed them and concealed information from them. The jury returned special verdicts in favor of respondents on their claims, and awarded damages totaling approximately $34.5 million. The verdict reflects that the jury largely accepted respondents' theory of damages.

H&K challenges the judgment on several grounds, including Sabadia's standing, insufficiency of the evidence regarding causation and the existence of damages, instructional error, and defects in the special verdicts. To the extent respondents sought recovery of their net cash investments, we conclude that the award of damages fails for want of an adequate showing of causation, with the exception of one item of claimed damage. Specifically, we conclude that respondents did not show that H&K's conduct -- whether characterized as malpractice, breach of fiduciary duty, constructive fraud, or fraudulent concealment

-- proximately caused them to lose the value of their investments. Furthermore, to the extent Sabadia sought a recovery for the value of his outstanding personal loan guarantees, we conclude that the award fails for want of an adequate showing that he had suffered actual damage. We also conclude that the jury's special verdicts regarding damages reflect errors regarding respondents' theory of recovery.

In view of these determinations, we reverse the judgment. As further explained below, we direct the entry of judgment against respondents on their claims on behalf of the Sabadia Family Irrevocable Trust, and remand the matter for a new trial on Sabadia's claims as an individual and the claims on behalf of the Sabadia Family Trust.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. *Complaint*

The underlying action commenced in May 2010. In June 2011, respondent Sabadia, together with his wife Batool, and his brother-in-law, Dr. Khan, filed a second amended complaint containing claims against H&K for fraudulent concealment, constructive fraud, breach of fiduciary duty, legal malpractice, and breach of the implied covenant of good faith and fair dealing. Sabadia and Batool asserted the claims as trustees of the Sabadia Family Trust, and Khan asserted the claims as trustee of the Sabadia

Family Irrevocable Trust; Sabadia also asserted the claims as an individual.

The complaint alleged that in 2002, Sabadia met M. Shi Shailendra, a real estate promoter, who later retained H&K to act as counsel regarding several real estate transactions. H&K allegedly also represented respondents with respect to those transactions. From February 2002 to August 2009, respondents participated in the transactions by investing more than $16 million and guaranteeing loans totaling more than $18 million. During that period, the complaint alleged, Reeder Glass, an H&K partner, engaged in misconduct toward respondents, including failing to protect their interests and facilitating Shailendra's misuse of funds.[1]

B. *Trial*

1. *Respondents' Evidence*

a. *Background*

In 1985, Sabadia founded Sabtech Industries (Sabtech), which operated as a defense contractor. In the 1990's, he established the Sabadia Family Trust and Sabadia Irrevocable Family Trust in order to provide for his wife and children in the case of his death. During the

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[1] Prior to trial, in ruling on a motion for summary judgment by H&K, the court dismissed respondents' claim for breach of the covenant of good faith and fair dealing.

relevant period, Sabadia and his wife, Nafees Batool, were the trustees of the former, and Batool's brother Khan was the trustee of the latter.

In 1992 or 1993, Khan met Shailendra, a real estate promoter in Atlanta, and made some successful investments through him. In the early 2000's, when Sabadia was looking for investment opportunities in real estate, Khan introduced Sabadia to Shailendra. Thereafter, Sabadia and his family trusts participated in investments with Shailendra involving the purchase of real property. Khan was involved in the investments as an individual and as trustee of the Sabadia Irrevocable Family Trust. As trustees, Khan and Batool executed Sabadia's decisions.

H&K, a law firm active in Georgia and Florida, provided legal services for some of the investments in which Sabadia and his family trusts participated. Attorney Reeder Glass was the principal H&K attorney responsible for those services.

Respondents' claims focus on ten investments. Before the trial court and on appeal, the parties have generally referred to the investments as "transactions," as they involved the purchase of specific parcels of real property. Shailendra recruited investors to fund the purchase of the real property, and arranged for attorneys -- including H&K -- to implement the transactions. Each transaction involved a structure of entities, including an entity intended to hold the purchased property. The structure also included entities

controlled by the investor-participants funding the purchase. Shailendra oversaw the transactions as developer, manager, or general partner. Respondents made cash investments in the transactions, and Sabadia co-signed promissory notes and executed personal guarantees regarding the notes. Some of the transactions involved participants other than Shailendra and respondents, such as Joel Cowan, Sr., and his entities.

b. *Pertinent Transactions*

Respondents sought damages allegedly arising from ten transactions initiated from 2004 to 2008 for which H&K provided legal services. Of these transactions, four involved property in East Bay, Florida, and six involved property located in Georgia. At trial and on appeal, the parties have identified each transaction by using the name of the principal entity involved in the transaction.

In each transaction, a Sabadia family trust, or some other entity closely related to them, owned an interest in the principal entity. In some transactions, the key Sabadia-related entity was 21 14th Street One-Third, LLC (in which the Sabadia Family Irrevocable Trust was the sole interest owner), or 1400 Sabadia, LLC (in which the Sabadia Family Trust was the sole interest owner). In other transactions, the key Sabadia-related entity was the Sabadia Family Limited Partnership or PCB East Bay 1130, LLC (in which

the Sabadia Family Limited Partnership owned an interest).[2]

As the details of the ten transactions are material to respondents' claims, we set forth the following facts regarding each transaction, namely, the identity of the principal entity, the location of the relevant property, the formation date of the principal entity, the Sabadia-related entity owning an interest in the principal entity, and the total fees H&K received in the course of the transaction.

Principal Entity In Transaction	Location of Property	Formation Date	Key Sabadia-Related Entity	H&K's Fees
PCB Four, LLC	East Bay, Florida	3/9/04	Sabadia Family Irrevocable Trust	$158,165

[2] We note that the second amended complaint does not identify the Sabadia Family Limited Partnership as a party to this action.

PCB East Bay 1130, LLC[3]	East Bay, Florida	3/10/04	Sabadia Family Limited Partnership	$32,074
EBD Company of Florida, LLC[4]	East Bay, Florida	3/18/04	Sabadia Family Limited Partnership	$384,031
21 14th Street, LLC[5]	Atlanta, Georgia	6/30/05	Sabadia Family Irrevocable Trust	$3,765
Shi Investments One, LLC	Henry County, Georgia	12/8/05	Sabadia Family Trust	$51
Callaway 2297, LLC	East Bay, Florida	4/30/06	Sabadia Family Irrevocable Trust	$161,954

[3] This entity is also sometimes designated as "PCB 1130, LLC."

[4] This entity is also sometimes designated as "East Bay Development Company of Florida, LLC."

[5] This entity is also referred as "21 14th Street Co-Tenancy."

1400 Peachtree, L.P.	Atlanta, Georgia	10/19/06	1400 Sabadia, LLC	$170,815
1400 West Peachtree, L.P.	Atlanta, Georgia	12/13/06	21 14th Street One-Third, LLC	$91,432
1010 West Peachtree, L.P.	Atlanta, Georgia	3/14/07	21 14th Street One Third, LLC	$14,521
Jodeco Road Co-Tenancy	Henry County, Georgia	4/23/08	21 14th Street One Third, LLC	$39,277

c. *Key Events*

At trial, respondents offered evidence supporting the following version of the underlying events: In 2002 or 2003, before participating in the ten transactions described above or encountering H&K, Sabadia made investments through Shailendra. Sabadia sometimes executed personal guarantees in connection with those investments. He believed that he had no liability under the guarantees, however, because Shailendra told him that indemnification agreements by other investors shielded him from any such liability.

According to Sabadia and Khan, commencing in 2004, H&K's conduct led them to believe that it represented them in connection with the ten transactions. In December 2004, Glass and other H&K attorneys began to send Sabadia documents relating to the transactions for his signature or review. In 2005, H&K assisted in the creation of 21 14th Street One-Third, LLC, which eventually held interests in four of the ten transactions. In 2006, H&K created another Sabadia-related entity, namely, 1400 Sabadia, LLC, which eventually held an interest in one of the ten transactions. H&K never expressly told Sabadia that it was *not* acting as his counsel; rather, H&K sometimes identified itself as his "'special counsel,'" and occasionally stated that it was acting at his request or representing his interests. Although H&K never submitted a bill directly to Sabadia, at least one participant in the transactions asked Sabadia to reimburse it for payments to H&K.

Beginning in early 2004, Khan occasionally discussed the East Bay transactions with Glass. Glass told Khan that those transactions were "structured . . . properly" and that there was enough equity in the underlying loans to support the related loans. At some point, Glass also suggested that he was interested in personally participating in the East Bay transactions.

In 2006, Khan and his wife filed for a divorce. After the divorce, at Khan's request, Shailendra was appointed to act as an arbitrator to resolve their remaining disputes.

Glass and H&K represented Khan in the divorce proceeding, and also advised Shailendra in his role as arbitrator. Khan testified that rather than billing him for legal services, H&K sought payment from Shailendra, who in turn asked that Khan pay H&K.

In late 2006, when the transaction known as 1400 Peachtree, L.P., was being carried out, Glass concealed a feature of that transaction that was unfavorable to Sabadia. Sabadia believed that Shailendra and the Sabadia-related entity -- namely, 1400 Sabadia, LLC -- were to be assigned equal interests; in addition, Sabadia and other participants, including Jamestown Co-Invest 4 (Jamestown), were to execute personal guarantees relating to a $12 million loan. At that time, the Sabadia Family Trust -- which was the sole member of 1400 Sabadia, LLC -- held approximately $2.8 million in funds from profits realized in another transaction. However, notwithstanding Sabadia's belief that Shailendra and 1400 Sabadia LLC would be assigned equal interests, the final closing statement for 1400 Peachtree, L.P., reflected that approximately $2.79 million of the required $3.5 million cash equity came from 1400 Sabadia LLC. That contribution was made by a transfer of the Sabadia Family Trust's pre-existing funds. Glass was aware of the disparity but did not raise it with Sabadia.

Glass also never advised Sabadia regarding the hazards of his personal loan guarantees. According to Sabadia, when he became involved in the ten transactions,

he continued to believe that the personal guarantees he executed in connection with those transactions imposed no liability on him because other participants had agreed to indemnify him. That belief was critical to Sabadia's ongoing participation in the transactions, as he preferred to make cash investments and avoid debt.

In early 2007, Sabadia engaged Michael J. Peterson, an attorney employed by H&K, to provide estate planning services. In a letter dated January 23, 2007, Peterson alerted Sabadia to potential problems relating to the PCB East Bay 1130, LLC. Peterson stated that Sabadia was subject to a personal guarantee for a $328,250 loan, noting that "[a]s a general matter an [i]ndemnity is only as strong as the financial power of the [i]ndemnitor." Peterson also observed that Sabadia had given Shailendra and Khan a power of attorney to execute documents on his behalf, and advised Sabadia that they could use that power to cancel the relevant indemnity agreement.

According to Sabadia, Peterson's letter shook his confidence whether his investments had been "handled properly," and he decided to hold off making further investments. Sabadia forwarded Peterson's letter to Shailendra. In a memorandum sent to Shailendra on February 8, 2007, Glass told Shailendra that Peterson's letter was "based on the absence of documents" and reflected "erroneous conclusions." He recommended that Shailendra provide respondents with "an up to date summary of each

and every investment," offer them "a complete package of the documents relating to each transaction," and seek a complete "ratification of [his] activities on behalf of these investors," together with a waiver of liability.

In February 2007, Sabadia went to Atlanta for a meeting with Shailendra. There, Shailendra introduced Glass to Sabadia as "our lawyer," and told Sabadia to "feel free to call [Glass] any time."[6] Sabadia was told that he need not be concerned regarding his personal guarantees because "the people behind the indemnities . . . were pretty substantial . . . ." During the meeting, Sabadia provided Glass with information that he considered to be private, namely, that respondents potentially had considerable funds available for further investment. Reassured by the meeting, Sabadia decided to continue making investments with Shailendra, but arranged for the cancellation of the power of attorney. After the meeting, Glass told Shailendra that Sabadia "intends to have a substantial amount of money that will need to be invested."

In 2008, a lender involved in the 1400 Peachtree, L.P., transaction asked that its loan be restructured. Following

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[6] In deposition testimony respondents submitted at trial, Shailendra acknowledged that during a meeting in Atlanta, he introduced Glass to Sabadia as "our attorney." According to Shailendra, that remark meant only that Glass was the attorney for "East Bay."

that request, H&K assisted in amending the operating agreement for 1400 Peachtree, L.P. Under the terms of the restructured loan and amended agreement, Jamestown was released from its personal loan guarantee and (through an intermediary entity) was made a general partner. Although Sabadia executed the amended agreement, he was unaware that Jamestown was no longer guaranteeing the loan until 2010.

At some point in 2008, Sabadia retained wealth management expert Douglas Freeman to create a financial family plan. In reviewing Sabadia's records, Freeman noticed that Sabadia assigned no debts to his investments through Shailendra. When Freeman asked whether there were any such debts, Sabadia replied that the indemnification agreements related to the transactions shielded him from liability under his personal guarantees. In 2009, Freeman told Sabadia that the personal guarantees imposed obligations on him, notwithstanding the indemnification agreements. According to Freeman, Sabadia reacted as if "that was the worst piece of news he had ever received."

In late 2009, Sabadia hired Carlene Kikugawa, an accountant and fraud examiner, to examine his investments through Shailendra. In addition to reviewing Sabadia's files, Kikugawa requested additional records from Shailendra, usually by contacting H&K. When Shailendra failed to provide critical missing documents, she began to suspect that he was engaged in fraud. In January 2010, she

reported her suspicions to Sabadia, namely, that Shailendra was pocketing funds from current investors, paying them with proceeds from new investors or unauthorized loans, and not making required capital contributions to the projects. According to Kikugawa, it was apparent to her that Sabadia was not a knowledgeable real estate investor and that he lacked any independent understanding of his investments.

In February 2010, Sabadia, Khan, and Kikugawa met with Shailendra and Glass in Atlanta. Also attending the meeting were other investors, including Cowan. During the meeting, Glass stated that he had been representing Shailendra, Sabadia, and Khan. When Shailendra offered reassurances regarding the transactions, Sabadia pointed out that certain loans were in default, and demanded that Shailendra return the money that he had "stolen from [him]." Following a discussion, Shailendra and Sabadia decided to negotiate "a division of the properties" in order to compensate Sabadia. Following the Atlanta meeting, Sabadia proposed an agreement regarding the transactions to Shailendra, who refused to sign it. By that time, banks were sending Sabadia demand letters regarding outstanding loans.

In June 2010, Sabadia and other investors met with Shailendra, who acknowledged that he "'had taken money from one partnership . . . to another,'" and received commissions. Shailendra agreed to resign from his positions

in the relevant entities, but never complied fully with that agreement.

At some point in 2010, Glass left H&K and began to work "in house" for Shailendra. Freeman assisted Sabadia in purchasing outstanding loans for which he had signed personal guarantees and negotiating settlements with lenders. Sabadia also became involved in lawsuits arising from his investments through Shailendra and his related loan guarantees.[7]

d. *Legal Expert Testimony*

i. *Clark Cunningham*

Clark Cunningham, a professor at the Georgia State University College of Law, opined that under Georgia law, H&K established an attorney-client relationship with Sabadia personally and his family trusts with respect to the

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[7] According to Khan, in addition to misappropriating funds from the transactions, Shailendra took a sum of money from him as an individual after his divorce. Khan testified that his divorce decree required him to pay $1.5 million to his wife. In order to discharge that obligation, he gave $1.5 million to Shailendra with instructions to pass on the funds, but Shailendra spent them. In mid-2010, after discovering that the funds had not been transferred, Khan met with Shailendra and Glass and demanded that Shailendra resign as arbitrator, but Shailendra declined to do so. In December 2010, Glass represented Shailendra at a hearing regarding the missing $1.5 million Khan owed to his wife.

transactions involving Shailendra.[8] Cunningham found no documents showing that H&K ever terminated that relationship in compliance with the Georgia Rules of Professional Conduct.

ii. *Lawrence Jacobson*

California attorney Lawrence Jacobson, a specialist in real estate transactions, opined that H&K's conduct fell below the standard of care applicable to attorneys structuring real estate transactions involving multiple parties. According to Jacobson, H&K did not engage in adequate conflict checks or provide conflict disclosure letters, and failed to advise Sabadia regarding the risks inherent in joint representation, his need for independent counsel when actual conflicts arose, and the nature of his liability under the personal guarantees he signed. In connection with the personal guarantees, Jacobson stated that H&K should have advised Sabadia that an obligation arising under a personal loan guarantee is "absolute," and that the guarantor may rely on a promised indemnification "only to the extent that the indemnitor actually pays it."

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[8] Cunningham also testified that H&K established an attorney-client relationship with PCB East Bay 1130, LLC and the Sabadia-related entity involved in it (the Sabadia Family Limited Partnership), which he identified -- mistakenly -- as a Sabadia family trust.

iii. *Alisa Freundlich*

California attorney Alisa Freundlich, who specializes in complex real estate transactions, opined that H&K's conduct contravened the standard of care applicable to attorneys. The focus of her testimony was on 1400 Peachtree, L.P., in which the entities related to Sabadia and Shailendra each held a 25 per cent interest, even though the Sabadia Family Trust provided approximately $2.79 million of the $3.5 million in equity required for the project. According to Freundlich, H&K breached the standard of care in failing to disclose the trust's excessive contribution. Freundlich further opined that H&K breached its duties by failing to advise Sabadia regarding the risks attending his personal guarantee of the $12 million loan related to 1400 Peachtree, L.P. Additionally, Freundlich stated that H&K contravened its duties by failing to alert Sabadia when Jamestown was released from its personal loan guarantee.

e. *Financial Expert Testimony*

i. *Carlene Kikugawa*

Kikugawa opined that Sabadia received a disproportionately small interest in the ten transactions involving H&K's legal services. According to Kikugawa, in the course of those transactions, Sabadia arranged for investments totaling approximately $18.4 million, and executed personal guarantees for loans totaling approximately $44.1 million. According to Kikugawa, in

each transaction, the ratio of Sabadia's contribution of cash and personal loan guarantees to the purchase price of the real property exceeded the interest assigned to the Sabadia-related entity involved in the transaction.

Kikugawa testified that in the case of 1400 Peachtree, L.P., H&K knew that Shailendra received a greater interest than his cash contribution warranted. Although Shailendra and the Sabadia-related entity were assigned equal interests in 1400 Peachtree, L.P., approximately 80 percent of the required $3.5 million cash equity came from Sabadia's sources. Kikugawa characterized Glass's withholding of that information as a "badge of fraud."

Kikugawa further opined that during the ten transactions, Shailendra improperly diverted approximately $20.4 million belonging to the other investors.[9] She offered the following estimates of the misappropriations:

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[9] Kikugawa further estimated that Shailendra improperly diverted $6,257,050 from another transaction, namely, Shi Investments Two, LLC. That transaction was profitable, however, and respondents claimed no damages relating to it. Our summary of Kikugawa's opinions thus omits her testimony regarding it.

Transaction	Funds Misappropriated By Shailendra
PCB Four, LLC	$3,122,500
EBD Company of Florida, LLC, together with PCB East Bay 1130, LLC, and Callaway 2297, LLC	$4,460,951
21 14th Street LLC	$2,314,922
Shi Investments One, LLC	$4,731,233
1400 Peachtree, L.P.	nil
1400 West Peachtree, L.P.	nil
1010 West Peachtree, L.P.	nil
Jodeco Road Co-Tenancy	$5,758,883

According to Kikugawa, Shailendra acquired the funds by attaching unauthorized loans to the investments and pocketing the proceeds, and by making unauthorized transfers of funds -- for example, investor contributions -- to his private accounts. When there was a shortage of money to pay current investors, Shailendra drew on funds from new investors or unauthorized loans; Kikugawa characterized these acts as the "classic elements of a Ponzi scheme."[10]

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[10] At her deposition, Kikugawa was examined regarding an earlier evaluation of Shailendra's misappropriations that she prepared in early 2010. She then testified that she had
(*Fn. is continued on the next page.*)

ii. *Stefano Vranca*

Stefano Vranca, an accountant and fraud examiner, estimated that respondents suffered aggregate damages of $37,717,697, encompassing their net investments, potential liabilities due to Sabadia's personal loan guarantees, and "mitigation costs," that is, the costs of professional fees Sabadia incurred in attempting to mitigate respondents' losses and in purchasing outstanding loans.[11]

According to Vranca, respondents' investments totaled $14,954,675, a sum that represented net cash contributions from Sabadia-related sources -- including Sabtech and the Sabadia Family Limited Partnership -- to the ten transactions, adjusted to reflect profits that accrued to respondents in two other transactions.[12] Regarding the cash investments, Vranca allocated $7,630,304 to Sabadia personally, $4,129,895 to the Sabadia Family Trust, and $3,124,476 to the Sabadia Irrevocable Family Trust.

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found no evidence that H&K was involved with the loans and disbursements set forth in the evaluation. At trial, she reaffirmed her deposition testimony.

[11] Vranca also estimated that the accrued interest on the lost investments totaled $9,158,428, calculated at an annual rate of 10 percent.

[12] Vranca's estimate took note of profits totaling $723,853 from two entities for which H&K provided services, namely, the Shannon 1 Partnership and Shi Investments Two, LLC.

Vranca further testified that Sabadia's personal loan guarantees relating to the ten transactions rendered him potentially liable for a sum totaling $19,796,191. That sum arose from three projects -- PCB East Bay 1130, LLC, EBD Company of Florida, LLC, and 21 14th Street, LLC -- involving loans that were "still active," as there had been no foreclosure or other resolution of those loans. Vranca estimated that Sabadia's mitigation costs totaled $2,966,830.

Vranca's estimates relating to the ten transactions were as follows:

Transaction	Respondents' net cash investment	Sabadia's Potential Liability Due to Outstanding Loan Guarantees	Mitigation Costs[13]
PCB Four, LLC	$776,186	Nil	nil
PCB East Bay 1130, LLC	$3,375,000	$5,919,638	nil
EBD Company of Florida, LLC	$1,833,333	$12,909,380	nil

[13] Vranca's estimate of mitigation costs included $225,043 in "[a]dditional [m]itigation [e]xpenses" reflecting Kikugawa's fees that he did not assign to any of the ten transactions.

21 14th Street, LLC	$682,788	$967,173	$65,248
Shi Investments One, LLC	$100,000	Nil	$2,518,678
Callaway 2297, LLC	$697,778	Nil	$1,170
1400 Peachtree, L.P.	$3,027,956	Nil	$156,692
1400 West Peachtree, L.P.	$2,039,118	Nil	nil
1010 West Peachtree, L.P.	$500,000	Nil	Nil
Jodeco Road Co-Tenancy	$2,646,369	Nil	Nil

Although Vranca acknowledged that the recession commencing in late 2007 resulted in falling real estate values, he attributed respondents' losses primarily to "an alleged Ponzi scheme." According to Vranca, after Shailendra attached loans to the investment properties and diverted the borrowed funds, the recession prevented him from replacing the funds. Vranca stated: "The money that was used, that was borrowed against this property was no

longer there. . . . And people [who] invested their money lost everything."

2. *H&K's Evidence*

a. *Testimony Regarding Pertinent Transactions*

Glass testified that in 1980, he joined H&K as a partner. In March 2004, Shailendra engaged H&K to provide legal services with respect to the East Bay transactions, including overseeing the activities of other law firms involved in them. Glass denied that respondents ever engaged H&K to represent them. According to Glass, H&K provided legal services solely to certain entities involved in Shailendra's projects. Glass further testified that prior to respondents' lawsuit against H&K, Khan never suggested that he believed Glass to be representing him in his divorce. In 2010, after retiring from H&K, Glass was employed by the Shailendra Group.

Joel Cowan, Sr., testified that through his investment entities, he participated in the East Bay transactions with Shailendra. According to Cowan, in late 2007 or early 2008, "everything stopped" due to the real estate crisis.

b. *Legal Expert Testimony*

Arthur Elliot and Robert Holt, two Georgia attorneys specializing in real estate transactions, offered testimony regarding the formation of attorney-client relationships and the standard of care for attorneys under Georgia law. Each

opined that no attorney-client relationship existed between respondents and H&K. Holt further testified that H&K engaged in no misconduct regarding 1400 Peachtree, L.P., and that an attorney for an entity need not advise a sophisticated nonclient investor regarding a personal loan guarantee relating to that entity.

California attorney Peter Thompson, who specializes in legal malpractice actions, also opined that no attorney-client relationship was established between respondents and H&K.

c. *Financial Expert Testimony*

Quentin Lee Mimms, a forensic accountant, opined that H&K was responsible for no losses to respondents. He offered an estimate of respondents' "net investment" in Shailendra's projects -- including the ten transactions -- reflecting both respondents' contributions and proceeds they received in the course of the projects. According to Mimms, respondents invested $24,113,837 in the projects and received $12,083,468 from them. As $5,289,137 of the funds received were reinvested in other projects through "roll-over exchanges," respondents' net investments totaled $17,319,506.

Although Mimms acknowledged that Sabadia and his related entities suffered some investment losses, Mimms found no damages, that is, "loss[es] . . . caused by a specific party." According to Mimms, the recession that commenced in December 2007 was "very relevant" to respondents'

claimed losses, in view of the decline in the real estate market. Mimms further opined that Sabadia faced no potential losses arising from his personal guarantees relating to the three transactions identified by Vranca.

C. *Verdict and Judgment*

The jury returned special verdicts in favor of respondents on their claims for fraudulent concealment, constructive fraud, breach of fiduciary duty, and legal malpractice. The jury returned special verdicts awarding damages totaling $34,496,779.92, comprising $28,632,327.60 in damages to Sabadia as an individual, $3,104,710.04 in damages to Sabadia and Batool as trustees of the Sabadia Family Trust, and $2,759,742.28 to Khan as trustee of the Sabadia Family Irrevocable Trust.[14]

On May 3, 2012, a judgment was entered in favor of respondents and against H&K reflecting the jury's award of damages.[15] The trial court denied H&K's motion for a new trial. This appeal followed.

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[14] In awarding damages, the jury found that respondents were not entitled to pre-judgment interest.

[15] Pursuant to a stipulation, respondents waived their claim for punitive damages with prejudice.

DISCUSSION

H&K challenges the judgment on several grounds, contending (1) that Sabadia lacks standing to seek damages for his personal investment losses, (2) that there was insufficient evidence of the standard of care applicable to attorneys in Georgia, (3) that there was insufficient evidence supporting respondents' entitlement to certain claimed items of damages, (4) that there was instructional error, and (5) that the jury awarded duplicative and inconsistent damages. As explained below, we conclude that H&K has established reversible error with respect to item (3).

A. *Respondents' Claims*

As H&K asserts numerous challenges to respondents' recovery of damages, we begin by examining respondents' theory at trial and the elements of their claims. Respondents asserted four claims against H&K, namely, legal malpractice, breach of fiduciary duty, fraudulent concealment, and constructive fraud. In support of those claims, they offered evidence regarding Shailendra's investment projects, placing special emphasis on H&K's course of conduct in the ten transactions for which respondents claimed damages. According to respondents, during that course of conduct, H&K established an attorney-client relationship with respondents and contravened its duties arising from that relationship. Respondents asserted that H&K repeatedly acted in a manner that favored

Shailendra, contending, inter alia, that H&K did not advise Sabadia regarding the risks attending his personal loan guarantees, failed to ensure that respondents' interests in the transactions were commensurate with their cash contributions, and concealed Shailendra's misappropriations.

Although respondents asserted four claims, each claim relied on the same course of conduct spanning the ten investments, and sought recovery of the same damages, namely, the total amount of damages that respondents attributed to the course of conduct. In closing argument, after describing the course of conduct, respondents' counsel remarked, "[T]hat goes to all of our claims in this case," and then stated that Vranca's estimate of the total damages constituted the "scope" of the claims. On appeal, respondents acknowledge that "the damage theory for all four causes of action was the same."

The four claims, though predicated on the same facts, involve different elements. To state a cause of action for legal malpractice, "a plaintiff must plead '(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence.'" (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 179 (*Charnay*), quoting *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) Here, the attorney's duty "is not

limited to [a] failure to use the skill required of lawyers. Rather, it is a wider obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances. The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct." (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1147 (*Day*).)

The tort of breach of fiduciary duty is distinct from professional negligence. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 (*Stanley*).) In actions against attorneys, 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.] [¶] The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define . . . the fiduciary duty which an attorney owes to his [or her] client.' [Citations.]" (*Stanley*, *supra*, 4th at pp. 1086-1087.) A negligent breach of fiduciary duty may support the recovery of damages. (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1276 (*Ash*).)

In contrast with legal malpractice and breach of fiduciary duty, fraudulent concealment by an attorney involves substantive requirements relating to the attorney's and client's states of mind. "'[T]he elements of an action for

fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.'" (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868, quoting *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.) Although the attorney's fiduciary relationship with a client imposes the requisite duty to disclose (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-189), fraudulent concealment also calls for other facts, including the intent set forth in element (3) (*Stueve Bros. Farms, LLC v. Berger Khan* (2013) 222 Cal.App.4th 303, 322).

Constructive fraud by an attorney against a client ordinarily involves a misrepresentation or nondisclosure that verges on -- but falls short of -- fraud. (See *Prakashpalan v. Engstrom, Lipscomb and Lack* (2014) 223 Cal.App.4th 1105, 1114, 1131.) "'Constructive fraud "arises on a breach of duty by one in a confidential or fiduciary relationship to another which induces justifiable reliance by the latter to his prejudice." [Citation.] Actual reliance and

causation of injury must be shown. [Citation.]' [Citations.]" """". . . Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated -- that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud.' [Citation.]"' [Citations.]" (*Id.* at p. 1131.) Thus, "'a careless misstatement may constitute constructive fraud even though there is no fraudulent intent.'" (*Salahudin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562 (*Salahudin*), italics omitted, quoting 2 Miller & Starr (2d ed. 1989) § 3:20, pp. 120-121; Civil Code § 1573, subd. (1) [defining circumstances in which constructive fraud occurs "without an actually fraudulent intent"].) Furthermore, "the reliance element is relaxed in constructive fraud to the extent we may presume reasonable reliance upon the misrepresentation or nondisclosure of the fiduciary, absent direct evidence of a lack of reliance. [Citations.]" (*Estate of Gump* (1991) 1 Cal.App.4th 582, 601.)

B. *Sabadia's Standing*

H&K contends Sabadia lacked standing to claim damages for investment losses as an individual. H&K does not challenge Sabadia's standing to seek damages related to his personal loan guarantees or mitigation expenses, arguing only that his claim for investment losses (whether framed as legal malpractice, breach of fiduciary duty, or fraud) belonged to the trusts and other entities. For the reasons

discussed below, we conclude that Sabadia adequately demonstrated standing to seek personal investment losses arising from the ten transactions.

1. *Governing Principles*

"Standing is a jurisdictional issue that . . . must be established in some appropriate manner." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232, disapproved on another ground in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 169-170.) Only real parties in interest have standing to prosecute actions. (*Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American Dist. of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445.) "'Generally, "the person possessing the right sued upon by reason of the substantive law is the real party in interest." [Citations.]' [Citation.] To have standing, a party must be beneficially interested in the controversy, and have 'some special interest to be served or some particular right to be preserved or protected.' [Citation.]" (*Ibid.*)

Broadly put, the focus of an inquiry into standing is on whether the plaintiff is asserting a claim that "belongs to somebody else." (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004 (*Cloud*); accord, *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 501.) Ordinarily, that inquiry examines the plaintiff's entitlement "'to get his

complaint before a . . . court, and not . . . the issues he wishes to have adjudicated.'" (*Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 159.) Because the plaintiff typically discloses the basis for his or her standing in the complaint (*Clifford S. v. Superior Court* (1995) 38 Cal.App.4th 747, 751), the existence of standing is usually challenged by demurrer (*Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 481). Nonetheless, lack of standing is not forfeited by a failure to assert a demurrer, as it may be raised at any stage of the proceedings, including on appeal. (*Cummings*, *supra*, at p. 501.)[16]

2. *Analysis*

In view of these principles, we address a narrow issue, namely, whether Sabadia's claim for personal investment losses, as asserted at trial, "belong[ed] to somebody else" (*Cloud*, *supra,* 67 Cal.App.4th at p. 1004; see *Keru Investments, Inc. v. Cube Co.* (1998) 63 Cal.App.4th 1412, 1423-1425 (*Keru Investments*)). The crux of H&K's challenge to Sabadia's standing is that he is not identified as an interest holder in the principal entities involved in the ten

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16 We note that prior to trial, H&K asserted objections to Sabadia's standing to seek recovery for investment losses relating to at least some of the transactions.

transactions; the only Sabadia-related interest holders are the Sabadia Family Trust, the Sabadia Family Irrevocable Trust, the Sabadia Family Limited Partnership, or some other entity involving the trusts or the partnership.

We begin by describing the key features of Sabadia's claim, as set forth in the operative complaint and elaborated at trial. The complaint alleges that the Sabadia Family Trust, unlike the other trust, is revocable, but does not refer to the Sabadia Family Limited Partnership. At trial, the evidence showed that Sabadia established the Sabadia Family Trust and the Sabadia Family Irrevocable Trust, that Sabadia and his wife Batool are the beneficiaries of the former trust, and that their children are the beneficiaries of the latter trust. The sole evidence at trial concerning the partnership was provided by Sabadia, who testified, "I think the kids are in there, if I can recall correctly, Nafees and myself. I don't know exactly how it was structured."

Regarding Sabadia's entitlement to recover personally for lost investments, the complaint alleged the theory for which respondents offered evidence at trial, namely, that due to H&K's misconduct, Sabadia funded the Sabadia-related entities' participation in the transactions, which were at risk of "imploding" due to Shailendra's own fraud. Respondents' financial expert Vranca testified that Sabadia personally contributed $7,630,304 of respondents' aggregate lost investments of $14,954,675.

Under the theory alleged in the complaint and developed at trial, Sabadia was wrongfully induced to transfer personal funds to his entities (the trusts and other entities related to him) -- or alternatively, to Shailendra or others on behalf of those entities -- in order to finance their participation in the pertinent transactions. As explained below, under that theory, he had standing to seek personal investment losses to the extent he incurred losses in giving up possession of his own funds.

Ordinarily, the person entitled to assert claims for damages relating to property is its owner at the time of injury. (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 996 (*Jasmine Networks*).) That principle, coupled with the substantive law applicable to trusts and partnerships, potentially circumscribed Sabadia's entitlement to recover damages directly attributed to the interests held (directly or indirectly) by his family trusts and partnership.[17] Nonetheless, under the principle, the right to

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[17] Ordinarily, the settlor of an irrevocable trust retains no interest in the trust's property (4 Rest. Trusts (Third), § 94, com. d(2), p. 7); furthermore, individual partners in a partnership lack standing to assert private claims against third parties for damages to property belonging to the partnership, absent special circumstances (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 59-64; *Tinseltown Video, Inc. v. Transportation Ins. Co.* (1998) 61 Cal.App.4th 184, 198-200). In contrast, the settlor of a revocable trust retains
(*Fn. is continued on the next page.*)

recover damages relating to property may sometimes be vested in its previous owner, rather than its current owner. (*Ibid.* [in action for misappropriation of trade secrets, plaintiff retained right to recover damages even though it sold patent rights after initiating action]; *Keru Investments, supra*, 63 Cal.App.4th at pp.1423-1425 [in negligent construction action, right to sue belonged to owner of building at time of injury to building, not subsequent owner].) The previous owner's standing to assert such a claim hinges on whether he or she suffered damages relating to the property *before* the transfer of ownership. (*Jasmine Networks*, *supra*, at p. 996.)

Here, Sabadia sought to recover personal investment losses on the theory that H&K's misconduct induced him to part with his own funds to finance his entities' participation in unsound transactions. As that theory alleges the existence of pecuniary losses personal to Sabadia due to misconduct directed at him, we conclude that he established standing to sue for investment losses as an individual. (See *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 296 [investor asserting claim that law firm fraudulently induced him to part with valuable stock in corporation in

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full ownership of the trust's property while the trust remains revocable. (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1319-1320.)

exchange for worthless stock in another corporation alleged standing to sue].)

Southern California Federal Sav. & Loan Ass'n v. U.S. (Fed. Cir. 2005) 422 F.3d 1319, upon which H&K relies, is distinguishable. There, a group of investors, encouraged by the federal government, formed a holding company in order to operate a savings and loan institution. (*Id*. at p. 1325.) In the course of that transaction, the holding company and the investors executed certain agreements with the federal government. (*Ibid*.) Later, the applicable federal laws were amended in a manner that caused the savings and loan institution to suffer financial losses. (*Id*. at pp. 1326-1327.) In order to stabilize that institution, the holding company sought new capital, resulting in the extinguishing of the investors' ownership interest in the holding company. (*Ibid*.) The investors sued the federal government and recovered damages for breach of contract. (*Ibid*.) Reversing, the appellate court held that the investors lacked standing to recover those damages because the contractual term violated by the federal government was not found in any agreement executed by the investors. (*Id*. at pp. 1328-1331, 1334-1335.) Here, in contrast, Sabadia asserted that misconduct directed at him motivated him to part with his own funds.

Accordingly, he adequately demonstrated standing to seek personal investment losses.[18]

C. *Standard of Care*

H&K contends respondents failed to establish the standard of care applicable to attorneys practicing in Georgia, for purposes of the legal malpractice claim. At trial, respondents offered testimony from three legal experts, Georgia attorney Clark Cunningham and California attorneys Lawrence Jacobson and Alisa Freundlich. Cunningham testified primarily regarding the principles

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[18] During oral argument, H&K contended that Sabadia lacked standing to seek the full amount of $7,630,304 in investment losses that Vranca attributed to Sabadia, arguing that a significant portion of those cash investments came from Sabtech and the Sabadia Family Limited Partnership. We disagree. At trial, Vranca stated that the pertinent investments from those two sources were properly assigned to Sabadia. He further testified that Sabtech was effectively owned by Sabadia, who had the authority to draw funds from it for his personal use. Although the record discloses little evidence regarding the Sabadia Family Limited Partnership, limited partnerships may distribute cash to partners in accordance with the partnership agreement, subject to certain restrictions. (Corp. Code, § 15905.08.) Nothing before us suggests that Sabadia's personal cash investments were improperly drawn from the Sabadia Family Limited Partnership.

governing the existence of an attorney-client relationship under Georgia law, while Jacobson and Freundlich testified regarding the standard of care in real estate transactions. H&K does not challenge the sufficiency of Cunningham's testimony to support the jury's finding that H&K had attorney-client relationships with respondents. Rather, it maintains that Jacobson and Freundlich failed to establish the standard of care applicable to H&K because they were not qualified to testify regarding the standard operative in Georgia. As explained below, we conclude that respondents submitted sufficient evidence regarding that standard of care.

In a legal malpractice action, the standard of care "'is that of members of the profession "in the same or a similar locality under similar circumstances." [Citation.]' [Citation.]" (*Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1237.) Although expert testimony is ordinarily required to establish an attorney's duty in a specific set of circumstances, such testimony is unnecessary when "the attorney's negligence is readily apparent from the facts of the case." (*Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502, 1508; see *Day*, *supra*, 170 Cal.App.3d at p. 1147; *Wilkinson v. Rives* (1981) 116 Cal.App.3d 641, 647-648.) Thus, for example, expert opinion is unnecessary to show that an attorney may not advise his client on the basis of perfunctory research. (*Goebel*, *supra*, at pp. 1508-1509.) Furthermore, expert opinion is

unnecessary when the duty in question is specified by a rule of professional conduct properly submitted to the trier of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 892-893, disapproved on another ground in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239; *Day*, *supra*, at p. 1147.)

Although respondents' legal malpractice claim was predicated on a lengthy series of events spanning the ten transactions, the essential misconduct they ascribed to H&K required no detailed knowledge of Georgia law or ethical rules. Respondents asserted that due to H&K's relationship with Shailendra, H&K persistently disregarded respondents' interests, usually in ways that favored Shailendra. According to respondents' theory at trial, H&K failed to alert Sabadia to its conflicts of interest relating to Shailendra, advise Sabadia regarding his personal loan guarantees or respondents' inadequate interests in the transactions, and disclose changes to the transactions potentially unfavorable to respondents; furthermore, H&K concealed or failed to disclose Shailendra's misappropriations from the transactions.

In our view, Cunningham and Glass offered testimony sufficient to show that the conduct described above breached the standard of care applicable to attorneys in Georgia. Cunningham stated that Georgia's rules of professional conduct were generally based upon the rules of the American Bar Association. He further testified that under Georgia's

rules, a lawyer may not represent a client if there is a significant risk that the lawyer's duties to another client will materially and adversely affect the representation of the client; in such cases, the lawyer must advise both clients regarding the conflicts involved in the joint representation. Glass acknowledged that he was subject to rule 1.2(d) of Georgia's rules of professional conduct, which states that a lawyer may not enable a client "to engage in conduct that the lawyer knows is criminal or fraudulent or knowingly assist a client in such conduct." Cunningham's and Glass's testimony thus sufficed to establish the standard of care applicable to respondents' legal malpractice claim.[19]

In a related contention, H&K maintains the trial court erred in denying its motion for a directed verdict on the legal malpractice claim. Relying on Georgia case authority, H&K asserts that the court was obliged to dismiss that claim as duplicative of the breach of fiduciary duty claim, to the extent both were predicated on a breach of H&K's duty of

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[19] H&K maintains that the trial court erred in admitting Jacobson's and Freundlich's testimony because they were not qualified to testify regarding the applicable standard of care. However, because Cunningham's and Glass's testimony established the essential aspects of the duty of care, there is no reasonable possibility that an outcome more favorable to H&K would have occurred had Jacobson and Freundlich not testified. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527.)

loyalty, that is, the obligation to give impartial attention to respondents' interests. We disagree.

Here, respondents asserted their claims for legal malpractice and breach of fiduciary duty under California law, which regards those torts as distinct (*Stanley*, *supra*, 35 Cal.App.4th at p. 1086), even though the duty underlying each tort is specified by the same rules of professional conduct (see *ibid.*; *Day, supra*, 170 Cal.App.3d at p. 1147). Thus, violations of the rules requiring impartial attention to a client's interests may constitute a breach of fiduciary duty or a breach of the duty of care, for purposes of legal malpractice. (See *Stanley*, *supra*, at pp. 1087-1092; *Day, supra*, at pp. 1147-1149.) Furthermore, under California law, plaintiffs may properly seek damages under multiple theories, although they may not obtain "more than single recovery for each distinct item of compensable damage supported by the evidence." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158 (*Tavaglione*).) Respondents therefore were entitled to assert claims for legal malpractice and breach of fiduciary duty, notwithstanding the overlapping standards applicable to the claims. In sum, respondents established the standard of care applicable to attorneys practicing in Georgia, for purposes of the legal malpractice claim.

D. *Causation*

H&K contends respondents did not adequately show that its conduct caused their claimed damages. "Causation analysis in tort law generally proceeds in two stages: determining cause in fact and considering various policy factors that may preclude imposition of liability." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1235, fn. 1 (*Viner*).) H&K argues that respondents' claims fail at the first stage with respect to five transactions, and otherwise fail at the second stage with respect to all ten transactions. We reject H&K's argument regarding the first stage (see pt. D.2 of the Discussion, *post*), but conclude that H&K's argument regarding the second stage is correct, with the exception of one item of claimed damages relating to a single transaction (see pt. D.3. of the Discussion, *post*). As explained below, respondents established the requisite causal connection only with an excessive contribution of approximately $1 million relating to 1400 Peachtree, L.P., by 1400 Sabadia, LLC, in which the Sabadia Family Trust was sole member.[20]

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[20] Although H&K's opening brief argued that respondents failed to establish that H&K "was the legal cause of" respondents' damages, its primary arguments regarding the second stage of the causation analysis were contained in its reply brief, addressing respondents' arguments. We denied respondents' request to strike the reply brief, but permitted both parties to file supplemental briefs.

1. *Principles Regarding Causation*

At trial, respondents sought their full net investments in the ten transactions under distinct tort claims, each of which was predicated on the same course of conduct. As noted above (see pt. A. of the Discussion, *ante*), they maintained that they were entitled to recover their investments due to H&K's misconduct, regardless of whether that misconduct was evaluated as legal malpractice, breach of fiduciary duty, constructive fraud, or fraudulent concealment. We therefore examine the principles relating to the causation of damages under those torts.

Although the parties focus on the fraud claims, all the claims are subject to similar principles. Each claim asserted by respondents requires a showing that the wrongful act was the proximate cause of the asserted damages. (*Charnay*, *supra*, 145 Cal.App.4th at p. 179 [legal malpractice]; *Stanley*, *supra*, 35 Cal.App.4th at pp. 1086-1087 [breach of fiduciary duty]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 60 [constructive and actual fraud].) The concept of proximate causation includes two components: one concerns "'causation[-]in[-]fact,'" and the other concerns policy considerations governing liability for conduct. (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315 (*PPG Industries*); *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 834-835.)

Notwithstanding the distinctions among the torts, they require the identical showing of causation-in-fact. In the

first stage of the causation analysis, the plaintiff must demonstrate that the misconduct was a "'substantial factor'" in bringing about the asserted harm. (*Stanley*, *supra*, 35 Cal.App.4th at pp. 1086, 1095 [legal malpractice and breach of fiduciary duty]; *Strebel v. Brenlar Investments, Inc.* (2006) 135 Cal.App.4th 740, 746, 749 (*Strebel*) [constructive fraud]; *State ex. rel. Wilson v. Superior Court* (2014) 227 Cal.App.4th 579, 604-609 [fraud];*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 131-132 & fn. 9 (*Williams*) [fraudulent concealment]). Absent unusual situations, this standard "produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. [Citations.]" (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 969; see *Viner*, *supra*, 30 Cal.4th at pp. 1239-1240.)

The torts are also subject to the second stage of the causation analysis. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045-1046 (*Ferguson*) [legal malpractice]; *Ash*, *supra*, 223 Cal.App.4th at pp. 1276-1277 [breach of fiduciary duty]; *Wells v. Lloyd IV* (1936) 6 Cal.2d 70, 83-88 (*Wells*) [actual fraud and fraud based on breach of fiduciary duty].) That is because tort liability is subject to limitations "related not only to the degree of connection between the conduct and the injury, but also with public policy." (*PPG Industries*, *supra*, 20 Cal.4th at p. 316). That analysis is sometimes conducted in terms of whether

the risk of harm from the tortious act was reasonably foreseeable. (E.g., *Anaya v. Superior Court* (2000) 78 Cal.App.4th 971, 973.)

The torts thus require two distinct showings regarding causation. Under each tort, plaintiffs alleging that the defendant's misconduct caused them to participate in an injurious transaction must establish -- at minimum -- that "but for" the misconduct, they would have not have participated in the transaction, and thus would have avoided the damages they attribute to it. In addition, they must demonstrate an appropriate causal connection running from the defendant's misconduct to the claimed damages. The particular nature of the two showings depends in part on the elements of each tort.

In the case of constructive fraud and fraudulent concealment, the two showings are controlled by elements common to fraud claims. Broadly speaking, "there are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062.)

In view of these requirements, reliance upon a misrepresentation may be a "but for" cause of the claimed injury, yet not support the recovery of damages. That is because the plaintiff's reliance may lead him or her to adopt

an injurious course of action, but the pertinent misrepresentation lacks an appropriate causal connection to the injury claimed as damages. In *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 359-363, an unaccredited law school falsely told applicants that they would be exempt from a first-year examination requirement imposed on the students in unaccredited law schools. (*Id.* at p. 359.) A student admitted to the school and later dismissed for low grades asserted fraud claims against the school, alleging that its misrepresentations induced him to study at the school. (*Id.* at p. 364.) Affirming summary judgment in the school's favor on the claims, the appellate court concluded that the student failed to show that his claimed damages were attributable to the misrepresentations upon which he relied, rather than his dismissal for low grades. (*Id.* at pp. 364-365.)

In *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816-1819, a business told a nonunion contractor that it intended to replace its current union contractor with a nonunion contactor, and also planned to resist union opposition. Relying on those assurances, the nonunion contractor invested in materials in order to mount a bid to serve as the replacement and entered into a contract with the business, but was discharged after several months. (*Ibid.*) Seeking the recovery of the pre-contract investments, the nonunion contractor asserted a claim for promissory fraud, the crux of which was that the business had falsely

stated that it would ensure that the contract would be performed despite union "pressure tactics." (*Id.* at p. 1816.) The appellate court determined that the claim failed, concluding that "the termination, not the misrepresentation, . . . resulted in the alleged harm" because the pre-contract investments were necessary for the performance of the contract. (*Id.* at p. 1818.) The court stated: "[E]ven if [the business] falsely promised to take steps to ensure continued performance during a union campaign, [the nonunion contractor's] reliance on that promise by entering in the contract and preparing to perform did not constitute 'detriment proximately caused' by the [business's] conduct, as the tort of deceit requires." (*Ibid.*, quoting Civ. Code, § 3333; see also *Hill v. Wrather* (1958) 158 Cal.App.2d 818, 824 ["A false representation which cannot possibly affect the intrinsic merits of a business transaction must necessarily be immaterial because reliance upon it could not produce injury in a legal sense"].)

In the case of legal malpractice and breach of fiduciary duty, the nature of the required second showing -- that is, of a causal connection between the misconduct and the claimed damages -- ordinarily hinges on factors that limit liability, rather than on specific elements of the claims. (See *Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 69-70 (*Kumaraperu*); *Lazy Acres Market, Inc. v. Tseng* (2007) 152 Cal.App.4th 1431, 1435-1436.) Those factors include public policy (*Ferguson*, *supra*, 30 Cal.4th at pp. 1045-1047; Rest.3d

Law (1998) The Law Governing Lawyers, § 49, com. d, p. 350) and the rules regarding intervening forces and superseding causes. (*Lombardo v. Huysenytruyt* (2001) 91 Cal.App.4th 656, 665-666 (*Lombardo*); *Ash*, *supra*, 223 Cal.App.4th at pp. 1274-1278).[21]

2. *"But for" Causation*

We begin with H&K's contention that respondents failed to make the requisite showing of "but for" causation with respect to five transactions: PCB Four, LLC; PCB East Bay 1130, LLC; 21 14th Street, LLC; Shi Investments One, LLC; and Jodeco Road Co-Tenancy.[22] H&K argues that

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[21] As discussed further below, H&K challenges the existence of substantial evidence to support the causation findings necessary for respondents' claims. On review for substantial evidence, "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]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.)

[22] H&K's contention here differs in scope from its contention directed at the second requirement of an appropriate causal connection. H&K's challenge regarding "but-for" causation relating to the five transactions asserts
(*Fn. is continued on the next page.*)

there is no evidence that its conduct induced respondents' participation in the transactions, placing special emphasis on the evidence that respondents joined in the first two transactions in March 2004, before respondents had any contact with H&K. As explained below, we reject that contention.[23]

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that respondents' evidence was insufficient to support their claimed damages, including lost investments, exposure of liability through personal loan guarantees, and mitigation costs. In contrast, H&K's challenge regarding the existence of an appropriate causal connection relating to the ten transactions focuses exclusively on claimed lost investments. We limit our inquiry to the scope of the challenges as presented to us.

[23] Respondents assert that H&K forfeited its contention by failing to request a special verdict form requiring a specific finding of damages attributed to the five transactions. We disagree.

"Courts have held in some circumstances that a defendant who fails to request a special verdict segregating the elements of damages forfeits the right to challenge a separate element of damages on appeal. [Citations.] The reason for this rule is that a reviewing court ordinarily cannot determine what amount was awarded for each element of damages requested and therefore cannot determine whether any error with respect to a particular element of damages was prejudicial. [Citations] Thus, the rule is based on the presumption that an appealed judgment is correct [citation] and the requirement that an appellant

(*Fn. is continued on the next page.*)

must present a record sufficient to overcome that presumption [citations]." (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053.) Accordingly, the rule is inapplicable when the appellant contends the jury's award of damages necessarily exceeds the amount recoverable under the plaintiff's claims. (*Ibid.*)

That exception governs here. H&K challenges the sufficiency of the evidence to support a finding of "but for" causation relating to the lost investments. Ordinarily, such a contention is not forfeited for failure to preserve the point in a suitable manner before the trial court. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17.) Furthermore, at trial, respondents sought damages totaling $37,717,697, including $17,071,080 relating to the five transactions, and the jury rendered a special verdict that respondents were entitled to damages totaling $34,496,779.92. Because that award necessarily relied on the damages attributed to the five transactions, we decline to find a forfeiture.

The decisions upon which respondents rely are distinguishable. In each, the jury's award allowed no conclusion whether it incorporated the challenged item of damages. (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158 [because jury received evidence plaintiff suffered $232,363 in lost wages and $216,000 in medical expenses, special verdict of damages totaling $260,000 for both categories permitted no determination whether it included $78,000 in nonrecoverable medical expenses]; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346-348 (*Heiner*) [jury's verdict regarding damages permitted no determination whether it included improper recovery for lost

(*Fn. is continued on the next page.*)

In some circumstances, attorneys may be obliged to prevent harm to a client arising from an event that occurred before the representation began. (See *Cline v. Watkins* (1977) 66 Cal.App.3d 174, 178-180 (*Cline*).) Furthermore, representations and omissions that induce the plaintiff to refrain from acting may constitute actionable fraud. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 174.)

Here, the record discloses evidence that prior to December 2004, when H&K first sent Sabadia documents concerning the East Bay transactions, Sabadia executed a personal loan guarantee relating to PCB Four, LLC, and respondents made several cash investments in those transactions. Thereafter, H&K's conduct led Sabadia and Khan to believe that it was representing respondents in the ten transactions. Respondents made new cash investments in two East Bay transactions identified above and the other three transactions, which were initiated from 2005 to 2008. Sabadia also executed new personal loan guarantees relating to three of them (PCB Four, LLC, PCB East Bay 1130, LLC, and 21 14th Street, LLC).

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profits because verdict awarded less than half the damages properly claimed for other items of loss]; *English v. Lin* (1994) 26 Cal.App.4th 1358, 1368-1370 [jury's verdict regarding damages permitted no determination whether it included improper recovery for lost future earning because verdict was supportable on basis of other claimed items of loss].)

At trial, Sabadia testified that critical to respondents' participation in the ten transactions was his belief -- acquired from Shailendra -- that he had no liability under the guarantees due to the indemnification agreements by other investors.[24] According to respondents' showing, because H&K never advised Sabadia regarding the risks of his personal guarantees, he acted upon that false belief until 2009, when Freeman told him that he was subject to liability under the guarantees. In addition, respondents offered evidence that H&K never disclosed its potential conflicts of interest regarding Shailendra or discussed respondents' disproportionately small interests in the transactions.

In our view, the evidence supports the reasonable inference that after H&K established an attorney-client relationship with respondents, it induced them to continue participating in the five transactions without remedying -- or acting to mitigate -- unfavorable aspects of those transactions predating the relationship. We therefore conclude that respondents established "but for" causation with respect to the five transactions.

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[24] Sabadia testified: "I wanted to pay for my share in cash. And from what I understood . . . the rest of the partners were putting up some money and then financing the rest of it and they would indemnify me from any liability for any loans. But the banks needed . . . every owner [to] . . . co-sign the note."

3. *Causal Connection Between Misconduct and Claimed Damages*

We turn to H&K's contention there is insufficient evidence of the requisite causal connection between its alleged misconduct and respondents' investment losses. As discussed below, in order to establish that connection, respondents have relied on the theory that their losses were causally related to Shailendra's undisclosed misappropriations, as identified by respondents' forensic examiner Kikugawa.

We conclude that although the theory fails, the record nonetheless demonstrates a causal connection of a different type sufficient to support recovery of all or part of a single item of the claimed investments. Because the facts relating to that item of investment are critical to respondents' theory of causation, we discuss the item before examining respondents' theory.

a. *Causal Connection Regarding an Excessive Contribution Relating to 1400 Peachtree, L.P.*

In our view, there is sufficient evidence of an appropriate causal connection between misconduct by H&K and an excessive cash contribution relating to 1400 Peachtree, L.P. As explained below, that connection involves misconduct by H&K that caused respondents to invest funds

exceeding the value of the interest they received, rather than any undisclosed misappropriation by Shailendra.

The record shows that in October 2006, H&K participated in the creation of 1400 Peachtree, L.P., together with David Cofrin, an attorney not employed by H&K who also represented Shailendra. Cofrin was the closing agent in the transaction. According to Sabadia, under the proposed terms of the transaction, Shailendra and the Sabadia-related entity -- namely, 1400 Sabadia, LLC -- were to make equal cash investments and receive equal interests in the transaction.

On October 16, 2006, Cofrin sent to H&K attorney Glass a draft closing statement regarding the transaction. Later that day, in an e-mail to Glass, James Watson, another H&K attorney, noted that the draft closing statement appeared to allocate Shailendra $1,225,000 as a refund for advancing $225,000. The refund was to be processed through Gulf Coast Exchange Services. Watson remarked: "The statement seems inconsistent as to accounting for a refund to Shi of [*sic*] money he fronted for the buyer. Note 8(a) says there is to be a $225,000 refund to him. . . . But the disbursement line 7 shows Shi getting $1,225,000." Although Glass subsequently communicated by e-mail with Cofrin on October 16, he did not mention the apparently excess refund.

On October 17, 2006, in response to a request by Sabadia to execute certain documents relating to the

transaction, Glass e-mailed those documents to him, and asked Sabadia and Batool to sign blank signature pages for the documents. The following day, Cofrin sent an unexecuted version of the closing statement by e-mail to Sabadia's assistant. "[H]ere is the final closing statement for [R]ahim and [N]afees to review. [P]ls tell me it is [O]K to substitute this with their signatures. [O]ne more small change is possible but it will only affect [the underlying property's] seller . . . ." The version of the closing statement accompanying Cofrin's e-mail contained the provision noted by Watson regarding the apparently excess refund to Shailendra.

The executed closing statement, dated October 19, 2006, contained the provision discussed above, as well as a note not found in the October 18 version of the closing statement Cofrin sent to Sabadia, namely, note 15. Note 15 stated that approximately $2.79 million of the required $3.5 million equity came from 1400 Sabadia LLC through a transfer of funds held by Gulf Coast Exchange Services.

Later, in 2008, H&K participated in the amendment of the operating agreement for 1400 Peachtree, L.P. A schedule attached to the amended agreement reflected effectively equal original contributions to the transaction by Shailendra and 1400 Sabadia LLC.[25]

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[25] In March 2009, before Sabadia hired Kikugawa, he and Batool signed a personal financial statement which reflected
(*Fn. is continued on the next page.*)

Kikugawa opined that the disproportionately large capital contribution by 1400 Sabadia LLC set forth in note 15 of the executed closing statement reflected the same funds as those involved in Shailendra's excessive refund, stating that the refund was "the discrepancy for all intent[s] and purposes between the two capital contributions." According to Kikugawa, the contribution involved a "1031 exchange" of funds from the sale of another property carrying certain tax advantages. Respondents' financial expert Vranca appears to have included that excessive contribution in his estimate of the Sabadia Family Trust's net investment in 1400 Peachtree, L.P.

Sabadia testified that he was unaware of note 15, and that no one at H&K disclosed to him the excessive capital contribution. He could not recall executing the October 19, 2006 final closing statement, and believed that someone had attached one of the blank signature pages he executed for Glass to the final closing statement. He also could not recall authorizing the pertinent transfer of the Sabadia Family Trust's funds.

Glass testified that H&K did not participate in the addition of note 15 to the final closing statement, or collect signatures for that document. According to Glass, Cofrin -- who did not work for H&K -- was responsible for preparing

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their ownership of real estate designed "1400 Peachtree." The statement valued that property at $2,700,000.

the closing statement. Later, Glass reviewed the 2008 amended operating agreement, but did not evaluate the accuracy of the equity contributions stated in the schedule.

Although the record does not establish the provenance of note 15, there is sufficient evidence that H&K engaged in some misconduct relating to respondents' excessive contribution. That misconduct, however, did not involve denying Sabadia access to the facts regarding the refund and equity contribution reflected in the executed final closing statement. H&K did not hide the excessive refund to Shailendra noted by Watson, as that refund was described in the version of the closing statement that Cofrin sent to Sabadia for his review on October 18, 2006. Nor does the record show that H&K denied Sabadia access to the executed closing statement containing note 15 or the underlying transfer of the Sabadia Family Trust's funds. Although Sabadia stated that he was unaware of note 15, Kikugawa did not include the excessive refund or capital contribution among Shailendra's undisclosed misappropriations.[26]

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[26] At trial, Kikugawa attributed no undisclosed misappropriations to 1400 Peachtree, L.P., and identified the excessive contribution as a portion of respondents' investment in that transaction. Although when deposed she initially assigned $316,731 in undisclosed misappropriations to 1400 Peachtree, L.P. (see fn. 11, *ante*), at trial she described her trial estimates as the conclusions of her forensic investigation.

Although Sabadia believed that someone -- presumably Glass -- attached to the executed version of the closing statement one of the blank signature pages he had signed for Glass, the blank pages that Glass sent Sabadia are plainly different in style, form, and substance from the page bearing Sabadia's signature in the executed closing statement.

Rather, the record shows only that H&K did not independently direct Sabadia's attention to the facts regarding the refund to Shailendra and the contribution by 1400 Sabadia, LLC, as reflected in the closing statement and the amended operating agreement. In October 2006, H&K did not alert Sabadia to the excessive refund, and in 2008, it did not rectify the inaccuracies regarding the cash contributions contained in the amended operating agreement.

The evidence thus establishes an appropriate causal connection between some misconduct by H&K and an excessive cash contribution of approximately $1 million relating to 1400 Peachtree, L.P., that is, either the excessive $1 million refund to Shailendra or the slightly larger excessive equity contribution from 1400 Sabadia, LLC, reflecting that refund. A reasonable jury could have concluded that H&K was causally responsible for the excessive refund of which Glass was aware, and potentially also for the excessive equity contribution. On appeal, H&K concedes that there is an appropriate causal connection relating to the excessive refund. We observe, however, that

the connection involves no undisclosed misappropriation by Shailendra of the type identified by Kikugawa. H&K's misconduct merely enabled a change in the capital contributions relating to 1400 Peachtree, L.P. reflected in the draft closing statement -- which Sadabia unquestionably received -- and the executed closing statement. In sum, respondents demonstrated that misconduct by H&K caused an excessive cash contribution of approximately $1 million relating to 1400 Peachtree, L.P.

b. *Respondents' Theory of Causation Regarding Other Investment Losses*

The remaining issue is whether there is a causal connection supporting the recovery of respondents' other claimed investment losses. At trial and on appeal, respondents have relied on a theory of causation involving two premises, namely, (1) that Shailendra's undisclosed misappropriations contributed to respondents' loss of their investments in the transactions, and (2) that those misappropriations, as well as the lost investments, were a "foreseeable risk" or "foreseeable result" of H&K's alleged misconduct.

At trial, respondent's theory rested primarily on testimony from forensic examiner Kikugawa and financial expert Vranca. Kikugawa estimated that in the course of the ten transactions, Shailendra secretly diverted

approximately $20.4 million from the transactions.[27] According to Kikugawa, Shailendra "added" unauthorized loans to the properties owned by the investments, pocketed the proceeds, and made unauthorized transfers of funds. When obliged to pay current investors, Shailendra sometimes drew on funds from new investors or unauthorized loans, which Kikugawa described as the "classic elements of a Ponzi scheme." Vranca testified that although the recession that commenced in late 2007 resulted in falling real estate values, Shailendra's theft undermined the transactions, and thus "people [who] invested their money lost everything."

In closing argument, respondents' counsel acknowledged that the recession was the "catalyst" for respondents' claims, but asserted that it merely exposed Shailendra's misappropriations and H&K's fraud, stating, "[W]hen the tide goes out, you see the rocks below." Counsel argued that Shailendra converted "tens of millions of Sabadia's investment[,] . . . took out millions of dollars of loans against the partnership property[,] . . . pocketed the money[,] and then defaulted and saddled his investors with the fallout."

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[27] As noted above (see fn. 10, *ante*), Kikugawa estimated that Shailendra improperly diverted an additional $6,257,050 from another transaction (Shi Investments Two, LLC) regarding which respondents claimed no damages.

On appeal, respondents maintain that their investment losses, even if potentially exacerbated by the recession, were appropriately linked to Shailendra's misappropriations. They further argue that their losses were the foreseeable result of certain acts of alleged misconduct by H&K. As acts of misconduct, they identify omissions or misrepresentations by H&K and Glass regarding subjects allegedly material to the transactions. They point in particular to H&K's failure to tell Sabadia that "[he] was putting more money into the deals than Shailendra," placing special emphasis on the excessive contribution to 1400 Peachtree, L.P. Additionally, they rely on Glass's failure to advise Sabadia regarding his personal loan guarantees, reassurances to Sabadia regarding those guarantees, failure to inform Sabadia when Jamestown was released as a loan guarantor relating to 1400 Peachtree, L.P., and favorable comments to Khan regarding the East Bay transactions (namely, that they were "structured . . . properly," that there was enough equity in the underlying property to support the relevant loans, and that Glass personally found them to be attractive investments).[28]

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[28] Although respondents also direct our attention to four other purported acts of misconduct, we do not include them in our analysis, as those acts are clearly unrelated to the claimed losses. Respondents point to Glass's participation in Khan's divorce, which they maintain was improper. Nothing
(*Fn. is continued on the next page.*)

before us suggests that the divorce proceeding itself causally contributed to respondents' investment losses.

Respondents further note that in 2007, when Sabadia raised concerns regarding his personal loan guarantees, Glass advised Shailendra to seek a ratification of his past conduct. However, as discussed further (see pt. D.3.d.ii. of the Discussion, *post*) because that advice appeared in a memorandum in which Glass also asked Shailendra to provide respondents with "an up to date summary of each and every investment" and "a complete package of the documents relating to each transaction," it cannot reasonably be regarded as misconduct that causally contributed to respondents' losses. (Italics omitted.)

We reach the same conclusion regarding another alleged incident, namely, that in 2007, after Sabadia told Glass in confidence that he had additional funds to invest, Glass conveyed that information to Shailendra. That misconduct did not contribute to respondents' losses, as Sabadia testified that at the time, he independently decided to make additional investments.

Respondents also contend H&K hindered Kikugawa's forensic investigation, pointing to her testimony that Shailendra failed to provide documents after she placed requests for them through H&K. However, nothing in that testimony suggests that H&K encouraged Shailendra to withhold the documents. According to Kikugawa, commencing in late 2009, she asked Shailendra to provide her with certain documents. Although initially cooperative, Shailendra soon claimed that some documents were missing. Kikugawa stated that following a meeting in Atlanta --

(*Fn. is continued on the next page.*)

H&K contends respondents failed to show causation on many grounds, including that respondents' claimed losses were due to the recession commencing in 2007, and that H&K had no knowledge of Shailendra's misappropriations. For the reasons discussed below, setting aside the excessive contribution to 1400 Peachtree, L.P., we conclude that premise (1) of respondents' theory -- namely, that Shailendra's misappropriations causally contributed to the investment losses -- fails with respect to three of the ten transactions. We further conclude that premise (2) of the

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apparently, the February 2010 meeting during which Sabadia demanded that Shailendra return money that he had stolen -- "most requests" for documents went through H&K, which "had involvement in whether they were produced or not." Kikugawa knew of that involvement because H&K "would either be the originator of the e-mail or . . . would be copied on the e-mail," and "there would be [an] indication that [H&K] would be sending the information."

Although this testimony shows that H&K transmitted documents by e-mail, Kikugawa identified no H&K e-mail withholding a document material to her investigation. Indeed, as discussed further (see pt. D.3.d.ii. of the Discussion, *post*), Kikugawa offered no evidence that H&K was aware of Shailendra's undisclosed misappropriations or had access to documents or other information establishing their existence. It is thus speculation that H&K acted improperly regarding Kikugawa's requests.

theory -- that Shailendra's misappropriations and respondents' losses were foreseeable in light of H&K's misconduct -- fails with respect to all ten transactions.

c. *Failure of Respondent's Theory Regarding 1400 West Peachtree, L.P., 1010 West Peachtree, L.P., and 1400 Peachtree, L.P.*

Respondents' theory fails to support investment losses totaling $2,539,118 attributed to two transactions -- namely, 1400 West Peachtree, L.P. and 1010 West Peachtree, L.P. -- because there is no evidence that those losses were linked in any way to Shailendra's misappropriations. For the same reason, respondents' theory fails to support approximately $2 million in investment losses attributed to 1400 Peachtree, L.P., that is, the losses respondent sought beyond the approximately $1 million excessive cash contribution. As explained below, under respondents' tort claims, their theory of causation did not require them to show that Shailendra's misappropriations were solely responsible for their losses. Nonetheless, they were required to establish that the misappropriations contributed in *some* way to the losses, as the only other potential cause for the losses suggested in the record is the recession, which must be viewed as unrelated to any misconduct that respondents attributed to H&K. However, respondents made no showing that Shailendra's

misappropriations contributed to the losses in the three transactions identified above.[29]

We begin with respondents' claims for constructive fraud and fraudulent concealment. As explained in *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 873 (*OCM Principal Opportunities Fund*), in the context of fraud claims seeking investment losses, proximate causation requires that the alleged loss have "some form of causal 'connection with or relation to the matter [fraudulently] represented.'" (Quoting

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[29] The parties dispute the extent to which respondents had the burden at trial of showing an appropriate causal connection between H&K's purported misconduct and the *complete* loss of respondents' net investments, that is, as H&K puts the matter, "the decline in the value of [the ten investments] . . . to zero." However, our analysis relies solely on a principle not contested by the parties, namely, that the plaintiff ordinarily has the burden of establishing that the defendant's conduct appropriately contributed in some manner to the claimed loss. (*Williams*, *supra*, 33 Cal.App.4th at p. 131 [negligence and fraud]; see *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1582 [breach of fiduciary duty].) It is thus unnecessary to examine the issue noted above.

We also note that although the parties refer to federal case law regarding fraud claims under the so-called "fraud on the market" theory of proximate causation, they agree that the "fraud on the market" theory is inapplicable here. We therefore do not discuss it.

Rest.2d. Torts, § 549, com. c, p. 111.) That requirement is set forth in comment c to section 549 of the Restatement Second of Tort, which states: "One who, having acquired securities, retains them in reliance upon another's fraudulent representation is not entitled to recover from him a loss in the value of the securities that is in no way due to the falsity of the representation but is caused by some subsequent event that has no connection with or relation to the matter misrepresented." (Rest.2d Torts, § 549, com. c, p. 111.)

Nonetheless, the requisite causal connection need not identify the misrepresentation as the *sole* determinant of the loss. (*OCM Principal Opportunities Fund*, *supra,* 157 Cal.App.4th at p. 873.) "[I]f such a connection or relation exists, the investor may recover damages, even though 'subsequent changes in financial or business conditions are factors which, in conjunction with the falsity of the misrepresentation, contribute[d] to diminish or increase the market price of the securities.' [Citation.] . . . 'Thus, when a promoter induces an investor to subscribe to shares in a corporation by false statements of the amount of capital subscribed and of its assets, the fact that the insolvency of the corporation was in part due to the depressed condition of the industry in question does not prevent the investor from recovering his *entire loss* from the promoter, since if the corporation had had the capital and assets that it was represented as having, its chance of surviving the depression

would have been greatly increased.'" (*Ibid.*, quoting Rest.2d Torts, § 549, com. c, p. 111.) Respondents' theory thus required them to show -- at a minimum -- that Shailendra's diversion of funds contributed to their investment losses, even if that conduct was not fully responsible for them.

The same is true of the claims for legal malpractice and breach of fiduciary duty. In the context of a legal malpractice claim, "'[an] attorney's negligence need not be the sole cause of his client's loss in order to subject him to liability.'" (*Cline*, *supra*, 66 Cal.App.3d at p. 178, italics omitted, quoting *Starr v. Mooslin* (1971) 14 Cal.App.3d 988, 1002.) For that reason, there may an appropriate causal connection between the negligence and the client's loss even though other circumstances contributed to that loss. (*Cline*, *supra*, at pp. 178-180; see *Huang v. Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 348.) A similar principle applies to claims for breach of fiduciary duty. (Rest.3d Law, *supra,* The Law Governing Lawyers, § 49, com. d, p. 350.) Nonetheless, there must be some appropriate causal connection between the misconduct and the loss. (*Kumaraperu*, *supra*, 237 Cal.App.4th at pp. 69-70; see *Ash*, *supra*, 223 Cal.App.4th at pp. 1274-1278.)

In the case of 1400 West Peachtree, L.P. and 1010 West Peachtree, L.P., respondents showed no causal connection whatsoever between Shailendra's misappropriations and respondents' net investment losses, which Varanca estimated to total $2,539,118. Kikugawa did not

find that Shailendra diverted any funds from the two transactions, and there is otherwise no evidence that Shailendra's misappropriations from other transactions caused investment losses in the two transactions. Respondents' theory of causation thus fails for those two transactions.

The same rationale applies to 1400 Peachtree, L.P., to the extent respondents sought their investment losses beyond the excessive cash contribution of approximately $1 million discussed above (see pt. D.3.a. of the Discussion, *ante*). Vranca attributed net investment losses totaling $3,027,956 to that transaction, of which he allocated $250,000 to Sabadia and the balance to the Sabadia Family Trust. Although respondents showed an appropriate causal connection relating to the excessive contribution, they showed no causal connection supporting the recovery of the remaining claimed losses.

There is no evidence that Shailendra secretly withdrew any funds from 1400 Peachtree, L.P., notwithstanding the excessive cash contribution. Although the executed closing statement reflected an excessive $1 million refund to Shailendra drawn from respondents' funds, that refund did not "leave" the transaction, but became a portion of respondents' excessive capital contribution, as reflected in note 15 of the executed closing statement. Kikugawa opined that the excessive refund was "the discrepancy for all intent[s] and purposes between" respondents' $2.79 million

contribution of the required $3.5 million capital and Shailendra's smaller contribution. Furthermore, Kikugawa did not find that Shailendra improperly diverted any funds from 1400 Peachtree, L.P. H&K's misconduct thus allowed Shailendra to acquire an equal interest in 1400 Peachtree, L.P. "on the cheap," but did not facilitate an improper diversion of funds from 1400 Peachtree, L.P.

Because H&K's misconduct merely resulted in respondents' paying more for their interest than agreed, that misconduct cannot be regarded as causally responsible for the remaining claimed losses. Furthermore, nothing suggests that Shailendra's misappropriations from other transactions contributed to the losses attributed to 1400 Peachtree, L.P. Accordingly, respondents' theory of causation failed for that transaction, insofar as they claimed losses beyond the excessive contribution.

The decisions upon which respondents rely are distinguishable. In each case, the plaintiff adequately showed (or pleaded) that the defendant contributed to the claimed loss by its own wrongful conduct, or by improperly facilitating another party's wrongful conduct that contributed to the claimed loss.[30] In contrast, regarding the

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[30] Respondents rely on the following cases: *OCM Principal Opportunities Fund*, *supra*, 157 Cal.App.4th at pp. 873-875 [investors in company established that defendant investment bank overstated assets held by company, the absence of which contributed to company's
(*Fn. is continued on the next page.*)

collapse]; *Knepper v. Brown* (2008) 345 Or. 320, 324-327, 329-332 [195 P.3d 383, 384-386, 387-388] [plaintiff injured by cosmetic surgery performed by unqualified doctor showed that the defendant advertiser encouraged the doctor to overstate his qualifications in advertisement seen by plaintiff]; *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.* (9th Cir. 2011) 655 F.3d 1039, 1044-1047, 1054 [investors in company stated fraud claim against company based on allegations that it concealed fact that company founders were secretly selling their stock while encouraging others to buy stock, which caused value of stock to decrease when the secret sales were discovered]; *Emergent Capital Inv. Management, LLC v. Stonepath Group, Inc.* (2d Cir. 2003) 343 F.3d 189, 196-198 [reaching similar conclusion on similar allegations]; *Suez Equity Investors, LP v. Toronto-Dominion Bank* (2d Cir. 2001) 250 F.3d 87, 94-97 [investors in company stated fraud claim against investment bank based on allegations that it concealed the company principal's poor managerial skills that ultimately caused the company to fail]; *LBBW Luxembourg S.A. v. Wells Fargo Securities LLC* (S.D.N.Y. 2014) 10 F.Supp.3d 504, 520 [investors in alleged Ponzi scheme stated fraud claim against bank based on allegations that bank perpetuated scheme]; *Schwarz v. ThinkStrategy Capital Management LLC* (S.D.N.Y. 2012) 2012 U.S. Dist. LEXIS 79453, *1-*51 [investors established fraud and breach of fiduciary duty by investment fund and its manager by showing that manager falsely represented diligence in screening investments, many of which were fraudulent]; *In re J.P. Jeanneret Associates, Inc.* (S.D.N.Y. 2011) 769 F.Supp.2d 340, 363-365 [investors stated fraud claim against advisors based on allegations that

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advisors falsely represented diligence in investigating investments in Bernard Madoff's Ponzi scheme]; *Anwar v. Fairfield Greenwich Ltd.* (S.D.N.Y. 2010) 745 F.Supp.2d 360, 412 [same]; *In re Beacon Associates Litigation* (S.D.N.Y. 2010) 745 F.Supp.2d 386, 412-413 [same]; *Burnett v. Rowzee* (C.D. Cal. 2008) 561 F.Supp.2d 1120, 1128-1129 [investors stated fraud claim against attorney based on allegations that she participated in Ponzi scheme to which investors made cash contributions]; *Plumbers & Pipefitters Local 572 v. Ciscon Systems* (N.D. Cal. 2005) 411 F.Supp.2d 1172, 1177 [stock holders in company stated fraud claim against it based on allegations that it persistently misrepresented its financial condition, which caused value of stock to decrease when that condition was disclosed]; *Fogarazzo v. Lehman Bros., Inc.* (S.D.N.Y 2004) 341 F.Supp.2d 274, 289-293 [investors in company stated fraud claim based on allegations that defendant investment banks overstated company's financial strength, the absence of which contributed to company's collapse]; *In re Enron Corp. Sec. Der. & "ERISA" Lit.* (S.D. Tex. 2004) 310 F.Supp.2d 819, 832 [investors stated fraud claim against broker based on allegations that it knowingly misrepresented value of securities issued by Enron]; *Walco Investments, Inc. v. Thenen* (S.D.Fla. 1995) 881 F.Supp. 1576, 1584 [investors in alleged Ponzi scheme stated fraud claim against law firm based on allegations that it negligently or knowingly facilitated scheme]; *In re Colonial Ltd. Partnership* Litigation (D.Conn. 1994) 854 F.Supp. 64, 94 [investors in alleged Ponzi scheme stated fraud claim against accounting firm based on allegations that it knowingly facilitated scheme].

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three transactions, respondents offered no evidence that Shailendra's misappropriations contributed causally to the relevant claimed losses of approximately $3.5 million. They thus failed to establish the requisite causal connection between misconduct by H&K and those losses.

d. *Failure of Respondent's Theory Regarding the Ten Transactions*

As explained below, we conclude that respondents' theory also fails with respect to all ten transactions because there is no evidence that H&K knew, or reasonably should have known, that Shailendra was likely to be engaged in the misappropriations. The crux of respondents' theory is that an appropriate causal connection ran from H&K's misconduct, as identified in the theory, to the loss of their investments via Shailendra's misappropriations, regardless of whether H&K's misconduct is construed as constructive fraud, fraudulent concealment, legal malpractice, or breach of fiduciary duty. In our view, under the circumstances presented here, the principles governing those torts mandated a showing that H&K knew, or reasonably should have known, that Shailendra was likely to be diverting funds away from the transactions, that is, that H&K had actual or

constructive knowledge of his propensity to weaken the investments by secretly taking their funds.[31]

i. *Governing Principles*

In the context of respondents' claims for legal malpractice and breach of fiduciary duty (insofar as that claim sounded in negligence), the showing in question arises from the rules concerning intervening forces and superseding causes, which may limit a defendant's liability for damages when a third party's conduct occurs as a crucial element in the chain of causation between the defendant's misconduct and the claimed damages.[32] (*Lombardo*, *supra*,

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[31] Generally, constructive knowledge, "means knowledge 'that one using reasonable care or diligence should have, and therefore is attributed by law to a given person.'" (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1190, quoting Black's Law Dict. (7th ed. 1999) p. 876.)

[32] "'An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.' (Rest.2d Torts, § 441, subd. (1) . . . .) Whether it prevents an actor's antecedent negligence from being a legal cause of harm to another is determined by other rules (§ 441, subd. (2)), chiefly those governing the related concept of superseding cause." (*Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1030-1031 (*Brewer*).) These rules are set out in sections 442 through 453 of the Restatement Second of Torts, and have been accepted as law in California. (*Stewart v. Cox* (1961) 55

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91 Cal.App.4th at pp. 665-666; *Ash*, *supra*, 223 Cal.App.4th at pp. 1274-1278). In view of those rules, the chain of proximate causation may be broken when the third party's conduct was sufficiently unforeseeable or independent, or the harm it caused was different in kind from that expected from the defendant's misconduct. (*Brewer*, *supra*, 40 Cal.App.4th at pp. 1029-1037.)

Pertinent here is the following rule: "'The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his

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Cal.2d 857, 863-864; *Cline, supra,* 66 Cal.App.3d at p. 179.) Under those rules, after an individual acts negligently, a third party's conduct may constitute a superseding cause of injury when it is "extraordinary rather than normal." (Rest.2d Torts, § 442, subd. (b).)

Witkin states a similar rule: "Where, subsequent to the defendant's negligent act, an independent intervening force actively operates to produce the injury, the chain of causation may be broken. It is usually said that if the risk of injury might have been reasonably foreseen, the defendant is liable, but that if the independent intervening act is highly unusual or extraordinary, not reasonably likely to happen and hence not foreseeable, it is a *superseding cause*, and the defendant is not liable. [Citations.]" (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1197, p. 574.)

negligent conduct *realized or should have realized* the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.'" (*Kane v. Hartford Accident & Indemnity Co.* (1979) 98 Cal.App.3d 350, 360, quoting Rest.2d Torts, § 448, italics added.) In view of that rule, Shailendra's dishonest acts broke the causal connection between H&K's misconduct -- as identified in respondents' theory -- and their claimed investment losses unless H&K knew, or should have known, that Shailendra was likely to be diverting funds away from the transactions.

We conclude that the same showing was required to establish respondent's remaining claims. Although the rules regarding intervening forces and superseding causes are "less likely to cut off the chain of events" when the defendant engaged in an intentional tort, they still limit liability in such cases. (*Brewer, supra*, 40 Cal.App.4th at p. 1036; *Wells*, *supra*, 6 Cal.2d at pp. 86-87.) As explained below, the rule noted above is applicable here.

In the context of respondents' claims for constructive fraud and fraudulent concealment, the showing in question arises in part from the elements of those torts. As explained above (see pt. D.1. of the Discussion, *ante*), those torts require a causal relationship between the target misrepresentation or omission and the claimed damages. In view of that requirement, respondents' theory depends on the existence of misrepresentations or omissions by H&K

implicating the theory's key causal feature, namely, Shailendra's ongoing concealed theft of funds from the transactions. As noted in *OCM Principal Opportunities Fund, supra,* 157 Cal.App.4th at page 873, "'[a] shareholder in a bank induced to retain his stock by the fraudulent misrepresentation of its president that [a particular series of sales] were bona fide transactions is not entitled to recover for the depreciation of the shares due solely to the subsequent speculations of the cashier of the bank.'" (Quoting Rest.2d. Torts, § 549, com. c, p. 111.)

To the extent respondents attributed their losses to reliance upon H&K's failure to disclose Shailendra's undisclosed thefts, respondents' theory required them to show -- at a minimum -- that H&K had actual or constructive knowledge of such thefts. To establish fraudulent concealment, respondents were obliged to show that H&K knew of Shailendra's misappropriations. (*Sewell v. Christie* (1912) 163 Cal.76, 79-80 [colleague of investment promoter who assisted promoter in selling worthless stock was not liable for fraud because he believed promoter's representations regarding the stock's value].) In contrast, under the claim for constructive fraud, a lesser showing was required. As explained in *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 415, "[t]he failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is *known (or should be known)* to the

fiduciary, may constitute constructive fraud." (Italics added.)

To the extent respondents attributed their losses to H&K's fraud regarding other matters on the theory that H&K's misconduct facilitated Shailendra's theft, we conclude that they were also required to make a showing regarding H&K's actual or constructive knowledge. In fraud actions, an inquiry into the defendant's actual or constructive knowledge attaches to the element of causation when tortious conduct by a third party allegedly contributed to the existence of damages. In *Wells,* the plaintiff asserted claims for actual fraud and fraud based on a breach of fiduciary duty, alleging that a bank conspired with the principals of a company, who sold bonds held by the company to the plaintiff through misrepresentations regarding the value of the bonds. (*Wells, supra,* 6 Cal.2d at pp. 79-87.) Following trial, a directed verdict was entered in favor of the plaintiff' on its claims against the bank. (*Id.* at p. 75.) Reversing, our Supreme Court determined that although the bank made misleading statements to a regulatory agency that facilitated the establishment of the company, the evidence did not compel the conclusion that those statements were the "proximate cause" of the plaintiff's claimed damages, as the bank's statements did not concern the value of the bonds, and the bank lacked actual and constructive knowledge of the principals' fraud. (*Id.* at pp. 79-80, 84-87.)

In our view, under the claims for concealment and constructive fraud, respondents' theory required them to show -- at a minimum -- that H&K had actual or constructive knowledge of facts sufficient to apprise it that Shailendra was likely to be engaged in dishonest acts that would weaken the value of the investments. The record shows that Shailendra, as promoter and manager, engaged H&K to "structure" the transactions, that is, provide their key legal documents and assist in securing the loans the parties agreed were necessary for their operation. Unless H&K had actual or constructive knowledge of Shailendra's secret misappropriations as promoter and manager, such misappropriations were sufficiently unexpected and independent of H&K's misconduct -- as set forth in respondents' theory of causation -- to break the chain of causation, even if some of H&K's favoritism was knowing or intentional. (See *Brewer, supra*, 40 Cal.App.4th at p. 1037.)

Under the circumstances present here, a similar showing also was required to establish respondents' breach of fiduciary duty claim, insofar as it was based on intentional conduct. Intentional breaches of fiduciary duty relating to the duty to disclose information ordinarily constitute constructive fraud. (*Salahudin*, *supra*, 24 Cal.App.4th at p. 563.) Here, the misconduct identified in respondents' theory, if viewed as intentional, constitutes omissions or misrepresentations on matters regarding which H&K, as

respondents' counsel, was subject to a duty of disclosure.[33] Accordingly, to the extent respondents' breach of fiduciary duty claim was asserted as an intentional tort, it effectively merged into respondents' constructive fraud claim, and was subject to the showing set forth above.[34]

ii. *Analysis*

As explained below, the record contains no substantial evidence that H&K knew, or should have known, that Shailendra was likely to divert funds away from the transactions. With the exception of Shi Investments One, for which H&K received only $51 for legal services, Kikugawa

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[33] As noted above (see pt. D.3.b. of the Discussion, *ante*), the alleged omissions involve H&K's and Glass's failure to discuss respondents' disproportionately small interests, failure to inform Sabadia that Jamestown was released as a loan guarantor, failure to advise Sabadia regarding his loan guarantees, and failure to alert Sabadia to the excessive contribution to 1400 Peachtree, L.P.; the alleged misrepresentations involve assurances to Sabadia regarding those guarantees, and favorable comments to Khan regarding the East Bay transactions.

[34] For similar reasons, the showing was also required to establish the malpractice claim, insofar as it may have constituted an intentional tort -- as respondents contend -- due to H&K's allegedly intentional or knowing favoritism toward Shailendra.

opined that H&K was "intimately involved" in the transactions, as its name occurred on many of the legal documents she examined in the course of her forensic examination. Nonetheless, Kikugawa presented no testimony showing that H&K was aware of Shailendra's undisclosed misappropriations or had access to documents or other information establishing their existence. She identified the misappropriations primarily by examining documents from Shailendra, including accounting records and bank statements, many of which she obtained only as result of a court order or subpoena.[35] She acknowledged that at the time of her deposition, she testified that she had found no evidence that H&K was involved in the undisclosed misappropriations, and at trial she offered no new evidence of any such involvement.[36]

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[35] Kikugawa stated that in 2009, when she began her forensic examination, she examined numerous documents, most of which came from Shailendra. At that time, Shailendra repeatedly failed to provide her with certain critical records, including accounting records, bank statements, and documents relating to his capital contributions. That conduct, coupled with the documents available to her, led her to the preliminary conclusion that he was engaged in fraud. Later, the critical documents were obtained through a court order or subpoena, and confirmed her conclusions.

[36] Respondents assert that "Kikugawa believed that H&K's extensive involvement in the[] transactions created
(*Fn. is continued on the next page.*)

Nor does the record disclose other evidence supporting the reasonable inference that H&K had actual or constructive knowledge of Shailendra's misappropriations. Nothing suggests that H&K knew Shailendra was engaged in those misappropriations, or that H&K had access to his personal records or other sources of information sufficient to establish constructive knowledge of the concealed thefts (see *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 438 ["'means of knowledge'" is an element of constructive knowledge]; *Sime v. Malouf* (1949) 95 Cal.App.2d 82, 107 [means of discovering facts is required for constructive knowledge].) On the contrary, the record shows that in February 2007, after Sabadia developed concerns regarding his personal loan guarantees, Glass recommended that Shailendra give Sabadia "an up to date summary of each and every investment," offer "a complete package of the documents relating to each transaction," and only then seek a ratification of his conduct.

Respondents contend H&K's misconduct relating to the excessive cash contribution to 1400 Peachtree L.P., coupled with the other misconduct attributed to H&K, establishes H&K's actual or constructive knowledge of the likelihood

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the inference that it knew what was happening and that Shailendra was adding loans to the properties." However, the trial court declined to admit that testimony from Kikugawa. Respondents do not assign error to that ruling, and we discern none.

that Shailendra was already secretly taking funds from the transactions. We disagree. As explained above (see pt. D.3.a. of the Discussion, *ante*), H&K's misconduct regarding 1400 Peachtree L.P. consisted of a failure to alert Sabadia to an excessive refund and cash contribution disclosed in the transaction's key documents. The record shows that although H&K knew that a draft of the closing statement awarded an apparently excessive loan refund to Shailendra, it did not call that fact to Sabadia'a attention when the unexecuted closing statement was sent to Sabadia for his review, and it otherwise never pointed out the excessive cash contribution attributed to respondents in the executed closing statement.

That evidence does not support the reasonable inference that H&K knew, or should have known, that Shailendra was likely already engaged in concealed misappropriations that impaired the value of the investments. Although H&K may have had actual or constructive knowledge of irregular cash contributions relating to 1400 Peachtree, L.P., those irregularities did not operate to diminish the financial stability of the investments. Rather, they resulted in Shailendra and 1400 Sabadia, L.P., owning equal interests in the transaction, despite the latter's greater cash contribution toward the $3.5 million they were jointly obliged to invest. Accordingly, H&K's actual or constructive knowledge that Shailendra had acquired an equal share in 1400 Peachtree, L.P. "on the

cheap" cannot reasonably be regarded as further signaling to H&K that he was likely to weaken that transaction or the other pertinent transactions -- and thus endanger their existence -- by secretly diverting funds. The same is true of the other misconduct attributed to H&K by respondents' theory of causation, as it shows only that H&K acted favorably to Shailendra regarding some aspects of the transactions, but not in a manner likely to place them on notice that Shailendra was secretly stealing the transaction's assets.[37] In sum, with the exception of the excessive cash

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[37] During and after oral argument, respondents have pointed to other evidence they suggest establishes H&K's actual or constructive knowledge of Shailendra's secret thefts. At oral argument, they pointed to Glass's advice to Shailendra that he seek ratification of his management, and H&K's involvement in the provision of Shailendra's documents to Kikugawa. For the reasons discussed above (see fn. 30, *ante*), that evidence fails to demonstrate H&K's actual or constructive knowledge of the thefts.

In a letter brief submitted after oral argument, respondents' directed our attention to evidence relating to Glass's involvement in Khan's divorce. That evidence places special emphasis on Shi Investments Two, LLC, a profitable transaction for which respondents sought no damages, even though Kikugawa's forensic examination showed that Shailendra misappropriated funds from it, including funds owed to Khan as an individual.

(*Fn. is continued on the next page.*)

According to the evidence in question, Khan and his wife Virginia commenced their divorce in 2004. Khan testified that Shailendra soon "inserted himself" in the divorce, and tried to persuade Khan not to file for a divorce. In November 2007, after Khan initiated a divorce proceeding, the property relating to Shi Investments Two, LLC, was sold. Kikugawa's forensic evaluation showed that Shailendra secretly misappropriated $1.4 million in sale proceeds owed to Khan in order to cover up his thefts from Shi Investments Two, LLC; according to Kikugawa, Shailendra told Khan that the proceeds were reinvested in one of the East Bay transactions.

The evidence further shows that on December 6, 2007, shortly after the sale, Virginia served subpoenas in the divorce proceeding, seeking real estate records. Khan testified that Virginia intended to conduct an "audit" or "forensic examination," for purposes of dividing his real estate assets. After the subpoenas were served, Glass discussed the subpoenas with Shailendra, talked to Virginia's attorney on Khan's behalf, and then participated in a telephone conference with Khan, Virginia's lawyer, and Shailendra. Later, Glass assisted Khan in negotiating a divorce agreement, and worked on the division of Khan's real estate assets. At trial, Khan asserted his belief that Glass and Shailendra "were worried about [Virginia] uncovering the [fraudulent real estate] scheme."

Respondents argue that Glass's conduct in response to the subpoenas supports the reasonable inference that he knew of Shailendra's theft from Shi Investments Two, LLC. We disagree. Nothing before us shows that the subpoenas sought records that would have disclosed Shailendra's theft,
(*Fn. is continued on the next page.*)

contribution of approximately $1 million to 1400 Peachtree, L.P. respondents failed to show that H&K's alleged misconduct caused the loss of their investments, which Vranca estimated to total $14,954,675.[38]

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that the subpoenas were not fully discharged, or that Glass deterred Virginia from conducting a further forensic examination. Furthermore, respondents identify no evidence that Glass, in assisting in Khan's divorce, had access to records showing Shailendra's theft. As noted above, at the time of Kikugawa's deposition, she stated that she had found no evidence that H&K was involved in the undisclosed misappropriations, and at trial she offered no new evidence of any such involvement. The evidence in question thus supports only speculation regarding H&K's knowledge of Shailendra's theft.

[38] The decisions upon which respondents rely are distinguishable, as in each case, the plaintiff adequately showed (or pleaded) that the defendants knew, or should have known, that they were making material misstatements or omissions regarding third party misconduct or other facts that contributed to the losses (*ESG Capital Partners, LP v. Stratos* (9th Cir. 2016) 828 F.3d 1023, 1035-1036; *Zazzali v. Advisory Group Equity Services, Ltd.* (D.Idaho 2016) 2016 WL 6469343, pp. *12-*13, *14-*15; *FIH, LLC v. Foundation Capital Partners LLC* (D.Conn 2016) 176 F.Supp.3d 52, 92-94).

E. *Recovery For Outstanding Loan Guarantees*

H&K contends there is insufficient evidence to support an award for Sabadia's outstanding personal loan guarantees. At trial, Sabadia sought damages totaling $19,796,191 for guarantees relating to three transactions, namely, PCB East Bay 1130, LLC, EBD Company of Florida, LLC, and 21 14th Street, LLC. For the reasons discussed below, we agree that the evidence supports no recovery for the guarantees.[39]

1. *Governing Principles*

H&K's contention implicates an element of tort claims, namely, the existence of actionable injury, often designated -- perhaps misleadingly -- the "fact of damage" (*Walker v. Pacific Indemnity Co.* (1960) 183 Cal.App.2d 513, 517 (*Walker*)).[40] The principles applicable to the contention are

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[39] Respondents contend H&K forfeited their challenge by failing to request a special verdict form segregating the damages awarded for the guarantees. We reject that contention for the same reasons underlying our rejection of respondents' contention regarding H&K's challenge relating to causation (see fn. 22, *ante*).

[40] As explained in *Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1302-1303, "[a]lthough the words 'injury' and 'damage' often are used interchangeably, a distinction may be made. 'Injury' refers to the fact of harm suffered by the plaintiff due to the defendant's conduct. 'Damages'

(*Fn. is continued on the next page.*)

set forth in *Green Wood Industrial Co. v. Forceman Internat. Development Group, Inc.* (2007) 156 Cal.App.4th 766 (*Green Wood Industrial Co.*). There, a Hong Kong scrap metal dealer, acting on behalf of a Chinese buyer, ordered scrap metal from an American supplier. (*Id.* at p. 770.) After the supplier failed to deliver the metal and presented fraudulent documents relating to its shipment, the dealer sued the supplier for fraud and negligence. (*Ibid.*) The evidence at trial showed that the buyer had asserted a claim against the dealer for nondelivery of the metal, which the dealer had agreed to pay. (*Id.* at p. 778.) A jury rendered verdicts in the dealer's favor on its causes of action and awarded damages, including a sum reflecting the buyer's claim against the dealer. (*Id.* at pp. 770-771.)

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refers to the monetary sum that the plaintiff may be awarded as compensation for the injury. To recover in tort, the plaintiff must prove the fact of proximately caused injury with reasonable certainty. [Citation.] When the fact of proximately caused injury is proven sufficiently, the measure of damages to be awarded need only be shown with the degree of certainty that the circumstances of the case permit. [Citation.] But where the fact of proximately caused injury is not proven with reasonable certainty, the plaintiff cannot recover regardless of how much evidence was introduced to show the measure of the recovery sought by the plaintiff. [Citations.]"

On appeal, the supplier challenged the damages award relating to the buyer's claim. The appellate court explained: "Under California law, a plaintiff -- whether the plaintiff's claim sounds in contract or tort -- generally cannot recover damages alleged to arise from a third-party claim against the plaintiff when caused by the defendant's misconduct. 'It is clear that the mere possibility, or even probability, that an event causing damage will result from a wrongful act does not render the act actionable . . . .' [Citations.] Accordingly, the existence of a mere liability is not necessarily the equivalent of actual damage. This is because the *fact* of damage is inherently uncertain in such circumstances. . . . [¶] . . . [¶] California law does, however, recognize that a plaintiff in a tort action may recover for a 'loss reasonably certain to occur in the future. This is known as *prospective damage*.' [Citations.] . . . [¶] . . . But even if a liability to a third party might be included as damages without actual payment, more certainty is necessary than just evidence of an obligation to pay a third party. The obligation by itself does not mean that one will pay the third party. Accordingly, as with other types of prospective damage, a plaintiff must demonstrate that it will suffer the damage with reasonable certainty -- that is, the plaintiff must prove to a reasonable certainty that the plaintiff could and would pay the liability." (*Green Wood Indus. Co.*, *supra*, 156 Cal.App.4th at pp. 776-778, fns. omitted.)

Applying those principles, the appellate court found insufficient evidence that the dealer would have to pay the buyer's claim. (*Green Wood Indus. Co.*, *supra*, 156 Cal.App.4th at pp. 776-778.) Although the dealer presented evidence that it had effectively settled the claim by agreeing to pay it, the record disclosed no evidence that the claim was enforceable in China or the United States or that the dealer would, in fact, pay the claim. (*Id.* at p. 778.)

As the loan guarantees were subject to litigation at the time of the underlying trial, the key issue here is the showing required to establish "a reasonable certainty that [Sabadia] could and would pay the liability" prior to the resolution of the litigation (*Green Wood Indus. Co.*, *supra*, 156 Cal.App.4th at p. 778). We find guidance on that issue from *Pac. Pine Lumber Co. v. W. U. Tel. Co.* (1899) 123 Cal. 428 (*Pac. Pine Lumber*), *Walker, supra,* 183 Cal.App.2d 513, and *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489 (*Shopoff & Cavallo*).

In *Pac. Pine Lumber*, a shipper asserted a negligence claim against a telegraph service it had engaged to communicate with customers. (*Pac. Pine Lumber, supra*, 123 Cal. at pp. 429-430.) The shipper's complaint alleged that after the service delivered the shipper's offer of transportation services to a lumber supplier, the supplier accepted the offer, but the service failed to deliver the acceptance to the shipper. (*Ibid.*) As a result, the shipper provided no transportation for a shipment of lumber, which

the supplier was forced to sell at a loss. (*Ibid.*) The supplier demanded that the shipper make up the loss, and threatened litigation. (*Ibid.*) The complaint sought an award of damages amounting to the loss, alleging that the shipper had no defense against the supplier's claim. (*Ibid.*) Our Supreme Court concluded that the complaint stated no negligence claim because it failed to allege "actual loss" to the shipper. (*Id.* at p. 431.)

In *Walker*, a trucker asked his insurance broker to obtain a policy for him with limits of $50,000, but the broker secured a policy with limits of only $15,000. (*Walker*, *supra*, 183 Cal.App.2d at p. 515.) The trucker was involved an accident with an automobile, the driver of which obtained a $100,000 judgment against the trucker in a personal injury action. (*Ibid.*) The trucker assigned his negligence claim against the broker to the driver, who prevailed on that claim in an action against the broker and the relevant insurer. (*Ibid.*) On appeal, the broker contended that the driver's claim was time-barred because it accrued no later than the date of the accident. The appellate court disagreed, stating: "[I]t is uncertainty as to the fact of damage, rather than its amount, which negatives the existence of a cause of action. [citations]. In the case at bar, the fact of any damage at all was completely uncertain until judgment in the personal injury action." (*Id.* at p. 517.)

In *Shopoff & Cavallo*, a partner in a business hired an attorney to represent him in a complex legal action

regarding the business. (*Shopoff & Cavallo*, *supra*, 167 Cal.App.4th at pp. 1498-1500.) After securing a judgment that proved difficult to enforce, the attorney negotiated a global settlement of the action. (*Id*. at p. 1499.) That settlement resulted in an interpleader action aimed at liquidating the business's assets. (*Id*. at p. 1501.) While the interpleader action was pending, the partner asserted claims for legal malpractice and breach of fiduciary duty against the attorney, alleging that the judgment, if enforced, would have afforded him a greater financial return and fewer liabilities than the interpleader action. (*Id*. at pp. 1509-1511.) The trial court sustained a demurrer to the claims without leave to amend. (See *id*. at pp. 1502, 1506.) Affirming that ruling, the appellate court concluded that the alleged damages were speculative because they were dependent on the outcome of the interpleader action. (*Id*. at pp. 1510-1511.) In so concluding, the court noted that the partner's share of the business assets could not be determined until the resolution of the interpleader action.

2. *Analysis*

As explained below, we conclude that the fact of damage regarding Sabadia's guarantees was not established at trial.[41] On the basis of personal loan guarantees, Sabadia

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[41] The record establishes that from 2002 to 2009, Sabadia engaged in many transactions with Shailendra that required
(*Fn. is continued on the next page.*)

sought the full value of outstanding loans relating to three transactions, assigning $5,919,638 in damages to PCB East Bay 1130, LLC, $12,909,380 in damages to EBD Company of Florida, LLC, and $967,173 in damages to 21 14th Street, LLC.

Regarding the pertinent loans, many facts were undisputed. Although the loans relating to the two East Bay transactions were in default and subject to pending lawsuits involving Sabadia, the loans had guarantors other than Sabadia. In the case of PCB East Bay 1130, LLC, Shailendra and Khan also had signed personal guarantees; in the case of EBD Company of Florida, LLC, there were five other guarantors, including Shailendra and Khan. Additionally, Shailendra and Khan had signed agreements to indemnify Sabadia regarding his personal loan guarantee for PCB East Bay 1130. Although Sabadia was apparently

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loans. In connection with some of these transactions -- including transactions for which respondents did not seek damages -- Sabadia executed personal loan guarantees. Although the record does not disclose the resolution of each loan and Sabadia's guarantee (when present), it shows that after 2009, he bought some of the loans, and in one instance, settled a lawsuit against him based on a loan guarantee relating to 1400 Peachtree, L.P., which is not among the three for which he sought damages based on his outstanding personal guarantees.

the sole guarantor of the loan relating to 21 14th Street, LLC, there was no evidence that it was in default. Respondents' financial expert Vranca stated that the loan was "being serviced," although he was unsure whether it was "current and being paid." Vranca opined that Sabadia was subject to liability for the full amount of that loan because the property was "overleveraged" -- that is, a second loan on the same property was in default -- thus potentially triggering a foreclosure proceeding.

There were also conflicts in the evidence regarding the loans. H&K's financial expert Mimms stated that according to a 2010 appraisal, the value of the property securing the pertinent loan relating to 21 14th Street, LLC, was $2.5 million, which exceeded the outstanding $2.3 million total balance of the two loans on the property. He further suggested that the properties relating to the East Bay transactions retained some value, noting that in December 2007, a buyer had offered to purchase them -- together with other property -- for $73.8 million. Respondents' financial expert Vranca opined that the property related to the two East Bay transactions was worthless "raw" land. However, he offered no testimony regarding the value of the property related to 21 14th Street, LLC, and acknowledged that it was fully developed land under lease to a tenant.

In our view, Sabadia's liability under the three guarantees is as speculative as the fact of damage in *Walker* and *Shopoff & Cavallo*. At the time of the underlying trial,

the two actions regarding the East Bay transaction loans were pending, there were multiple guarantors other than Sabadia, and no judgment had been entered against Sabadia on his guarantees; the remaining loan was not in default. Regarded in the light most favorable to respondents, the trial evidence demonstrated only a level of uncertainty regarding Sabadia's liability equivalent to that attending the possible outcome of the analogous actions in *Walker* and *Shopoff & Cavallo*.

Respondents direct our attention to two out-of-state cases in which the court concluded that a lender's demand that the plaintiff satisfy a personal loan guarantee was sufficient to establish the fact of damage. (*First Maryland Leasecorp v. Rothstein* (Wash.Ct.App. 1993) 72 Wash.App. 278, 286 [864 P.2d 17, 21]; *Brahos v. Chickerno* (Ill.App.Ct. 2012) 2012 Ill.App.Unpub. LEXIS 1017, pp. *32-*33.) In our view, those decisions do not accurately reflect California law. Although *Green Wood Indus. Co.* and *Pac. Pine Lumber* addressed demands based on a breach of contract, rather than demands based on a contractual obligation, they stand for the proposition that a mere demand, even if unopposed or meritorious, does not establish the fact of damage. We therefore do not find the out-of-state decisions persuasive on the issue before us. In sum, there is insufficient evidence to support an award for Sabadia's outstanding personal loan guarantees, which Vranca estimated to total $19,796,191.

F. *Instructions*

H&K contends the trial court improperly failed to give instructions it requested regarding comparative fault and the out-of-pocket measure of damages. As explained below, we conclude that H&K has shown no prejudicial error.

1. *Standard of Review*

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) However, "[i]n order to complain of failure to instruct on a particular issue the aggrieved party must request the specific proper instructions. [Citations.]" (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335.)

The improper rejection of a requested instruction is not reversible error unless the omission was prejudicial, that is, it is "reasonably probable defendant would have obtained a more favorable result" had the instruction been given. (*Soule*, *supra*, 8 Cal.4th at p. 570.) "A 'reasonable probability' in this context 'does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.'" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th

659, 682, italics omitted, quoting *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)[42]

2. *Comparative Fault*

We begin with H&K's contention regarding its proposed comparative fault instruction. The trial court declined H&K's request to instruct with a modified version of CACI No. 405, which stated: "Defendant claims that . . . [Sabadia's] own negligence contributed to his harm. [¶] To succeed on this claim, Defendant must prove both of the following: [¶] 1. That . . . Sabadia was negligent; and [¶] 2. That . . . Sabadia's negligence was a substantial factor in causing his harm. [¶] If Defendant proves the above, damages to . . . Sabadia are reduced by your determination of the percentage of . . . Sabadia's responsibility. I will calculate the actual reduction." We conclude that the court properly rejected this instruction because it was incomplete, and thus likely to mislead the jury.

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[42] Generally, to determine whether instructional error was prejudicial, we evaluate "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule*, *supra*, 8 Cal.4th at pp. 580-581.) In this regard, the evidence is viewed in the light most favorable to the party claiming error. (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 223.)

"An instruction correct in the abstract, may not be given where it . . . is likely to mislead the jury." (*Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 303.) The trial court has no duty "to modify proposed instructions to make them complete or correct. [Citations.] Such instructions may be rejected without the trial court's attempting to modify or correct them. [Citation.]" (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 526.)

Generally, "[t]he comparative fault doctrine . . . 'is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine 'is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss."' [Citation.]" (*Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1233, quoting *Knight v. Jewett* (1992) 3 Cal.4th 296, 314.)

The doctrine is subject to several exceptions. It is inapplicable when "the defendant has committed an intentional tort and the injured plaintiff was merely negligent." (*Heiner, supra,* 84 Cal.App.4th at p. 350.) The doctrine thus does not encompass intentional concealment by the defendant. (*Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 176.) Nor is it applicable to negligent misrepresentations in business transactions. In *Carroll v.*

Gava (1979) 98 Cal.App.3d 892, 894 (*Carroll*), the plaintiffs bought some property in reliance on the seller's representation that it was zoned for multiple mobile homes. Upon learning otherwise, they sued the seller for negligent misrepresentation, and prevailed on the claim. (*Id.* at pp. 895-896.) The appellate court rejected the seller's contention that the claim was subject to the doctrine of comparative negligence, stating: "Business ethics justify reliance upon the accuracy of information imparted in buying and selling, and the risk of falsity is *on the one who makes a representation*. [Citation.] This straightforward approach provides an essential predictability to parties in the multitude of everyday exchanges; application of comparative fault principles . . . would only create unnecessary confusion and complexity in such transactions." (*Id.* at p. 897, italics added.)

We conclude that H&K's proposed instruction was defective because it failed to exclude respondents' claims for fraud and breach of fiduciary duty (insofar as the latter relied on intentional misrepresentations and omissions). Under the principles discussed above, the comparative fault doctrine must be regarded as inapplicable not only to the claim for fraudulent concealment, but also to the claim for constructive fraud, which potentially encompassed intentional and negligent misrepresentations (*Sixta v. Ochsner* (1960) 187 Cal.App.2d 485, 490 (*Sixta*)). To the extent respondents' claim for constructive fraud may have

relied on negligent misrepresentations, the rationale stated in *Carroll* necessarily extended to it. The doctrine was also inapplicable to respondents' claim from breach of fiduciary duty, insofar as it relied on intentional omissions or misrepresentations relating to matters regarding which H&K was subject to a duty of disclosure. As explained above (see pt. D.3.d.i. of the Discussion, *ante*), the breach of fiduciary duty claim, so construed, merged into respondents' claim for constructive fraud. In sum, because the trial court was not obliged to modify H&K's proposed defective instruction, it did not err in rejecting the instruction.[43]

3. *Out-of-Pocket Damages*

H&K contends the trial court erred in declining to give an instruction regarding the out-of-pocket measure of damages. H&K asked the court to instruct the jury with

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[43] In a related contention, H&K suggests that the trial court erred in responding to a jury note seeking guidance regarding the possible application of comparative fault principles. The jury asked, "In the event we decide that Mr. Sabadia should in fact be compensated, are we permitted to adjust our total based on our opinion that Mr. Sabadia is partially responsible for some of his losses?" Although H&K asked the trial court to answer in the affirmative, the court responded, "You are the jury." For the reasons discussed above, H&K has failed to show error, as H&K's proposed answer was defective, and the court's response added nothing to the existing instructions.

BAJI 12.56 or CACI 1923, which reflect the out-of-pocket measure, as set forth in Civil Code section 3343 (section 3343). The court rejected that request, and instructed the jury with CACI 3900, which reflects the broader measure of damages stated in Civil Code section 3333 (section 3333). That instruction directed the jury to award damages "for each item of harm that was caused by [H&K's] wrongful conduct . . . ."

The crux of H&K's contention is that all of respondents' claims were predicated on a negligent failure to disclose, and thus subject to the out-of-pocket measure. As explained below, in view of respondents' concession on appeal that they sought only out-of-pocket damages at trial and their failure to establish in full two categories of requested damages (see pts. D. & E. of the Discussion, *ante*), our inquiry is limited to whether the absence of an instruction on the out-of-pocket measure was prejudicial with respect to other potentially recoverable damages, viz, the excessive contribution to 1400 Peachtree, L.P., and the mitigation costs. For the reasons discussed below, we conclude that H&K has demonstrated no such prejudice.

a. *Governing Principles*

In fraud actions, there are two potential basic measures of damages. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 (*Alliance Mortgage Co.*).) Ordinarily, a defrauded party is limited to recovering his or

her out-of-pocket loss. (*Ibid.*) Generally, "[t]he 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received.'" (*Ibid.*, quoting *Stout v. Turney* (1978) 22 Cal.3d 718, 725 (*Stout*).) Section 3343 provides that the out-of-pocket measure applies in fraud cases involving "the purchase, sale or exchange of property." That statute also permits a defrauded party to recover for "'additional damage'" attributable to the fraud. (*Sixta, supra*, 187 Cal.App.2d at pp. 490-491).[44]

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44 Section 3343 provides in pertinent part: "(a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:

(1) Amounts actually and reasonably expended in reliance upon the fraud.

(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.

(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him
(*Fn. is continued on the next page.*)

As our Supreme Court has explained, that statute "must be applied realistically so as to give the defrauded person his actual out-of-pocket loss, and, where necessary to reach that result, the court must consider subsequent circumstances." (*Garrett v. Perry* (1959) 53 Cal.2d 178, 184.) Thus, in suitable circumstances, the statute permits defrauded buyers who lose their property in foreclosure due to the seller's fraud to recover their entire payment in

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for profits or other gains which might reasonably have been earned by use of the property had he retained it.

(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply: (i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.

(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it."

purchasing the property, rather than the difference between the price paid and the value of the property at time of the sale. (*Ibid*; see *Feckensher v. Gamble* (1938) 12 Cal.2d 482, 500; *OCM Principal Opportunities Fund*, *supra*, 157 Cal.App.4th at pp. 872-873.)

The statute also permits a defrauded party to recover consequential or "additional" damages, regardless of whether out-of-pocket losses are demonstrated. (*Stout*, *supra*, 22 Cal.3d at pp. 729-730.) Those damages may include payments the defrauded party becomes legally obliged to make as the result of the fraud. (*Alliance Mortgage Co.*, *supra*, 10 Cal.4th at pp. 1248-1250.) In addition, they may include recovery of attorney fees and costs incurred to resolve litigation involving third parties that results from the fraud. (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 112.)

Damages for fraud are also potentially assessed under a benefit-of-the-bargain measure. (*Alliance Mortgage Co.*, *supra*, 10 Cal.4th at p. 1240.) That measure ""is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive."" (*Ibid.*, quoting *Stout*, *supra,* 22 Cal.3d at p. 725.) Prior to the enactment of section 3343, courts regarded the benefit-of-the-bargain measure, when

applicable, as authorized under section 3333, which states that "[f]or the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by [the Civil Code], is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." (§ 3333; *Cory v. Villa Properties* (1986) 180 Cal.App.3d 592, 598-599.)

Unresolved issues regarding the proper measure of damages attend fraud by a fiduciary. Our Supreme Court has concluded that in actions involving negligent representation by a fiduciary relating to a property transaction, the plaintiff is limited to the recovery of out-of-pocket damages under section 3333. (*Alliance Mortgage Co.*, *supra*, 10 Cal.4th at pp. 1249-1250.) There is a division of opinion among the courts, however, regarding the measure appropriate to intentional fraud by a fiduciary. (*Strebel, supra,* 135 Cal.App.4th at p. 748 [discussing cases].)

b. *Analysis*

Our inquiry into H&K's contention has a narrow focus. Although the parties discuss the measure of damages applicable to a fiduciary's intentional fraud, respondents state that they sought only out-of-pocket damages at trial. For that reason, we limit our inquiry to whether the trial court's failure to give an instruction on that measure of damages was prejudicial.

Our examination is further circumscribed by respondents' failure to support the full recovery of two categories of requested damages. At trial, respondents sought damages totaling $37,717,697, comprising $14,954,675 in lost investments, $19,796,191 in liabilities due to Sabadia's personal loan guarantees, and $2,966,830 in mitigation costs, that is, certain professional fees and the costs of purchasing an outstanding loan. As explained above (see pts. D. & E. of the Discussion, *ante*), there was insufficient evidence to support recovery of the first two categories of claimed damages, with the exception of an excessive cash contribution to 1400 Peachtree, L.P. We therefore limit our inquiry to the excessive contribution and the mitigation costs.

H&K has failed to demonstrate that the absence of an out-of-pocket damages instruction was prejudicial with respect to those potentially viable items of claimed damages. The claimed excessive contribution may be identified as the $1 million excessive loan refund to Shailendra or, alternatively, the slightly larger excessive equity contribution by 1400 Sabadia, LLC, reflecting that refund (see pt. D.3.a. of the Discussion, *ante*). Because the loss represents an item of damages potentially recoverable under the out-of-pocket loss measure, there is no reasonable likelihood of a more favorable outcome for H&K had an out-of-pocket damages instruction been given. Furthermore, H&K has not challenged the recovery of the mitigation costs

under the out-of-pocket measure, and thus has forfeited any contention regarding prejudice regarding the award of such costs. Accordingly, H&K has shown no reversible error due to the absence of an instruction on the out-of-pocket measure of damages.

G. *Special Verdicts*

H&K contends the jury's special verdicts are inconsistent or hopelessly ambiguous. The crux of their contention is that the jury, in rendering findings regarding the total damages, awarded duplicative damages. Generally, because respondents sought the same damages under their four claims, they were precluded from obtaining "[d]ouble or duplicative recovery for the same items of damage . . . ." (*Tavaglione*, *supra*, 4 Cal.4th at pp. 1158, 1159.) As explained below, we conclude that the special verdicts regarding the damages under respondents' four individual claims cannot be reconciled with the total damages the jury awarded.

1. *Governing Principles*

As explained in *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092 (*Zagami*), challenges to verdicts as ambiguous or inconsistent are subject to the rules set forth in *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457: "'If the verdict is ambiguous the party adversely affected should request a more formal

and certain verdict. Then, if the trial judge has any doubts on the subject, he may send the jury out, under proper instructions, to correct the informal or insufficient verdict.' [Citations.] But where no objection is made before the jury is discharged, it falls to 'the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.' [Citations.] Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation. [Citations.]" Ordinarily, "[i]f the verdict is hopelessly ambiguous, a reversal is required, although retrial may be limited to the issue of damages. [Citations.]" (*Woodcock*, *supra*, at p. 457.)

When a reviewing court is called upon to interpret special verdicts, it applies one of two tests, depending on whether the issue presented concerns harmonizing the special verdicts with a general verdict, or harmonizing the special verdicts themselves.[45] Under the first test, "a

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[45] The terms "general verdict" and "special verdict" are defined in Code of Civil Procedure section 624: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those
(*Fn. is continued on the next page.*)

general verdict will not be set aside unless there is no possibility of reconciling the general and special verdicts under any possible application of the evidence and instructions." (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 679; *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540 (*Hasson*), overruled on another ground in *Soule, supra,* 8 Cal.4th, at pp. 574, 580.) Because the reviewing court seeks an interpretation that preserves the general verdict, "no presumption is to be indulged in favor of answers to special interrogatories and every reasonable intendment in favor of the general verdict is indulged." (*Hasson*, *supra*, at p. 540.) Nonetheless, the general verdict fails when the special verdicts "'are so clearly antagonistic to it as to be absolutely irreconcilable, the conflict being such as to be beyond the possibility of being removed by any evidence admissible under the issues, so that both the general verdict and the special findings cannot stand.'" (*Law v. Northern Assurance Co.* (1913) 165 Cal. 394, 406 (*Law*); see *Hasson*, *supra*, at pp. 540-541.)

Under the second test, "there is no presumption in favor of upholding a special verdict . . . . [Citation.] 'Where there is an inconsistency between or among answers within

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conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law."

a special verdict, both or all the questions are equally against the law.' [Citations.] 'The appellate court is not permitted to choose between inconsistent answers.' [Citation.]" (*Zagami*, *supra*, 160 Cal.App.4th at p. 1092.) As with the first test, the reviewing court will not attempt to remove the conflict by imposing an interpretation not supportable by the evidence admitted at trial. (*Id*. at p. 1093.)

2. *Underlying Proceedings*

In closing argument, respondents' counsel explained that they sought the same damages under each of the four claims. The special verdict form asked the jury to specify the amount of damages awarded to each respondent with respect to each claim. Additionally, in Question 21, the special verdict form asked the jury to state the total damages awarded to each respondent, as well as the total damages in their entirety. Question 21 instructed the jury to "add the damages that are *distinct and separate* and state the TOTAL amount of damages to be awarded to each Plaintiff on all causes of action." (Italics added.) Regarding that determination, Question 21 further stated: "If you decided a Plaintiff prevailed on more than one of the . . . causes of action, the *same damages* which resulted from different causes of action *must be counted only once*." (Italics added.)

In response, the jury awarded the following damages to each respondent under the four causes of action:

Claim	Sabadia	Sabadia Family Trust	Sabadia Family Irrevocable Trust
Legal Malpractice	$11,452,931.00	$1,241,884.00	$1,103,896.90
Breach of Fiduciary Duty	$11,452,931.00	$1,241,884.00	$1,103,896.90
Constructive Fraud	$2,863,232.80	$310,471.02	$275,974.24
Fraudulent Concealment	$2,863,232.80	$310,471.02	$275,974.24

Under Question 21, in stating the total awards, the jury aggregated the sums awarded to each respondent in the claim-specific special verdicts, rendering the following determinations:

Sabadia	Sabadia Family Trust	Sabadia Family Irrevocable Trust	Total
$28,632.327.60	$3,104,710.04	$2,759,742.28	$34,496,779.92

Before the jury was dismissed, H&K's counsel argued that the specific awards for the individual claims were potentially duplicative and requested that the trial court ask the jury to clarify the awards, but the court declined to do so.

3. *Analysis*

Because the trial court did not secure clarification regarding the damages awarded, we examine the record de novo to determine whether the verdicts can be harmonized. (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1182-1186 (*Lambert*); *Zagami*, *supra*, 160 Cal.App.4th at pp. 1093-1094.) As explained below, it is unnecessary for us to determine whether the answers to Question 21 constitute a general verdict or special verdicts, as those answers cannot be reconciled with the claim-specific special verdicts without attributing errors to the jury.[46]

Under the first test, we seek an interpretation of the answers to Question 21 that will render them consistent with the claim-specific special verdicts, indulging "every

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[46] Respondents suggest that H&K forfeited its contention to the extent that H&K attributes jury confusion to insufficiently detailed instructions or special verdict questions. However, H&K's challenge is not directed at the adequacy of the instructions or the special verdict form, but at the jury's responses on the special verdict form. That contention has not been forfeited. (*Lambert*, *supra*, 67 Cal.App.4th at p. 1182.)

reasonable intendment in favor of" the answers to Question 21, viewed as a general verdict (*Hasson*, *supra,* 19 Cal.3d at p. 540). No such interpretation exists. If the answers to Question 21 represent the total nonduplicative damages awarded, as requested on the special verdict form, the claim-specific special verdicts find no support in the record. Respondents acknowledge that they sought the same damages under each claim, and offered no evidence at trial reasonably supporting awards of "different and independent" damages under the four claims constituting "*exactly* 40%, 40%, 10%, and 10%" of the total damages awarded. On the other hand, if the claim-specific special verdicts awarded duplicative damages, the jury could not properly aggregate those special verdicts in answering Question 21. There is thus a conflict between the damages awarded under each claim and the total damages awarded that is "'beyond the possibility of being removed by any evidence admissible under the issues . . . .'" (*Law, supra,* 165 Cal. at p. 406.)

The same is true under the less stringent second test. In view of the rationale set forth above, there is necessarily an inconsistency between the claim-specific special verdicts and the answers to Question 21, viewed as special verdicts.

Respondents contend the defective jury verdicts do not constitute reversible error. They argue that because there is no reasonable chance that the jury awarded nonduplicative damages under the four claims as set forth in the claim-specific special verdicts, "[t]he only possible conclusion is the

jury calculated the total damage award and then allocated it to the different causes of action by fixed percentages." However, because we have found other errors in the judgment, the question we confront concerns the appropriate remedy for the errors -- including the defective verdicts -- and not whether the verdicts, viewed in isolation, require reversal of the judgment. Respondents' contention does not nullify the existence of error in the jury's determinations of damages; instead, it asks us to disregard the claim-specific special verdicts as unsupportable, even though the jury was instructed to "add" the amounts stated in those verdicts in responding to Question 21. Respondents thus acknowledge that the jury made its determinations of damages -- including the responses to Questions 21 -- while under some misapprehension relating to respondents' theories of recovery. On the record before us, it is uncertain whether that misapprehension influenced the responses to Question 21. The weight attributable to the defective determinations in selecting the remedy is discussed below.

H. *Remedy for Prejudicial Error*

Because respondents failed to support the recovery of approximately $33.75 million of their claimed $37,717,697 in damages and the jury returned defective verdicts awarding them damages totaling $34,496,779.92, the judgment cannot be affirmed. We therefore examine the appropriate remedy.

In the case of the claims asserted by Khan on behalf of the Sabadia Family Irrevocable Trust, the judgment must be reversed with directions to enter a new judgment in favor of H&K and against respondents on those claims. "When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence. [Citations.]" (*McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661.) Here, the claims asserted on behalf of the Sabadia Family Irrevocable Trust sought only its net total investments in the transactions, but following a lengthy trial, the evidence failed to show that H&K's alleged misconduct caused that trust's investment losses. As explained above (see pt. D.3.a. of the Discussion, *ante*), the only item of investment loss for which respondents satisfied the causal requirements for a recovery was an excessive cash contribution of approximately $1 million to 1400 Peachtree, L.P., in which the Sabadia Family Irrevocable Trust did not participate. Thus, a judgment in favor of H&K is required on the claims by the Sabadia Family Irrevocable Trust.

In contrast, a new trial is required on Sabadia's claims as an individual and those of the Sabadia Family Trust. Regarding those claims, the jury awarded less in damages than requested at trial:

Total Damages	Sabadia	Sabadia Family Trust
Awarded by Jury	$28,632,327.60	$3,104,710.04
Sought at Trial	$30,393,326.00	$4,129,895.00

Because the record permits no clear determination regarding the extent to which damages were awarded for proper items, rather than for items respondents failed to support, and the jury's determinations of damages are defective, it is inappropriate to modify the judgment to correct the award of damages, or to issue a remittitur conditioning affirmance of the judgment on respondents' agreement to remit part of the award. (See *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 696-697.)

The remaining question concerns the proper scope of the new trial. "It is a firmly established principle of law that '[t]he appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial.' [Citation.]" (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776, quoting *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801.) In applying the principle,"[w]e resolve any doubts in favor of a complete, rather than limited, new trial." (*Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 940.)

Factors governing the principle's application include the complexity of the plaintiff's theory of liability and the likelihood of jury misunderstanding in the first trial. It is ordinarily inappropriate to order a new trial limited to causation and damages when the plaintiff alleges many acts of misconduct and the special verdicts do not identify the wrongful acts determined by the jury. (*Lewis v. City of Benecia* (2014) 224 Cal.App.4th 1519, 1541; see *Liodas v. Sahidi* (1977) 19 Cal.3d 278, 283-285.) In such cases, a limited trial results in confusion and uncertainty because the second jury will have to determine whether the alleged misconduct caused damages without knowing which of those acts the first jury identified as misconduct. (*Lewis v. City of Benecia*, *supra*, at p. 1540.) It may also be inappropriate to order a limited new trial when the record discloses circumstances placing in doubt the jury's understanding of the plaintiff's theories of recovery. (*Ryan v. Crown Castle NG Networks Inc* (2016) 6 Cal.App.5th 775, 790-791; see *Liodas v. Sahidi*, *supra*, at pp. 283-285.)

Both factors are present here. Respondents asserted four claims, each of which was based on the same lengthy series of events, consisting of many alleged acts of misconduct spanning ten distinct transactions. Although the jury found liability under each claim, its special verdicts did not identify the acts determined to be wrongful. Furthermore, the jury's special verdicts reflect a misunderstanding relating to respondents' theories of

recovery and entitlement to damages. Accordingly, we conclude that a full retrial is necessary with respect to Sabadia's claims as an individual and those of the Sabadia Family Trust.

DISPOSITION

The judgment in favor of Khan, as trustee of the Sabadia Irrevocable Family Trust, is reversed, and the matter is remanded to the trial court with directions to vacate the judgment in Khan's favor and enter in a new judgment in favor of H&K. The judgments in favor of Sabadia as an individual and in favor of Sabadia and Batool, as trustees of the Sabadia Family Trust, are reversed, and the matter is remanded for further proceedings in accordance with this opinion. H&K is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.