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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JEFF SHAW et al., Plaintiffs and Respondents, v. ERIC SCHLAIFER et al., Defendants and Appellants.	B279600 (Los Angeles County Super. Ct. No. PC056528)

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Reversed and remanded with directions.

Cabanday Law Group and Orlando F. Cabanday for Plaintiffs and Respondents.

Wilton Law & Mediation and Ronald D. Wilton for Defendants and Appellants.

In the underlying action, a jury awarded $56,000 in compensatory damages to respondent Jeff Shaw in his action for breach of fiduciary duty and conversion against appellants Eric Schlaifer and Bandit RC, LLC (Bandit). Appellants challenge the judgment on the ground of insufficiency of the evidence, evidentiary error, and error in the trial court's rulings on appellants' post-judgment motions. They also allege inconsistency in the jury's special verdicts. While we reject the first three challenges, we conclude that the special verdicts are irreconcilably inconsistent. Accordingly, we reverse.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. *Complaint*

In July 2015, respondents Jeff Shaw and Santa Clarita Valley Remote Control (SCVRC) initiated the underlying action against Eric Schlaifer, asserting claims for breach of fiduciary duty based on the repudiation of a partnership and conversion; respondents also requested dissolution of the partnership and an accounting. Respondents sought compensatory and punitive damages.[1]

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[1] We observe that SCVRC appears before us as a respondent, though all its claims were dismissed upon entry of the judgment, which awarded it no damages. As appellants have not objected to SCVRC's participation in the appeal, we do not address whether its appearance is proper.

The complaint alleged the following facts: In April 2014, Shaw and Schlaifer orally agreed to enter into a partnership to buy and operate a racing track for remote-controlled cars. Thereafter, they bought the business and formed a general partnership known as SCVRC. Each contributed one-half of the purchase price and contributed to SCVRC's operating expenses. After the partnership's formation, Shaw demanded that Schlaifer agree to certain business formalities, including obtaining a business license, filing tax returns, and entering into a written partnership agreement. Schlaifer refused, "effectively kicked Shaw out of the business," and denied him access to the business's operating assets. When Shaw demanded access to SCVRC's books and records, Schlaifer claimed that no partnership had ever existed, thereby effectively converting the partnership and its assets.

In June 2016, the complaint was amended to add Bandit as a "Doe" defendant.

B. *Trial*

In September 2016, the trial court conducted a jury trial on respondents' claims for breach of fiduciary duty and conversion, prior to the court's resolution of their equitable claims for dissolution and an accounting. The jury trial was bifurcated with respect to the issue of punitive damages.

1. *First Phase of Trial*

a. *Respondents' Evidence*

Shaw testified as follows: Prior to March 2014, he operated his own internet technology consulting firm, and participated as a partner in a yogurt retail business. In the case of the consulting firm, he personally created the operating agreement and acquired the requisite tax identification numbers, business license, fictitious business name, and bank accounts. In the case of the retail business, Shaw and his co-partner operated as a "50/50" partnership: Shaw was the "back office" manager and accountant, and his partner supervised the business on a daily basis. The retail business used an electronic point of sale (POS) system to generate receipts, record sales and sales taxes, track inventory, and monitor employee work time.

Shaw also enjoyed remote control car racing at the business he later operated as SCVRC, which involved a racing track and a parts and accessories store. He often encountered Schlaifer there. After becoming friends, they decided to form a 50/50 partnership to buy and operate SCVRC. They agreed that Schlaifer would manage the business on a daily basis, and that Shaw would provide accounting services and back office management; that they would share expenses and profits equally and defer taking salaries until the business was sustainable; and that they would establish business "formalit[ies]." Regarding the latter, they agreed to create an "LLC" for the business; execute an operating agreement; establish a fictitious

business name; acquire tax identification numbers, permits, and bank accounts; and implement a POS system. Shaw testified that he would have rejected any proposal to use an existing business entity because he "like[d] to start fresh with a new partner . . . ."

On April 4, 2014, Shaw sent Schlaifer an e-mail regarding their agreement. The e-mail set forth the financial information relating to SCVRC, referred to the "50/50 partnership with Eric," and stated: "All Permit issues must be resolved." Under the caption, "TO DO," the e-mail listed the following items: "Establish Partnership Contract -- 50/50 [¶] Create LLC/S-Corp [¶] Create DBA [¶] FIND new NAME [¶] Search for Domain Name [¶] Find POS that will handle inventory."

In April 2014, after contributing equal shares of the $20,000 necessary to buy SCVRC, Shaw and Schlaifer entered in a lease for the business. Shortly afterward, Shaw formed an entity to conduct the business. In May 2014, Shaw secured tax identification numbers, a bank account, and a fictitious business name -- "E.J.S. Performance LLC" (E.J.S.) -- for that entity. Because the business lacked a POS system and had only a nonfunctioning cash register, Shaw created worksheets to enable Schlaifer to record cash sales on a daily basis.

Because the business lacked a bank account, Shaw did not initially object when Schlaifer used a bank account for Schlaifer's business known as "Bandit." In June 2014, Shaw established the bank account for E.J.S. Although he gave

Schlaifer access to the account and repeatedly asked him to use it, Schlaifer ignored him. Schlaifer also did not respond when Shaw gave him a proposed operating agreement.

According to Shaw, by August 2014, Schlaifer was conducting the business as if it were his own. In Shaw's view, Schlaifer ran the business as a "playground": he stocked liquor in the refrigerator, parked his trailer in the back lot, and allowed "a lot of alarming things." Shaw attempted to perform accounting on the basis of the worksheets provided to him, but had no influence over the business and no access to the funds in Bandit's account. Although Shaw had invested up to $20,000 in the business, he received no funds from it.

In September 2014, Shaw requested by e-mail that Schlaifer collect sales tax, implement a POS, and conduct business operations through E.J.S. and its bank account. The e-mail stated: "SCVRC needs to run like a real business."

When Schlaifer replied that he was temporarily unable to work, Shaw went to SCVRC in an effort to make the necessary changes. Shaw fixed the cash register so that it would process sales, generate receipts, and calculate sale taxes; deposited funds in the E.J.S. account; and linked the store's PayPal device -- which processed credit card sales -- to the E.J.S. account. Upon returning to SCVRC, Schlaifer "exploded" and began yelling at Shaw. Schlaifer asserted that Shaw "ha[d] no right to do what [he] ha[d] done."

Scared and shocked by Schlaifer's conduct, Shaw

stopped visiting the business, but continued to engage in accounting and back office management, and communicated with Schlaifer by e-mail. In an e-mail dated September 26, 2014, Shaw stated: "I'm staying in. . . . [¶] Since starting this business, I have never had access to the bank accounts used. . . . I don't know the financials at all. IT NEED[S] TO STOP NOW!!!! [¶] Going forward the items below MUST happen: [¶] The new LLC must be used. [¶] The [E.J.S.] checking account must be used. [¶] Transfer all balances from your old accounts to the new [E.J.S.] checking account." Although Schlaifer replied, "Let's discuss this next week," he never addressed the issues raised in the e-mail.

By the end of September 2014, Shaw believed that he could not work with Schlaifer, but nonetheless made an additional attempt "to make things work out." In an e-mail dated October 17, 2014, Shaw asked: "Have any of the items below been applied? [¶] 1 -- New LLC must be used . . . . [¶] 2 -- New [E.J.S.] account must be used . . . . [¶] 3 -- Transfer all balances from your old accounts to the new [E.J.S.] account. [¶] 4 -- Transfer PayPal deposits to new [E.J.S.] account." The e-mail also proposed a mediator for their dispute.

When Schlaifer did not respond to the e-mail, Shaw sought legal assistance. He testified: "I was at a standstill. There is no communication. There is nothing. So I tried to look for help." Shaw talked to an attorney and asked for SCVRC's records. According to Shaw, Schlaifer never provided the records or confirmed that Shaw was his

partner. Shaw thus filed the underlying action.

Called as an adverse witness (Evid. Code, § 776), Schlaifer testified as follows: He and his parents formed Bandit in 2011. Schlaifer acknowledged that he maintained Bandit's financial records, and that it had never filed a tax return.

Prior to March 2014, Schlaifer operated an online business through Bandit, but intended to buy the racing track and store later owned by SCVRC, regardless of whether he had a partner. Schlaifer was acquainted with Shaw, who visited the race track and store. In March 2014, Schlaifer and Shaw orally entered into a partnership to buy and operate the business. At trial, Schlaifer acknowledged that Shaw's April 4, 2014 e-mail set forth the material terms of their agreement.

After SCVRC began its operations, Schlaifer used Bandit's bank account to handle its revenue and expenditures. Commencing in March 2014, Bandit's bank account reflected only SCVRC's revenue, as Schlaifer had no other source of income. According to Schlaifer, he told Shaw that he intended to operate SCVRC through Bandit because Shaw had not created an alternative entity for the business. Although Schlaifer proposed operating the business through Bandit in lieu of establishing a new entity, Shaw did not want to do so.

After Shaw formed E.J.S. to conduct the business, Schlaifer continued to use Bandit's account. Schlaifer testified that he did so because Shaw did not give him access

to E.J.S.'s bank account; additionally, some product suppliers would have required a costly "buy in" from E.J.S. Performance as a new customer in order to receive certain discounts. Schlaifer further testified that he paid employees in cash, that he occasionally used SCVRC's revenue to pay personal expenses, and that he had not paid SCVRC's taxes, with the exception of sale taxes.[2]

Conflicting evidence was presented regarding whether Schlaifer believed that he ever formed a partnership with Shaw. At trial, Schlaifer testified that from March through September 2014, he referred to Shaw as his partner, and treated him as such. The jury was also presented with a video recording of a portion of Schlaifer's deposition, in which he provided the following testimony:

"Q. . . . [¶] In July of 2015, did you hold the belief that at some point before July of 2015[,] you and Mr. Shaw entered into a partnership regarding the business?

"A. No.

"Q. In July of 2015, you didn't hold the belief you ever entered [into] a partnership agreement with him?

"A. No."

At trial, Schlaifer testified that when deposed, he

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[2] Shaw acknowledged that in mid-2014, when he was setting up operations at SCVRC, he also paid employees in cash without making payroll deductions; additionally, he did not ensure that sales taxes were collected. At trial, he characterized those decisions as "mistakes."

intended to assert that the partnership was "invalid" because Shaw failed to meet his obligations. He stated: "My belief [at the deposition] was that the partnership hadn't existed because the conditions set forth originally were never met, but many times prior to July 2015, I stated I was in a partnership." According to Schlaifer, soon after he and Shaw agreed to enter into a partnership, Shaw failed to arrange for Schlaifer to have access to the E.J.S. bank account, made increasingly infrequent visits to SCVRC, failed to contribute funds to the business when necessary, proposed no method for formalizing the payment of employee wages, and never requested information necessary for tax returns. Schlaifer last spoke with Shaw "face to face" in September 2014. Schlaifer denied that his trial testimony reflected a new theory not offered at his deposition.

Schlaifer's father Harold testified that he was an officer of Bandit, but had never actively participated in it. Although aware that Schlaifer operated SCVRC through Bandit, Harold had neither discussed Bandit's activities with Schlaifer nor seen tax returns or bank statements for Bandit.

Lauren Ann Marie Renterria testified that in late 2014, she became an employee at SCVRC. Schlaifer paid her wages in cash on a weekly basis; in some instances, he reduced the amount of her wages when she decided to buy merchandise. Renterria was unsure whether Schlaifer kept wage records or withheld payroll taxes, stating that he "just handed [her] cash." Renterria further stated that SCVRC

had no electronic system for recording sales; customers were given a receipt only when they requested one. At the end of each business day, Schlaifer counted the cash in the register and placed it in a pouch. After Shaw filed the underlying action, Schlaifer began using POS.

Aaron Keely, another SCVRC employee, testified as an adverse witness (Evid. Code, § 776). According to Keely, when Shaw and Schlaifer hired him in mid-2014, they "acted like 50/50 partners." Schlaifer paid Keely's wages in cash on a weekly basis, did not deduct payroll taxes, and never provided pay stubs or a W-2. Keely recorded sales on worksheets prepared by Shaw.

Keely further testified that in September 2014, while Schlaifer was absent, Shaw made changes in the manner in which SRVRC tracked cash sales and deposited its revenue. When Schlaifer returned, he became upset by the changes, and had a "discussion" with Shaw outside the store. After Shaw developed concerns regarding Schlaifer's management practices, Keely allied himself with Shaw, and gave information to Shaw's attorney regarding Schlaifer's conduct. In April 2016, Keely decided that Schlaifer "wasn't doing anything really wrong," and broke off contact with Shaw.

David Wall, a forensic accountant, testified that although Bandit and SCVRC were separate entities, it appeared that the former controlled the latter. Wall examined Bandit's bank account statements for the 25-month period from April 2014 through April 2016; Wall

also inspected Schlaifer's ledger. Wall relied on those records, rather than on Shaw's business records, because only Schlaifer had access to Bandit's bank account, and Shaw's records were incomplete and unreliable.

According to Wall, during the period in question, the bank account reflected $503,000 in gross income, $292,950 in customary business expenditures, and $78,000 in unidentified disbursements. Wall estimated that the bank account statements showed $131,936 in net income, on the assumption that the unidentified disbursements constituted legitimate business expenses. Relying on that estimate of net income, Wall determined that the business had a value of $158,323. Wall further estimated that Schlaifer disbursed $129,017 from Bandit's account for his personal benefit.

Wall testified that the business's operations fit the description of a "bust out scheme," that is, "an enterprise that is constructed to run up the liabilities and to suck out as much cash as you can." According to Wall, the business was not in compliance with the local building code and business registration requirements; it lacked general liability insurance and other forms of insurance; and payroll deductions were not applied to employee wages. Wall further noted that it was unclear that sales taxes were properly collected.

b. *Nonsuit Against SCVRC*

Following the presentation of respondents' case-in-chief, appellants sought nonsuit on SCVRC's claims,

contending that a two-member general partnership may not seek a recovery from one partner on behalf of the other partner. The trial court ruled that SCVRC's claims would be dismissed upon entry of judgment.

c. *Appellants' Evidence*

On direct examination, Schlaifer testified that in September 2014, he discovered that Shaw had emptied Schlaifer's desk, thrown his belongings into a box, and "rearranged pretty much everything in the shop." When Shaw stated that he had linked the store to the E.J.S. bank account in order to track purchases, Schlaifer replied that he had no access to the E.J.S. account, and thus could not determine whether it held sufficient funds to buy new inventory. According to Schlaifer, Shaw angrily asserted that "[h]e was losing tons of money and [that] it was all [Schlaifer's] fault." Schlaifer denied threatening Shaw in any manner.

When cross-examined, Schlaifer maintained that he had never denied entering into a partnership with Shaw, but acknowledged that during discovery, when asked in a request for admission to admit that he and Shaw entered into a partnership agreement, he answered, "Deny." On re-direct examination, Schlaifer stated that his intent in so responding was to deny the existence of a written agreement, noting that in answering a special interrogatory, he also expressly asserted that he and Shaw had not entered into an agreement of that type.

d. *Special Verdicts*

The special verdict form submitted three claims asserted by Shaw to the jury, namely, a breach of fiduciary duty claim against Schlaifer, and conversion claims against Schlaifer and Bandit. The jury rendered special verdicts in favor of respondents only with respect to the claim for breach of fiduciary duty against Schlaifer, awarding Shaw $56,000 in damages under that claim. The jury further found that both appellants acted with malice, oppression, or fraud, for purposes of an award of punitive damages.

2. *Second Phase of Trial*

After Schlaifer testified regarding his and Bandit's financial worth, the jury returned special verdict awarding no punitive damages against appellants.

C. *Judgment and Post-Judgment Motions*

Following the jury trial, the court dismissed respondents' equitable claims. On September 28, 2016, the trial court entered a judgment in favor of Shaw and against Schlaifer alone, awarding Shaw $56,000 in damages. Appellants filed motions for a new trial, judgment notwithstanding the verdict, and vacation of the judgment, all of which the trial court denied. This appeal followed.

DISCUSSION

Appellants contend (1) that there is insufficient evidence to support the special verdicts unfavorable to them,

(2) that the trial court erred in admitting Wall's expert testimony, (3) that the special verdicts are irreconcilably inconsistent, and (4) that the special verdicts mandate the entry of judgment in favor of Bandit. As explained below, we reject the contentions, with the exception of the challenge to the consistency of the special verdicts.

A. *Sufficiency of the Evidence*

Appellants contend there is insufficient evidence to support the special verdicts regarding Schlaifer's breach of fiduciary duty and the existence of malice, oppression, or fraud. Generally, on review for substantial evidence, "all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." (*Estate of Teel* (1944) 25 Cal.2d 520, 527.)[3]

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[3] Our inquiry applies established principles of review for substantial evidence. Factual findings are examined for the existence of substantial evidence, regardless of whether the party seeking to establish the findings was obliged to prove them by a preponderance of the evidence or by clear and convincing evidence. (See *Shupe v. Nelson* (1967) 254 Cal.App.2d 693, 700.) "Substantial evidence" is not "'synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value . . . .' [Citation.]" (*Kuhn v.*

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

1. *Breach of Fiduciary Duty*

We begin with appellants' challenge to the sufficiency of the evidence to support Shaw's claim against Schlaifer for breach of fiduciary duty. During closing argument, respondents' counsel explained that the claim relied on a specific theory, namely, that Schlaifer treated the business as his own, took its assets for himself, and denied the partnership. Appellants target the jury's special verdict that Schlaifer breached his fiduciary duty as a partner "to refrain from excluding [Shaw] from the partnership, to refrain from repudiating the existence of the partnership and to refrain from converting partnership assets for his own benefit."

Department of General Services (1994) 22 Cal.App.4th 1627, 1633.) However, "the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) Finally, "in all cases, the determination whether there was substantial evidence to support a finding or judgment must be based on the whole record. The reviewing court may not consider only supporting evidence in isolation, disregarding all contradictory evidence." (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 412.)

a. *Governing Principles*

Generally, "[t]he 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" (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086). Fiduciary duties arise in many ways, including the establishment of partnerships and joint ventures. (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 631-633.) As fiduciaries, partners and joint ventures are """bound to act in the highest good faith""" toward co-partners and co-venturers, and may not take exclusive advantage of property that is the subject of the partnership or joint venture. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 514.) This duty encompasses "'all the partnership transactions, including the transactions contemplated by the firm and constituting the object or purpose for which the partnership was formed.'" (*Ibid.*, italics omitted, quoting *Koyer v. Wilmon* (1907) 150 Cal. 785, 787.)

Under Corporations Code section 16405, subdivision (b)(1), a partner may assert a claim for legal relief against another partner "with or without an accounting as to partnership business, to . . . [¶] . . . [e]nforce the partner's rights under the partnership agreement." Here, Shaw's claim relied on a well-established basis for legal relief in lieu of an accounting. As explained in *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 557 (*Gherman*), that basis is demonstrated when "one partner excludes the other,

repudiates the very existence of the partnership[,] and converts all of the partnership assets . . . ."

An instructive application of the theory is found in *Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 276-283 (*Boyd*), which involved a joint venture agreement to exercise an option to buy real property and develop it. The parties to the agreement were the option holders and two general contractors. (*Id*. at pp. 281-282.) The general contractors arranged to buy the land independently of the option holders, who demanded a meeting to clarify the status of the joint venture. (*Id*. at p. 281.) At the meeting, the general contractors repudiated the joint venture, asserting that the option holders "'didn't have anything.'" (*Id*. at p. 282 & fn. 17.) When the option holders initiated an action against the general contractors based on allegations that they had wrongfully terminated the joint venture and converted its assets, a jury awarded the option holders compensatory and punitive damages. (*Id*. at pp. 276, 283.) Affirming, the appellate court noted that although joint venturers ordinarily may not seek legal relief against co-venturers, "such rule does not apply where the wrongful act or acts complained of are not only a breach of contract but constituted a tort and particularly where the tort is of such a nature that it terminates the joint venture, wrongfully destroys it and results in the conversion by the co-adventurer of the entire assets to his own use." (*Id*. at p. 288.)

Under this theory, repudiation requires "a denial of the very existence of a partnership or joint venture relationship," rather than a mere breach of the pertinent agreement. (*Gherman*, *supra*, 72 Cal.App.3d at pp. 563, 564.) California recognizes only two forms of repudiation, namely, express and implied. (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 (*Taylor*).) "An express repudiation is a clear, positive, unequivocal refusal to perform [citations]; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible [citations]." (*Ibid*.)

As Schlaifer never lacked the power to perform under the partnership agreement, only express repudiation is applicable here. Generally, to constitute an express repudiation, the statement or relevant conduct must amount to an unequivocal refusal to perform "the whole contract or . . . a covenant going to the whole consideration" (*Atkinson v. District Bond Co.* (1935) 5 Cal.App.2d 738, 743 (*Atkinson*); see *Taylor, supra*, 15 Cal.3d at p. 140), and must be regarded as such by the party claiming repudiation (*Wilton v. Clarke* (1938) 27 Cal.App.2d 1, 3). Repudiation presents a factual question of intent to be resolved by the jury. (*Nemanick v. Christensen* (1948) 87 Cal.App.2d 844, 846.)

Although express repudiation ordinarily involves a dateable statement (e.g. *Boyd*, *supra*, 247 Cal.App.2d at p. 282 & fn. 17; *Laughlin v. Haberfelde* (1946) 72 Cal.App.2d 780, 784), our Supreme Court has recognized that a course of conduct involving actions and words may constitute a

repudiation. In *Middleton v. Newport* (1936) 6 Cal.2d 57, 58, the plaintiff and defendant entered into a partnership or joint venture to conduct a real estate project. The plaintiff soon ceased his efforts regarding the project, but the defendant continued the project for several years, during which the plaintiff occasionally contacted him. (*Id.* at pp. 59-61.) After exercising complete control and management over the project for a lengthy period, the defendant stated that the plaintiff had no interest in it. (*Id.* at p. 61.) When the project was completed, the plaintiff demanded an accounting. (*Ibid.*) The trial court rejected that claim, concluding that the joint venture terminated through abandonment, and that the plaintiff's claim was time-barred because it accrued when he ceased working on the project. (*Ibid.*) Affirming, our Supreme Court stated that "even if [the plaintiff] be considered not to have lost all interest in the assets of the adventure by abandonment, still the assertion by [the defendant] of rights of ownership and control to the exclusion of [the [plaintiff] constituted sufficient repudiation of the latter's rights to start the running of the statute of limitations . . . ." (*Id.* at p. 62.)

The theory also requires a showing of conversion. Generally, ""[c]onversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the

property to his own use."'" (*Messerall v. Fulwider* (1988) 199 Cal.App.3d 1324, 1329, quoting *Igauye v. Howard* (1952) 114 Cal.App.2d 122, 126.)

b. *Analysis*

Appellants contend there is insufficient evidence of the three elements critical to Shaw's theory, namely, (1) Shaw's exclusion from the partnership, (2) the existence of a repudiation, and (3) conversion of the partnership's assets. As explained below, we disagree.

Viewed in the light most favorable to Shaw, the evidence showed that the key terms of the partnership agreement required SCVRC to be operated with business "formality" through the newly created entity E.J.S. Rather than complying with those terms, Schlaifer operated the business through Bandit and its bank account, and otherwise denied Shaw any influence over the business. Although Shaw did not object to Schlaifer's use of Bandit's bank account prior to the creation of E.J.S., after E.J.S. and its bank account became available in mid-2014, Shaw repeatedly asked Schlaifer to operate through them, but Schlaifer did not do so. Instead, Schlaifer operated the business as a cash-based "bust out scheme" through Bandit's account, to which Shaw had no access. In early September 2014, when Shaw personally tried to bring the business into compliance with the agreement, Schlaifer told Shaw that he "ha[d] no right to do what [he] ha[d] done" in a manner that deterred Shaw from visiting the business. In late September

and early October 2014, Shaw twice demanded that Schlaifer implement the key terms of the agreement, but Schlaifer neither responded to the demands nor implemented the terms of the agreement. Recognizing that Schlaifer had no intention of complying with the agreement, Shaw then sought legal assistance. Later, after Shaw initiated the underlying action, Schlaifer denied the existence of the agreement during discovery.

That evidence suffices to show that Schlaifer excluded Shaw from the business, expressly repudiated the agreement, and converted the business's assets. As Shaw stated in his September 26, 2014 e-mail, Schlaifer's conduct made it impossible for Shaw to "know the financials . . . ." Schlaifer's conduct further constituted a repudiation of the agreement. He exercised total control over the business's revenue through Bandit, told Shaw that he had no right to bring the business into compliance with the agreement, and ignored Shaw's e-mails demanding compliance with the agreement. Viewed in the context of Schlaifer's prior assertion that Shaw "ha[d] no right to do what [he] ha[d] done" to implement the agreement, Schlaifer's failure to respond to Shaw's e-mails unmistakably conveyed his rejection of the key provisions of the agreement. Shaw himself regarded that conduct as evincing the end of the agreement, as he sought legal assistance after Shaw disregarded the e-mails. Schlaifer's course of conduct thus constituted a clear, positive, and unequivocal refusal to perform "the whole contract or . . . a covenant going to the

whole consideration . . . ." (*Atkinson, supra*, 5 Cal.App.2d at p. 743.) There was also ample evidence of conversion, as Wall found that Schlaifer disbursed $129,017 from Bandit's account -- which held only SCVRC's revenue -- for his personal benefit.

Schlaifer contends the record does not establish the theory's elements, relying on evidence favorable to his view. He places special emphasis on evidence that he referred to Shaw as his partner through September 2014, that he and Shaw often discussed ordinary business matters, that he offered Shaw access to Bandit's account, and that Shaw failed to visit the business after September 2014, even though he indicated his intention to stay in the partnership. Schlaifer further maintains that Shaw withdrew from the partnership in or after September 2014, noting that when cross-examined, Shaw stated that he -- not Schlaifer -- decided to "walk away" because he could no longer work with Schlaifer.

In so arguing, Schlaifer "'misapprehends our role as an appellate court. Review for substantial evidence is not trial de novo. [Citation]' [Citation.] When there is substantial evidence to support the [factfinder's] actual conclusion, 'it is of no consequence that the [factfinder,] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' [Citation.]" (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1301.) Moreover, "[t]he testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other

evidence, inconsistent or false as to other portions. [Citations.]" (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.)

As explained above, there is sufficient evidence to support the jury's determination that Schlaifer breached his fiduciary duties to Shaw through repudiation of the partnership agreement. Shaw's testimony during cross-examination does not establish that he withdrew from the partnership, as it merely appears to reflect Shaw's judgment that the partnership was not salvageable due to Schlaifer's repudiation. In sum, the record discloses evidence adequate to demonstrate Schlaifer's breach of fiduciary duties to Shaw.[4]

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[4] In a related contention, relying on *Gonsalves v. Li* (2015) 232 Cal.App.4th 1406, 1414-1417, Schlaifer contends his denial of a request for admission was improperly admitted to show that he denied the existence of the partnership. During the presentation of the defense evidence, Schlaifer was cross-examined regarding his response to the following request for admission, "Admit that Plaintiff and the Defendant . . . [¶] . . . [¶] entered into a partnership agreement to operate [SCVRC]." Schlaifer acknowledged that he answered "Deny."

Schlaifer has forfeited his contention for want of a timely and specific objection on the ground asserted on appeal (Evid. Code, § 353). Schlaifer objected only on the ground that the denial was to a different request for admission -- which was not correct -- and that the questioning was "argumentative." However, were we to

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

2. *Existence of Malice, Fraud, or Oppression*

Although the jury awarded no punitive damages, appellants challenge the jury's findings that they acted with malice, fraud, or oppression. Generally, punitive damages may be awarded only when the trier of fact finds, by clear and convincing evidence, that the defendant acted with malice, fraud, or oppression. (Civ. Code, § 3294, subd. (a).) The jury found that Schlaifer had engaged in misconduct with malice, fraud, or oppression, and that conduct was committed "by one or more officers, directors, or managing agents of [Bandit] acting on behalf of [Bandit]."

During closing argument, respondents' counsel relied primarily on a theory of promissory fraud, asserting that Schlaifer never intended to honor his partnership agreement with Shaw, that he induced Shaw to invest in SCVRC with the intent to take possession of the business and its assets, and that Bandit was the entity by which Schlaifer "transferred all the partnership assets." As explained below, there is sufficient evidence to support the jury's findings under that theory.

As our Supreme Court had explained, "[a] promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be

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address the contention, we would find no prejudice, as Schlaifer made a similar denial during his deposition, and he has not challenged the admission of that denial on appeal.

actionable fraud. [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) In seeking legal relief, a partner is permitted to adopt the following course of action: (1) allege that he or she entered into a partnership agreement as the result of the defendant's fraud, (2) elect to affirm the agreement, and (3) assert a claim for breach of fiduciary duty based on the defendant's post-fraud repudiation of the agreement. (*Boyd*, *supra*, 247 Cal.App.2d at pp. 287-295; see *Gherman*, *supra*, 72 Cal.App.3d at pp. 564-565.) Promissory fraud is a proper basis for an award of punitive damages. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 135.)

Here, there is sufficient evidence to support a finding of promissory fraud by Schlaifer. He testified that owning a remote control car racing business was his goal, and that he established Bandit as a means to that goal. According to Schlaifer, prior to March 2014, he intended to buy the business later operated as SCVRC. The evidence at trial further showed after he and Shaw entered into the agreement, he did not operate the business in accordance with the agreement, despite Shaw's repeated requests that he do so. In view of Schlaifer's desire to own the business and resolute indifference to the agreement, the jury reasonably could have concluded that he never intended to honor the agreement, but instead planned to operate the business for his own benefit through Bandit.

There is also sufficient evidence to support a finding that Bandit authorized or ratified Schlaifer's promissory

fraud, for purposes of an award of punitive damages. As the jury was instructed, punitive damages may be awarded against a corporation for fraudulent conduct by an employee when an officer, director, or managing agent, acting on behalf of the corporation, authorizes the fraud or approves it after it has occurred. (Civ. Code, § 3294, subd. (b).) Although Bandit was not a party to the partnership agreement, it benefited from Schlaifer's promissory fraud, as SCVRC's revenue flowed into Bandit's account. Furthermore, because Schlaifer was Bandit's sole active officer with exclusive access to the funds in its account -- some of which he used for personal purposes -- the jury reasonably could have concluded that he engaged in the fraud, and authorized or approved it, while acting on behalf of Bandit and himself. In sum, there is sufficient evidence to support the special verdicts regarding the existence of malice, fraud, or oppression.

B. *Expert Testimony*

Appellants contend the trial court erred in admitting financial expert Wall's testimony regarding Schlaifer's income from SCVRC after September 2014. Their contention relies on the principle that after a partnership is dissolved, an ex-partner who continues the partnership business must account to other ex-partners only for income attributable to the partnership's assets. (*Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 Cal.App.3d 200, 216, 220, disapproved on another ground in *Allied Equipment Corp.*

v. Litton Saudi Arabia, Ltd. (1994) 7 Cal.4th 503, 521, fn. 10.) Appellants argue that the evidence unequivocally showed (1) that in September 2014, Shaw withdrew from the partnership, thereby causing its dissolution, and (2) that none of SCVRC's post-dissolution income was attributable to its pre-dissolution assets. Appellants thus maintain that Wall's testimony was inadmissible because it was irrelevant. We disagree.[5]

For the reasons discussed above (see pt. A.1. of the Discussion, *ante*), appellants' contention fails. The record discloses substantial evidence establishing that the partnership ended due to Schlaifer's repudiation, rather than due to any purported withdrawal by Shaw. Furthermore, respondents asserted their claim for breach of fiduciary duty on the basis of the theory set forth in *Gherman.* Under that theory, alternative remedies were available to respondents, contingent upon the manner in which they framed their claim.[6] Here, the jury was

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[5] The trial court's determinations of relevance are reviewed for abuse of discretion. (See *Spolter v. Four-Wheel Brake Serv. Co.* (1950) 99 Cal.App.2d 690, 699.)

[6] *Gherman* states: "Where a partner or joint venturer wrongfully repudiates the partnership or joint venture agreement and converts the assets of the partnership or joint venture to his own use and benefit, the victim at least has alternative remedies: he may waive the tort or breach and sue to specifically enforce the partnership or joint venture agreement, including the remedy of a judicial dissolution
(*Fn. is continued on the next page.*)

instructed with CACI No. 3900, which reflects the broad measure of tort damages stated in Civil Code section 3333, namely, "the amount which will compensate for all the detriment proximately caused [by the tortious conduct], whether it could have been anticipated or not."[7] In view of that measure of damages, Wall's testimony regarding Schlaifer's income after September 2014 was relevant to appellants' theory of recovery because they sought a share of that income as an item of damages. Accordingly, the trial court did not err in admitting Wall's testimony.

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and an accounting and if necessary (as an auxiliary remedy) to impress a trust on partnership or joint venture property, or the victim may submit to the repudiation and sue for damages for conversion of his interest in joint venture assets [citation]; or the victim may submit to the repudiation and sue for damages for breach of the joint venture agreement (including 'profits which might have been made') the same as any other action for damages for breach of any other contract [citations] or he may sue in tort [citation]. *It does not lie in the mouth of the wrongdoer to demand that his victim be limited to that cause of action which is most beneficial to the wrongdoer*." (*Gherman*, *supra*, 72 Cal.App.3d at pp. 564-565.)

[7] As appellants have not challenged this instruction on appeal, they have forfeited any such contention of error.

C. *Inconsistency in the Special Verdicts*

Appellants contend the jury's special verdicts regarding Schlaifer are inconsistent. The crux of their contention is that the special verdict under the breach of fiduciary duty claim regarding Schlaifer's conversion cannot be reconciled with the special verdicts under the conversion claim against Schlaifer. As explained below, we agree.

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, 456-4577: "'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 pp. 456-457.)

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. Under the first test, "a 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 v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 581.) 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.)

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 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.)

An instructive application of the second test is set forth in *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338 (*Singh*). There, the plaintiff, relying on the defendant's offer of employment, left his employment in India, and began working for the defendant in California. (*Id*. at pp. 345-346.) When the defendant terminated that employment, the plaintiff asserted claims for promissory estoppel, misrepresentation, false promise, and concealment. (*Id*. at p. 349.) Under the jury's special verdicts, the jury found that although the defendant had made no false promise or misrepresentation regarding the plaintiff's work, the defendant had intentionally or recklessly misrepresented an important fact. (*Id*. at pp. 350-351.)

After judgment was entered in favor of the plaintiff, the appellate court reversed, concluding that the findings were inconsistent. (*Singh*, *supra*, 186 Cal.App.4th at pp. 358-359.) The court reasoned that because the trial evidence, instructions, and closing arguments showed that the claims in question were predicated on the same alleged promises and representations, the finding of no promise or misrepresentation relating to work could not be reconciled with the finding of a misrepresentation regarding an important fact. (*Id*. at p. 359.)

2. *Underlying Proceedings*

During closing argument, respondents' counsel asserted that the case was about Schlaifer's fraud, stating: "He misrepresented his intentions never to . . . honor his partnership promises to . . . Shaw. He simply made those representations to have . . . Shaw invest in the business . . . . And once he had all the partnership assets in his possession, . . . he converted all of those assets to himself." Although counsel acknowledged that Bandit was a separate entity, he maintained that Bandit was the entity by which Schlaifer "transferred all the partnership assets." Counsel further maintained that Schlaifer's misconduct "c[a]me[] to a head" in September 2014, arguing that Schlaifer denied the partnership and claimed it for himself after Shaw managed the business and tried to bring it into compliance with the partnership agreement by, inter alia, ensuring that all revenues went into the E.J.S. account, and fixing the cash register so that it generated receipts and calculated sales taxes.

Under the claim for breach of fiduciary duty against Schlaifer, the jury returned the special verdict that Schlaifer breached his fiduciary duty to refrain from repudiating the partnership and converting partnership assets for his own benefit. Under the conversion claim against Schlaifer, the jury responded "Yes" to the following questions:

"2. Did [Schlaifer] intentionally and substantially interfere with [Shaw's] interest in the partnership physical assets by taking possession of the partnership physical

assets or by preventing [Shaw] from having access to the partnership physical assets? [¶]

3. Did [Shaw] consent?"

In compliance with the special verdict form's directions, the jury answered no further questions upon answering "Yes" to Question 3. Under the conversion claim against Bandit, the jury gave the same responses to the corresponding questions. As noted above (see pt. A.2. of the Discussion, *ante*), the jury found that Schlaifer had engaged in malice, fraud, or oppression as a individual and as a principal of Bandit.

Before the jury was dismissed, neither side requested clarification of the special verdicts. Appellants first challenged the consistency of the special verdicts in their motions for a new trial and motion to set aside the judgment, which the trial court denied.

3. *Analysis*

Because the jury did not clarify the special verdicts, we examine the record de novo to determine whether they can be harmonized. (*Zagami*, *supra*, 160 Cal.App.4th at pp. 1093-1094.) We thus seek an interpretation of the answers to Questions 2 and 3 under the conversion claim against Schlaifer that will render them consistent with the special verdict that he breached his fiduciary duty to refrain from repudiating the partnership and converting its assets.

We conclude that no such interpretation exists, even though Questions 2 and 3 focused on Schlaifer's conversion of the partnership's assets. In finding that Schlaifer

breached his fiduciary duties, the jury necessarily found that he repudiated the partnership and converted its assets. As explained above (see pt. A.1.b. of the Discussion, *ante*), the evidence establishing Schlaifer's repudiation of the partnership and conversion of its assets relied on his resolute failure to change the business's operations so that its revenues flowed through E.J.S., rather than Bandit. The crucial conduct demonstrating a repudiation occurred in September 2014, when Schlaifer expressly denied Shaw's right to change the business's operations in order to channel its income to E.J.S. and maintain business "formalities." Because that conduct necessarily constituted an act of conversion -- that is, an intentional and substantial interference with Shaw's access to the partnership's assets to which Shaw did not consent -- the jury's answers to Questions 2 and 3 cannot be reconciled with its finding of a breach of fiduciary duty. Accordingly, the judgment must be reversed with respect to the claims against Schlaifer.[8]

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[8] Respondents assert that appellants forfeited their contention because Schlaifer proposed the jury instructions and special verdict form. We disagree. Appellants are not challenging the instructions or the special verdict form as such, but instead are attacking the consistency of the jury's special verdicts. That objection is not forfeited even when no clarification of the special verdicts is requested before the jury is dismissed. (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1183; *Zagami*, *supra*, 160 Cal.App.4th at p. 1093, fn. 6.) Furthermore, although the proponent of the

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

D. *Judgment Notwithstanding the Verdict*

Appellants contend the trial court erred in denying Bandit's motion for judgment notwithstanding the verdict (n.o.v.). They argue that because Shaw's claim for conversion against Bandit failed, the jury's finding that Bandit engaged in malice, fraud, or oppression cannot preclude the entry of a judgment in favor of Bandit and against appellants. As explained below, we conclude that Bandit is not entitled to judgment n.o.v.

Code of Civil Procedure section 629 provides: "The court . . . shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." As motions for judgment notwithstanding the verdict potentially conclude

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special verdict form may forfeit a challenge to the consistency of the special verdicts under the doctrine of invited error (*Lambert v. General Motors*, *supra*, at p. 1183), that doctrine is inapplicable here. Respondents identify no instruction or aspect of the special verdict form to which they ascribe the inconsistency in the special verdicts. The record also contains no suggestion that appellants proposed the special verdict form with an intent to gain an improper technical advantage. On the contrary, when the parties and the trial court discussed the form, respondents' counsel informed the trial court, "If you want [the jury] to answer each of the individual questions, I am all for that . . . ." Under the circumstances, we decline to find a forfeiture. (*Ibid.*)

litigation on a complaint, the rules governing them are "strict." (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750.) As Witkin explains, a necessary precondition for a motion for judgment n.o.v. is that "the jury must have reached a verdict and it must be a valid one." (7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 436, p. 508.) Thus, when the jury's verdicts are inconsistent, the proper remedy is reversal of the existing judgment, not the grant of a judgment n.o.v. (*Stillwell v. Salvation Army* (2008) 167 Cal.App.4th 360, 376 (*Stillwell)* ["[T]he remedy for . . . inconsistent verdicts is not to grant judgment as a matter of law in favor of one of the parties, but rather, to order a new trial"]; *Mish v. Brokus* (1950) 97 Cal.App.2d 770, 776-777 (*Mish*); see *Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 725-726, 730).

As explained in *Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 100-101, a verdict in favor of a defendant is inconsistent with a verdict against another defendant when the liability of both defendants depends upon the same facts. For the reasons discussed above (see pt. D. of the Discussion, *ante*), the jury's special verdicts regarding Bandit cannot be reconciled with its finding that Schlaifer breached his fiduciary duties to Shaw. At trial, the evidence showed that throughout the pertinent events, Schlaifer acted with, and on behalf of, Bandit. Schlaifer testified that he established Bandit in order to operate a remote control racing business, and that after buying SCVRC, he operated

that business through Bandit. The jury determined that Schlaifer and Bandit were closely aligned, as it found that Schlaifer, in engaging in his misconduct, acted with malice, fraud, or oppression as an individual and as a principal of, and on behalf of, Bandit.

In view of the evidence, the special verdict regarding Schlaifer's repudiation of the partnership is inconsistent with the special verdicts regarding Shaw's consent to Schlaifer's and Bandit's interference with SCVRC's assets. As explained above, the crucial conduct demonstrating Schlaifer's repudiation -- namely, his express denial of Shaw's right to modify the operations of the business to meet the terms of the agreement -- constituted an act of conversion. Nothing reasonably suggests that Schlaifer, in engaging in that conduct, acted solely on behalf of himself, and not also on behalf of Bandit, as Schlaifer expressly denied Shaw's right to shift SCVRC's revenue flow from Bandit to E.J.S. Schlaifer's conduct thus also necessarily constituted act of conversion *by Bandit*. Accordingly, the jury's special verdicts regarding Bandit are thus inconsistent with its finding of a breach of fiduciary duty by Schlaifer.

In view of that inconsistency, a grant of judgment n.o.v. in Bandit's favor is not proper. Because the special verdicts are inconsistent with respect to both Schlaifer and Bandit, the appropriate remedy is reversal of the judgment in its entirety. (*Stillwell*, *supra*, 167 Cal.App.4th at p. 376; *Mish*, *supra*, 97 Cal.App.2d at pp. 776-777.)

DISPOSITION

The judgment is reversed, and the matter is remanded for retrial in accordance with this opinion. Appellants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.