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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LILONGO TAFEA et al.,

Plaintiffs, Cross-defendants and Respondents,

v.

GATEWAY TITLE COMPANY et al.,

Defendants, Cross-complainants and Appellants.

G048674 (consol. with G049227)

(Super. Ct. Nos. 06CC00277, 06CC12261, 07CC02715)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kim Garlin Dunning, Judge. Affirmed as modified with instructions.

Bryant & Bryant, Kenneth A. Bryant and Michael P. Bryant for Defendants and Appellants Mildred Cork and James A. Cork, Jr.

Gilbert, Kelly, Crowley & Jennett, Timothy W. Kenna, John J. Moura, Jennifer Calderon; Freeman Mathis & Gary, Timothy W. Kenna, John J. Moura and

Rebecca J. Smith for Defendant, Cross-complainant, and Appellant Gateway Title Company.

Klinedinst, Greg A. Garbacz and G. Dale Britton for Plaintiffs, Cross-defendants and Respondents Future Growth, LLC and Lilongo Tafea and Cross-defendants and Respondents Peter Starflinger, LA Investments, LLC, Marcelina Real Estate Services, Inc., Carson, LLC and 621, LLC.

* * *

Lilongo Tafea and Future Growth, LLC (collectively, Plaintiffs) sued Gateway Title Company (Gateway) and its employees Mildred Cork and James A. Cork, Jr., to recover $1.25 million Plaintiffs deposited in two escrows conducted by Mildred.[1] The funds were loans to Edward Showalter's company, High Park Investment Group, Inc. (High Park), so it could flip three residential properties and purchase a commercial property. Under oral escrow contracts, Mildred agreed to obtain title insurance and record second trust deeds for Plaintiffs on each property before she released Plaintiffs' funds to Showalter and High Park.

Mildred, however, released the funds without recording Plaintiffs second trust deeds or obtaining title insurance. On the residential properties, Mildred's delay in recording the trust deeds placed them behind senior lien holders because High Park was operating a Ponzi scheme in which it promised second trust deeds to many investors and significantly over encumbered the properties. On the commercial property, Mildred failed to conduct the escrow on High Park's purchase and never recorded a trust deed for Plaintiffs. James notarized many of the trust deeds and other documents relating to these properties.

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[1] To avoid confusion we refer to Mildred and James by their first names and collectively as the Corks. We refer to Gateway and the Corks collectively as Defendants.

Following a lengthy trial, the jury found Mildred breached her fiduciary duty as an escrow officer, fraudulently misrepresented and concealed significant facts to induce Plaintiffs to deposit their funds with her, and never intended to provide escrow services to Plaintiffs. The jury also found the Corks conspired with Showalter and High Park to defraud Plaintiffs of their deposits. Based on these findings, the jury not only awarded Plaintiffs their escrow deposits as damages, but also $900,000 in punitive damages against Gateway and lesser amounts against the Corks. After the jury returned its verdict, the trial court granted Plaintiffs' motion for prejudgment interest under Civil Code section 3287, subdivision (a) (section 3287(a)), because it found Plaintiffs' damages were certain or capable of being made certain. Gateway and the Corks appealed.

Defendants based their defense on the alter ego doctrine. Defendants alleged Plaintiffs and several other entities formed by Peter Starflinger were alter egos of one another and part of a single enterprise Starflinger used to make investments like the ones Plaintiffs made. According to Defendants, when all of these entities are considered as a single enterprise, the enterprise suffered no loss relating to the commercial property because another entity in the enterprise purchased the commercial property at a foreclosure sale two years after Plaintiffs made their loans, and the property's value at that time exceeded the total of the Plaintiffs' investment and the amount the other entity paid to purchase the property. Defendants further alleged the enterprise bore responsibility for any damages it suffered on the commercial property because it chose to purchase the property at the foreclosure sale and thereby extinguished the second trust deed that High Park issued to yet another member of the enterprise a few months after it was supposed to provide Plaintiffs a second trust deed. Defendants argue the enterprise should have foreclosed on that trust deed and taken the property subject to the senior trust deed it acquired at foreclosure.

The trial court bifurcated Defendants' equitable theories of defense to follow the jury's decision on the legal claims and defenses, excluded the evidence regarding Defendants' alter ego theories during the jury trial, and later granted judgment on the pleadings on these defenses because the court concluded the defenses failed as a matter of law. Defendants argue these rulings denied them their constitutional rights to a jury trial and to present evidence on these defenses and improperly required the jury to decide the factual issues before the court decided the legal issues.

We conclude these challenges lack merit because they are based on the erroneous assumption Defendants presented a viable defense based on the alter ego doctrine. As explained below, the alter ego doctrine requires not only a unity of interest among the entities alleged to be alter egos, but also that the corporate form was used to perpetuate a fraud or engage in wrongdoing. Defendants failed to show the alleged enterprise's purchase of the commercial property in an independent transaction, using new funds, and without any credit for the funds Plaintiffs paid, allowed the enterprise to perpetuate a fraud or engage in wrongdoing. Moreover, Defendants fail to show how that purchase had any impact on Plaintiffs' claim they were defrauded out of their escrow deposits two years earlier, or how the enterprise could have foreclosed on the belated second trust deed High Park issued when the senior trust deed prohibited High Park from granting any second trust deeds.

The Corks also argue we must reverse the judgment because, as an escrow officer and notary public, they owed Plaintiffs no contractual or fiduciary duties and therefore are not liable to Plaintiffs for conspiracy. Not so. The Corks ignore that the general duty not to injure someone through fraud is distinct from and in addition to the professional duties they owed as an escrow officer and notary. Moreover, the jury found Mildred acted as an escrow officer for Plaintiffs and found she committed fraud regardless of any conspiracy.

Gateway challenges the jury's punitive damages award, arguing the record lacks clear and convincing evidence showing Mildred acted as Gateway's managing agent and the $900,000 award was excessive based on Gateway's net worth. As explained below, we conclude substantial evidence supports the jury's managing agent finding, but agree the amount of the award was excessive. We conclude the evidence supports an award in the lower amount of $360,000 and modify the judgment accordingly, provided Plaintiffs timely consent to that modification. If not, we reverse and remand for a new trial limited to the amount of punitive damages.

Finally, Defendants argue the trial court erred in awarding Plaintiffs prejudgment interest under section 3287(a) because Plaintiffs only prevailed on their tort claims, not their contract claims. According to Defendants, Civil Code section 3288 required Plaintiffs to seek an award for prejudgment interest from the jury as an element of damages, not the court after it dismissed the jury. Defendants misconstrue the governing law. Section 3287(a)'s applicability turns on whether Plaintiffs' damages are certain or capable of being made certain regardless of whether Plaintiffs' claims arise in tort or contract, and Defendants do not challenge the certainty of Plaintiffs' damages.

Accordingly, we modify the judgment to reduce the punitive damage award, subject to Plaintiffs' consent. Plaintiffs are entitled to a new trial solely on the amount of punitive damages if they do not consent. We affirm the judgment in all other respects.

I

FACTS AND PROCEDURAL HISTORY

A. *The Parties*

Starflinger is an investment manager and former real estate broker. He forms limited liability companies or other entities to hold title and manage each of his client's investments, but he holds no ownership interest in those entities. On Plaintiffs'

behalf, Starflinger made the investments at issue in this lawsuit and Defendants dealt with him exclusively. Starflinger has general powers of attorney for both Plaintiffs that authorize him to sign documents and make decisions for them regarding these investments. LA Investment, LLC (LA Investment), Marcelina Real Estate Services, Inc. (Marcelina), Carson, LLC (Carson), and 621, LLC (621) are other entities Starflinger formed and operated to manage his clients' investments.

Gateway is a title insurance company that also provides escrow services. Mildred is an escrow officer with nearly 30 years of experience. In 2000, she owned and operated her own escrow business when Gateway hired her as a branch manager. Mildred supervised and trained the employees at her branch, including her son James, who was a licensed notary.

Showalter is a real estate developer who did business through High Park. His basic business model was to purchase undervalued residential properties, and sell them for a profit after remodeling them. Showalter solicited investors to finance his projects. Through High Park, he would enter into separate joint venture agreements with each investor for each project, and then provide the investor a promissory note and trust deed on the property as security for the investment. In 2004, Showalter began using Mildred as his escrow officer for these transactions. He would direct the investors to Mildred and they would deposit their investments with her for Showalter to use in purchasing and remodeling the properties. Mildred met each investor separately, accepted the investment, and provided the investor with a receipt, the joint venture agreement, the promissory note, and a copy of the trust deed.

Mildred created a separate, unilateral escrow account into which she deposited the investors' funds. This account was not a purchase escrow for any particular project, but rather an open holding account Mildred used to commingle investor funds from numerous projects. She drafted a customized set of escrow instructions for the account because of its unusual nature. Although she considered each investor to be a

party to this escrow, she never informed the investors about this separate account and none of the investors signed the escrow instructions she created; only she and Showalter did.

Each joint venture agreement would identify the purchase escrow for the project to which it related, but Mildred would deposit the investor's funds into the holding account rather than the purchase escrow without the investor's knowledge. Under the instructions she drafted, Mildred would release funds from the holding account to High Park upon Showalter's request without notice to or instructions from the investors, and regardless of whether the conditions for the funds' release had been satisfied. She provided these escrow services to Showalter free of charge, although she charged for the purchase escrows she performed on the properties High Park acquired.

In addition to serving as an escrow officer on High Park's transactions, Mildred also invested with High Park and encouraged others to do so, telling them it was "a good investment" and "we're all going to be millionaires." On at least two occasions, Mildred made loans to High Park on transactions for which she was the escrow officer without disclosing that information to other investors. Mildred failed to document these loans, and identified the funds in the escrow documents as High Park's funds. Showalter gradually repaid these loans and Mildred generally was unaware of the source of the funds he used. On at least one occasion, however, Showalter used funds from the closing of a transaction to make a payment and Mildred did not disclose that information to the other participants in that transaction.

B. *The Orange County Properties*

During the summer of 2004, Starflinger inspected several properties with Showalter and agreed to loan High Park funds from Plaintiffs so it could remodel three residential properties located in south Orange County—the Marbella, Via Ballena, and Via Verde properties (collectively, Orange County properties). Starflinger conditioned

the loans on Plaintiffs receiving second trust deeds on the properties, junior only to the institutional lenders for the properties' purchase. Showalter told Starflinger there would be only one investor on each property and therefore Plaintiffs believed they were the only investors on these properties. Showalter also insisted the parties use Mildred as the escrow officer for the transactions. Starflinger agreed because Mildred worked for Gateway.

On August 5, 2004, Starflinger met with Showalter and Mildred. He gave Mildred three cashier's checks from Future Growth totaling $400,000, and two checks from Tafea totaling $200,000. Starflinger discussed with Mildred the escrow instructions, promissory notes, and trust deeds she would prepare for each property and requested that she obtain title insurance for the properties. He also specifically instructed Mildred to record Plaintiffs' trust deeds in second position and not to release Plaintiffs' funds to High Park until she recorded the trust deeds. Mildred agreed. She also provided Starflinger with the joint venture agreement, but he and Showalter explained that Starflinger was making loans to High Park, not entering into a joint venture. For their $600,000 investments, Plaintiffs received $720,000 in promissory notes, which included the principal amount of the loans and the agreed upon return.

James notarized the trust deeds and other documents outside everyone's presence and Mildred kept the original trust deeds for recording. Although Starflinger discussed the need for written escrow instructions with Mildred, she explained they were not ready and she would mail them to Starflinger for him to sign. Mildred did not tell Starflinger about the holding account or show him the escrow instructions for that account. Starflinger left the meeting with escrow receipts for the investments and copies of the promissory notes and joint venture agreements.

Mildred promptly released Plaintiffs' funds to Showalter and High Park after this meeting without recording Plaintiffs' trust deeds in second position, providing written escrow instructions for Starflinger to sign, or obtaining title insurance for

Plaintiffs' benefit. For example, Plaintiffs' trust deed on the Marbella property was not recorded until four months after Mildred released Plaintiffs' funds and more than one trust deed was recorded ahead of it. In fact, when Mildred accepted Plaintiffs' investments and released the funds to Showalter and High Park, she could not record Plaintiffs' trust deed against the Marbella property because High Park did not own the property and only acquired title more than two months after Mildred released Plaintiffs' funds.

Plaintiffs also were not the only investors in the Marbella property from whom Mildred accepted investments and promised to record a second trust deed. Just hours before she met with Starflinger and accepted Plaintiffs' investment, Mildred also met with another investor, accepted her investment, and agreed to record a trust deed in second position. In total, approximately 40 trust deeds were recorded against the Marbella property between October 2004 and November 2005. Mildred, however, never disclosed to Starflinger or Plaintiffs that High Park lacked title to the Marbella property when she released their funds or other investors existed who also had been promised a second trust deed.

Mildred similarly failed to record Plaintiffs' second trust deeds on the Via Verde and Via Ballena properties, and these properties were over encumbered with trust deeds High Park executed in favor of other investors who also were promised second trust deeds. James notarized many of these trust deeds. After obtaining Mildred's commitment to record Plaintiffs' second trust deeds, Starflinger assumed Mildred followed his directions.

In the fall of 2005, the United States Securities and Exchange Commission (SEC) sued High Park, accusing it of securities fraud for operating a Ponzi scheme. In December 2005, a federal court appointed a receiver for High Park and all of its assets. A few months later, the receiver filed a bankruptcy petition on High Park's behalf. Plaintiffs ultimately lost all of their investments in the Orange County properties.

C. *The Rosecrans Property*

In the summer of 2004, High Park agreed to purchase a commercial property in Los Angeles County (Rosecrans property) from Scripps Investments (Scripps). Believing she would conduct the purchase escrow for the transaction, Mildred opened an escrow account and drafted instructions regarding the Rosecrans property. By late July, however, Mildred learned Chicago Title would handle the purchase escrow and prepare its own escrow instructions.

High Park lacked the funds necessary to complete the transaction, and therefore asked Starflinger if Future Growth would loan High Park a substantial portion of the down payment. In early September, Future Growth agreed to loan High Park $650,000 in return for a $784,875 promissory note and second trust deed on the Rosecrans property, and the option to convert the loan to an equity interest. Showalter told Starflinger that Future Growth should deposit its funds with Mildred because she was handling the purchase escrow and would record the second trust deed and other documents for Future Growth.

In September 2004, Mildred told Starflinger she was managing the purchase escrow for the Rosecrans property and the lender knew High Park was borrowing a substantial portion of the down payment from Future Growth, both of which were false. In response, Starflinger told Mildred that Future Growth would send her the $650,000 and instructed her to record the second trust deed in Future Growth's name when escrow closed. Starflinger sent Mildred a fax confirming these verbal instructions. Mildred accepted Future Growth's funds and provided an escrow receipt without disclosing that she was not conducting the purchase escrow. After receiving Future Growth's funds, Mildred transferred them to Chicago Title without Starflinger's knowledge. The next day, Chicago Title recorded a grant deed in High Park's favor and a $2 million first trust deed in Scripps's favor. Neither Mildred nor Chicago Title recorded a second trust deed in Future Growth's favor. Moreover, the Scripps trust deed

prohibited High Park from granting a second trust deed or otherwise conveying any interest in the Rosecrans property without Scripps's consent.

In October 2004, Starflinger formed Carson. Two months later, a second trust deed was recorded against the Rosecrans property in Carson's favor for $784,875, the same amount as the trust deed Future Growth was to receive from High Park. Starflinger testified he was unaware of this trust deed and had no paperwork to support it, but the return address listed on the trust deed was Starflinger's regular business address.

In the fall of 2005, Starflinger learned High Park was behind on its loan payments to Scripps and threatened to foreclose on the second trust deed he thought Future Growth held on the Rosecrans property. In response, High Park executed a grant deed transferring the Rosecrans property to Future Growth, but with a repurchase option. Around the same time, Future Growth learned Scripps was foreclosing on its first trust deed and refused to allow Future Growth to bring Scripps's loan current because High Park had breached Scripps's loan in more ways than just missing payments. A few days later, the SEC filed its action against High Park and obtained a restraining order barring any transactions regarding the Rosecrans property. That restraining order was lifted after High Park's bankruptcy proceedings were resolved.

In August 2006, Marcelina paid approximately $2.1 million to purchase Scripps's first trust deed and promissory note on the Rosecrans property at foreclosure. Marcelina thereafter recorded a trustee's deed upon sale that extinguished both the grant deed High Park executed in Future Growth's favor and the second trust deed High Park executed in Carson's favor. In early 2008, LA Investment purchased the Rosecrans property from Marcelina. In December 2008, Starflinger formed 621 and LA Investment executed a grant deed transferring the Rosecrans property to 621. At the time of trial, title remained in 621.

D. *The Litigation*

In December 2006, Plaintiffs filed this lawsuit against Gateway and the Corks to recover the $1.25 million Plaintiffs deposited with Mildred. The operative fifth amended complaint alleged claims for (1) breach of oral escrow contracts; (2) breach of fiduciary duty; (3) fraud—intentional misrepresentation; (4) fraud—negligent misrepresentation; (5) fraud—concealment; (6) fraud—promise without intention to perform; (7) constructive fraud; (8) conspiracy to commit fraud; and (9) negligence.[2] According to Plaintiffs, Mildred breached her oral escrow agreements with Plaintiffs, breached the fiduciary duties she owed Plaintiffs as an escrow officer, and defrauded Plaintiffs of their escrow deposits as part of a conspiracy with Showalter and High Park. Plaintiffs named Gateway on all claims as Mildred's employer, and named James solely on the conspiracy to defraud claim. In addition to their escrow deposits, Plaintiffs also sought punitive damages.

Gateway answered Plaintiffs' complaint and alleged a variety of affirmative defenses, including failure to mitigate damages, unclean hands, unjust enrichment, set off, waiver, estoppel, and laches. According to Gateway, Future Growth, LA Investment, Marcelina, Carson, and 621 are each Starflinger's alter egos and Tafea was merely a strawman Starflinger used to make investments. Gateway alleged all of these entities and Tafea formed part of a single enterprise that Starflinger used to create the appearance Plaintiffs suffered their alleged losses, but the enterprise actually earned a net profit when all relevant transactions are considered together.

Specifically, on the Rosecrans property, Gateway alleged Starflinger received what he bargained for when High Park provided a second trust deed in Carson's

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[2] Plaintiffs also alleged claims for breach of the implied covenant of good faith and fair dealing, violation of Business and Professions Code section 17200, and successor liability. The trial court dismissed the successor liability claim before trial and Plaintiffs voluntarily dismissed the other two claims during trial.

name. According to Gateway, Starflinger chose to extinguish that interest and create Plaintiffs' alleged loss by using Marcelina to purchase the Scripps trust deed at foreclosure rather than foreclose on the Carson trust deed and take the property subject to paying off the Scripps trust deed. Gateway further alleged the value of Rosecrans property when Marcelina bought it was roughly $3.85 million, Starflinger's enterprise paid only about $2.8 million to acquire the property when both Future Growths' $650,000 and Marcelina's $2.1 million are considered, and that profit offsets the alleged losses on both the Rosecrans and Orange County properties. Mildred and James filed an answer that echoed these same defenses.

Gateway also filed a cross-complaint against Starflinger, Future Growth, Carson, Marcelina, and LA Investment seeking a declaratory judgment that (1) these entities are alter egos of one another and Starflinger, and therefore Future Growth is the equitable owner of the Rosecrans property and suffered no damages; and (2) Gateway is entitled to implied indemnity or contribution from the cross-defendants to the extent Plaintiffs suffered any damages. Gateway based the cross-complaint on the same facts alleged in its answer.

In August 2011, the trial court granted Gateway leave to amend its cross-complaint to add 621 as a cross-defendant and allege 621 belonged to the Starflinger enterprise. The court, however, bifurcated the cross-complaint for trial because Gateway made the motion just a few weeks before the expiration of the mandatory five-year period for bringing the case to trial (Code Civ. Proc., § 583.310) and 621 previously was not a party to the lawsuit.

In December 2011, the trial court heard Gateway's and Plaintiffs' competing motions to bifurcate Gateway's and the Corks' affirmative defenses. Gateway argued the court should hear and decide its alter ego equitable defenses before the jury heard Plaintiffs' legal claims because doing so would identify the proper plaintiffs, whether those Plaintiffs suffered any losses, whether Gateway's and the Corks' conduct

caused Plaintiffs' losses, and the amount of damages. Plaintiffs argued the court first should hear the legal issues to avoid presenting a large portion of the evidence twice—once to the court on the equitable issues and a second time to the jury on the legal claims. The court granted Plaintiffs' motion and ordered defenses based on the alter ego doctrine tried to the court after the jury decided the legal issues raised by Plaintiffs' claims.

Based on its bifurcation ruling, the court also granted Plaintiffs' motions to exclude evidence before the jury regarding Gateway's alter ego theory, and the existence of the other entities Gateway claimed formed part of Starflinger's enterprise. The court also excluded evidence Carson received a second trust deed on the Rosecrans property, and that Marcelina acquired the Rosecrans property at foreclosure. The court explained hearing this evidence would bring the cross-complaint into the trial before the jury, significantly lengthen the jury's portion of the case, and these issues would confuse the jury. The court declared it would not enter judgment until all issues were decided and Gateway still could prevail based on its defenses and cross-complaint even if the jury returned a verdict for Plaintiffs.

Between January and March 2012, the court conducted a jury trial on Plaintiffs' claims. Gateway repeatedly sought during trial to introduce evidence relating to the alter ego issues. Outside the jury's presence, the court gave Gateway numerous opportunities to explain the relevance of this evidence to the issues presented by Plaintiffs' claims and Gateway's legal defenses. The court also allowed Gateway to cross-examine Starflinger on these issues during an Evidence Code section 402 hearing, but the court concluded the lengthy testimony had minimal probative value and would confuse the jury.

Nonetheless, the court permitted Gateway to show High Park provided a second trust deed on the Rosecrans property a few months after purchasing it. The court explained Gateway could not use Carson's name in presenting this evidence because it could confuse the jury and was not relevant to Gateway's defense it provided a second

trust deed, albeit a few months late. At the court's urging, the parties reached a stipulation that a second trust deed on the Rosecrans property was recorded a few months after High Park purchased the property, and the court allowed Gateway to argue Plaintiffs therefore received what they bargained for.

In March 2012, the jury returned a special verdict for Plaintiffs. On the breach of contract claim, the jury found Gateway, through Mildred, entered into and breached oral escrow contracts with Plaintiffs regarding both the Orange County and Rosecrans properties, but the statute of limitations barred Plaintiffs' claim. On the fraud claims, the conspiracy to defraud claim, the breach of fiduciary duty claim, and the negligence claim,[3] the jury found for Plaintiffs and awarded the deposits they made with Mildred as damages: $1.02 million to Future Growth and $200,000 to Tafea.[4] As to punitive damages, the jury found both Mildred and James acted with oppression, fraud, and malice, and Mildred was an officer, director, or managing agent of Gateway. Following a separate trial on Defendants' financial condition, the jury awarded Plaintiffs punitive damages in the following amounts: $900,000 against Gateway ($750,000 to Future Growth and $150,000 to Tafea); $24,000 against Mildred ($20,000 to Future Growth and $4,000 to Tafea); and $6,000 against James ($5,000 to Future Growth and $1,000 to Tafea).

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[3] On the negligence claim, the jury found Plaintiffs, acting through Starflinger, were negligent in failing to diligently investigate High Park and follow up with Mildred to ensure she fully performed, but that negligence was not a substantial factor in causing Plaintiffs' harm. The jury also found Showalter and High Park were "at fault" and a substantial factor in causing Plaintiffs' harm. The jury therefore allocated 10 percent fault to James, 40 percent to Mildred, and 50 percent to Showalter and High Park.

[4] The jury reduced Future Growth's damages from the $1.05 million it deposited with Mildred to $1.02 million based on a $30,000 payment Future Growth received from High Park.

Following the jury's verdict, the trial court allowed Plaintiffs and the alleged members of the Starflinger enterprise to file motions for judgment on the pleadings challenging all of the bifurcated defenses and the claims Gateway alleged in its cross-complaint. Assuming a single Starflinger enterprise existed, Plaintiffs argued the remaining defenses and the cross-complaint failed as a matter of law because Defendants presented no evidence to show Starflinger used the enterprise to commit a fraud or other wrongdoing concerning Plaintiffs' lost escrow deposits and the transactions with Defendants.

Plaintiffs explained the alter ego doctrine, the bifurcated equitable defenses, and Gateway's implied indemnity and contribution claims required Defendants to show the enterprise committed some wrong concerning the transactions at issue, but as a matter of law, Starflinger committed no wrong when it paid over $2 million to purchase the Rosecrans property at an independent foreclosure sale two years after Defendants fraudulently induced Plaintiffs to deposit their funds with Mildred. To refute the Defendants' allegation the enterprise should have foreclosed on the Carson second trust deed to maintain its interest in the Rosecrans property, Plaintiffs asserted it was unenforceable because the senior Scripps note and trust deed prohibited High Park from granting a second trust deed on the Rosecrans property. The trial court granted the motions and disposed of all remaining defenses and Gateway's cross-complaint without a trial.

In January 2013, the trial court granted Plaintiffs' motion for prejudgment interest under Civil Code section 3287, subdivision (a), based on the court's finding Plaintiffs' damages were certain or capable of being made certain. In April 2013, the Court entered judgment against Defendants and awarded Tafea $475,016.46 and Future Growth $2,404,047.23, including prejudgment interest. After the court denied motions for new trial and judgment notwithstanding the verdict, Defendants appealed.

II

DISCUSSION

A. *The Trial Court Did Not Err in Its Rulings Concerning Defendants' Alter Ego Theory and Defenses*

Defendants contend the trial court committed several errors and essentially gutted their defense based on its rulings concerning Defendants' alter ego theory. Specifically, Defendants challenge the court's orders bifurcating its equitable defenses to follow the jury's decision on Plaintiffs' legal claims, excluding all evidence regarding Defendants' alter ego theory and defenses during the jury trial, and granting judgment on the pleadings on all bifurcated defenses and Gateway's Cross-Complaint. Defendants contend the trial court erred in making these orders because they (1) deprived Defendants of their constitutional right to a jury trial on their legal defenses of whether Plaintiffs suffered economic damages, whether Defendants caused Plaintiffs' damages, whether Plaintiffs mitigated their damages, and the amount of damages; (2) deprived Defendants of their constitutional right to present evidence on these defenses; and (3) violated Code of Civil Procedure 592 by requiring the jury to decide the issues of fact before the court decided the issues of law.

Defendants' assume their alter ego theory provided a defense to Plaintiffs' claims. We disagree. The Defendants' allegations and proffer of proof show their alter ego theory did not apply to the facts presented and Defendants related defenses provided no defense to Plaintiffs' claims as a matter of law. Defendants' challenges therefore lack merit because Defendants' rights to a jury trial and to present evidence only extend to viable defenses and relevant evidence; Defendants failed to show they had either.[5]

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[5] Defendants challenge based on Code of Civil Procedure section 592 lacks merit for the additional reason that Defendants failed to show the trial court abused its discretion in deciding the order of proof on the factual and legal issues. In cases involving both an issue of fact to be tried to a jury and an issue of law to be tried to the

We start our analysis by clearly identifying Defendants' alter ego theory, how that theory allegedly provided defenses to Plaintiffs' claims, and the claims to which Defendants contend those defenses applied. Defendants contend Future Growth, Carson, Marcelina, LA Investment, and 621 are alter egos of one another and Starflinger, and together these entities constitute a single, unified enterprise controlled by Starflinger. Defendants argue Starflinger commingled the funds and assets of these entities and failed to maintain their legal separateness, and therefore we must treat them as a single entity when evaluating Plaintiffs' claims.

When considered as part of this single enterprise, Defendants contend Future Growth suffered no loss on the Rosecrans property because the enterprise eventually owned that property outright after Marcelina bought it at foreclosure. Moreover, Defendants contend the enterprise mitigated its damages because the Rosecrans property's value when Marcelina purchased it allegedly ranged between $3.25 and $3.85 million, which more than offset the approximately $2.8 million the enterprise invested in the property based on Future Growth's $650,000 and the $2.1 million Marcelina paid.

Defendants also contend the enterprise, rather than Defendants, caused Future Growth to lose $650,000 because the enterprise decided to use Marcelina to purchase the senior note and trust deed at foreclosure and thereby extinguish the second trust deed High Park issued to the enterprise in Carson's name. Under Defendants' theory, the enterprise could have avoided Future Growth's loss by foreclosing on the

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court, section 592 states "the issue of law must be first disposed of." The case law, however, provides that rule is simply the "'better practice'" (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 157) and "goes to the order of proof"; it "is not jurisdictional" (*Bate v. Marsteller* (1965) 232 Cal.App.2d 605, 617). Instead, the trial court has the discretion to determine the order of proof. (*Hoopes*, at p. 163.)

Carson trust deed and thereby taking the Rosecrans property subject to paying off the senior Scripps note and trust deed.[6]

Defendants' alter ego theory and defenses apply only to Future Growth's claims relating to the Rosecrans property. Defendants do not contend these defenses apply to the claims regarding the $600,000 Plaintiffs lost on the Orange County properties. Defendants also do not challenge the trial court's decision to bifurcate Gateway's cross-complaint or its decision granting judgment on the pleading on the cross-complaint.

Alter ego and single enterprise are two names for the same equitable doctrine that allows courts to disregard a corporate identity "'where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used to perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners.'" (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1341 (*Troyk*); see *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1107-1108.) The

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[6] In the trial court, Defendants asserted an additional alter ego defense based on the Carson trust deed. Defendants argued the enterprise suffered no damages on the Rosecrans property because it received what it bargained for from High Park—a second trust deed on the Rosecrans property – although the trust deed was in Carson's name, rather than Future Growth's name. On appeal, Defendants do not contend the trial court erred in withholding this defense from the jury. The likely reason is that the court allowed Defendants to argue this defense. Specifically, the court barred Defendants from using Carson's name or making any alter ego argument, but it allowed Defendants to present evidence and argue Future Growth was not damaged because it received a replacement or the equivalent of the second trust deed it was supposed to receive from High Park.

doctrine applies not only to corporations, but also to limited liability companies. (Corp. Code, § 17703.04, subd. (b); *Curci Investments, LLC v. Baldwin* (2017) 14 Cal.App.5th 214, 220-221.)

"'In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone.'" (*Troyk*, *supra*, 171 Cal.App.4th at p. 1341.)

The alter ego doctrine most often applies to defendants, but in rare instances, our courts have applied the doctrine as a defense to a plaintiff's claims when necessary to avoid fraud or an inequitable result.[7] (See, e.g., *H.A.S. Loan Service v. McColgan* (1943) 21 Cal.2d 518, 522-523; *Wenban Estates, Inc. v. Hewlett* (1924) 193 Cal. 675, 695-696.)

Here, Defendants focus on the alter ego doctrine's first element, which requires a unity of interest among the entities. But Defendants fail to show invoking the doctrine is necessary to avoid a fraud or an inequitable result. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 539 [alter ego doctrine does not apply without evidence showing "some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form"]; see *Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 838.) The jury found Defendants fraudulently induced Future Growth to deposit $650,000 with Mildred for High Park to

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[7] Defendants contend "[t]he trial court made a fundamental error of law by ordering the alter ego doctrine applied *exclusively* to defendants." The court made no such order. Rather, the court acknowledged that California courts have applied the doctrine to plaintiffs, and nonetheless concluded the doctrine did not support Defendants' defenses based on the facts of this case.

use in purchasing the Rosecrans property in 2004. Defendants do not contend Future Growth or any other member of Starflinger's alleged enterprise committed any fraud or engaged in any wrongdoing concerning Future Growth's deposit of these funds. Rather, Defendants contend the alter ego doctrine applied because the enterprise used $2.1 million in new money to purchase the Rosecrans property in another name two years later. Defendants, however, fail to explain how that purchase at an independent foreclosure sale adversely affected Defendants and showed the enterprise used the corporate form to perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose. Some evidence or allegations of fraudulent or deceptive intent is required, but Defendants point to none. (*Sonora Diamond Corp.*, at p. 539.)

Similarly, assuming a single enterprise existed, the defenses Defendants asserted based on the alter ego doctrine do not apply to defeat Future Growth's claims or reduce its damages. It is irrelevant to Future Growth's claims against Defendants that the enterprise later acquired the Rosecrans property, and the property's value at that time exceeded the combined total of Future Growth's $650,000 and the $2.1 million Marcelina paid for the property. The enterprise purchased the Rosecrans property by spending new money at an independent foreclosure sale. The enterprise received no credit toward the purchase based on Future Growth's money, and Future Growth likewise would have received no credit if it had purchased the property in its own name. Defendants cite no authority and fail to explain how this later independent purchase of the property has any bearing on Future Growth's claims. Defendants' contention to the contrary ignores the basis for those claims.

Future Growth sued Defendants to recover the escrow deposit it made with Mildred. It did not sue High Park or Showalter to recover any difference in value between what Future Growth was supposed to receive under its agreement with High Park and what Future Growth actually received. Future Growth alleged Mildred breached her fiduciary duties and fraudulently induced it to deposit its money with her

through numerous misrepresentations and concealments. Future Growth asserts it would not have deposited the money with Mildred if she had disclosed she was not managing the purchase escrow on the Rosecrans property, the lender did not know or approve of High Park borrowing the down payment, or the other frauds she and Showalter had committed against Future Growth regarding the Orange County properties. The jury agreed with Future Growth and awarded Future Growth the lost deposit as its damages. This was the proper measure of damages based on Mildred's fiduciary fraud. (*Strebel v. Brenlar Investments, Inc.* (2006) 135 Cal.App.4th 740, 747 [victim of fiduciary fraud not limited to Civil Code section 3343's "out-of-pocket" measure of damages, but rather may recover under the broader tort measure authorizing damages for all detriment proximately caused by fraud (Civ. Code, §§ 3333, 1709)].) The alleged Starflinger enterprise's later purchase of the Rosecrans property does not change the fact that Defendants defrauded Future Growth out of $650,000 that it never recovered.

Defendants' contention the enterprise caused its own damages by purchasing the Rosecrans property at a foreclosure sale, rather than foreclosing on the Carson trust deed, also provides no defense to Future Growth's claims. As explained, Future Growth sued Defendants to recover the funds it deposited with Mildred based on her fiduciary fraud. Future Growth essentially sought to undo the transaction and get its money back. Defendants cite no authority that required Future Growth to foreclose on the trust deed when the relief it sought was to undo the fraudulent transaction. More importantly, this argument assumes the Carson trust deed was valid and enforceable. The senior Scripps note and trust deed, however, prohibited High Park from transferring any interest in the Rosecrans property without Scripps's consent, and Scripps did not consent.

B. *The Trial Court Properly Denied the Corks' Judgment Notwithstanding the Verdict and New Trial Motions Because the Corks Owed a Duty to Abstain From Committing Fraud*

The Corks contend the trial court erred in denying their judgment notwithstanding the verdict and new trial motions because the verdict and judgment are contrary to the law. The Corks assert they could not be liable for conspiracy to defraud Plaintiffs because they did not owe Plaintiffs any contractual or fiduciary duties as a matter of law. We disagree because the Corks ignore the basis for the jury's verdict against them.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511 (*Applied Equipment*).)

"By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*Applied Equipment*, *supra*, 7 Cal.4th at p. 511.) "Conspiracy . . . cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (*Id*. at p. 514; *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 (*Doctors' Co.*) ["A cause of action for civil conspiracy may not arise . . . if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing"].) For example, a defendant is not liable for a conspiracy to breach fiduciary duties if the defendant did not owe the

plaintiff a fiduciary duty. (*Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI* (2002) 100 Cal.App.4th 1102, 1107-1108.)

James contends his duties as a notary are limited to confirming a person's identity and notarizing the person's signature; he has no duty to read the documents he is notarizing, confirm their content, or determine their validity. (See *Kirk Corp. v. First American Title Co.* (1990) 220 Cal.App.3d 785, 811-812; *Vanderhoof v. Prudential Savings & Loan Assn.* (1975) 46 Cal.App.3d 507, 510-512.) James argues he is entitled to judgment as a matter of law because all parties agreed when they finalized the special verdict form that James owed no duty to Plaintiffs and a negligence claim did not lie against him.[8]

Similarly, Mildred argues her duties as an escrow officer are limited to compliance with the escrow instructions provided by the parties and she owes no duty to anyone who is not a party to the escrow. (See *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711; *Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1114; *Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508, 526, 529.) Because Starflinger and Plaintiffs were not parties to the escrow for the Orange County properties and Mildred was not the escrow officer for the purchase of the Rosecrans property, she concludes she owed

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[8] The special verdict form asked the jury whether James was negligent and whether his negligence caused Plaintiffs' harm. The parties and the trial court acknowledged the parties should not have included these questions on the verdict form because Plaintiffs did not have a negligence claim against James, but the parties agreed to submit the form to the jury with these questions rather than redo the verdict form and delay submission of the case to the jury. The parties further agreed the jury's response to these questions would be disregarded and the court would not enter judgment against James based on the jury's responses. The court acknowledged that agreement and stated it did not rely on the jury's response to these questions when entering judgment against James or in denying his judgment notwithstanding the verdict and new trial motions.

Plaintiffs no duties regarding those transactions and therefore is not liable for any conspiracy to injure Plaintiffs.[9]

These arguments fail to recognize the jury did not find the Corks liable for a conspiracy to violate the professional duties they owed as a notary or escrow officer, but rather for conspiring with Showalter and High Park to defraud Plaintiffs of the funds they deposited with Mildred. The general duty not to injure someone through fraud is distinct from and in addition to the professional duties the Corks owed as a notary and escrow officer.

"Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights." (Civ. Code, § 1708; see *Applied Equipment*, *supra*, 7 Cal.4th at p. 515; *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 511 (*Younan*).) This general duty requires everyone to refrain from injuring others by committing fraud. (*Applied Equipment*, at pp. 512-513 [citing *Younan* with approval]; *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 711 (*Skarbrevik*).)

For example, in *Skarbrevik*, the Court of Appeal concluded an attorney could not be liable for conspiring with his client to conceal information from a third party with whom the attorney had no professional relationship, but the attorney could be liable to the third party for conspiring to commit actual fraud by making false representations: "Under [the general duty to refrain from injuring others], an attorney who conspires with

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[9] Mildred's contention Plaintiffs were not parties to any escrow she conducted ignores the jury's findings she contractually agreed to provide Plaintiffs escrow services relating to the Orange County and Rosecrans properties, and that she owed Plaintiffs fiduciary duties. Mildred does not argue a lack of substantial evidence to support these findings. Instead, she merely ignores them and argues evidence to the contrary. Mildred therefore forfeited any challenge to these findings by the jury and we are bound to accept them. (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 415-416 (*Chicago Title*); *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429-430, fn. 5.)

a client to defraud a third party and who commits *actual* fraud in pursuit of the conspiracy may be liable for conspiracy to defraud. In that situation, liability is premised on the breach of the attorney's personal duty to abstain from harming another by false misrepresentation, a duty independent of the client's duty. [Citations.] But an attorney will not be liable for conspiracy to commit *constructive* fraud where that charge rests on a fiduciary duty of disclosure owed only by the client." (*Skarbrevik*, *supra*, 231 Cal.App.3d at p. 711; see *Younan*, *supra*, 111 Cal.App.3d at pp. 511, 516-517 [insurer's agents liable for conspiracy to commit actual fraud because they had a duty to abstain from injuring plaintiff through express misrepresentation independent of insurer's duties, but agents not liable for constructive fraud because that charge rested solely on insurer's fiduciary duty of disclosure to plaintiff]; *Applied Equipment*, *supra*, 7 Cal.4th at pp. 512-513 [citing *Younan* with approval]; *Doctors' Co.*, *supra*, 49 Cal.3d at p. 48 [same].)

The Corks do not dispute they owed Plaintiffs a duty not to defraud them, and they fail to explain why they are not liable for entering a conspiracy to defraud Plaintiffs. Moreover, although conspiracy was the only basis for the jury's verdict against James, Mildred fails to acknowledge the jury not only found her liable for conspiring to defraud Plaintiffs, but it also found her directly liable for making intentional and negligent misrepresentations, concealing material information, and making promises without an intention to perform. The verdict against Mildred therefore would stand even if she could successfully challenge the conspiracy claim.[10] The trial court properly denied the Corks' judgment notwithstanding the verdict and new trial motions.

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[10] Although she fails to explain how, Mildred also contends the conspiracy claim against her fails based on the agent's immunity rule. Under the agent's immunity rule, "'when a corporate employee acts in his or her authorized capacity on behalf of his or her corporate employer, there can be no claim of conspiracy between the corporate employer and the corporate employee.'" (*People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 638-639; see *Applied Equipment*, *supra*, 7 Cal.4th at p. 512, fn. 4.)

C. *Substantial Evidence Supports the Decision to Award Punitive Damages Against Gateway, But Not in the Amount the Jury Awarded*

1. Plaintiffs Presented Sufficient Evidence to Show Mildred Was Gateway's Managing Agent

Gateway contends we must reverse the punitive damages award because Plaintiffs failed to present clear and convincing evidence establishing Mildred was its managing agent whose conduct could subject Gateway to punitive damages.[11] We disagree.

"Civil Code section 3294, subdivision (a) permits an award of punitive damages 'for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.' Civil Code section 3294, subdivision (b), provides that a corporate employer is not liable for punitive damages based upon the acts of its employees unless the acts were committed, authorized, or ratified by a corporate officer, director, or managing agent." (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 885 (*Powerhouse Motorsports*).)

"The term 'managing agent' includes 'only those corporate employees who exercise substantial independent authority and judgment in their corporate

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Agents, however, may be liable for conspiracy "for conduct which the agents carry out 'as individuals for their individual advantage' and not solely on behalf of the principal." (*Doctors' Co.*, *supra*, 49 Cal.3d at p. 47.) The agent's immunity rule does not apply here because there is no claim Mildred conspired with her employer, Gateway, and Mildred conspired with Showalter and High Park for her individual advantage.

[11] Gateway also argues there was insufficient evidence to establish James was Gateway's managing agent. We do not address that argument. Although the jury found James engaged in fraudulent conduct that subjected him individually to punitive damages, it did not find he was Gateway's managing agent. Rather, the jury solely found Mildred was Gateway's managing agent, and therefore we must determine the propriety of the punitive damages award against Gateway solely based on whether Mildred was a managing agent.

decisionmaking so that their decisions ultimately determine corporate policy.' [Citation.] '[T]o demonstrate that an employee is a true managing agent . . . , a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business.' [Citation.] But the determination of whether certain employees are managing agents '"does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions . . . ."'" (*Powerhouse Motorsports*, *supra*, 221 Cal.App.4th at p. 886; see *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-567, 577 (*White*); *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822-823 (*Egan*).) The purpose of the managing agent requirement is to "distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White*, at p. 572.)

For example, in *Egan*, the Supreme Court concluded two insurance claims adjusters were managing agents whose conduct subjected their employer to punitive damages on a bad faith claim because they exercised broad discretion in adjusting the plaintiff's claim without supervision: "When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation." (*Egan*, *supra*, 24 Cal.3d at p. 823.) As the *Egan* court explained, the unsupervised actions of the adjusters "necessarily results in the ad hoc formulation of policy." (*Ibid*.)

"The scope of a corporate employee's discretion and authority . . . is . . . a question of fact for decision on a case-by-case basis." (*White*, *supra*, 21 Cal.4th at p. 567.) We review the jury's determination of the issue for substantial evidence, "consider[ing] the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference, and resolv[ing] evidentiary conflicts in support of the judgment." (*Powerhouse Motorsports*, *supra*, 221 Cal.App.4th at p. 885; see *Egan*, *supra*, 24 Cal.3d at p. 821.) Civil Code section 3294 requires the plaintiff to

establish the right to punitive damages by clear and convincing evidence, but we review this issue under the traditional substantial evidence standard. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 606.)

Here, substantial evidence shows Gateway employed Mildred as a branch manager under a written employment contract that entitled her to 50 percent of the profits her branch generated. Mildred had authority to hire and fire employees, she provided any training the employees required, and she ensured the four employees at her branch complied with the guidelines and regulations for conducting escrows. Gateway did not train Mildred or provide her with any formalized policies, and she had no direct supervisor. Instead, Mildred reported directly to Gateway's president and board of directors. There was no day-to-day oversight of Mildred's conduct.

Mildred was free to open escrows as she saw fit without obtaining permission or approval. She maintained all records relating to the deposit of funds, and there were no limits on her authority to accept, transfer, withdraw, or release escrow funds. She determined the appropriate instructions for each escrow. Mildred also had discretion to engage in nontraditional escrow transactions and open unusual accounts such as the holding account she used to deposit the investors' funds before releasing them to Showalter and High Park.

The foregoing supports the jury's conclusion Mildred acted as Gateway's managing agent, a conclusion Gateway does not challenge. Instead, Gateway relies on other evidence showing it had more than 30 branches and branch managers, each branch manager had no authority regarding any other branch, and Mildred was merely one of approximately 200 employees. That is insufficient to meet Gateway's burden to establish a lack of substantial evidence to support the managing agent finding. (*Chicago Title*, *supra*, 188 Cal.App.4th at p. 415 ["'[A]n appellant who challenges a factual determination in the trial court . . . must marshal *all* of the record evidence relevant to the

point in question and affirmatively demonstrate its insufficiency to sustain the challenged finding"].)

2. Plaintiffs Failed to Present Sufficient Evidence of Gateway's Financial Condition to Support a $900,000 Punitive Damages Award

Gateway contends the punitive damages award is excessive as a matter of law because it represents 37.5 percent of Gateway's $2.4 million net worth. Gateway asserts punitive damage awards encompassing a large percentage of a defendant's net worth presumptively are the result of passion and prejudice and must be overturned. We agree $900,000 in punitive damages is excessive and not supported by the evidence Plaintiffs presented on Gateway's financial condition, but conclude the evidence supports an award in a lesser amount, rather than an outright reversal of the award.[12]

Punitive damages are not awarded to compensate for the injuries a plaintiff suffered. Rather, punitive damages serve the public purpose of punishing wrongdoing and deterring future misconduct by the defendant and other potential wrongdoers. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110 (*Adams*); *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1658 (*Stevens*); see Civ. Code, § 3294, subd. (a) [punitive damages allowed "for the sake of example and by way of punishing the defendant"].) In an excessive punitive damages claim, the essential question on appeal is whether the amount awarded substantially serves the public's interest in punishment and deterrence. (*Adams*, at p. 110; *Stevens*, at p. 1658.)

"[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award

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[12] The Corks did not challenge the punitive damage awards in their opening briefs, and therefore forfeited the issue. (*Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 296, fn. 7 ["Issues not raised in the appellant's opening brief are deemed waived or abandoned"].)

which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 (*Neal*); see *Adams*, *supra*, 54 Cal.3d at p. 110; *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 307-308.) "The purpose of punitive damages 'is not served by financially destroying a defendant. The purpose is to deter, not to destroy.'" (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 546 (*Walsh*); see *Soto v. BorgWarner Morse TEC, Inc.* (2015) 239 Cal.App.4th 165, 192 (*Soto*) [punitive damages award is excessive if "'it destroys, annihilates, or cripples the defendant'"].)

Our Supreme Court has identified three criteria we apply in evaluating whether a punitive damages award is excessive under California law: (1) "the reprehensibility of the defendant's conduct"; (2) "the reasonableness of the relationship between the award and the plaintiff's harm"; and (3) "in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct."[13] (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679 (*Baxter*); see *Adams*, *supra*, 54 Cal.3d at p. 110; *Neal*, *supra*, 21 Cal.3d at p. 928; *Stevens*, *supra*, 49 Cal.App.4th at p. 1658.)

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[13] These criteria determine whether a punitive damages award is excessive under California law. The United States Supreme Court has established three separate "guideposts" for courts to apply in determining the constitutional maximum for a particular punitive damages award under the federal due process clause: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm Mut. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418.) Gateway does not challenge the constitutionality of the punitive damages award under federal law, but rather limits its challenge to whether the award is excessive under California law. We therefore do not address the constitutionality of the award under federal law. (*Stevens*, *supra*, 49 Cal.App.4th at p. 1659, fn. 5.)

"Under California law, we review a trial court's determination of punitive damages under the substantial evidence standard." (*Walsh*, *supra*, 158 Cal.App.4th at p. 545; see *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 535.) "We are also 'guided by the "historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice . . . ." [Citation.]' [Citation.] Stated differently, '[a]n appellate court may reverse an award of punitive damages only if the award appears excessive as a matter of law or is so grossly disproportionate to the ability to pay as to raise a presumption that it was the result of passion or prejudice.'" (*Behr*, at p. 535; see *Walsh*, at p. 545.)

Gateway does not challenge the appropriateness of the award in this case based on either the reprehensibility of its conduct or the relationship between the award and Plaintiffs' harm. Rather, Gateway argues the award is excessive because it exceeds Gateway's ability to pay the award based on the evidence Plaintiffs presented on Gateway's financial condition. Although the three criteria the Supreme Court identified usually are considered together, an award may be "so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone*"—that is, even though the award otherwise is reasonable based on the nature of defendant's conduct and the relationship between the award and the plaintiff's harm. (*Adams*, *supra*, 54 Cal.3d at p. 111; see *Baxter*, *supra*, 150 Cal.App.4th at p. 680.)

"[A]n award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition." (*Adams*, *supra*, 54 Cal.3d at p. 109; see *Soto*, *supra*, 239 Cal.App.4th at p. 192; *Walsh*, *supra*, 158 Cal.App.4th at p. 546 ["a defendant's ability to pay a punitive damage award must be based on meaningful and substantial evidence of his or her financial condition"].) "Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive" (*Adams*, at p. 112; see *Baxter*, *supra*, 150 Cal.App.4th at

p. 680), and as with compensatory damages, a punitive damages award "must not be based on speculation" (*Adams*, at p. 114).

"Our Supreme Court has not prescribed a rigid standard for measuring a defendant's ability to pay. [Citations.] Accordingly, there is no one particular type of financial evidence a plaintiff must obtain or introduce to satisfy its burden of demonstrating the defendant's financial condition. Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. [Citations.] Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' [Citations.] Evidence of a defendant's income, standing alone, is not '"meaningful evidence."' [Citation.] 'Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.'" (*Soto*, *supra*, 239 Cal.App.4th at p. 194; see *Baxter*, *supra*, 150 Cal.App.4th at p. 680.)

"'"Without evidence of the actual total financial status of the defendants, it is impossible to say that any specific award of punitive damage is appropriate." [Citation.]' [Citation.] 'Thus, there should be some evidence of the defendant's actual wealth' [citation], but the precise character of that evidence may vary with the facts of each case [citations]." (*Soto*, *supra*, 239 Cal.App.4th at pp. 194-195; see *Baxter*, *supra*, 150 Cal.App.4th at p. 680.) "Whether the defendant's financial prospects are bleak or bright [also] is relevant to the ultimate issue whether the damages will ruin him or be absorbed by him." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622 (*Rufo*).) "The evidence should reflect the named defendant's financial condition at the time of trial." (*Soto*, at p. 195.)

To support its challenge, Gateway cites a line of cases that suggests a punitive damages award should not exceed 10 percent of a defendant's net worth. (See

Sierra Club Foundation v. Graham (1999) 72 Cal.App.4th 1135, 1163; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1596 (*Michelson*); *Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515.) Each of these cases, however, recognizes that 10 percent of net worth is merely a general guideline. Moreover, only two of these cases overturned a punitive damages award, and both did so because the award greatly exceeded 10 percent of the defendant's net worth. (*Sierra Club*, at pp. 1162-1163 [upholding award that did not exceed 10 percent of defendant's net worth]; *Weeks*, at p. 1167 [upholding award that "slightly exceed[ed]" 10 percent of defendant's net worth]; *Michelson*, at p. 1596 [reversing award that was 28 percent of defendant's net worth]; *Storage Services*, at p. 515 [reversing award that was at least 33 percent of defendant's net worth].)

More recent cases have rejected limiting punitive damages to 10 percent of a defendant's net worth. (See, e.g., *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 83 (*Bankhead*).) Rather, "each case must be decided on its own facts, considering all three factors and various indicators of wealth." (*Rufo*, *supra*, 86 Cal.App.4th at pp. 624-625; see *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582-583 (*Zaxis*).) For example, the *Zaxis* court determined a corporate defendant had the ability to pay a $300,000 punitive damages award despite having a negative net worth because the evidence also showed (1) the defendant earned hundreds of millions of dollars the previous two years even though it had a net loss; (2) the net worth calculation was reduced by $4.9 million in accumulated depreciation and a $6 million loan from the defendant's sole shareholder that did not affect the defendant's ability to pay the award; (3) the defendant had cash on hand and a checking account balance totaling more than $19 million; and (4) the defendant obtained a $50 million credit line with an available balance of $5.3 million. The court found the credit line was the most compelling evidence of ability to pay because it showed the lender had determined the defendant could pay sums greatly exceeding $300,000. (*Zaxis*,

at p. 583; see *Bankhead*, at p. 83 [corporation had ability to pay $4.5 million punitive damages award despite negative net worth because it had $12 million in net profit, it paid its CEO $7.6 million in annual salary, it recently borrowed $245 million, and it had $343 million in cash or cash equivalents].)

In *Rufo*, the Court of Appeal upheld a punitive damages award that exceeded the individual defendant's net worth because the evidence showed the award would not financially destroy the defendant. Specifically, the evidence showed the defendant had pension funds worth more than $4.1 million that were exempt from execution and he had the ability to gain substantial wealth in the future based on his celebrity and notoriety. (*Rufo*, *supra*, 86 Cal.App.4th at pp. 624-625.)

Here, the evidence Plaintiffs presented regarding Gateway's financial condition and ability to pay does not support the $900,000 punitive damages award because it constitutes an excessive amount of Gateway's net worth and Plaintiffs failed to show Gateway's ability to pay the award was significantly greater than reflected in its net worth. The evidence shows Gateway had a net worth of $2.4 million as of September 2011, and that value had decreased slightly by the March 2012 punitive damages trial. Between 2004 and 2011, Gateway consistently operated at a loss and had a total retained loss over that period of more than $32 million. For 2011, Gateway's operating loss was approximately $1 million, but its losses were shrinking and its controller informally estimated Gateway would "break even" by the end of 2012. Gateway did not have any credit lines nor did it have any borrowing arrangements with its parent company, Fidelity National Title Insurance Company (Fidelity), that enhanced its ability to pay beyond that established by its net worth.[14] Similarly, Plaintiffs did not

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[14] The evidence showed Fidelity paid the costs associated with this litigation, but there was no evidence showing Fidelity paid any other expenses or received any revenue from Gateway.

present any evidence to show Gateway had any significant cash on hand that would enable it to pay the jury's punitive damages award.

Plaintiffs contend the evidence showed Gateway's net worth was much higher than $2.4 million because the $32 million in retained losses was an "artificial entry" on Gateway's balance sheet that it used to shelter income. Plaintiffs assert there must be additional value in the company that allowed it to continue operating despite those losses. Plaintiffs' suspicions are based on mere speculation and they cite no evidence to support them. Plaintiffs did not call an expert or any other witness to testify that Gateway had manipulated its net worth in any way or that it had significantly more resources to pay a punitive damages award than reflected in its $2.4 million net worth. The balance sheet establishing that net worth was not generated for this litigation, but rather was a balance sheet Gateway prepared and filed with the State of California to maintain its license. That balance sheet showed Gateway received a total of $35 million in capital contributions during the approximately eight years leading up to the trial, it suffered more than $32 million in losses during that same period, and therefore its net worth was approximately $2.4 million. Although the case law recognizes net worth can be manipulated to hide a defendant's ability to pay a punitive damages award, the plaintiff must point to evidence showing manipulation. Plaintiffs failed to do so.

Plaintiffs also argue Gateway has a greater ability to pay a punitive damages award because it had 140 employees in six offices and had just opened a new office in Las Vegas. Plaintiffs fail to explain how the number of employees or offices demonstrate Gateway had a greater ability to pay a punitive damages award than reflected in its balance sheet. It is the financial performance of those offices and employees that is important. In any event, the evidence showed Gateway had closed the new Las Vegas office by the time of trial.

Plaintiffs' next point to Gateway's projected revenue of approximately $20 million for 2012, and its actual revenue of $18 to $20 million in 2011 and

$15 million in 2010. They also point to a $10 million goodwill entry from 2008 and capital assets of $5.7 million in 2008 and $9 million in 2007. The foregoing case law, however, makes clear that revenue, income, and assets are meaningless without the other side of the balance sheet—expenses and liabilities. (*Soto*, *supra*, 239 Cal.App.4th at p. 194; see *Baxter*, *supra*, 150 Cal.App.4th at p. 680.) Plaintiffs cite no evidence addressing the expenses Gateway incurred to generate the revenue on which Plaintiffs rely. Moreover, the goodwill and asset figures Plaintiffs cite predate the trial by three years and notably do not account for the fact Gateway went out of business in the interim.

Other than the evidence showing Gateway consistently had a net operating loss, the only evidence Plaintiffs cite concerning Gateway's liabilities shows Gateway had no liabilities on the books when its current owners purchased Gateway in 2010. That evidence, however, has no meaning unless we also consider evidence of Gateway's assets during that same period. (*Soto*, *supra*, 239 Cal.App.4th at p. 194; see *Baxter*, *supra*, 150 Cal.App.4th at p. 680.) Although not argued by Plaintiffs, the evidence shows Gateway's assets in 2010 totaled $3.3 million.

This comparison of Gateway's assets and liabilities reveals a marginally greater ability to pay punitive damages than reflected in Gateway's $2.4 million net worth, but nonetheless falls short of supporting the jury's $900,000 punitive damages award. The jury's award represents 37.5 percent of Gateway's net worth and 27.3 percent of the difference between Gateway's 2010 assets and liabilities. Awarding this amount as punitive damages goes well beyond what is necessary or appropriate to serve the award's deterrent and punitive purpose. The award therefore is excessive and cannot stand.

But Gateway's positive net worth, the comparison of its assets and liabilities, and its potentially profitable future demonstrate Gateway has the ability to pay punitive damages in a lesser amount, and an award is warranted to punish and deter Gateway's conduct in this case. Based on the foregoing authorities and evidence, we

conclude a total award of $360,000—$300,000 to Future Growth and $60,000 to Tafea—is appropriate. That amount represents 15 percent of Gateway's net worth and less than 11 percent of its assets after deducting liabilities. An award in those amounts also maintains the ratio between the award the jury made to Future Growth and Tafea.

We therefore modify the judgment to reduce the punitive damages award against Gateway and affirm the judgment as modified, provided Gateway consents to the modification. (See Cal. Rules of Court, rule 8.264(d).) If Gateway does not consent, we will reverse the punitive damages award and remand the matter for a new trial limited to the amount of punitive damages. (See *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1704; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 763-764.)

D. *The Trial Court Properly Awarded Plaintiffs Prejudgment Interest*

Defendants contend the trial court exceeded its authority by awarding Plaintiffs prejudgment interest on a posttrial motion. Defendants argue the jury had the exclusive authority to award prejudgment interest because Plaintiffs only prevailed on their tort causes of action, and therefore Plaintiffs forfeited their claim for prejudgment interest by failing to present it to the jury. Defendants misconstrue the governing procedures and statutory authority regarding prejudgment interest.

Civil Code sections 3287 and 3288 authorize an award of prejudgment interest in a variety of circumstances. Section 3287(a) authorizes a prejudgment interest award on liquidated claims: "A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day."[15] An award under section 3287(a) is mandatory when its conditions are met; a trial

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[15] In its entirety, section 3287(a) states: "A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest

court has no discretion to deny or limit an award. (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 828 (*North Oakland*).) Because an award under section 3287(a) is a matter of right, a plaintiff properly may seek an award on a posttrial motion made before entry of judgment. (*North Oakland*, at pp. 830-831.)

Section 3287(a)'s application to both contract and tort claims "is well established." (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958 (*Wisper Corp.*); see *Palomar Grading & Paving, Inc. v. Wells Fargo Bank, N.A.* (2014) 230 Cal.App.4th 686, 690; *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 1004, 1009; *Marine Terminals Corp. v. Paceco, Inc.* (1983) 145 Cal.App.3d 991, 994; *Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 795-798 (*Levy-Zentner*).)

Since its enactment in 1872, "'the key distinguishing factor'" for determining section 3287(a)'s application "'[is] not . . . whether the cause of action arose in tort or contract, but rather whether the damages [are] readily ascertainable.'" (*Wisper Corp.*, *supra*, 49 Cal.App.4th at p. 958; see *Levy-Zentner*, *supra*, 74 Cal.App.3d at p. 795.) Indeed, our Supreme Court repeatedly has rejected the notion that section 3287(a)'s application is limited in any way by the nature of the plaintiff's claim. (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 681-682 (*Tripp*), overruled on other grounds in *Frink v. Prod* (1982) 31 Cal.3d 166, 180; *Mass v. Board of Education* (1964) 61 Cal.2d 612, 626 (*Mass*); see *Levy-Zentner*, at pp. 796-797.)

Although Civil Code sections 3287, subdivision (b) (section 3287(b)), and 3288 (section 3288) also authorize an award of prejudgment interest, the plain language

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thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state."

of these provisions limit their application to specific types of claims. (§§ 3287(b), 3288; *Levy-Zentner*, *supra*, 74 Cal.App.3d at p. 796.) Section 3287(b) authorizes a prejudgment interest award on unliquidated contract claims: "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed." Section 3288 authorizes prejudgment interest on claims not arising from a contract: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." An award under section 3287(b) is vested in the trial court's discretion (*North Oakland*, *supra*, 65 Cal.App.4th at p. 828), and an award under section 3288 is vested in the trier of fact's discretion (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814, fn. 16 (*Bullis*); *Michelson*, *supra*, 29 Cal.App.4th at p. 1587).

Here, the trial court properly granted Plaintiffs posttrial motion and awarded prejudgment interest under section 3287(a) because Plaintiffs' damages were certain or capable of being made certain. Plaintiffs sued Defendants on both contract and tort theories to recover the funds Plaintiffs deposited into escrow with Defendants and later lost when Showalter failed to provide the promised security or repay the funds. The jury found the statute of limitations barred Plaintiffs' contract claims, but it returned a verdict in Plaintiffs' favor on their fraud, breach of fiduciary duty, negligence, and conspiracy claims and awarded Plaintiffs the full amount of their deposits as damages.

Defendants do not dispute Plaintiffs damages were certain or capable of being made certain. Instead, Defendants argue the trial court erred because section 3287(a) did not apply based on the nature of the claims on which Plaintiffs prevailed. According to Defendants, section 3288 governed Plaintiffs' request for prejudgment interest because they prevailed solely on their tort claims. Defendants are mistaken.

Defendants fail to address the foregoing authorities holding that section 3287(a) applies to both contract and tort claims. Instead, Defendants cite *Michelson* for the following proposition: "It is always the trier of fact that determines the issue of damages and this is true with regard to prejudgment interest pursuant to section 3288." (*Michelson*, *supra*, 29 Cal.App.4th at p. 1586; see *Bullis*, *supra*, 21 Cal.3d at pp. 814-815; *Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App.4th 565, 572; *Barry v. Raskov* (1991) 232 Cal.App.3d 447, 457.) *Michelson* and the other cases cited by Defendants, however, simply conclude that a request for prejudgment interest under section 3288 must be made to the trier of fact because it has the exclusive authority to award prejudgment interest under that statute. Those cases do not address a trial court's authority to award prejudgment interest under section 3287(a) when the plaintiff's damages are certain. As explained above, an award under section 3287(a) may be made on a posttrial motion. (*North Oakland*, *supra*, 65 Cal.App.4th at pp. 830-831.)

In their reply briefs, Defendants cite the following statement from *Nathanson v. Murphy* (1957) 147 Cal.App.2d 462, 467 (*Nathanson*): "Although section 3287 seems to provide that in every case involving 'certain' damages interest should be allowed, when that section is read with section 3288 it is clear that in cases 'not arising from contract' discretion as to interest is conferred on the trial court. . . . When these sections are read together the proper rule is that the defrauded party may ask for damages from the date of the fraud, but '[w]hether such interest is to be awarded is left to the discretion of the trier of fact to be exercised in consideration of the circumstances of the case.'"

Nathanson provides no analysis to support this conclusion and it is not supported by the rules of statutory construction. As *Levy-Zentner* explained, "the language of section 3288 is expressly limited to certain types of actions. Section 3287[(a)] applies by its terms without restriction to 'Every person who is entitled to recover damages' . . . . [Section 3287(b)] is expressly limited to 'Every person who is

entitled . . . to receive damages based upon a cause of action in contract . . . .' . . . Sections 3287 and 3288 were adopted from the same draft based on the Field's Draft and at the same time. Accordingly, under the usual rules of statutory interpretation, we can reasonably assume that if the Legislature had intended to limit section 3287[(a)] to certain actions only, it would have specifically so stated, as it did in section 3288 and more recently enacted [section 3287(b)], which is limited to causes of action in contract." (*Levy-Zentner*, *supra*, 74 Cal.App.3d at p. 796, italics omitted.)

Only one case has cited *Nathanson* for the foregoing proposition in the past 60 years (*Pepitone v. Russo* (1976) 64 Cal.App.3d 685, 690), and that case too provided no analysis to support the conclusion. We therefore join the Ninth Circuit in declining to apply *Nathanson* because it is inconsistent with the California Supreme Court's interpretation that section 3287(a) applies when a plaintiff's damages are certain or capable of being made certain regardless of the nature of the plaintiff's claim. (*Parvin v. Davis Oil Co.* (9th Cir. 1979) 655 F.2d 901, 904-905, citing *Tripp*, *supra*, 17 Cal.3d 671, and *Mass*, *supra*, 61 Cal.2d 612.)

Finally, in their reply brief the Corks for the first time argue Plaintiffs are estopped to raise the issue because their counsel told the jury they were not seeking prejudgment interest. The Corks forfeited this argument by failing to raise it in their opening brief. (*Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1274 [argument in reply brief forfeited on appeal where plaintiffs failed not only to present issue in opening brief but to present it to trial court].) Moreover, the Corks cite no authority to show or explain how Plaintiffs' argument to the jury affected their statutory right to obtain prejudgment interest from the trial court based on the certainty of their damages. The Corks contend Plaintiffs' argument convinced the jury to award Plaintiffs the full amount of their deposits, but fail to explain how the jury could have awarded any lesser amount based on Plaintiffs' liability theories. The Corks also ignore

that Plaintiffs' trial brief advised them that Plaintiffs would seek an award of prejudgment interest from the court after the jury returned its verdict.

E. *The Corks Forfeited Their Claim of Judicial Misconduct*

As part of their statement of procedural history, the Corks suggest the trial court engaged in judicial misconduct in its treatment of Gateway's counsel throughout the trial. The Corks argue the court's treatment of Gateway's counsel necessarily prejudiced the jury against them as Gateway's codefendants and employees. The Corks forfeited this argument by failing to raise it in the trial court and it nonetheless lacks merit.

A party forfeits a claim of judicial misconduct by failing to object to the conduct and seek appropriate relief in the trial court, such as a mistrial or new trial. The party may not ignore the conduct, await the trial's outcome, and then raise the claim on appeal. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 269; *Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 85-86; *Marini v. Dept. of Alcoholic Beverage Control* (1960) 177 Cal.App.2d 785, 787.) Here, the Corks contend the judicial misconduct occurred throughout the pretrial proceedings and the jury trial, but they did not object or seek any relief from the trial court based on the alleged judicial misconduct. They therefore waived this contention.

The Corks' claim also fails on the merits. The vast majority of interactions between the trial judge and Gateway's counsel that the Corks cite as instances of judicial misconduct occurred outside the presence of the jury, and therefore could not have prejudiced the jury against Gateway or the Corks. Our review of the instances the Corks cite that occurred before the jury reveals no instances of judicial misconduct. That conclusion is confirmed by Gateway's failure to assert any claim of judicial misconduct either in the trial court or on appeal.

III

DISPOSITION

We affirm the judgment in all respects except the amount of punitive damages. We modify the judgment to reduce the punitive damages award against Gateway to $360,000—$300,000 to Future Growth and $60,000 to Tafea—provided Plaintiffs file a timely consent to such reduction under California Rules of Court, rule 8.264(d). If Plaintiffs do not file a consent within the time allowed, we reverse the judgment with regard to the amount of punitive damages only, and remand for a new trial solely on that issue. Each side shall bear its own costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.