2d Civil No. B142432

STATE OF CALIFORNIA

COURT OF APPEAL

SECOND APPELLATE DISTRICT

DIVISION FOUR

PHILLIP ALEXANDER, an individual and
DIANE N. ALEXANDER, an individual,

Plaintiffs/Respondents,

vs.

FARMERS GROUP, INC., et al.,

Defendants/Appellants.

Appeal from Los Angeles Superior Court
Honorable Ernest Williams
Honorable John W. Ouderkirk
Los Angeles Superior Court Case No. BC147454

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Plaintiff Phillip Alexander claims that almost twenty years ago he was induced to leave his position as an insurance sales agent to run a district manager agency overseeing other sales agents. When that district agency contract was terminated after a dozen years, Alexander sued. He claimed that he was fraudulently induced to enter into the district manager agency contract at the outset.

This Division's precedent, *Magpali v. Farmers Group, Inc.*, holds that an insurance agent's cause of action for fraudulent inducement accrues when the agent leaves his initial position and learns of the alleged falsity of the representations. The evidence is undisputed that Alexander actually knew of (and indeed complained about) everything that he now claims was misrepresented to him more than three years before he filed his complaint. His whole fraud action, therefore, was barred by the statute of limitations as a matter of law.

Making matters worse, the trial court refused to allow the defendants even to try their statute of limitations defense to the jury. Instead, it ruled that, as a matter of law, a fraudulent inducement claim is timely when filed 14 years after the plaintiff is induced to leave one position for another. On the basis of the statute of limitations alone, the judgment must be reversed.

Untimeliness is not the only defect in Alexander's claim. The centerpiece of his deceit claim was the assertion that he was told that his new district manager agency contract would not be terminated except for good cause. The contract itself, however, *expressly* stated that it could be terminated on 30 days notice *without cause*. The claimed cause-only termination promise contrary to the written contract's provision for termination without cause, was the 800 pound Gorilla that dominated the trial.

Without his cause-only representation claim, Alexander had no case. With it, the parol evidence rule and the justifiable reliance requirement barred his claim. For this reason as well, the judgment should be reversed with directions for entry of judgment in the defendants' favor or at a minimum for retrial.

Even the damages awards were laced with prejudicial error. Alexander's claim of economic injury was *expressly* based on his counsel's

assumptions in closing argument that had no basis in the record. Those assumptions included steadily increasing income and great longevity had he remained a sales agent. The emotional distress award is equally flawed, premised not on any fraudulent inducement, but solely on his years-later treatment as a district manager.

Even more flawed is the $12.5 million punitive award. The jury ambiguously found only that the "defendant" engaged in malice, oppression, or fraud, without specifying which of the seven defendants that finding applied to. But Alexander then sought and was awarded punitive damages against only one defendant, Farmers Group, Inc. Even more striking, the jury never found and the trial court refused to instruct—despite Group, Inc.'s request—that it had to find malice, oppression, or fraud perpetrated by an officer, director, or managing agent as Civil Code section 3294, subdivision (b), requires.

And, in assessing a punitive amount, the jury never evaluated the reprehensibility of the defendant's actions *relative to* other acts deserving of punishment as required by both California and United States Supreme Court decisions. At the same time, the trial court expressly precluded any defense evidence of the deterrent effect the award in this case would have other than evidence of the defendant's admittedly substantial wealth. These prejudicial errors as well require reversal of the punitive damage award.

For all of these reasons as well as those discussed below, the judgment should be reversed with directions to enter judgment on the tort claims in defendants' favor. At a minimum, the judgment should be reversed for a new trial on liability, compensatory damages, and punitive damages.

STATEMENT OF FACTS

A. Alexander Is Recruited To Become A District Manager.

Alexander was a successful insurance sales agent. (RT 996.) He became an agent for the defendant insurance entities (collectively "the Companies").[1] (RT 3911, 3914.) Alexander's district manager told him

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[1] Defendants are commonly managed insurance entities (collectively, the (continued...)

that he would enjoy the district manager agency position and that he would be naturally good at it. (RT 3925-3927.)

Alexander then discussed the district manager agency position and its governing contract, the District Manager Appointment Agreement ("the Agreement"), with Michael Bigley, a regional sales manager, Bigley's successor Stan Bergstrom, and Paul Whealen, the regional manager above Bergstrom. (RT 1055, 3926-3928, 983.) According to Alexander these three regional employees made false representations to him about the Agreement. (RT 3932-3934.) None of them had the authority to appoint Alexander to a district manager position, but could only make recommendations. (RT 988, 1056, 1063, 3931.)

B. The Alleged Oral Promises.

Alexander acknowledged that the oral statements set forth below were not in his written contract, the Agreement, but he believed them to be promises to him, and he claims he relied upon them. (RT 4626-4627.)[2]

1. *Alleged promise of no termination without cause.* Alexander was reluctant to sign the Agreement because it provided for no-cause termination; he asked Bergstrom and Whealen to put something in writing about a for-cause requirement for termination. (RT 3951-3954.) Bergstrom and Whealen declined to do so saying that they had other candidates for the district manager position. (*Ibid.*) Nonetheless, they assured Alexander that they had never terminated a district manager without cause and that if a problem developed it would be solved internally by moving the district manager "inside the company" or by having the district manager become a sales agent again. (*Ibid.*) Whealen told Alexander that in the time that Whealen had been a regional manger, no district manager had ever been terminated. (*Ibid.*)

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[1] (...continued)
"Companies) and an entity, Farmers Group, Inc. ("Group, Inc."), that performs some management services for them. Distinctions between the Companies are not material to this appeal. For most, but not all, purposes, the distinctions between the Companies and Group, Inc. are not material. They are collectively referred to as "defendants."

[2] Defendants denied that the claimed promises were made.

2. *Alleged promise that Alexander's income would depend entirely on his own efforts to motivate and train agents.* Alexander's "understanding" was that how much he made was entirely up to him and depended only on how many new agents he recruited and how he trained and motivated his agents. (RT 3947-3948.)

3. *Alleged promise of ability to recruit agents.* Bigley and Whealen indicated to Alexander that he would be able to recruit agents acceptable to the Companies without limitation in their number. (RT 3938-3939.)

4. *Alleged promise that the Companies would not withdraw insurance products unless it was done in a manner that would be acceptable to all parties.* Bergstrom and Whealen told Alexander that it was the Companies' corporate responsibility to the agency force, as well as district managers, to maintain an active presence in the marketing areas they were already in, such as the auto, homeowner, and commercial markets. (RT 3948-3949.) They told him that to their knowledge, the only business the Companies had gotten out of occurred before "their time" and involved discontinuing the writing of long-haul trucking companies. (RT 3944.) Alexander's *understanding* was that none of these markets could be frivolously or capriciously changed and that it would only be done in a "manner acceptable to all parties." (RT 3948-3949.)

5. *Alleged promise of no financial obligation for expenses other than those incurred to maintain a district office.* Alexander *understood* that his expenses as a district manager would basically be the same as for an agent but for more people. (RT 3946-3947.)

6. *Alleged promise of no reporting requirements.* Alexander never understood what was meant by a profit and loss statement and didn't know what Bergstrom and Whealen were talking about when they explained a district manager's reporting obligations (RT 4370-4373), but he was told that good district managers maintained good records on agent performance, sales, claims and related items. (RT 3943-3944.)

7. *Alleged promise that the Companies would establish only "easily obtainable" goals and objectives.* (RT 3941-3942, 4393-4399.) Alexander was told that the "goals and objectives" established by the Companies under the Agreement were easily obtainable. (RT 3941-3942.)

C. The Written Terms Of The District Manager Agreement, Some Of Which Contradict The Claimed Oral Promises.

On January 11, 1982, Alexander signed the Agreement. (Appellants' Appendix ["AA"] 59[3]; RT 3960.) Under the Agreement Alexander was an independent contractor to be paid a commission, or "overwrite," on each sale made by his agents. (AA 59 [1255].) Upon termination, Alexander was entitled to a "contract value" based on the number of policies his agents had in force and his years as a district manager. (AA 59 [1258].) An enhanced contract value was to be paid if he became disabled. (*Ibid.*)

The Agreement also contains provisions directly contrary to what Alexander claims he was orally promised:

1. The Agreement could "be cancelled without cause by either the District Manager or the Companies on 30 days written notice." (AA 59 [1256, ¶ D].)[4]

2. Alexander agreed to "maintain adequate records, including a monthly profit and loss statement, as may be required by the Companies," and make them "available for audit." (AA 59 [1256, ¶ B.4].)

3. Alexander agreed to "conform to all regulations, operating principles and standards of the Companies." (AA 59 [1256, ¶ B.3].)

An integration clause warned that prior representations could not be relied upon; instead, the "Agreement supersedes and takes the place of any and all prior agreements, written or otherwise . . . ." (AA 59 [1260, ¶ J]; see RT 4329- 4330.)

D. Alexander Becomes Aware That The Companies' Requirements Are Contrary To The Alleged Oral Representations.

Reporting Requirements. From 1982 on, Alexander knew that the Companies monitored his success in production and agency development reports and expected him to meet quotas. (RT 4340.) From at least early

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[3] The Appellants' Appendix is cited by tab number and page number, when applicable. Thus AA 59 [1255] refers to page 1255, tab 59 of the Appellants' Appendix.

[4] The Agreement also provided that the Companies could cancel without notice if any of six enumerated events occurred. (AA 59 [1256, ¶ D].)

1983 he was required to make progress reports that he believed violated the Agreement. (RT 4354-4376; AA 90.)

At the end of 1991, the Companies introduced the "Distribution System 2000" program imposing quarterly reporting requirements on district managers. The program became operative sometime before April 1992. (RT 4225, 4351-4363, 4561-4566.) Alexander felt at the time that this program violated the Agreement. (RT 4226-4227.)

Financial Obligations. By 1983, within a year of signing the Agreement, Alexander had discovered that the Companies would require him to assume financial obligations for each new agent by signing a "participation agreement." (RT 4337-4339.)

Monitoring and Goals. Initially, Alexander's district had problems with profitability. In 1984, for example, Alexander's district was placed on a priority program for additional monitoring due to unprofitablity. (RT 4382; AA 66.)

In January 1990, Alexander wrote to regional management expressing his concern about the goals being established by the Companies. (AA 83; RT 3979-3984.) He expressed concern about whether a particular goal could realistically be met. (RT 3982.)

Limitation on Number of Agents. In a memorandum dated November 26, 1991, the Companies told Alexander that after December 13, 1991, the Companies would not accept any new agents from his district in 1992 until the termination of another full-time agent. (AA 88; see RT 2493-2494, 3985-3989.) Alexander understood this to alter what he was promised, and he so informed the Companies. (RT 3985-3989.)

Withdrawal from auto dismantler insurance businesses. In December 1991, Alexander learned that the Companies had decided to withdraw from insuring auto dismantler businesses. (RT 4537, 4001-4007; AA 86.) In 1992, Alexander complained about that decision, but to no avail. (AA 86, 91; RT 4001-4007, 4545.)

E. Alexander's District Manager Expenses.

Before signing the Agreement, Alexander rented office space for himself and his agents. (RT 3960, 3963.) Over the years, he incurred

hundreds of thousands of dollars in operational expenses as a district manager. (RT 4047-4051, 4227-4234; AA 65, 84.)

F. Alexander's Tenure As A District Manager.

For the first eight years, Alexander was happy with his relationship with the Companies. (RT 925-926.) Beginning in about 1990, with the commencement of a new management system by the Companies, a contentious relationship developed and Alexander started to confront the Companies' managers about their decisions. (E.g., RT 4226-4227, 4685-4686, 4689.) The Companies came to view Alexander as disruptive, impolite, and opposed to their management goals. (E.g., RT 1276, 1288-1289, 1578, 1655-1658, 1665, 2265-2266, 2548-2555, 2598-2599, 2795-2798, 5180-5182; AA 60, 63, 87; see also RT 930.) By March 1993, a regional manager wrote to Alexander questioning whether the "relationship continues to be one of good faith," suggesting that it might not be in Alexander's "best interests to continue in [his] present position" and that they meet "to discuss our alternatives." (AA 64.) Alexander viewed that letter as an attack on his continuing as a district manager. (AA 65.) In response, the regional manager reiterated on April 27, 1993, that the prior letter reflected "the opinion that you are not sufficiently meeting your contractual obligations . . . ." (AA 62.)

G. Alexander's Health Problems And Claims For Disability.

Beginning also in 1990, Alexander began experiencing health problems. (RT 4009-4011.) He was under stress from his job and from personal problems (RT 3437-3439, 3441-3444), and in February 1994, he applied for disability (RT 4586-4590; AA 92). In July 1994, his disability carrier found him to be totally and permanently disabled. (RT 4654.)

H. The Companies Terminate Alexander's District Manager Agreement.

The Companies terminated Alexander's tenure as a district manager by notice dated January 6, 1995, giving him 30 days notice in compliance with the Agreement's no-cause termination provision. (AA 79.) The notice also stated cause for the termination, citing Alexander's "inability to

conduct the responsibilities of a District Manager." (*Ibid.*) The effective date of the termination was extended to March 3, 1995. (AA 80.)

PROCEDURAL HISTORY

A. Alexander Files Suit In April 1996.

Alexander filed this suit on April 2, 1996. (AA 1.) He alleged, among other things, that he had been induced (either fraudulently or negligently) to leave his agent position to become a District Manager. (*Ibid.*; see AA 3.) He also alleged that he was contractually entitled to a greater payout upon termination, based on the Agreement's provisions for enhanced payments in the event of the district manager's disability. (*Ibid.*)

B. The First Trial Judge Summarily Adjudicates The Cause-Only Termination Issue But Declines To Enforce The Statute Of Limitations.

Defendants moved to summarily adjudicate the fraud and negligent misrepresentation causes of action as well as whether they owed any duty to terminate the Agreement only for cause. They argued that (1) under the parol evidence rule, the integrated Agreement's express terms barred any reasonable reliance on contradictory or additional oral promises, and (2) the statute of limitations barred the claims because Alexander had discovered their claimed falsity more than three years before filing his complaint. (AA 4, 32 [464, 475-477].)

Concluding that there was no ambiguity, the trial court, Judge John Ouderkirk, found that the Agreement foreclosed any reliance on a promise of cause-only termination. Thus, the trial court held, Alexander could not contend that the Companies could terminate the Agreement for good cause only. (RT B-2.) Judge Ouderkirk further found "that any parol evidence of an alleged implied term, duty, misrepresentation, promise, or fraudulent inducement at variance with this unambiguous and integrated term is barred as a matter of law, and barred by the parol evidence rule." (AA 48 [1131].)

Judge Ouderkirk rejected the statute of limitations argument on the ground that "it wasn't until the occurrence of a variety of other acts and

ultimately its termination that the plaintiff discovered the fraud and the negligent misrepresentation." (RT A-5.)

C. The Second Trial Judge Admits Testimony Regarding A Supposed Cause-Only Termination Promise.

Based on Judge Ouderkirk's adjudication, the defendants moved in limine to preclude evidence of any claimed promise of for-cause-only termination. (AA 18.) The trial court, Judge Ernest Williams, denied the motion, ruling that "the law is all of the facts and statements that led to the inducement of the signing of the contract are admissible to show the state of mind, and also subsequent events are also admissible to show the state of mind." (RT 316.) Defendants' petition to this Court for writ relief and stay was denied on February 18, 2000. (No. B139036.)

Judge Williams allowed Alexander, over objection (RT 904, 917-919), to introduce evidence of the alleged promises of cause-only termination (RT 905-906, 917-919, 3949-3956), and much of the trial was consumed by whether cause existed.[5] Judge Williams refused defendants' proffered instruction that liability could not be based on any promise of cause-only termination. (RT 5750-5755; AA 97 [1475].) Alexander's counsel argued the claimed promise of cause-only termination in his closing summation. (RT 6049, 6051-6052.)

D. The Damages Evidence.

As economic damages, Alexander claimed the difference between the income he had made as a district manager and what he asserted he would have made had he remained a sales agent. (E.g., RT 6078.) He presented no expert testimony on his likely income as a sales agent, however. (See RT 320-329.)

Alexander presented evidence of the gross incomes for various agents in the district from 1990 to 1994. (AA 81 [1362], AA 89.) The only other evidence on the subject was that in 1981 he had gross income of about $90,000 per year as a sales agent (RT 3913-3925); in 1982 he expected he

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[5] E.g., RT 1202-1203, 1235, 1272-1278, 1286-1287, 1317-1324, 1327-1328, 1605-1606, 1624-1626, 1650-1670, 3022-3027, 3076-3078, 3635-3637.

would have made between $96,000 and $120,000 as a sales agent (RT 3925); and in 1994-1995 the top producing agent in his district (who was bringing in twice the new business of any other agent in the district) made $300,000 and at the time of trial, in 2000, was making $400,000 (RT 3717; see RT 3723-3724).

There was no evidence of any sales agent income from 1982 to 1990 or from 1995 to 1999; no evidence of the retirement age of agents; and no evidence whether agents' income remained constant throughout their careers. There was also no evidence that Alexander's 1981 book of business was similar to those of the agents for whom income information had been provided. Nor was any evidence presented about the amount of Alexander's (or anyone else's) expenses as a sales agent.

His counsel argued damages to the jury based on his own "assumption" that Alexander's income would have grown at a constant rate to $250,000 in 1994 (an annual compound increase of over eight percent), that his income would have increased $50,000 (20 percent) over the next six years to $300,000, and that he would have continued to make that income until age 67. (RT 6079-6081.) Based on these "assumptions," his counsel calculated $5,695,000 in gross lost sales agent income. (RT 6081.)

Alexander also claimed that he suffered emotional distress resulting from his conflicts with others at the Companies from 1990 through the Agreement's termination in 1995. (RT 1364, 1367, 1369, 4299-4301, 4304-4305.)

E. The Trial Court Rules That, As A Matter Of Law, The Statute Of Limitations Could Not Apply.

In addressing the special verdict form, the trial court held that the statute of limitations defense could not apply because (1) as a matter of law, Alexander could not have suffered any damage until he was terminated as a district manager (RT 5800 ["I'm saying that it (the statute of limitations) doesn't run until the 'defendant' was fired. The plaintiff"]); and (2) as a matter of law, the statute of limitations *first* began running from the regional sales manager's April 27, 1993 letter to Alexander (RT 5803). No one previously argued that the April 27 letter had any statute of limitations relevance. That letter was the first document after the April 3, 1993, statute

of limitations cut off date. The trial court precluded the presentation to the jury of any defense as to the statute of limitations. (RT 5803-5804.)

F. The Special Verdict Form.

Defendants proposed a special verdict form that named only Group, Inc. for Alexander's tort claims. (AA 102 [1536, 1545].) Alexander proposed and the trial court adopted a shorter BAJI-model special verdict form that listed all defendants but referred only generically to "defendant" in its findings. (AA 103; RT 5787-5792.) That special verdict form also omitted any finding as to whether any officer, director, or managing agent was responsible for malice, oppression, or fraud. (AA 106; compare AA 102 [1546].)

G. The Liability And Compensatory Damages Verdict.

Using plaintiff's verdict form, the jury found "defendant" liable for fraud/intentional misrepresentation, fraud/concealment, fraud/false promise, negligent misrepresentation, and breach of contract. (AA 103 [1554-1561]; RT 6905-6913.) It found clear and convincing evidence that "defendant" committed malice, oppression, and fraud in the conduct upon which the jury based its finding of liability for intentional misrepresentation. (AA 103 [1561-1562]; RT 6915.) It was not asked to find nor did it find that the malice, oppression, or fraud had been committed, approved, directed, or ratified by any officer, director, or managing agent. (AA 103.)

For the tort claims, the jury found $5,695,000 in gross economic loss. It was instructed to subtract as a set-off the stipulated amount that the Companies had paid Alexander as a district manager, $3,205,051, to arrive at a "Net Economic Loss"; however, it calculated that number to be, $2,500,000, the amount Alexander's counsel had argued, some $10,051 more than simple arithmetic would indicate. (AA 103 [1561]; see RT 6081, 6914.) The jury also awarded another $2,500,000 in tort damages for "emotional distress (non-economic) loss." (RT 6915; AA 103 [1561].) Finally, the jury determined that Alexander had been totally disabled on the effective date of the Agreement's termination, March 3, 1995. (AA 103 [1560].) The parties stipulated that the trial court would calculate the

additional amount due to Alexander under the disability provisions of the Agreement. (RT 5811.)

Alexander then dropped his tort claims against the Companies, pursuing them only against Group, Inc. (RT 7206.)

H. Punitive Damages.

The trial court instructed the jury to determine whether to award punitive damages against Group, Inc. only. (RT 7223; AA 97 [1443].)

1. The Punitive Damage Jury Instructions.

During the liability phase of the trial (*before* Alexander dropped his tort claims against the Companies), the trial court instructed the jury as to what constituted malice, fraud and oppression. (RT 6033-6034.) It also instructed that "[a]ny act or omission of an officer or employee within the scope of authority or employment is in law the act or omission of [the defendant] corporation." (RT 6029; AA 97 [1436].) The trial court refused to instruct the jury, despite defendants' request (AA 97 [1502]), that in order to impose punitive damages it had to find that any act of malice, fraud or oppression was committed, approved, or ratified by an officer, director, or managing agent, as required by Civil Code section 3294, subdivision (b).[6]

2. The Trial Court Bars Group, Inc. From Presenting Any Evidence Other Than Its Wealth.

During the punitive damages phase the trial court refused to allow Group, Inc. to introduce evidence other than its wealth; it held that "the only thing that we are talking about is the wealth here." (RT 7217; see also 7218-7219.) In particular, it refused to allow Group, Inc. to present evidence that its senior management would scrutinize the compensatory award and would thereby already receive a "message." (RT 7218-7220.) The only evidence that the trial court permitted was Group, Inc.'s net worth as of December 31, 1999, about $7 billion. (RT 7212.)

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[6] The trial court instructed the jury when an employee could be considered to have acted in a "managerial capacity." (RT 6033-6034.) That definition, however, was not referenced in any other instruction or finding.

3. The Trial Court Refuses To Instruct The Jury Regarding Relative Reprehensibility.

The trial court directed the jury to consider the reprehensibility of the conduct in determining the amount of damages that would have a deterrent effect. (RT 7223.) But it refused to instruct that the reprehensibility test requires the jury to consider the reprehensibility of Group, Inc.'s conduct *relative to other types of conduct deserving of punitive damages.* (RT 7202-7204; AA 97 [1506E].)

4. The $12.5 Million Punitive Damage Award.

By a 9-3 margin, the jury assessed $12,500,000 in punitive damages against Group, Inc. (RT 7503-7505; AA 106.)

I. Judgment, Post-Trial Motions And Appeal.

Judgment was entered on April 17, 2000 for $2.5 million economic damages, $2.5 million emotional distress damages, and $12.5 million punitive damages, for a total of $17.5 million against Group, Inc. only. (AA 113 [1689].) In addition, the judgment awarded breach of contract damages against the Companies for $190,126.06 including prejudgment interest to April 1, 2000. (*Ibid.*) Notice of entry of judgment was mailed on April 18, 2000. (AA 116.)

Fourteen days later, on May 2, 2000, defendants timely moved for a new trial and for judgment notwithstanding the verdict. (AA 117, 118.) Among other grounds, defendants asserted that the jury's compensatory damages award was excessive and that the statute of limitations and parol evidence rule barred Alexander's deceit claims. (AA 117-119.) The trial court denied both motions on June 7, 2000. (AA 126.)

J. Statement Of Appealability.

Defendants timely noticed this appeal from the judgment and from the denial of their motion for judgment notwithstanding the verdict on June 19, 2000. (AA 127; Cal. Rules of Court, rules 2 and 3.)[7] This appeal

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[7] Notice of appeal was filed effectively within 60 days of the notice of entry of judgment (the 60th day falling on a Saturday) and within 30 days of (continued...)

is from a judgment fully disposing of all claims between these parties in this action. (Code Civ. Proc., § 904.1.)

LEGAL ARGUMENT

I. THE STATUTE OF LIMITATIONS BARS ALEXANDER'S DECEIT CLAIMS BECAUSE HE WAS INJURED BY AND ADMITTEDLY KNEW OF ANY FALSITY MORE THAN THREE YEARS BEFORE FILING SUIT.

Alexander's claims for fraud and misrepresentation are woefully stale. They stem from representations allegedly made in 1981 and 1982 to induce Alexander to give up his sales agent contract and to enter into the Agreement in January 1982. But he took advantage of the Agreement for over a decade before filing suit on April 2, 1996, more than 14 years after the alleged representations. (AA 1.) His suit was far too late.

The relevant limitations period is three years from discovery. (Code Civ. Proc., § 338, subd. (d); *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482.) His claim ripened in 1982 when he left his sales agency to accept the district manager agency. He admittedly recognized well before April 2, 1993, that each of the alleged representations was false. As a matter of law, the statute of limitations bars Alexander's claims. (*Carlson v. Blatt* (2001) 87 Cal.App.4th 646, 649 [statute of limitations determined as a matter of law]; *Magpali v. Farmers Group, Inc., supra*, 48 Cal.App.4th 471 [nonsuit affirmed based on statute of limitations].)

A. Alexander's Deceit Claims Ripened When He Gave Up His Sales Agency To Become A District Manager.

As a matter of law, Alexander's deceit claim came into being when he gave up his sales agency to become a district manager. He claimed that the defendants deceptively induced him to leave his position as a sales agent and to instead enter into the Agreement. (RT 3957-3959, 6048, 6077-6078.)

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[7] (...continued)
the denial of the post-judgment motions.

In the trial court, Alexander argued that he did not suffer any damage from the fraud until the Companies terminated the Agreement in 1995. (E.g., RT 5799-5800; AA 120 [1781].) The trial court agreed, holding that Alexander's deceit claims did not accrue until then. (RT 5800; RT A-5.)

In *Magpali v. Farmers Group, Inc.*, *supra*, 48 Cal.App.4th 471, this Division rejected Alexander's theory under identical facts. There, a former insurance sales agent sued the Companies and Group, Inc. for fraudulently inducing him to leave his prior employment to become a full-time sales agent. This Court held that the agent's claim existed upon leaving one position for the other, and that the limitations period therefore began to run when the plaintiff discovered (or reasonably should have discovered) that the representations were false:

> "By April of 1989 at the very latest, [plaintiff] was informed of the existence of the allegedly concealed program and its effect on his ability to sell Farmers insurance. He had already left his position with [his prior employer], suffering the alleged damage. Since he did not file the complaint until July of 1992, more than three years later, the claim was [time] barred." (*Id.* at p. 483.)

Magpali expressly rejected the theory that Alexander's damages did not accrue until his tenure as a district manager was terminated: "[T]he damages do not arise from the loss of the position with Farmers, as [plaintiff] suggests in his brief, *but from the loss of the previously held position which the agent was induced to leave.*" (*Id.* at p. 484, emphasis added.)

By its very nature, a fraud in the inducement claim comes into being upon the plaintiff's reliance on the claimed misrepresentation:

> "[T]he tort of fraud in the inducement is complete the moment the plaintiff suffers reliance damage by leaving his previous employment. The only reason the statute of limitations does not accrue immediately is that plaintiff is presumably ignorant of the fraud at that point. [Citation.] Once the plaintiff obtains the requisite knowledge, the statute begins to run. *Put in terms of the present complaint, the*

crucial event for accrual purposes is the occasion on which the plaintiff first learns of the [falsity of the representation], not the date on which he is terminated." (*Id.* at pp. 483-484, emphasis added.)

At the latest, Alexander suffered injury and his claim came into being by January 1982—some fourteen years before he filed suit—when he traded the alleged security of his sales agent position for the termination-without-cause world of the Agreement. (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 648-649 [damages for fraud in the inducement include loss of security and income associated with former employment].)

In fact, that's exactly what Alexander argued to the jury.[8] His theory from the outset was that he was damaged by the loss of income from "being induced to leave [his] lucrative position" as a sales agent. (RT 938.) He asked the jury to award damages on that theory "since this was fraud to induce him to leave his position as an agent, he would be entitled to what he would have made as an agent *from 1982* through the present and beyond." (RT 6078, emphasis added; see RT 6079.) The jury did so awarding the *exact* number his counsel suggested. (Compare RT 6081 with AA 103 [1561].) Alexander not only allegedly suffered injury as early as 1982, but he also sought and recovered damages for that supposed injury.

Alexander also admittedly incurred out-of-pocket expenses, beyond those of a sales agent, in reliance on the Agreement well before 1993. For example, even before 1982, he incurred additional expenses in preparing to open his district manager's office and renting office space for himself and his sales agents. (RT 3960, 3963; see RT 3946-3947.) His district manager operational expenses over the years amounted to hundreds of thousands of dollars. (RT 4047-4051; see RT 4227-4234 [Alexander put substantial funds into his district]; AA 65 [1303] [as of 4/13/93 Alexander had expended substantial sums and incurred significant debt as a district manager].) Even his health problems—which Alexander blamed on the

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[8] "[W]hile briefs and arguments are outside the record, they are reliable indications of a party's position on the facts as well as the law, and a reviewing court may make use of statements therein as admissions against the party." (*DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn. 3.)

defendants and for which he recovered substantial noneconomic damages—commenced in 1990, years before the April 1993 statute of limitations deadline. (RT 4009-4011, 4026-4028 [The Companies' 1992 auto dismantler decision caused him stress]; see RT 938 [counsel asserts that emotional distress began in 1990].)

These injuries alone suffice for statute of limitations purposes. (*Spellis v. Lawn* (1988) 200 Cal.App.3d 1075, 1081 ["the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date," citations and emphasis omitted]; *Miller v. Lakeside Village Condominium Assn.* (1991) 1 Cal.App.4th 1611, 1623 ["The extent of damages is not an element of a cause of action in tort, and the general rule is that the cause of action is complete on the sustaining of 'actual and appreciable harm,' on which the recoverable damages would be more than nominal," citations omitted].)

A plaintiff such as Alexander "cannot be permitted to rest on his rights, shifting to defendant the risk and expense" of the Agreement's profitability, asserting his claim only when the Agreement no longer favors him. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 515.) The injuries that Alexander claimed resulted from the defendants' wrongdoing unquestionably occurred, if at all, well before 1993. Alexander, in fact, recovered damages for those pre-1993 injuries. The statute of limitation barred his claims so long as he discovered or should have discovered the falsity of representations before April 1993.

B. Alexander Knew Or Reasonably Should Have Known Of The Falsity Of Each Of The Claimed Misrepresentations More Than Three Years Before Filing Suit.

Because they existed before April 1993, Alexander's claims can only be timely if he did not discover and should not reasonably have discovered the falsity of the pre-1982 representations assertedly made to him until April 1993 or later. That is not even plausibly the case. The undisputed evidence is clear; he knew of the fraud claims well before April 1993.

The three-year limitations period begins to run when the plaintiff either discovers or through the exercise of reasonable diligence should have discovered the falsity of the representations. A "requirement of 'reasonable

diligence' in discovering the facts . . . [is] read into the 'discovery' provision of the statute of limitations for tort actions based on fraud as set forth in Code of Civil Procedure section 338, subdivision 4 [now subdivision (d)]. . . . 'The statute commences to run . . . after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry.'" (*People v. Zamora* (1976) 18 Cal.3d 538, 561-562, citations omitted; see *Kline v. Turner* (2001) 87 Cal.App.4th 1369 [plaintiff on notice when it knew that defendant had paid the wrong person even though it did not know why].)

This rule does not depend on Alexander's awareness of a legal remedy; a "plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory" for wrongdoing. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397, quoting *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110.) Thus, once Alexander knew or even should have suspected that the representations made to him were false, the statute began to run.

It is undeniable that Alexander knew or reasonably should have known the falsity of each of the representations he alleges well before April 1993.

- *No termination without cause.* The Agreement undeniably put Alexander on notice that he could be terminated without cause, because it expressly says that. (AA 59 [1256, ¶ D].) Alexander understood that; he even raised the point before signing the Agreement. (RT 3951-3954.) And he admitted as much in his papers, arguing that "Farmers' true intention—to reserve the right to terminate a District Manager's appointment for other than cause—was immediately manifested by the language of the DM Agreement itself." (AA 120 [1785].) Likewise, from the outset he knew or should have known that the "Agreement supersedes and takes the place of any and all prior agreements, written or otherwise, between the District Manager and the Companies, or any of them," and that it could only be altered by a signed writing. (AA 59 [1260, ¶ J]; RT 4329-4330.)

- *Alexander's income would depend entirely on his own efforts.* In a November 26, 1991 memorandum, the Companies told Alexander that he could add no new agents. (AA 88; RT 3985-3896.) Alexander then

believed that that altered the Agreement, and he "told them so." (RT 3985-3989, 4566-4568.) At least by late 1991, Alexander therefore knew that his efforts alone would not determine his income, and he recognized and articulated that this constituted a breach of what he claimed had been promised to him.

- *Ability to recruit agents.* For the same reasons, Alexander was aware by late 1991, at the latest, that any alleged promise of unfettered ability to recruit agents was false. (RT 2493-2494, 4042-4043, 4569-4571; AA 88; see *Magpali v. Farmers Group, Inc., supra*, 48 Cal.App.4th at p. 483 [agent necessarily knew about supposedly concealed program when he was subjected to it].)

- *The Companies would not withdraw insurance products except in a manner acceptable to all parties.* Alexander admitted that he knew in the mid-1980's that the Companies withdrew from several lines of insurance. (RT 4368-4370.) By December 1991, he knew that the Companies were withdrawing from the auto dismantler's business, and in early 1992, he expressed his displeasure to no avail. (AA 86, 91; RT 4001-4007, 4537, 4545.) Alexander believed at the time that this violated the Agreement. (RT 4685-4686.) By then, at the latest, Alexander therefore knew that the Companies could discontinue and in fact had discontinued writing particular insurance lines over protest.

- *No financial obligation for expenses except to maintain a district office.* Alexander conceded that within a year of signing the Agreement he had discovered that the Companies required him to assume financial obligations for his agents by signing "participation agreements." (RT 4337-4339.) His own papers admit that the evidence showed additional expenses were assessed to him "very soon after he assumed the District Manager position." (AA 120 [1785].)

- *No reporting requirements.* Alexander was aware almost from the outset that the Companies imposed reporting requirements on district managers. He conceded that from at least early 1983 he was required to give progress reports that he believed violated the Agreement. (RT 4354-4376, 3967; AA 82.) He also conceded to being aware that quarterly reporting requirements would be imposed under the "Distribution System 2000" program, which became operative before April 1992. (RT 4225,

4351-4363, 4561-4566.) He believed at the time that the Distribution System 2000, with its imposition of a quarterly reporting requirement, violated the Agreement, and he "immediately" (but fruitlessly) demanded supporting legal authority. (RT 4561-4566, 4226-4227; AA 61.)

- *Goals and objectives would be "easily obtainable."* Long before April 1993, Alexander discovered, or had reason to suspect, that the Companies would not establish easy-to-meet quotas. As early as 1984, he was necessarily aware that the Companies set goals and objectives that they expected district managers to achieve, for at that time his district was placed on a "priority district program" for additional monitoring because it was unprofitable and failed to meet improvement goals. (RT 1218-1221, 4382; AA 65A, 66; *Magpali v. Farmers Group, Inc.*, *supra*, 48 Cal.App.4th at p. 483 [agent necessarily knew about supposedly concealed program of limited underwriting authority once he was put in it].) Alexander admittedly knew, from 1982 on, that the Companies expected him to meet quotas and were monitoring his success monthly through production and agency development reports. (RT 4340.) Indeed, in 1990, Alexander wrote to management about the achievability of the Companies' goals (AA 83; RT 3979-3984), expressing concern about whether a particular goal could be met (RT 3982).

There can be no reasonable debate under this evidence. Alexander knew, or as a matter of law reasonably should have known, years before April 2, 1993 that each of the claimed misrepresentations was false. The statute of limitations, thus, barred his claims on each ground, and judgment should have been entered for the defendants. (*Magpali v. Farmers Group, Inc.*, *supra*, 48 Cal.App.4th at pp. 484-485.)

C. The April 27, 1993 Letter Relied On By The Trial Court Does Not Establish When Alexander Knew Or Should Have Known That The Alleged Representations Were False.

The trial court ruled, as a matter of law, that the *first* event that could have afforded Alexander notice of the falsity of any representations was an April 27, 1993 letter to him from a regional sales manager, Paul Hopkins. (RT 5803.) That conclusion and ruling are without apparent basis, and

Alexander himself had never made such an argument. Nor could he have logically done so.

The April 27, 1993 letter was the *third* in a series between Alexander and Hopkins. In it Hopkins merely reiterated and explained a previous letter dated March 19, 1993. (AA 62.) If the April 27, 1993 letter afforded notice to Alexander, then so too did the March 19, 1993 letter, rendering Alexander's claims untimely. Indeed, Alexander's reply to the March 19 letter characterized it as an attempt to interfere with his contract rights. (RT 4049-4050; AA 65.)

More important still, neither the April 27, 1993 letter nor the preceding correspondence has anything to do with the supposed representations that Alexander claims led him to enter into the Agreement. And nothing in the April 27, 1993 letter can negate Alexander's notice and knowledge of his claims well before then as discussed above. The April 27, 1993 letter cannot possibly support the trial court's ruling precluding the statute of limitations defense.

D. When Wrongful Termination Claims Accrue Is Not Relevant To Fraud-In-The-Inducement Claims.

In opposing the defendants' post-trial motions, Alexander relied on two California Supreme Court cases decided in the wrongful termination context to argue that the statute of limitations for his fraud-in-the-inducement claims had not accrued. (*Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 737-739; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479.) He misreads those authorities. Neither case applies to the accrual date for a fraudulent inducement claim.

Mullins determined "when the statute of limitations begins to run in a *contract* action *based upon constructive discharge*." (15 Cal.4th at pp. 737-739, emphasis added.) Its discussion applied as well to a common law tort claim for *wrongful termination* in violation of public policy. In *Mullins* the Supreme Court held, not surprisingly, that in the case of wrongful constructive discharge the statute of limitations does not begin to run until the plaintiff resigns. But the theory in that case was breach of the contract itself (and of public policy) through termination; it was not, as here, a fraudulent inducement to enter into a contract.

Romano, like *Mullins*, did not involve an action for fraud in the inducement. It too concluded that in an action for wrongful termination—not fraudulent inducement—the statute of limitations runs from the date of actual termination of employment, not from notice of termination. (*Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th 479.)

The distinction is critical for the reasons explained in *Magpali.* In an action arising from an alleged wrongful termination of an employment contract (whether alleged in contract or tort), the wrong and the injury is the termination or breach of the existing contract. But in a fraudulent inducement claim, the wrong and the injury is the *entering into* the contract, not its later breach or termination. A necessary element to the claims in *Mullins* and *Romano* was the plaintiff's discharge or termination. That's not the case here.[9]

Alexander's fraud-in-the-inducement claim was viable, if at all, regardless of whether the Agreement was ever terminated or breached. Alexander had a claim from the outset, as soon as being a district manager required any expenditure or was not as secure or profitable as represented (e.g., because of the termination without cause provision, or the imposition of additional expenses or limitations on the ability to recruit additional agents contrary to what was promised). As a fraud-in-the-inducement plaintiff, Alexander would be entitled to benefit-of-the-bargain damages to the degree that being a district manager was less profitable, or even less secure, than it was represented to be. (AA 97 [1430]; *Lazar v. Superior Court*, *supra*, 12 Cal.4th at p. 646 [damages for both benefit of the bargain

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[9] There is another reason why a wrongful-termination analysis does not apply: Alexander was an independent contractor not an employee. Even if Alexander's tort claims were based on wrongful termination rather than fraudulent inducement, still they would not be timely. A different statute of limitations—the one year limit in Civil Code section 340, subdivision (b)—applies to wrongful termination tort claims, as in *Mullins* and *Romano.* (*Acuna v. Regents of University of California* (1997) 56 Cal.App.4th 639; *Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200; see *Mullins v. Rockwell Internat., Corp.*, *supra*, 15 Cal.4th at p. 736 [not disputed that section 340, subdivision (3) applies to tort claim].) Alexander's claim, filed in April 1996 after his March 1995 termination, would have been untimely on that theory as well.

and "loss of security" of employment recoverable for fraud]; BAJI 12.57; see *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 565-568.)

Alexander's claims were legally viable in January 1982 when he gave up his sales agency contract to enter into the Agreement. Thereafter, he knew or through the exercise of reasonable diligence should have known that the representations on which his claim is based were false more than three years before he filed suit. As a matter of law, the statute of limitations for fraud bars his claims.

E. At A Minimum, A New Trial Is Required On The Statute Of Limitations Defense.

The trial court did not merely decline to hold that the statute of limitations barred Alexander's various deceit claims, it ruled that *as a matter of law* the statute of limitations did not apply. (RT 5803-5804.) It thus deprived defendants of the opportunity even to persuade the jury of the facts triggering the statute of limitations—that before April 1993, Alexander had suffered damages, and that he knew or reasonably should have known the claimed representations were false. Thus, even if the statute of limitations does not bar Alexander's deceit claims as a matter of law, at a minimum the judgment should be reversed to allow the defendants the opportunity to prove that the statute of limitations bars Alexander's claims as a matter of fact.

Because the trial court effectively granted a nonsuit or directed verdict on the defendants' statute of limitations defense, as to this issue the facts must be construed in the light most favorable to *the defendants*, and all permissible inferences in the defendants' favor must be presumed. (*Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1333 & fn. 7.) Under that standard, the facts discussed in section I.A., above, undeniably support a conclusion that Alexander in fact suffered damage from relying on the claimed representations well before April 1993. And under the same standard, the facts discussed in section I.B., above, more than justify a jury's conclusion that Alexander knew of the falsity of one or more of the supposed representations well before April 1993.

Because at a minimum there was evidence that, if believed, would allow (if not compel) the conclusion that the statute of limitations barred one or more aspects of Alexander's claims, the trial court erred in depriving the defendants of that defense, and the error was prejudicial to the defendants. The judgment must be reversed.

II. ESTABLISHED LAW BARS ALEXANDER'S CLAIM PREMISED ON ORAL PROMISES INCONSISTENT WITH THE WRITTEN AGREEMENT.

Even if it did not run afoul of the statute of limitations, Alexander's claim would still be barred. The central theme of Alexander's case was that to induce him to enter into the Agreement, the defendants orally promised something—cause-only termination—directly at odds with the Agreement's express terms. (E.g., RT 6048-6053.) He argued that the oral promise can be inferred to have been false when made *because* it contradicts the written Agreement he then signed. (RT 6069; AA 120 [1785].) Longstanding legal principles, however, bar Alexander's reliance on a supposed oral promise that directly contradicts his integrated written Agreement.

Here, there is no dispute that Alexander claimed an oral promise of cause-only termination that contradicts the express, integrated provisions of the written Agreement. (See RT 6048-6052 [Alexander argued to the jury that what he was orally promised was at odds with the Agreement he signed].) Indeed, the direct contradiction between the supposed oral promises and the express written provisions of the Agreement was the basis Alexander argued as proof of the defendants' fraudulent intent. (*Ibid.*; RT 6070-6071; AA 120 [1785].) As a matter of law, that proof cannot support the judgment for deceit.

A. The Parol Evidence Rule Bars Alexander's Claims That He Was Defrauded By Alleged Oral Promises That Contradict The Explicit Terms Of The Agreement.

Substantive law bars the very theory on which Alexander recovered. The parol evidence rule bars a party from proving or relying on an extrinsic promise, whether oral or written, that contradicts an integrated written

instrument. (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1433-1434; see Code Civ. Proc., § 1856.)[10]

Alexander did not dispute that the oral representations he alleged are directly at odds with the express terms of the Agreement. (RT 6048.)[11] But he theorized, and the trial court agreed, that parol promises contradicting the *express* provisions of a written contract can show fraud in the inducement even if it cannot support a claim for breach of contract. (RT 905-906, 917-919.)

The Supreme Court long ago ruled otherwise. A plaintiff cannot avoid the parol evidence rule simply by claiming that a defendant orally promised something contrary to a written contract's express provisions:

> "For reasons founded in wisdom and to prevent frauds and perjuries, the rule of the common law excludes such oral testimony of the alleged agreement [not to enforce a written contract], and as it cannot be proved by legal evidence, the agreement itself in legal contemplation, cannot be regarded as existing in fact." *(Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263-264.)

Were the law otherwise, the meaning and certainty of written contracts could always be called into question by the simple expediency of claiming a contrary oral misrepresentation.

Pendergrass remains the law. (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 610-612; *Alling v. Universal Manufacturing Corp., supra*, 5 Cal.App.4th at pp. 1436-1437; *West v.*

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[10] Because the parol evidence rule is one of substantive law, evidence contrary to the parol evidence rule cannot support a verdict, whether objected to or not. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23.) In any event, defendants here repeatedly objected to the introduction of the parol evidence. (E.g., AA 18.)

[11] "[T]his is the contract. It's what it says. We don't dispute what it says. What it says in this contract is the contract. No question about it. If that were the contract [he] would never have been district manager. [Alexander] never would have signed that contract without the promises that went along with it." (RT 6048.)

Henderson (1991) 227 Cal.App.3d 1578, 1583-1584; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 418-421.)

There is a narrow exception to the *Pendergrass* rule. When a parol promise is *independent of* or *consistent with* an express written provision — such as a promise about the use to which the agreement will be put or a concealment of some other scheme of which the agreement is an element — the oral promise may be proved. (*Bank of America etc. Assn. v. Pendergrass*, *supra*, 4 Cal.2d at p. 263, accord *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, *supra*, 6 Cal.App.4th at pp. 611-612; *Alling v. Universal Manufacturing Corp.*, *supra*, 5 Cal.App.4th at p. 1437.) But that narrow exception does not swallow the rule. The rule does not allow a claim, such as the one on which the judgment is based, that a party fraudulently induced the contract by making a contrary promise without intention to perform (or concealing an intent not to perform) that promise.

Bernstein v. Financial Indem. Co. (1968) 263 Cal.App.2d 324, 326-327, specifically so holds, on the same facts as here. A plaintiff insurance agent claimed fraud in the inducement by virtue of an oral promise not to terminate the agency even though the written contract provided for termination without cause. The claim could not succeed. "[W]hen [a] promise is squarely against the terms of the contract . . . evidence of such promise can neither be received nor counted on to support a finding of fraud even though it be made with intent on the part of the promissor that the promise will not be kept." (*Id.* at p. 329, citation omitted.)

The centerpiece of Alexander's claim was exactly what *Bernstein* held "can neither be received nor counted on" to support a fraud claim—a promise of cause-only termination when the Agreement expressly permits termination without cause. (See also *Alling v. Universal Manufacturing Corp.*, *supra*, 5 Cal.App.4th at p. 1436 [plaintiff could not prove fraudulent oral promise to fund full amount in business plan where contract expressly gave defendant discretion as to how much to fund]; *West v. Henderson*, *supra*, 227 Cal.App.3d at pp. 1583-1584 [no fraud could be proved from promises that lease would be for five years, plaintiff would only be a guarantor, and landlord would pay for sign, where written lease was for 15 years, made plaintiff a direct tenant, and provided that tenant would pay for sign].)

The thrust of Alexander's case was that he was induced to sign the Agreement by fraudulent promises at odds with its express terms. The parol evidence rule bars his claims.

B. As A Matter Of Law, Alexander Could Not Reasonably Rely On Oral Promises That Contradict The Agreement.

The same result is reached by a parallel analytical route. It is a truism that reasonable reliance is an essential element of any deceit action. A "plaintiff [claiming deceit] cannot recover if his reliance was not justified or reasonable." (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1270 [fraud]; accord *Magpali v. Farmers Group, Inc., supra,* 48 Cal.App.4th at p. 482 [a false promise "must induce justifiable reliance" by plaintiff]; *Pacesetter Homes, Inc. v. Brodkin* (1970) 5 Cal.App.3d 206, 213 [lack of justifiable reliance is fatal to cause of action because justifiable reliance is essential element of fraud]; *Continental Airlines, Inc. v. McDonnell Douglas Corp., supra,* 216 Cal.App.3d at p. 402 [same regarding negligent misrepresentation].)

The rule is that a plaintiff's reliance upon an oral promise that contradicts the express terms of an ensuing contract cannot—as a matter of law—be reasonable. (*Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578, 1589 [reliance on representations contrary to ensuing contract are "unjustified as a matter of law"]; *Hackethal v. National Casualty Co.* (1987) 189 Cal.App.3d 1102, 1111.) This rule is applied in contexts comparable to this case. (E.g., *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 806-807 [plaintiff cannot claim reasonable reliance on a promise of continued employment or contractual relationship where the contract provides for at-will employment]; *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal.App.3d 467, 482 [same], disapproved on other grounds in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654.) A plaintiff cannot reasonably rely on promises such as that an agreement "would have no effect," "did not mean anything," "did not change the terms of their relationship," or were "a mere 'formality' and . . . 'just pro forma,'" because those promises are inconsistent with a contractual no-cause termination provision. (*Marketing West Inc. v. Sanyo Fisher (USA) Corp., supra,* 6 Cal.App.4th at p. 611, internal quotation

marks omitted.) There can be no reasonable reliance on such representations that are "contradicted by the existence of the integrated written agreements providing that appellants could be terminated without cause." (*Id.* at p. 612.)

Here, in light of the express, written no-cause termination clause, Alexander, as a matter of law, could not possibly have reasonably relied on an oral promise of cause-only termination. He was admittedly consciously aware of the no-cause provision in the Agreement and was unsuccessful in his attempt to negotiate something else. (RT 3952-3953.) His own papers admit that the defendants' intention to permit termination without cause was "*immediately manifested* by the language of the DM Agreement itself." (AA 120 [1785], emphasis added.)

Nor could he have reasonably relied on supposed promises of unfettered ability to control his own income or to operate without reporting or oversight. The written Agreement plainly provided that the Companies had "the exclusive right, in their sole discretion, to at any time decrease or otherwise change overwrite rates, schedules or classifications"—the bases on which he would be paid. (AA 59 [1256, ¶ B.5].) And he agreed to conform to the Companies' regulations, operating principles and standards, and to "maintain adequate records, including a monthly profit and loss statement, as may be required by the Companies . . . , and make them available for audit." (AA 59 [1256, ¶¶ B.3, B.4].)

There is no conflict in the evidence. Alexander could not have reasonably relied on the bulk of the claimed oral promises, because they were directly contradicted by the express terms of his written Agreement.

C. The Remaining Claimed Representations Cannot Support The Judgment.

The claimed promises contrary to the Agreement were the heart of Alexander's case. Indeed, he used the contradiction of the Agreement to supply evidence—his *only* evidence—that the promises were fraudulent when made. (RT 6052; AA 120 [1785].) Because "something more than nonperformance is required to prove the defendant's intent not to perform his promise" (*Magpali v. Farmers Group, Inc., supra*, 48 Cal.App.4th at p. 481, citations and internal quotation marks omitted), Alexander needed that

contradiction of the Agreement to create an inference that the promises were insincere and false when made.

The remaining claimed promises simply could not alone support the verdict. First, there was no evidence that those remaining alleged promises were or should have been known by those who made them to have been false when made.

- There is no evidence that *any* representation was made to Alexander about his financial obligations as a district manager; he testified only to his "understanding" (RT 3946), without evidence where his understanding came from or why it was reasonable.

- There is no evidence that those supposedly making factual representations about, for example, only limited withdrawals from insurance markets, the fact that they had not terminated district managers in the past, or that one retiring manager had been accommodated (see RT 3944, 3951-3957), either knew or reasonably should have known that their statements were untrue.

- There is no evidence that those who supposedly made untrue oral representations in 1982 (i.e., Bergstrom, Whealan, and Bigley) could possibly have known or contemplated the management changes commencing eight years later that Alexander claimed violated the oral promises to him.

- According to Alexander's own counsel, the Companies did not breach the claimed oral promises until "about 1990," some *eight years* after the Agreement was signed. (RT 925.)[12] This admission conclusively negates any inference—the inference on which Alexander relies—that the promises were false when made or were not intended to be honored by those who made them.

There is another reason the claimed promises that do not squarely contradict any specific provision of the Agreement cannot support the

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[12] "Nobody had any problems. All these things that had been talked about had been done. He could recruit agents. He had no problem with any of his products. He had all the insurance he could sell. I mean, all of these promises that we had talked about before, *all of them* were met and kept." (RT 925, emphasis added.)

verdict. To the extent some oral representation was not performed (so as to support an inference that it was false when made), it could not have been material. (See *Wilkins v. National Broadcasting Co.* (1999) 71 Cal.App.4th 1066, 1082-1083 [for actionable deceit, the representation must be material].) According to Alexander's own counsel, as noted above, Alexander did not perceive any *material* lack of promised performance until 1990. (RT 925.) If he had, of course, his claim based on the alleged falsity of any such promise would necessarily be barred by the statute of limitations.

Alexander's case boils down to his claim that he was orally promised things that are contrary to the written, integrated Agreement he signed. Under well-established law, that claim cannot support the judgment and the judgment should be reversed with directions to enter judgment in defendants' favor on the tort claims.

D. At Minimum, The Trial Court Prejudicially Erred In Allowing Alexander To Introduce Evidence Of And To Rely On An Oral Promise Directly Contradicting The Written Agreement As A Basis For Liability.

Even if there were evidence that could independently support the verdict, the judgment would still have to be reversed. Alexander's case was fundamentally premised on evidence that should never have been admitted nor allowed to be argued to the jury—evidence directly contrary to the Agreement's express provisions. For example, the trial court erroneously permitted Alexander, over defendants' objections, to repeatedly introduce evidence and to argue to the jury that he had been promised that he would only be terminated for cause. (RT 904-906, 917-919.) That was error and it was prejudicial, shaping the whole case.

The defendants objected from the outset to evidence of any oral promise that would contradict the unambiguous, written language of the Agreement, including the provision for termination without cause. (AA 18.) The trial court held, in no uncertain terms, that such evidence would be admissible. (RT 21, 906, 917-919.) Defendants repeatedly renewed their objections, without success, arguing that whether the Companies either required or had cause to terminate their relationship with

Alexander was irrelevant and violated the parol evidence rule, and that Judge Ouderkirk had previously so ruled. (E.g., RT 3016-3017, 3949-3950; see also RT 3019-3021, 3350-3356, 4301-4303.) The trial court even refused to instruct the jury that it could not award damages for terminating the contract without cause. (RT 5750-5755; AA 97 [1475].)

As we demonstrated above, the parol evidence rule and the requirement of reasonable reliance in deceit actions bar any proof of an oral promise of for-cause-only termination, and bar any claim based on such a promise. The trial court should not have admitted such evidence "for the express purpose of showing a fraudulent oral promise which was directly at variance with the terms of the . . . Agreement. The alleged unequivocal oral promise . . . , elicited in testimony and referred to repeatedly by plaintiffs' trial attorney both in opening and closing argument, varied and contradicted the specific language in . . . the . . . Agreement . . . . The evidence of that alleged promissory fraud was therefore improperly admitted." (*Alling v. Universal Manufacturing Corp.*, *supra*, 5 Cal.App.4th at pp. 1433, 1437.) In its ruling, the trial court also, in effect, improperly reconsidered and rescinded Judge Ouderkirk's binding prior parol evidence ruling. (Code Civ. Proc., § 1008, subd. (a) & (e).)

At a minimum, the defendants, as the parties against whom the evidence was offered, "were entitled . . . to a proper instruction limiting the purposes for which the evidence [might have been] considered." (*Continental Airlines, Inc. v. McDonnell Douglas Corp.*, *supra*, 216 Cal.App.3d at p. 412, emphasis omitted; accord Evid. Code, § 355 [When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly"].) Yet, the trial court denied defendants' request to instruct the jury that liability could not be premised on an oral promise of cause-only termination. (RT 5750-5755; AA 97 [1475].) It was thus error for the trial court both to admit the evidence and to refuse to appropriately instruct the jury as the defendants requested that it could not base any liability or damage determination on claimed oral promises of cause-only termination contrary to the Agreement.

These errors were undeniably prejudicial. From the beginning of the trial, Alexander's central theme was that he had been promised that his

contract could only be terminated for cause, and that the Companies had, therefore, devised a scheme to invent a cause for terminating the Agreement. His counsel espoused and emphasized that theme as his theory of the case in opening statement. (RT 917, 920, 922.) He argued that the cause-only promise was "very important" to Alexander, and in fact induced him to enter into the Agreement. (*Ibid.*) Repeatedly, Alexander sought to elicit evidence that, contrary to the written Agreement, the Companies in fact did require cause to terminate the Agreement. (E.g., RT 1268-1270, 1570, 1582-1583, 1650-1652, 2770-2773, 2795-2798, 3951-3956.) The trial was about the necessity and existence of good cause—the very good cause that the Agreement provided was not required. (See, e.g., RT 2487-2489, 2614-2619, 2881-2883, 3301-3322, 3603-3604, 3613-3618, 3628-3629.)

This improper good-cause issue became Alexander's hook to introduce and argue hot-button emotional evidence, and evidence that was wholly irrelevant under appropriate rulings, because the Companies needed no cause whatsoever to terminate the Agreement. He argued that the defendants did not assist Alexander with his stress disability (e.g., RT 935, 1236-1237, 2285, 2887-2890, 6068-6069) and that they were improperly "building a file" because they needed cause to justify terminating the Agreement (e.g., RT 1575, 1582-1583, 1596-1597, 2459, 2599-2601, 2605-2606, 2621-2622, 2801-2803). He used these invented issues emotionally (RT 6069 ["I'm disgusted. I know it shows . . . . It ticks me off"]), and even to accuse opposing counsel of misconduct (RT 6154-6155). Such conduct—using irrelevant evidence to appeal to the jury's emotions—is exactly what prejudice is about.

In closing argument, Alexander continued to hammer away at the claimed promise not to terminate the Agreement except for cause (what Alexander called the "six [specified] deadly sins"). (RT 6049-6053, 6069, 6076.) Whether cause to terminate (that was irrelevant under the contract) existed became the centerpiece of his argument. (E.g., RT 6053-6061, 6076.)

Thus, the case was hijacked. The trial court's error transformed it from a claim of fraud in inducing a contract that expressly and unambiguously permitted its termination without cause, into a case about

whether Alexander had been promised that the contract could only be terminated for cause, and whether such cause existed. (*Alling v. Universal Manufacturing Corp. supra*, 5 Cal.App.4th at pp. 1438-1439 [erroneous admission of parol evidence prejudicial where parol promise practically only thing plaintiff relied on].)

Given the emphasis that Alexander placed on his improperly introduced for-cause termination issue, there is no room for reasonable debate but that the error was prejudicial—i.e., that there exists a reasonable probability that a different outcome would have obtained in this case had there been no error.[13] Even if the judgment did not have to be reversed with directions to enter judgment in the defendants' favor for the reasons discussed in the preceding sections, it therefore should be reversed and remanded for a retrial on this ground alone.

III. ALEXANDER PRESENTED NO CLAIM FOR FRAUDULENT CONCEALMENT OR FOR A CONTINUING FRAUD.

Despite what he argued to the jury (RT 6048-6052, 6069), Alexander sometimes argued in the trial court (especially after trial) that this case was about fraudulent concealment (RT 305; AA 99 [1514] AA 120 [1777]) and ongoing fraud (RT 4807, 6048), not promissory fraud in the inducement. His reason for so claiming was simple and transparent: He used these theories to avoid the undeniably preclusive effect of the statute of

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[13] See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 [reversible prejudice exists if it "'*seems probable*' that the error 'prejudicially affected the verdict,'" citations omitted, emphasis added]; *id.* at pp. 580-581 [the effect of counsel's argument to jury one factor in establishing prejudice]; *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1162-1163 [same; counsel's argument established prejudice]; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 ["a 'probability' [of prejudice] in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*," emphasis added, citing *People v. Watson* (1956) 46 Cal.2d 818, 837]; *Strickland v. Washington* (1984) 466 U.S. 668, 693-694 [104 S.Ct. 2052, 2068, 80 L.Ed.2d 674] [a "reasonable probability" does not mean "more likely than not," but is present if there merely is a "probability sufficient to undermine confidence in the outcome"]; see *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677 [same standard applies regarding evidentiary error].

limitations and the parol evidence rule. (See AA 120 [1777-1778].) The gambit does not work.

To the extent that his underlying theory is that the defendants concealed their true intentions not to honor their promises (RT 305; AA 99 [1514], AA 120 [1777-1778]), it is just promissory fraud by another name. Nor does he have evidence of any such thing. As his counsel admitted, the Companies *performed* their promises to his satisfaction for eight years. And if it is some hidden scheme to "reserve the right" to terminate the Agreement without cause that he claims was concealed, he is wrong there, too. Nothing was concealed. The right to terminate without cause was expressed in the Agreement that he signed, and he knew it.

This distinguishes *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, *supra*, 6 Cal.App.4th 603, relied on by Alexander in the trial court. (See RT 303, 4801-4808, 8114-8116; AA 120 [1778-1779].) In *Marketing West* the defendant not only misrepresented that the no-cause termination provision would not be enforced (a misrepresentation that the parol evidence rule made non-actionable), but also fraudulently concealed that it already planned the termination and that the new agreement—a substitute for an existing cause-only termination agreement—was the means to achieve that termination. (*Marketing West*, *supra*, 6 Cal.App.4th at pp. 611-612.) But the record in this case contains not so much as a hint of such a scheme. Rather, plaintiff's own case established that for eight years after he entered the Agreement the Companies did not even think of terminating it.

That leaves only a claim that there was a concealed, ongoing fraud—that the defendants concealed from him that they were looking for a reason to terminate the agreement (though under the Agreement they needed no reason). (RT 3013-3017, 3948-3950; AA 120 [1777].) But there's no deceit there; Alexander offered no evidence that he was misled by such a concealed intent to give up anything. By the time the Companies were supposedly looking for a reason to terminate him, almost a decade into the Agreement, Alexander had long ago given up his sales agency. (See *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174 [no fraud where party misrepresents true reasons for terminating at-will contract].) Nor did Alexander present any evidence that he was damaged by such a concealment. His sole

damages theory was that he would have made more money had he remained a sales agent in 1982. And because by March 1993, Alexander knew that the defendants questioned whether their relationship with him should continue (AA 64), the belated fraudulent concealment cannot overcome Alexander's statute of limitations obstacle.

Alexander's only evidence and only claim of damage was that he was damaged by entering into the contract itself. *That* claim is undeniably barred by both the statute of limitations and the parol evidence rule.

IV. THE COMPENSATORY DAMAGE AWARD IS EXCESSIVE.

The jury awarded $2.5 million in economic damages as the difference between what Alexander made as a district manager and what he supposedly would have made had he remained a sales agent, and another $2.5 million for emotional distress he supposedly suffered as a result of the claimed fraud. Neither, however, is supportable.

The economic award is premised on rank speculation, not evidence. And the emotional distress award is for conduct entirely unrelated to the supposed fraud.

A. The Economic Damage Award Is Speculative.

Alexander presented no expert testimony as to what his aggregate net income would have been had he remained a sales agent. His economist was properly barred from giving evidence, because at deposition he had addressed only the wrong measure of damages. (See RT 320-329.) In place of expert testimony, Alexander relied on anecdotal evidence of what other individual agents earned, without offering the slightest showing that he could have expected to earn a comparable amount. He also presented no evidence about two critical elements of his calculation: to what age he expected to work, and what his expenses would have been, had he remained a sales agent. The result is a speculative award, without evidentiary moorings.

Over objection, Alexander introduced evidence of the earnings of the top producing agent in his district—an agent whose production was three times as much as the average agent, and over twice has much as the next best agent in the district. (RT 3717-3719, 3723-3725; see RT 3715-3717

[trial court admits this evidence over defendants' objection "[b]ecause the issue is going to be limited"].) He also introduced evidence of what other agents grossed. (AA 81, 89.) But he offered no evidence that he could achieve any such earnings. Alexander testified that in 1981 he was making about $90,000 a year and that he expected to make $96,000 to $120,000 in 1982. (RT 3923-3925.) But he offered no evidence or expertise that could support those expectations.

From this, Alexander's counsel took on the mantle of the absent expert witness, but without the benefit of the required expertise, and without submitting to cross-examination. In arguing to the jury he simply "*assumed,*" without evidence, that Alexander's gross income would have increased at a constant rate from $90,000 per year to $250,000 in 1994 (a compound increase in gross income of over eight percent per year).[14] He "*assumed*" that from 1995 to 2000 Alexander's income would grow by $50,000 (some 20 percent) to $300,000, or "three-quarters of what the top agent would be making," even though he admitted that the average agent's income in his district *dropped* during this time. (RT 6080, 6165; see RT 3723-3724.) And, he "*assumed*" that Alexander would work until age 67, without evidence of the average retirement age for agents and without evidence whether agents' income would remain constant throughout their careers. (RT 6079-6081.) The jury plainly accepted counsel's assumptions as though they were evidence, finding the exact $5,695,000 in lost sales agent income that he had calculated from his assumptions. (Compare RT 6081 with RT 6914 and AA 103 [1561].)

A plaintiff is not entitled to just "assume" an amount of damages, particularly damages based on lost profits, without supporting evidence. Alexander's claim for lost sales commission income "is analogous to that for lost profits due to [the] interruption of an established business." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [stock broker's commissions].) To prove such damages "[t]he plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 535.) Typically, this means

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[14] A present value of $90,000 grows to $250,000 over thirteen years at a compound annual rate of 8.2 percent.

expert testimony: "A projection of lost profits will almost always *require* some form of expert testimony." (2 Dunn, Recovery of Damages for Lost Profits (5th Ed. 1998) § 7.1 at p. 532, emphasis added; see *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 302 ["Plaintiff has not presented the 'best evidence' available. . . . (I)t presented no expert analysis or breakdown of the damages"].) Damages cannot simply be predicated on assumed circumstances; to the extent those circumstances lack evidentiary foundation, the resulting award is speculative. (*Piscitelli v. Friedenberg*, *supra*, 87 Cal.App.4th at p. 989 [damage award speculative to extent premised on unsupported assumption that accounts managed by broker would have grown].)

But unfounded assumptions are all that there is here. One critical assumption is that Alexander would have worked until age 67 had he remained a sales agent. That's five years past the age at which he first could draw social security retirement benefits, and a year and a half past when he would be eligible for maximum social security benefits. (See <http://www.ssa.gov/retirement/1940.html> [as of August 7, 2001] [for someone born in 1940, full social security benefits are payable at age 65½; early retirement benefits can be drawn as early as age 62].) About 85 percent of the entire economic damage award—$2.1 million of the $2.5 million total—is premised on Alexander working from age 60 to 67, without the slightest evidence to support that he would have done so. (RT 6081.)[15]

Equally without evidentiary support are Alexander's counsel's assumptions that Alexander would have increased his income by over eight percent per year, every year for thirteen years;[16] that he then would have

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15 The age 67 assumption is particularly problematic in light of the jury's finding that Alexander was totally and permanently disabled (AA 103 [1560]) and the fact that Alexander had numerous personal problems outside of work (e.g., RT 1367-1369, 1396-1401, 3441-3444).

16 Under that hypothetical straight-line profit-growth theory, Alexander's earnings in the 1990 to 1993 period would have ranged from $183,000 to $231,000 compared, to the actual earnings of agent Osterholt, to whom he compared himself, which ranged from $70,000 to $117,000. (See RT 6080, 6165; AA 81 [1362].) The difference between Alexander's

(continued...)

jumped his income 20 percent over a period when the average agent's income declined; and that thereafter he would have consistently had a gross income equal to three quarters of that of the district's top agent although no other agent was doing more than half that much new business. (*Piscitelli v. Friedenberg*, *supra*, 87 Cal.App.4th at p. 989 [economic award is speculative to extent premised on assumed growth in size of commissioned account].) And still, no evidence shows that Alexander's profits as a sales agent would have come anywhere near the earnings of the district's most successful agents. (See *Thoroughbred Ford, Inc. v. Ford Motor Co.* (Mo. App. 1995) 908 S.W.2d 719, 735-736 [profits of new auto dealership could not be measured by average performance of dealerships in the area].)

Making matters worse still, those assumptions, on which Alexander, rested his damages argument and on which the jury relied, were not revealed until his counsel's closing argument, precluding any contrary evidence or cross-examination. Thus it was the defendants, not Alexander, who bore the impact of the ruling disqualifying Alexander's expert from testifying. And, defendants never were afforded any opportunity to test Alexander's damages theory.

As a matter of simple fairness and due process, a $2.5 million damage award cannot be premised on assumptions and calculations for which there is no evidentiary basis, and that are not even revealed until counsel's closing argument.

Nor was there any evidence of what Alexander's expenses would have been, had he continued as an agent. As an agent Alexander admittedly would have had expenses. (see RT 3946-3947 [both as a district manager and as a sales agent Alexander had expenses].) He cannot recover his *gross* profits, he can only recover for a loss of *net* profits. (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679 [lost profits recovery is speculative without proof of what expenses would have been].) Without evidence of what his expenses would have been, there is no evidence of what his net profits might have been.

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[16] (...continued)
assumed hypothetical profits and Osterholt's actual earnings in that four-year period alone is over $400,000.

The $2.5 million economic award rests on nothing but counsel's unsupported assumptions. Alexander's damage claim—which the jury awarded in full—is premised on assumptions without evidentiary basis. It cannot stand.

B. The Concurrent Tort And Contract Awards Are Inconsistent, Resulting In A Double Recovery.

The jury awarded $2.5 million in economic damages against one defendant, Group, Inc. It arrived at this award by finding, as Alexander urged, that Alexander would have earned $5,695,000 as a sales agent, then subtracting the stipulated $3,205,051 in benefits he had received as a district manager. (AA 103 [1561]; RT 6078-6079.) (The $2.5 million figure reflects an obvious and indisputable arithmetical error and on its face is $10,051 too high.) Against the Companies, the judgment awarded Alexander $190,000 in *additional* district manager contract benefits under the Agreement's provision for enhanced contract benefits in the event of the district manager's disability. (AA 113 [1689].)

Alexander's tort damages recovery was premised on the theory that but for the claimed fraud he never would have entered into the Agreement or become a district manager.

But he recovered an additional $190,000 in benefits provided under the Agreement as a district manager, an amount not subtracted from what he would have made as a sales agent. In effect the jury enforced the Agreement for his benefit, while at the same time relieving Alexander of its burdens.

This is a double recovery. Either he opted to obtain the benefits of remaining a sales agent and to forego those under the Agreement, or to enforce the Agreement and abandon what benefits he might have received had he remained a sales agent; he could not elect to obtain the benefits of both. Alternatively, the $190,000 in additional district manager benefits should have been subtracted from his tort net economic damages. One way or the other, his total economic recovery is necessarily $190,000 too high.[17]

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[17] The Companies do not challenge on appeal the jury's finding that Alexander was totally and permanently disabled when the Agreement was (continued...)

C. There Is No Evidence That The Claimed Emotional Distress Award Is Proximately Connected To The Alleged Fraud.

Alexander's counsel asked that the jury measure the amount of emotional distress damages by the amount of economic damages. (RT 6081-6083.) And the jury apparently did so, awarding the identical number for both. (See AA 103 [1561].) But Alexander presented *no evidence* as to why the two should be linked. In fact, Alexander presented no evidence that his emotional distress had anything to do with any fraud.[18]

When a plaintiff recovers emotional distress damages for fraud, he may only do so to the extent that such distress is the proximate result of the fraud. (See *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1819 [to be recovered, damages must be proximately caused by fraud]; *Pepper v. Underwood* (1975) 48 Cal.App.3d 698, 711 [same] disapproved on another point in *Stout v Turney* (1978) 22 Cal.3d 718, 730.) Although the trial court instructed the jury that emotional distress damages had to be proximately caused by any fraud (RT 6035; AA 97 [1434]), it did not tell the jury what that meant, nowhere defining "proximate cause." That alone was reversible error. (*Pepper v. Underwood*, *supra*, 48 Cal.App.3d at p. 711 [reversible error not to instruct jury on proximate cause required for damages in fraud action].) Given Alexander counsel's argument focusing on precisely what the jury was instructed it could *not* consider as fraudulently caused emotional distress (compare RT 6035 with RT 6082, 6166) and the lack of evidence of emotional distress from any fraudulent inducement discussed below, prejudice is apparent.

Further, Alexander presented *no* evidence at all that there was anything emotionally wrenching in leaving his sales agent position to

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[17] (...continued)
terminated. If, as argued above, the tort award is stricken, then the $190,126.06 contract award can be affirmed. If, on the other hand, the tort award is affirmed or reversed for a retrial, then the $190,126.06 contract award must be subtracted from any award.

[18] To the extent that the emotional distress and economic damages properly are linked, the emotional distress award necessarily falls with the speculative economic award.

become a district manager. Indeed, by all accounts, including his own, he was relatively happy for eight years.

Rather, his claim was that eight years *after* he relied on the supposed representations, changed circumstances—changes in the Companies' management and a change in expectations—led to his emotional distress.

Alexander's emotional distress began in 1990 (RT 3495-3496) and was exacerbated by later events and conflicts with the Companies (RT 1364, 1367, 1369), including the termination of the Agreement (RT 3446-3447). He believed that *the events of 1994* and his relationship with regional management *then* increased his stress and caused his physical and emotional condition to worsen. (RT 4299-4301, 4304-4305.)

None of this, however, arose from the claimed fraud—the supposed inducing of Alexander *in 1982* to leave his position as a sales agent. For that reason defendants objected, though unsuccessfully, to the introduction of any such emotional distress evidence as irrelevant to the fraud claim. (RT 4302-4303.) Distress resulting from changes in management and management practices eight years after the alleged representations and reliance is simply too attenuated to be proximately caused by the representations. (*Service by Medallion, Inc. v. Clorox Co., supra*, 44 Cal.App.4th at p. 1819 [where defendant performed contract terminable at-will for three months, plaintiff's expenses in performing contract was not proximately caused by fraudulent promises not to terminate].) It is simply not a natural or imminent result that someone who is induced to enter into an agency relationship might be distressed eight years later based on an unforeseen change in his principal's management.

Plaintiff failed to prove that his emotional distress was proximately caused by the Group, Inc.'s fraud, and the damages awarded for that distress must be reversed.

V. THE $12.5 MILLION PUNITIVE AWARD AGAINST GROUP, INC. CANNOT STAND.

If any part of the compensatory damage award is reversed, then the punitive damage award must be reversed too. A *jury* must determine the appropriate relationship between punitive damages and compensatory damages. (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 284; *Auerbach v. Great*

Western Bank (1999) 74 Cal.App.4th 1172, 1190.) But even if there were no other grounds for reversal, the punitive award still must fall.

A. The Jury Never Found The Elements Necessary To Impose Punitive Damages On Group, Inc.

1. The special verdict form is fatally indefinite, for it does not identify which defendant acted with malice, oppression, or fraud.

In its special verdict, the jury only found that "defendant" acted with malice, oppression, or fraud without reference to any of the seven different corporate entities named in the suit. (AA 103 [1561-1562].) Alexander then dropped any punitive damage claim against the six defendant Companies, leaving only Group, Inc. (RT 7206.) The jury was then instructed "to determine whether [to] award punitive damages against Defendant Farmers Group, Inc. only" (AA 97 [1443]), without ever having determined that Group, Inc. was the defendant that had acted with malice, oppression, or fraud. The verdict, thus, skipped a critical step—the determination that *Group, Inc.* engaged in malice, oppression or fraud.

The failure to find on a material issue is reversible error. (E.g., *Rabago v. Unemployment Ins. Appeals Bd.* (1978) 84 Cal.App.3d 200, 212.) The same is true where the verdict is ambiguous as to just how the jury found on a critical element of the claim. (See *In re Bell* (1942) 19 Cal.2d 488, 499 [charging crime for violating one statute "and/or" another]; *Cal. Shipbuilding Corp. v. Ind. Acc. Com.* (1948) 85 Cal.App.2d 435, 436 [administrative agency's finding of willful misconduct by employer "and/or" its managing representative]; *Dinkins v. American National Ins. Co.* (1979) 92 Cal.App.3d 222, 232 [finding of misrepresentation "and/or" concealment in insurance application], disapproved on another ground in *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 642-645.)

Cal. Shipbuilding Corp. v. Ind. Acc. Com., supra, 85 Cal.App.2d 435, is analogous. There, the Court of Appeal reversed an administrative agency's imposition of liability based on its finding that the defendant employer "and/or" its managing representative engaged in willful misconduct. "Such a finding, . . . is indefinite, uncertain and unintelligible.

From the finding there is not any way of determining whether the injury was caused by the serious and willful misconduct (1) of the employer, (2) of the managing representative, or (3) of the employer and the managing representative working together." (*Id.* at pp. 436-437.)

And so it is here. The jury's finding that "defendant"—without reference to any of the seven different defendants—acted with malice, oppression, or fraud, is undoubtedly ambiguous. The rule is that "the intention of the jury must not be left to inference or presumption, that it must be expressly declared, and that where it is not expressly declared in reference to any one of several defendants who have separately answered, it must be taken that the jury has failed to pass upon that particular issue." (*Keller v. Smith* (1933) 130 Cal.App. 128, 133.)

Defendants attempted to avoid just this sort of ambiguity in the verdict, to no avail. They specifically proposed a special verdict form that named only Group, Inc. as to the punitive damage claim (the position that Alexander ultimately adopted, but only *after* the ambiguous verdict was rendered). (AA 102 [1516].) But Alexander opposed such clarity, and successfully invited the trial court to adopt the ambiguous form used. (RT 5787-5789.) Alexander thus invited the ambiguous finding.[19]

Where a plaintiff affirmatively requests an ambiguous finding, the result is properly a reversal with directions to enter judgment for the defendant. This is because it is the plaintiff's responsibility to obtain an adequate special verdict. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 & fn. 8 [punitive damage award reversed with directions where special verdict malice, oppression, or fraud finding ambiguous as to whether it encompassed finding of underlying tort liability (on which the jury was instructed); "[i]t is incumbent upon (plaintiff's) counsel to propose a special verdict that does not mislead a jury into bringing in an improper special verdict . . . . (Plaintiff) is bound by the erroneous special verdict"]; *Mayer v. Beondo* (1948) 83 Cal.App.2d 665, 670-71.) Thus, the punitive damage judgment

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[19] The trial court specifically rejected defendants' proposed form "right now so that you have got the right to go up on appeal on it" and directed counsel to work on an alternative form *without prejudice* to appellate rights. (RT 5787-5789.)

not only should be reversed but it should be reversed for entry of judgment in Group, Inc.'s favor on the punitive damage issue.

2. The jury was not instructed to find, and did not find, that an officer, director, or managing agent of the corporate defendant committed any malice, oppression, or fraud.

The special verdict omits any finding, express or implied, on another critical prerequisite for punitive damage liability. Civil Code section 3294, subdivision (b), makes clear that an essential element of punitive damage liability against a corporation is that the oppression, fraud, or malice "must be on the part of an officer, director, or managing agent of the corporation." (See *College Hospital, Inc. v. Superior Court*, *supra*, 8 Cal.4th 704, 721, 722-727 [punitive damages unavailable without malice, oppression, or fraud by officer, director, or managing agent].) The special verdict is insufficient on its face to support punitive damage liability because it contains no finding on this essential issue. Alexander "is attempting to enforce the judgment based on the special verdict and must bear the responsibility for [an incomplete] special verdict submitted to the jury in [his] own case. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.*, *supra*, 13 Cal.App.4th at pp. 961-962, citation omitted.)

Nor can the necessary finding be implied. Even had the jury been properly instructed on the issue, that would not imply a finding; "A jury instruction alone does not constitute a finding. Nor does the fact that evidence might support such a finding constitute a finding." (*Id.* at p. 961, fn. omitted.) "[W]ithout an actual verdict by the jury . . . , [even proper] instructions and [substantial] evidence cannot support the punitive damage award." (*Ibid.*) In these circumstances, the punitive award must be stricken in its entirety, without any retrial. (*Id.* at p. 962.)

In any event, the jury was not instructed that the requisite malice, oppression, or fraud must be that of an officer, director, or managing agent of the corporate defendant. The trial court specifically refused Group, Inc.'s proffered instruction to that effect. (AA 97 [1502].) It instead instructed the jury—wrongly as to punitive damage liability—that "[a]ny act or omission of an officer *or employee* within the scope of authority or

employment is in law the act or omission of [the defendant] corporation." (RT 6029; AA 97 [1436], emphasis added.)[20] Under that instruction, the jury could impose punitive damages against Group, Inc. based on malice, oppression, or fraud of *any employee.*

Group, Inc. was entitled to a specific and legally proper instruction on the issue. (*Soule v. General Motors, Corp.*, *supra*, 8 Cal.4th at pp. 548, 572.) It proffered an instruction properly setting out that, to be liable for punitive damages, the jury must find that any malice, oppression, or fraud must be by an officer, director, or managing agent, and properly defining a managing agent as one who sets or determines corporate policy. (AA 97 [1502].) The trial court erred in refusing that instruction.[21]

There can be no doubt that the error was prejudicial. None of the three individuals that had allegedly made false promises to Alexander was an officer at the time, and none had the authority to appoint Alexander to a district manager position; these regional employees could only make recommendations. (RT 988, 1056, 1063, 3931.) In his closing argument Alexander's counsel argued simply that "they"—unidentified individuals or a corporate abstract—had wronged Alexander. (RT 6084.) The trial court's failure to instruct the jury that the malice, oppression or fraud must have been that of an officer, director, or managing agent, thus was

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[20] The trial court elsewhere instructed the jury that "an employee acts in a managerial capacity where the degree of discretion permitted the employee in making decisions i[s] such that the employee's decisions will ultimately determine the business policy of the employer" (RT 6033-6034), but it did not instruct the jury why that would make any difference. In any event, "managerial capacity" is not the standard. In enacting Civil Code section 3294, subdivision (b), the Legislature specifically rejected a "managerial capacity" test in favor of "managing agent." (See *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 576 [Legislature rejected "managerial capacity" test; fact that persons have power to hire and fire, i.e., act in a managerial capacity and contract on behalf of the corporation, does *not* make them managing agents].)

[21] Even had defendants not requested that instruction, the trial court had an independent duty to instruct on the material prerequisites for punitive damage liability. (*Paverud v. Niagara Machine & Tool Works* (1987) 189 Cal.App.3d 858, 863 [even without request, "a complete failure to instruct on a material issue and a controlling legal principle" is error], overruled on another ground in *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th 548.)

prejudicial and independently requires reversal of the punitive damage award. (See *Brown v. Smith* (1997) 55 Cal.App.4th 767 [failing to instruct on basic element of cause of action is prejudicial].)

B. The Trial Court Prejudicially Erred By Refusing To Instruct The Jury That The Amount Of Punitive Damages Must Be Measured By Comparing The Reprehensibility Of The Conduct To The Reprehensibility Of Other Conduct Deserving Punishment, Rather Than In The Abstract.

Over defendants' objection that it was incomplete, the trial court gave BAJI No. 14.72.2 as the sole punitive damage instruction. (RT 7203-7204, 7223; AA 97 [1443].) It instructed the jury to consider "the reprehensibility of the conduct of the defendants [*sic*]" (RT 7223) but refused to instruct that reprehensibility is judged compared to other conduct deserving punishment, rejecting Group, Inc.'s proffered instruction to that effect. (See RT 7203-7204; AA 97 [1506E].) In doing so, it failed to adequately explain the governing federal and California punitive damage standards.

BAJI No. 14.72.2 instructs the jury to consider the reprehensibility of the defendant's conduct in the abstract. This test is a phantom: *All* conduct that warrants punitive damages is, *by definition*, reprehensible. The true test, absent from BAJI No. 14.72.2, is *relative* reprehensibility—the recognition that "some wrongs are more blameworthy than others." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589, 1599, 134 L.Ed.2d 809].) A defendant's conduct can only be evaluated "in light of the types of misconduct that will support punitive damages." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110-112 & fn. 2; see *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928; *Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 751.) The required comparison therefore is not between good conduct and bad conduct (as BAJI No. 14.72.2 erroneously implies), but rather between different kinds of bad conduct *all of which* warrant punitive damages.

Bad conduct covers a spectrum. At one end is conduct the defendant knew or intended would result in death or severe physical injury to many

people—mass murder, product tampering, toxic waste dumping, and the like. At the other end of the spectrum is conduct that also warrants punitive damages—the defendant consciously disregarded the rights of others— but that caused only economic harm, and only to a single victim.

Here, plaintiff's recoverable loss indisputably derived solely from an economic injury. No others were injured by Group, Inc.'s conduct toward Alexander. And, while Alexander claimed that the defendants harassed him, that formed no basis for his cause of action. Even judged in the worst possible light, the conduct came nowhere near the most reprehensible end of the spectrum. (See *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 623-624 [double murder at extreme end of reprehensibility scale].)[22] Yet BAJI No. 14.72.2 did not let the jury know that these considerations were relevant, because it did not tell the jury that it should compare Group, Inc.'s conduct to other *malicious, oppressive, or fraudulent* conduct.

There was far more than a "reasonable chance" that the jury would have decided punitive damages more favorably to Group, Inc. had it been properly instructed. (*College Hospital Inc. v. Superior Court*, *supra*, 8 Cal.4th at p. 715.) Alexander's counsel argued only the claimed reprehensibility of the conduct in the abstract (RT 7227) and that punitive damages should be awarded no matter the nature of the wrongful conduct (RT 7237). Even under the insufficient instruction, which concealed the

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[22] See also *Greenfield v. Spectrum Investment Corp*. (1985) 174 Cal.App.3d 111 [nationwide car rental company ratified and covered up employee's physical assault on customer; plaintiff severely beaten and sustained fractures, was disabled from work for six months and sustained permanent painful neck injury], disapproved on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644; *West v. Johnson & Johnson Products, Inc*. (1985) 174 Cal.App.3d 831, 846-848, 851-852, 869, 875 [corporate defendant consciously disregarded known health risk to thousands of women by marketing tampons prone to cause potentially fatal toxic shock syndrome]; *Vossler v. Richards Manufacturing Co*. (1983) 143 Cal.App.3d 952, 966 [defendant's continued sale of surgical implant knowing it would cause excruciating pain to hundreds of mostly elderly arthritic patients held still less reprehensible than conduct in *Grimshaw v. Ford Motor Co*., *infra*], disapproved on another ground in *Adams v. Murakami*, *supra*, 54 Cal.3d 105; *Grimshaw v. Ford Motor Co*. (1981) 119 Cal.App.3d 757, 821-822 [corporate defendant's reckless design of automobile gas tank threatened mayhem and death to thousands of people].

comparative reprehensibility analysis, the jury split 9-3 on the amount of the punitive award. For this reason as well, the punitive award must be reversed.

C. The Trial Court Prejudicially Erred In Refusing To Allow Group, Inc. To Present Evidence Relating To The Deterrent Effect A Punitive Award Would Have.

The trial court instructed the jury that in determining the amount of the punitive award it should consider "[t]he amount of punitive damages which will have a deterrent effect on the defendant . . . ." (RT 7223; AA 97 [1443].) It then improperly precluded Group, Inc. from presenting evidence on that very issue—the effect a punitive award would have.

In particular, Group, Inc. sought to introduce evidence that a compensatory award of the size that the jury had already awarded, $5 million, would be reviewed and carefully scrutinized by senior management—that the compensatory award alone would be noticed and act as a "message" and deterrent. (RT 7218-7220.) The trial court refused to allow such evidence, asserting that the *only* issue in the punitive damages phase of the trial would be Group, Inc.'s wealth. (*Ibid.*) Group, Inc. was thus denied a full or fair trial of the amount of punitive damages.

Wealth alone is not the only relevant factor. An individualized determination of the *deterrent effect* of any punitive award is what is required and what the defendant has a right to. (See *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 426-427 (conc. opn. of Brown, J.) [wealth alone becomes of less relevance, especially in the case of defendants with substantial resources]; *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928 ["the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter"].) Group, Inc., thus, was wrongly precluded from presenting evidence on one of the factors that the law identifies as *essential* to the determination of an appropriate punitive damages amount.

Again, the error was undoubtedly prejudicial. The jury split 9-3 on punitive damages. Alexander's counsel argued that the deterrent effect of an award could be measured in the abstract on the basis of Group, Inc.'s

wealth alone and that there was nothing new to consider regarding whether Group, Inc. had received any message. (RT 7224, 7230, 7237.) Group, Inc. was denied its day in Court on the issue of appropriate deterrence. The punitive damages award must be reversed for that reason as well.

CONCLUSION

This case was, and could only have been, one for fraud in the inducement. Under this Court's precedent in directly analogous circumstances, the claim was asserted years late. Even if it were timely, its core assertion—an alleged oral promise contrary to the written contract—is barred by the parol evidence rule and the justifiable reliance requirement. And, none of the damages awards can be justified.

The judgment should be reversed with directions to enter judgment on the tort claims in defendants' favor. In the alternative, each of the economic and noneconomic tort awards and the $12.5 million punitive damage award should be stricken. At a minimum, the judgment should be reversed for a new trial on liability, compensatory damages, and punitive

damages, and the trial court should be directed to offset the $190,000 contract damages award against any tort recovery.

Dated: August 28, 2001

Respectfully submitted,

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