2d Civil No. B142432

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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

Plaintiffs and Respondents,

v.

FARMERS GROUP, INC., et al.,

Defendants and Appellants.

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Alexander can't have it both ways. He can't continue to accept the benefits of a career change after knowing full well the true facts and at the same time reserve his right to claim years later that he was misled into choosing that career. He can't claim to have been damaged both at the outset of his tenure and only at the very end.

Yet, Alexander's whole position on appeal is premised upon having it both ways. The only way he can even attempt to justify the verdict is to rely simultaneously on two necessarily contradictory versions of the facts.

In one version, he was unaware that under the 1982 Agreement he would be required to meet various goals and standards, to report regularly, and to bear expenses beyond those of maintaining his own office. Most important, in that version he didn't know the Agreement's express provision, that it could be terminated without cause by either party upon 30 days notice, could be enforced. And in that version of the facts, he did not learn otherwise and suffered no damages until the Agreement was terminated in 1995, or at least until April 1993—three years before filing suit—at the earliest.

In Alexander's other version of the facts, after 1982 he was regularly burdened by, and complained about, reporting goals and financial obligations. He was more than just aware of the Agreement's express provision for termination without cause; he tried unsuccessfully to change that provision even before signing the Agreement. In that version, despite his complaints, he performed well for about 8 years, until in about 1990 management policies changed and the pre-Agreement promises began to be breached. Then, the restrictions began to damage his income and cause him emotional distress.

He asserts both versions simultaneously because the judgment cannot stand unless both factual versions co-exist. Without the second version, he has no proof that any promise was not intended to be performed when made. Without the first version, the statute of limitations is an absolute bar. Because they both cannot be true, the judgment cannot stand.

Alexander's approach to the parol evidence rule is less obtuse. He claims simply that a fraud exception swallows up the rule making that rule inapplicable to any claim of a fraudulent promise; and he claims that, in any event, there was insufficient evidentiary objection. Although less self-contradictory, both claims have been squarely rejected by controlling Supreme Court authority that he does not address.

As to damages, Alexander again plays both sides at once. He claims that the jury did not have to credit what he effectively admits was his counsel's entirely speculative argument as to how to calculate damages (even though the jury awarded *exactly* what Alexander's counsel argued for, down to a subtraction rounding). But he presents *no* theory to otherwise support the jury's damages determination. Either the jury credited Alexander's own, speculative theory or there is no evidence that supports the award. Either way, the judgment must fall.

For these and the other reasons discussed below and in the opening brief, the judgment should be reversed.

ARGUMENT

I.

THE STATUTE OF LIMITATIONS BARS ALEXANDER'S FRAUD-IN-THE-INDUCEMENT CLAIMS.

The impact of the statute of limitations on Alexander's case is decisive. This Division addressed the precise issue in *Magpali v. Farmers Group, Inc.*, *supra,* 48 Cal.App.4th 471. (See AOB 14-16.) Under *Magpali*, Alexander's fraud claim accrued in 1982 when he gave up the benefits of his sales agency position to become a district manager. Alexander simply refuses to believe that *Magpali* means what it says. (RB 10-13.)

But even if *Magpali* holds what Alexander claims it does, the undisputed factual record fatally skewers his only theory. That is because he *admits* he was injured by the supposed fraud far more than three years before he brought suit.

A. The *Magpali* Decision Holds That Alexander's Fraudulent Inducement Claim Accrued In 1982 When He Left His Sales Agent Position To Become A District Manager.

Under *Magpali*, Alexander's cause of action for fraudulent inducement accrued in January 1982 when he changed careers. In January 1982 he signed the Agreement, necessarily giving up his sales agency in the process. He did so, he says, relying on Group, Inc.'s fraudulent promises, made without any intention to perform.[1] He has consistently claimed that his "damages are based on the injury he suffered because he was induced to leave the secure sales agency he held." (RB 26-27.) He suffered *that* injury in 1982, the moment he signed the Agreement that required him to "leave the secure sales agency he held."

Magpali addresses and decides the central issue in this case—when the statute of limitations begins to run on a claim of fraudulent inducement to enter into an independent contractor agreement—in exactly the same legal and factual context presented here. Its facts are indistinguishable—a plaintiff claiming that he was fraudulently induced to leave a job that he in retrospect claims ultimately would have been more lucrative, in order to enter into a contract with the defendant. *Magpali* holds that the fraud claim "is complete the moment the plaintiff suffers reliance damage by leaving his

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[1] Although there were multiple defendants, the fraud judgment ultimately was entered only against Farmers Group, Inc. Accordingly, except where the distinction is relevant we refer to Group, Inc. as the defendant.

previous employment." (*Magpali v. Farmers Group, Inc., supra,* 48 Cal.App.4th at p. 484.) Under *Magpali,* Alexander suffered reliance damages "by leaving his previous employment." (*Ibid.*; accord, *Lewelling v. Farmers Insurance of Columbus, Inc.* (6th Cir. 1989) 879 F.2d 212, 216-217 [applying California law, statute of limitations on claims by district managers that they were fraudulently induced to relocate began to run when they relocated, and was not tolled until employment was terminated]; *Armstrong v. Peat, Marwick, Mitchell &* Co. (1989) 150 App.Div.2d 189, 191-193 [540 N.Y.S.2d 799, 802-803] [statute of limitations ran from when plaintiff was fraudulently induced to leave her former employment].) Alexander distorts *Magpali* by attempting to read it otherwise.

B. In Addition To Leaving His Sales Agency, Alexander Admittedly Suffered Other Injury Outside the Limitations Period.

Even if his reading of *Magpali* were correct, Alexander's assertion that he suffered no injury before the Agreement's 1995 termination is not. Over and over his brief disclaims any damages at all before 1995. Only then, he says, did the tide turn; only then, he claims, did the Agreement's burdens outweigh its relative benefits. (E.g., RB 13 fn. 6, 14-15, 18, 22; see RT 5799-5800; AA 120[1781].) Factually, Alexander is dead wrong.

Alexander's mantra that he suffered no damages until 1995 is a sham. Even apart from Alexander's admitted loss of job security when he gave up his sales agency to become a district manager (see RB 11 [lured into giving up secure job], 12 [damages are loss of security and income from former employment]), his own evidence establishes that he suffered additional claimed injury long before the Agreement's termination in 1995, and well before the earliest time still within the applicable limitations period, April 1993.

Alexander repeatedly admitted (and argued to the jury) that very fact. His proof claimed economic damages beginning long before 1995, including tens or hundreds of thousands of dollars in operational expenses incurred as a district manager (13 RT 4047-4051; 13 RT 3960, 3963; see 14 RT 3946-3947, 4227-4234, AA 65 [1303]), lost income (RT 6081:4-15 [losses 1982-1995 would have been about $295,000], 6082:23-26 [damages beginning 10 years before termination], and loss of compensation from discontinuation of the auto-dismantler line (RT 6160:15-6161:12 [lost income in 1992 from loss of auto dismantler business], Exh. 33, AA 81 [1361-1362]; Exh. 153, AA 86 [1376]). He testified that he began suffering emotional distress in 1990 and he recovered emotional distress damages on that basis. (13 RT 4009-4016, 4028; see 4 RT 938 [Alexander's counsel tells jury emotional distress started 1990]; 20 RT 6074, 6082 [same]; 6166 [defendants caused his health problems 1990-1994].) The record, as he himself characterized it in the trial court, indisputably shows that if Alexander was damaged by fraud, he suffered those damages well before 1995 or even 1993.

Alexander suffered other, immediately cognizable injury as well. As demonstrated in the opening brief (AOB 15, 21) and not disputed by Alexander, a fraud plaintiff may claim damages for loss of benefit of the bargain and for loss of security in a new job. His benefit-of-the-bargain damages began as soon as the various claimed promises were not performed. As soon as he netted less as a district manager than he had been promised (by incurring greater expenses, by losing commissions on the auto-dismantler line of business, by not being able to recruit additional agents, etc.) he suffered damage. And as soon as he signed the Agreement, with its no-cause termination provision, he lost the benefit of the career security he claimed to have had in his position as an agent.

Nodine v. Shiley Inc. (9th Cir. 2001) 240 F.3d 1149, is analogous. The plaintiff there had received a defective heart valve. She participated in a class settlement premised on her anxiety over having the defective valve. Years later, she had the valve replaced. She then sued for fraud, arguing that despite her long knowledge of the claimed defect, she suffered no real damage until the valve had to be replaced. (240 F.3d at p. 1153.) Applying California law, the court held that the plaintiff's injury occurred for statute of limitations purposes—at the latest—when she claimed emotional distress. So, too, here. Regardless when Alexander concluded that he had suffered his big-ticket career-choice economic damages, under what *he claimed to the jury* he suffered substantial damage long before the statute of limitations period. That alone bars his claim.

C. The Statute of Limitations Was Not Suspended Indefinitely To Allow Alexander To Gamble On Better Damages.

Even without *Magpali*'s clear holding, and even if the facts did not show independent injury to Alexander during his 13 year tenure, Alexander's delay for over a decade, knowing the true facts, could not prevent the limitations period from beginning to run. He could not for years knowingly take advantage of what he thought were fraudulent promises, accepting the benefits of being a district manager, before deciding that his abandoned career as a sales agent would have been more profitable.

The law does not abide such a calculated delay, while the supposed victim permits damages to mount. It does not toll the statute of limitations while a plaintiff knowingly gambles which would have been the better career. (E.g., *Magpali v. Farmers Ins. Group, Inc., supra,* 48 Cal.App.4th at p. 483 [plaintiff's uncertainty as to extent of damages does not prevent statute of limitations from running]; *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1327 [plaintiff who suspects wrongdoing cannot sit on rights while deciding whether to sue].) "[O]ne cannot blow both hot and cold, or . . . 'with full knowledge of the facts . . . be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.'" (*Estate of Anderson* (1997) 60 Cal.App.4th 436, 442, citations and quotation marks omitted.)

Again, the Ninth Circuit affords analogous authority. In *Volk v. Davidson & Co.* (9th Cir. 1987) 816 F.2d 1406, plaintiffs alleged that they had been fraudulently induced to buy tax shelter investments which the Internal Revenue Service later questioned and eventually disallowed. The Ninth Circuit held that plaintiffs had been injured upon purchase and that the limitations period began to run when they learned they had been deceived about the investment's propriety. It wryly commented that the law protects "the innocent investor," not one who "loses his innocence and then waits to see how his investment turns out" before deciding whether to sue. (*Id.* at p. 1413.)

And so it is here. Alexander was injured (if at all) when he left his sales agency to become a district manager; the limitations period on his fraud claim began to run when he lost his innocence—when he learned of or suspected the fraud. The statute of limitations did not hover in suspended animation while Alexander waited, with full knowledge of the claimed fraud, to see how his career would turn out.

The cases relied upon in Alexander's Brief are not to the contrary. None of them sanctions a fraud victim's decade-long delay to see whether his books will ultimately turn out black or red. Each of those cases alleged deceit involving procuring an insurance policy without a promised coverage. (*Walker v. Pacific Indemnity Co.* (1960) 183 Cal.App.2d 513 (RB 13), *Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035 (RB 14), and *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442 (RB 14).) But insurance, by its nature, deals with contingent events. (See Ins. Code, § 22.) In none of those cases did the plaintiff contemporaneously sacrifice a valuable right—e.g., a life-tenured job as Alexander claims here—to obtain the policy. Nor did the plaintiffs in those cases claim or offer proof of damages dating back to the deficient policy's first issuance. It is not surprising that those cases hold that an insured does not suffer injury until the contingent loss has occurred and the carrier has declined to cover it. But those insurance policy cases are not analogous to Alexander's claim.

Here, Alexander's injury was immediate. He gave up his sales agency; he incurred additional expenses; he undertook further risks; and he suffered emotional distress. None of this was contingent upon the later termination of the Agreement.

And unlike the insurance policy cases, Alexander identified his injury—even if in retrospect—as occurring when he gave up of his sales agency at the inception of the Agreement. Even Alexander admits that the defining measure of his damages is "the value of the 'loss of security and income associated with his former employment.'" (RB 12.) *That* was lost in 1982, immediately upon his signing the Agreement. He could not sit back for over a decade to see how his career panned out before deciding whether to sue.

While Alexander was sitting back, his claimed damages were mounting. If Alexander suffered any net economic loss at all, that loss was *caused by* his 14-year delay in suing rather than by any deceit. Simply by asserting his fraud claim at the outset he could have *wholly prevented* his damages from occurring in the first instance. (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568 [plaintiff cannot recover losses it could have avoided through reasonable efforts]; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41 [same].)

No matter how it is viewed, Alexander suffered actual detriment (if at all) before 1993. The statute of limitations on his cause of action for fraud began to run when he had the requisite notice that the promises on which he had relied were false. That's what *Magpali* holds: "Once plaintiff obtains the requisite knowledge [of falsity], the statute begins to run." (*Magpali v. Farmers Group, Inc., supra,* 48 Cal.App.4th at p. 484.) The undisputed evidence shows that knowledge came more than a decade before he filed suit. That should be the end of the case.

D. Alexander Had Notice That The Inducing Representations Were False More Than Three Years Before He Sued.

Alexander bore the burden of proving that he lacked notice of the fraud to delay commencement of the statute of limitations. The *plaintiff* must plead and prove the facts showing lack of knowledge (including lack of constructive or inquiry notice), lack of means of obtaining knowledge (i.e., in the exercise of reasonable diligence the facts could not have been discovered at an earlier date), and how and when he actually discovered the fraud or mistake. (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1525; accord *McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160, fn. 11; *Weir v. Snow* (1962) 210 Cal.App.2d 283, 292.)

Alexander did not carry that burden. The record demonstrates, without contradiction, that if the supposed promises on which Alexander claims to have relied in 1982 were in fact false, he had notice of that fact long before April 1993. His brief does not even try to show otherwise.

The Fact That The Agreement Could Be Terminated Without Cause. The Agreement itself unambiguously provides for its termination at will by either party upon 30-days notice. (AA 59 [1256], ¶ D.) Alexander does not contend otherwise. He admitted in the trial court that the right to terminate the agreement at will "was immediately manifested" by the Agreement itself. (AA 120[1785].) Indeed, Alexander specifically raised this clause before signing the Agreement. (E.g. RT 3951-3954.) As to any promise of other-than-at-will tenure, there was no delayed notice that could prevent the statute of limitations from running.

Alexander argues that he was orally assured that it was "Farmers' practice" not to terminate agreements without cause. From this he claims that the express at-will termination provision did not put him on notice that the contrary oral promises were false. (RB 20; see also RB 3, citing 4 RT 1075:4-13, 13 RT 3951:8-3952:8, 3954:3-23.) But even if the facts were as Alexander characterizes them, the record undermines rather than supports him, because it positively shows that he had the notice he now disclaims. The very reason he allegedly sought oral assurances before signing was that *he knew* that the Agreement, as written, permitted its termination without cause. (13 RT 3952:23-26; see 13 RT 3951-3954.) And one cannot reasonable rely on an oral promise of nonenforcement of a written contract term. (Code Civ. Proc., § 1856; *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258.) Alexander knew or should have known that the written agreement afforded the right to terminate without cause.

The Other Claimed Promises. Long before April 1993—a decade or more before—Alexander had ample notice that the various other supposed promises on which he claims to have relied were false.

Alexander's brief characterizes three categories of promises on which he relied in entering into the Agreement: that the Agreement would not be terminated without cause, that becoming a district manager would be a good thing for him financially, and that as an independent businessman he would have "a minimum of interference" from Group, Inc. (RB 16, see also RB 2.) Presumably, the second category encompasses the supposed promise that his only expenses would be to equip his own office. (13 RT 3946-3947.) Other than the cause-only termination representation, the remainder of the supposed promises to which he testified fall into the final category, that he could operate with "a minimum of interference." For example, that category encompasses the supposed promises that there would be no limitation on the number of agents he could recruit (13 RT 3938-3939, 3947), that he would be free of reporting requirements and quotas (e.g., 13 RT 4370-4373), that he would have only "easily obtainable" goals (e.g., 13 RT 3941-3942, 4393-4399), and that Group, Inc. would not drop insurance lines without his consent (e.g., 13 RT 3948-3949).

Alexander's brief says little about these supposed promises, for an obvious reason: Alexander *admits* that he was aware long before 1995 of conduct inconsistent with those claimed promises. (E.g., 14 RT 4339-4341, 4343-4344 [learned in 1982 about monthly monitoring and quotas], 4367-4370 [knew in 1985-86 that companies had deleted coverages]; 14 RT 4375-4377, 4384-4385, 4395-4397 [was required in 1983 to report on goals, knew and complained about limitations on business independence in 1984]; see also RB 4, citing Zissa depo. at p. 179:21-180:9; Exh. 183, AA 88 [1378] [late 1991 Farmers capped number of new agents Alexander could recruit]; 4 RT 925, 937-938 [counsel tells jury that evidence shows breach of promises began 1990-1991].) That admitted awareness necessarily triggered the statute of limitations.

To blunt the thrust of those admissions, Alexander claims that before at least April 1993 he lacked notice because *only sometimes* were things contrary to what had been promised him. Far from refuting notice, his arguments *admit* it. For example, he acknowledges that he was expected to file reports (contrary to a supposed promise); but he "did not always" do so, he was "often" late, and those defaults were "accepted." (RB 18.) He concedes that he "initially" was required to submit monthly performance evaluations (contrary to a supposed promise); but he later was very deficient in doing so. (RB 18-19.) He admits that he had production and recruiting quotas (contrary to a supposed promise); but he says he learned that if he missed "a quota" his Agreement would not be terminated. (RB 19.) He admits that he was required to guarantee his agents' performance (contrary to a supposed promise), but he did so only "reluctantly" and he didn't have to "make good" on any guarantee. (RB 19.) And he admittedly was asked to contribute to marketing campaigns (contrary to a supposed promise), but he *sometimes* declined. (RB 19.)

Alexander's argument is a two-edged sword, fatal to his own cause. The fact that a supposed promise was only *sometimes* broken nevertheless put him on notice that it, in fact, was false. (AOB 18.) By his own admission, long before April 1993 Alexander had notice that the various supposed additional promises on which he claims to have relied were false.

E. If Alexander Did Not Have Notice That The Supposed Promises Were False, It Was Because They Were Not.

If, as Alexander now claims, he lacked notice of the falsity of the obligations violating supposed oral representations because they "weren't real requirements" (RB 18; see RB 18-20), then he has proved too much. For if that is the case, there were no *materially* false representations, and therefore no fraud.

If the supposed promises to him were substantially performed for eight to 13 years, there is no possible inference that they were made without an intention to perform them. "'[S]omething more than nonperformance"—certainly something more than nonperformance a decade later—"is required to prove the defendant's intent not to perform his promise.'" (*Tenzer v.*

Superscope, Inc. (1985) 39 Cal.3d 18, 30; *Magpali v. Farmers Group, Inc.*, *supra,* 48 Cal.App.4th at p. 481.) But there is no such evidence.

Alexander offered *no* evidence that any supposed oral representation about "Farmers' practice" of avoiding terminations without cause was false in 1982 when it supposedly was made. Rather, he sought to infer falsity *solely* from the fact that 13 years later, after a change in management, *his* Agreement was terminated without cause. (See RB 3, 20, 23.) He also offered no evidence that any other representation supposedly made to him in 1982 was false. His only claim was that after accepting for eight or more years that the requirements imposed on him were not materially different from the 1982 representations, he decided that they were onerous.

Finally, Alexander wrongly suggests that the defendants abandoned their grievance that the evidence fails to show that the promises were false when made. (RB 20, fn. 7.) But the opening brief expressly argued the point. (AOB 28-30 [E.g.,"the contradiction of the Agreement [was] . . . his only evidence that the promises were fraudulent when made. . . . [T]here 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"].)

F. Even If The Statute Of Limitations Did Not Run As A Matter Of Law, Under The Proper Standard Of Review The Record Cannot Justify The Trial Court Taking The Issue From The Jury.

Alexander does not dispute that the trial court refused to instruct the jury on the statute of limitations issue, holding in effect that his suit was timely as a matter of law. He claims that the trial court's withdrawal of the factual issue from the jury "was not clearly erroneous" because the "record evidence supports a determination" in his favor on the statute of limitations issue. (RB 16, 21.)

The record supports no such thing, as we showed in the preceding sections. But even if it could, Alexander completely mangles the appropriate standard of review. The evidence does not "support[] a determination" that he lacked notice that the promises were false, because there was no "determination" to support. The jury made no such determination because the trial court refused to submit that issue to it. (19 RT 5803:11-23.)

The standard of review, therefore, is opposite from what Alexander assumes. Where the trial court determines an issue itself, refusing to submit it to the jury, the question is whether the record, construed in the light *most favorable to the opposing party* (defendants here), could support the *opposite* conclusion. Thus, the question is whether the record could support a determination that the April 27, 1993 letter was *not* the earliest event to put Alexander on notice of the 1982 fraud. (See *Parsons v. Tickner, supra*, 31 Cal.App.4th at p. 1525 [plaintiff has burden of proving delayed discovery].)

If the record *could* support that determination, the trial court erroneously withdrew that issue and deprived the defendants of a jury trial on that critical factual issue. (*Breazeal v. Henry Mayo Newhall Memorial Hospital* (1991) 234 Cal.App.3d 1329, 1337 [where trial court holds affirmative defense is established as a matter of law, evidence must be reviewed in light most favorable to appellant]; *Buchanan v. City of Newport Beach* (1975) 50 Cal.App.3d 221, 228-229 [trial court's determination in party's favor on affirmative defense reversed when evidence is sufficient to support jury finding in other party's favor].) Unless the record *required* a finding in Alexander's favor with respect to the statute of limitations—something Alexander doesn't even argue on appeal, because he can't—the trial court's withdrawal of the statute of limitations from the jury was prejudicially erroneous.

By arguing only that the evidence *might* support a finding in his favor (it doesn't even do that), Alexander effectively admits that, at a minimum, there was a fact issue—an issue requiring jury determination. In doing so, he effectively confesses prejudicial error—that the trial court improperly denied Group, Inc. a jury trial on the issue. So long as—at a minimum—the evidence *construed in Group, Inc.'s favor* would support a finding that Alexander suffered injury from and had actual or constructive notice of the alleged fraud before April 1993, the judgment must be reversed for retrial. Alexander does not contest (how can he?) that, at minimum, the evidence meets this standard.

II.

THE KEY EVIDENCE UPON WHICH ALEXANDER'S FRAUD CASE IS BASED, AS A MATTER OF LAW, CANNOT ESTABLISH FRAUD.

The centerpiece of Alexander's fraud case is his claim that he was induced was by a fraudulent oral promise contrary to the Agreement's written no-cause termination provision. (3d Am. Compl. ¶¶ 28, 32(k), 34, AA 3[103, 105-106, 107].) His own counsel argued to the jury that this was the "most important" promise to Alexander. (4 RT 917; see 4 RT 920 [promise of good cause only termination], 922-923 [same], 928-929 [same], 933 [same]; 20 RT 6048-6050 [counsel argues termination promise].)[2] According to Alexander, he was induced by that oral promise to enter into the Agreement although he knew that it provided for termination without cause. (13 RT 3948-3954 [Alexander was reluctant to enter into Agreement

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[2] The trial court and the jury plainly believed that the evidence established an oral promise that the Agreement would not be terminated without cause despite its contrary at-will termination provision. (See 19 RT 5750-5755; AA 97[1475][trial court refuses to instruct jury that there was no such promise].) But the evidence itself does not actually reflect any such promise. Alexander testified only to assurances that Group, Inc. did not normally terminate district managers without cause and ordinarily found other ways to deal with conflicts. (E.g., 13 RT 3951-3954; see 20 RT 6049-6052; RB 3, 20, 23 ["practice" was not to terminate without cause].)

because of at-will termination provision]; 20 RT 6048 [Alexander would not have signed Agreement without "promises that went along with it"]; see RB 2-3 [at-will termination provision was reason Alexander was reluctant to enter into Agreement].) That promise was the heart of the case, and its supposed falsity was the only basis on which Alexander claimed any economic damages. But that supposed oral promise undeniably violates the parol evidence rule. It cannot support the judgment. (See AOB 24-27.)

The remaining supposedly false promises cannot begin to support the judgment without the critical, asserted oral cause-only termination promise.

A. The Parol Evidence Rule Renders Void Any Oral Promise Limiting Group, Inc.'s Express Written Right To Terminate The Agreement Without Cause.

Alexander does not dispute that the parol evidence rule bars reliance on an oral promise contradicting the written Agreement's express no-cause termination term. (Code Civ. Proc., § 1856, subd. (a); *Bank of America etc. Assn. v. Pendergrass, supra*, 4 Cal.2d at p. 263; see also *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1387 ["A contract requiring termination only for cause will not be implied if there is an express writing providing to the contrary. There cannot be a valid express contract and an implied contract, each embracing the same subject, but compelling different results"]; *Wal-Noon Corp. v. Hill* (1975) 45 Cal.App.3d 605, 613.) He conceded that the Agreement here expressly could be terminated without cause. (See 20 RT 6048 [Alexander's counsel admits to jury that contract says it can be terminated without cause].) His brief tacitly admits—as it must—that proof of promises "directly at odds with the explicit provisions of the contract" violate the parol evidence rule. (RB 26.)

Alexander presents two arguments, one substantive, the other procedural, why the parol evidence rule should not bar reliance on the claimed oral cause-only termination promise "directly at odds with the explicit provisions of the contract." Substantively, he claims that the parol evidence rule simply does not apply to claims of fraud in the inducement. Procedurally, he claims that Group, Inc. waived the parol evidence rule by failing to object to his evidence.

Both arguments run counter to controlling Supreme Court authority. The so-called fraud exception does not permit proof of a claimed oral promise that a written contract term will not be enforced; nor does it allow proof of an oral promise that otherwise directly contradicts a written contract term. The "fraud exception" means only that an integration clause will not preclude fraud claims based on collateral representations or nondisclosures—promises *not* directly at odds with the explicit terms of the written contract. Despite its name, the parol evidence rule is a rule of substantive law, not of evidence. Evidentiary objections are not necessary. In any event, they were made here.

1. The fraud exception does not allow reliance upon oral promises that directly contradict a written contract term.

To overcome the parol evidence rule bar, Alexander invokes a "fraud exception." (RB 24-27; Code Civ. Proc.,§ 1856, subd. (g).)[3] The expansive interpretation of that exception that Alexander urges would swallow up the rule altogether, leaving little chance that it could *ever* apply. Long ago, the Supreme Court rejected just such an expansive interpretation.

The fraud exception only permits use of "other evidence"—evidence that *does not contradict* the agreement's express terms—to prove that the plaintiff was induced to enter into an agreement by false representations of fact.[4] That's what the statute says, and that's what the precedents consistently hold—when properly cited in the context of their facts. That

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[3] The "fraud exception" provides only that the parol evidence rule "does not exclude *other evidence* of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud." (Code Civ. Proc., § 1856, subd. (g), emphasis added.)

[4] The Law Revision Commission Comment to Code of Civil Procedure section 1856 explains that subdivision (g) does not make inadmissible extrinsic evidence—"*other than that made inadmissible by subdivisions (a) and (b)*"—to prove matters, such as fraud, specified in that subdivision. (Cal. Law Revision Com. com., 20 West's Ann. Code Civ. Proc. (1983 ed.) foll. § 1856, p. 30, emphasis added.) Because the amendment was proposed by the Law Revision Commission and enacted without change, the Commission's comment "is entitled to substantial weight in construing [section 1856]." (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 386-387.)

rule requires reversal here, with directions to enter judgment for the defendants.

The seminal, controlling decision is *Bank of America etc. Assn. v. Pendergrass*, *supra*, 4 Cal.2d 258, 263. *Pendergrass* held that the parol evidence rule excluded a claimed oral representation that a particular express contract term would not be enforced. (*Id.* at p. 263.) That is exactly what Alexander claims—that he was orally promised that the Agreement's no-cause termination provision would not be enforced. As a Supreme Court decision, *Pendergrass* is binding on this Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Yet, Alexander hardly discusses it.

Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal.App.3d 388, 417, well illustrates the controlling application of *Pendergrass* and the appropriate reach of the fraud exception. The Court of Appeal there carefully plumbed the line between evidence not cognizable under the parol evidence rule and other evidence that properly fell within the fraud exception. Its analysis demonstrates the error of the Alexander's proffered limitless fraud exception. There, the parties' integrated written contract promised that an aircraft's main landing gear would be designed so that specified failures would be "unlikely" to rupture its fuel lines. A parol promise that the fuel lines "will not rupture," was not cognizable because it was inconsistent with the contract's express promise that fuel line rupture would merely be "unlikely." (*Id.* at p. 418.) But other parol promises that did not contradict the terms of the written agreement could suffice to prove fraudulent misrepresentations. For example, evidence of a false parol promise that the landing gear *had already been designed* could be used to show fraud when, in fact, it had not yet been designed when the contract was signed. (*Id.* at p. 428.)

The same analysis applies to our case. Supposed promises that contradict the Agreement's express no-cause termination provision are simply not cognizable for any purpose. Those include the promise that the Agreement would be terminated only for cause and other variations of it (such as that the Agreement would be terminated only for "six deadly sins," that instead of terminating the Agreement Alexander would be transferred back to being a sales agent, and that the Agreement would not be terminated for Alexander's failure to attain goals and objectives). (13 RT 3955-3956 [six deadly sins]; 3954 [transfer or reinstatement], 3941-3942 [easily attainable goals and objectives].) The parol promises at the heart of Alexander's case are wholly inconsistent with the integrated contract's express no-cause termination provision. They are incompetent under subdivisions (a) and (b) of Code of Civil Procedure section 1856, and therefore do not constitute the "other evidence" referred to in the fraud exception, subdivision (g). They cannot support the judgment. Not even close.

Not surprisingly, Alexander's brief hardly mentions the controlling cases. The opening brief showed how and why the fraud exception to the parol evidence rule does not apply to claims such as Alexander's, and provided sound authority to support that reasoning. (AOB 26, citing *Bank* *of America etc. Assn. v. Pendergrass, supra*, 4 Cal.2d at p. 263; *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 611-612; *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1437; *Bernstein v. Financial Indem. Co.* (1968) 263 Cal.App.2d 324, 326-327, 329; *West v. Henderson* (1991) 227 Cal.App.3d 1578, 1583-1584.) Alexander's Brief ignores two of those authorities (*Alling* and *West v. Henderson*). It concedes the opening brief's interpretation of another two (*Bank of America etc. Assn. v. Pendergrass* and *Bernstein v. Financial Indem. Co.*). *Pendergrass*, as a Supreme Court decision, is binding. As to it, Alexander implausibly denies that the parol promises contradict the Agreement's no-cause termination provision. (RB 26-27.) The other case, *Marketing West, Inc. v. Sanyo Fisher (USA) Corp., supra,* Alexander touts as controlling—but only by failing to mention the critical facts that distinguish it. (RB 31-32.)

In *Marketing West, Inc., supra,* sales representatives sued for wrongful termination alleging oral promises that a new at-will agency agreement, replacing their written cause-only agreement, was merely "pro forma," a "formality," and "did not mean anything." (6 Cal.App.4th at p. 611.) The Court of Appeal held that the parol evidence rule barred consideration of those oral representations because "the representations are contradicted by the existence of the integrated written agreements providing that appellants could be terminated without cause." (*Id.* at p. 612.) Those are the identical facts as in this case and require the same holding.

Alexander ignores this central holding in *Marketing West*, the only one relevant here. He mistakenly relies instead on a different analysis that applies to different facts. (RB 31-32.) In *Marketing West* the plaintiffs alleged that the defendant company also had an *already-existing plan* to terminate the plaintiffs without cause as soon as they traded their cause-only tenure for the new at-will agreement. *Marketing West* held that fraudulent *concealment* of that *already-existing* termination plan was actionable independent of the contract's terms. (*Marketing West, Inc., supra,* 6 Cal.App.4th at pp. 612-614.) But Alexander presented no such facts. Unlike *Marketing West*'s allegations, Alexander offered no evidence of a hidden intent or fraudulent concealment existing in January 1982 to terminate the Agreement thirteen years later in 1995.[5] That portion of the *Marketing West* analysis does not apply to anything in our record, and cannot support the use of parol evidence here.

None of the other authorities on which Alexander relies approves the all-encompassing interpretation of the fraud exception that would be required to sanction use of the parol evidence that was admitted in this case. None involves the introduction of evidence of a prior or contemporaneous oral promise that contradicts the express term of an integrated agreement.

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[5] Alexander's did allege that Group, Inc. "secretly" intended that the Agreement *could be* terminated without cause. (3d Am. Compl. ¶78(h), AA 3[122:20-22]; see also RB 33 [management concealed intention that Agreement's terms would bind parties].) There was no such "secret" intent; that is what the Agreement provided, openly and unambiguously. (13 RT 3952 [Alexander knew of at-will termination provision]; AA 120[1785] [Alexander argues right of at-will termination "was immediately manifested by the language of the DM Agreement itself"].)

For example, in *Halagan v. Ohanesian* (1967) 257 Cal.App.2d 14 (RB 24) and *Ferguson v. Koch* (1928) 204 Cal. 342 (RB 25), unlike here, nothing in the allegedly fraudulent pre-contract representations directly contradicted the written agreement. *Vai v. Bank of America* (1961) 56 Cal.2d 329, 344 (RB 24-25), *Richard v. Baker* (1956) 141 Cal.App.2d 857, 864-865, and *Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 251 (RB 25), merely hold that recitals of no prior representations do not render moot alleged pre-contract fraudulent representations that do not directly contradict anything in the agreement.

Alexander's fraud exception argument is most notable for the authorities—such as *Bank of America etc. Assn. v. Pendergrass, supra*, 4 Cal.2d 258, and *Bernstein v. Financial Indem. Co., supra*, 263 Cal.App.2d 324—it ignores and contradicts. His bold proposition is that parol evidence may be used to prove that he was fraudulently induced to enter into the Agreement, even if it contradicts the Agreement's terms. (RB 25-27; see RB 26 ["Alexander is not seeking to establish that the contract could only be terminated for cause, but that he was fraudulently induced . . . by such a promise"].) But *Alling v. Universal Manufacturing Corp., supra*, 5 Cal.App.4th at pp. 1436-1437 analyzed—and soundly rejected—that exact argument. (See AOB 25, 26, 31, 33.) Instead of responding, Alexander punts.

And for good reason. In *Alling* the plaintiff claimed a promise that his business plan would be funded, notwithstanding an inconsistent written provision that funding was within the other party's discretion. Because "the evidence in question is offered to show a promise which contradicts an integrated written agreement," it could not establish fraud in the procurement of the agreement. (*Alling, supra*, 5 Cal.App.4th at pp. 1436-1437.) There, as here, "[u]nless the false promise is either independent of or consistent with the written instrument, evidence thereof is inadmissible.'" (*Ibid.* quoting *Simmons v. Cal. Institute of Technology* (1949) 34 Cal.2d 264, 274-275; see *Bank of America etc. Assn. v. Pendergrass, supra*, 4 Cal.2d at p. 263; *Banco Do Brasil* (1991) 234 Cal.App.3d 973, 1010-1011 [false promise that contradicts or varies terms of integrated written agreement is inadmissible to prove fraudulent promise or fraudulent inducement].) That's the law, despite Alexander's refusal to address it.

2. Because it is a rule of substantive law, evidence of a parol promise contradicting a written agreement cannot support a judgment, whether objected to at trial or not.

Substantively unable to avoid the parol evidence rule, Alexander offers a procedural dodge. He claims that Group, Inc. failed to adequately object to the admission of evidence of supposed oral promises contrary to the written Agreement. His argument is wrong both legally and factually.

Legally, the parol evidence rule, "founded in wisdom and to prevent frauds and perjuries," renders oral promises that contradict the express terms of a written agreement of no legal effect. (*Bank of America etc. Assn.*

v. Pendergrass, *supra*, 4 Cal.2d at pp. 263-264; *Alling v. Universal Manufacturing Corp.*, *supra*, 5 Cal.App.4th at pp. 1433-1434.) It is not just an evidentiary rule, it is substantive one: The terms of a writing intended as a final expression of the parties' agreement "*may not be contradicted* by evidence of any prior agreement or of a contemporaneous oral agreement." (Code Civ. Proc., § 1856, subd. (a), emphasis added.) The statute does not govern how facts may be proved, it governs, as a matter of policy, *what* may be proved.

Because the issue is one of what substantively may be proved, no evidentiary objection is required to invoke the rule. The Supreme Court has so held in no uncertain terms:

> "'The parol evidence rule, as is now universally recognized, is not a rule of evidence but one of substantive law. . . . Extrinsic [parol] evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself.' [Citation.] . . . [¶] If we treat the parol evidence rule as one of substantive law, we cannot consistently subjugate that rule to the principles of objection and waiver codified in the Evidence Code. (Evid. Code, § 353.)" (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 22-23.)

Alexander's waiver claim, thus, is frivolous.

3. Group, Inc. repeatedly, unsuccessfully objected to the admission of the evidence here and unsuccessfully sought a proper clarifying instruction.

In any event, Group, Inc. both objected to the introduction of inadmissible parol evidence *and* sought a legally appropriate jury instruction on the permissible effect—none—of such evidence. (E.g., AA 18 [motion in limine]; see AA 53 [trial brief objecting to any evidence of an oral promise of cause-only termination]; 4 RT 904, 917-919.) The trial court made abundantly clear that it was categorically overruling Group, Inc.'s objection to parol evidence contrary to the Agreement. (4 RT 905-906, 917-919.) Group, Inc. was not required to repeat its objection ad nauseam. "It has long been the rule that '[w]here a party has once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising at each examination of other witnesses; and his silence will not debar him from having the exception reviewed.'" (*People v. Antick* (1975) 15 Cal.3d 79, 95, citation omitted; accord, *People v. Wharton* (1991) 53 Cal.3d 522, 549, fn. 3 [no further objection necessary where objection conclusively ruled upon in limine]; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784 ["issues are preserved for review when it would be fruitless or an idle act for an attorney to object"].) Nonetheless, Group, Inc. repeatedly renewed its objection, without success.

(E.g., 10 RT 3016-3017, 3949-3950; see also 10 RT 3019-3021, 3350-3356, 14 RT 4301-4303.)

And no objection was necessary to preserve Group, Inc.'s request for a proper jury instruction explaining that the jury could not award damages for the expressly-permissible termination of the Agreement without cause. (19 RT 5750-5755; AA 97 [1475].) Alexander claims that the instruction was not really refused and was confusing. The trial court refused it in no uncertain terms, absent stipulation from Alexander. (RT 5756.) Nor was there anything confusing about the instruction. It was taken directly from the prior trial court order denying summary judgment (compare AA 48 [1131] with AA 97 [1475]), and it accurately reflected the parol evidence rule. Certainly, there was nothing that a minor interlineation by the court would not have corrected. (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1159-1160 [trial court could not reject instruction as confusing under hypertechnical reading; trial court had duty to change "injury" to "death" in instruction if that would eliminate confusion].)

4. Group, Inc.'s demonstration of prejudice is unrebutted.

Finally, Alexander claims that Group, Inc.'s demonstration of prejudice—necessary for reversal due to evidentiary and instructional error—is a "makeweight." (RB 30-31.) But he does not dispute the impact of the parol evidence, nor that much of the trial was consumed by his focus on oral promises and by Group, Inc.'s efforts to overcome that improper evidence with proof of cause to terminate the Agreement. (See record citations, AOB 9 & fn. 5.) And he does not dispute that the supposed oral promise of cause-only termination was the focus of his closing argument. (See AOB at 30-33.)

Rather, he asserts that there was no prejudice from the erroneous failure to instruct the jury because the trial court took the issue from that jury and ruled against Group, Inc. But that is circular. And he asserts that there can be no prejudice because this Court summarily denied a writ petition, a determination that is neither law of the case nor indicative of any view on the merits. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 895-896.) Either way, he does not address the real standard for prejudice—whether it was probable that the trial court's evidentiary and instructional errors affected the outcome of the case. The only possible answer to that inquiry—not disputed by Alexander— is "yes."

B. Even If The Parol Evidence Rule Did Not Apply, Alexander Could Not Justifiably Rely On Oral Promises That Contradict The Integrated Written Agreement.

Even without the parol evidence rule, Alexander's claim of a fraudulent oral promise limiting the right to terminate the Agreement fails as a matter of law. Alexander does not dispute that justifiable reliance is an essential element of his burden of proof for fraud. (AOB 27.) His argument on justifiability boils down to one thing: that he was justified in relying on an oral promise that he *knew at the time* was contradicted by the written Agreement he signed. (RB 28-30.)

The lack of legally justifiable reliance on an oral assurance that contradicts the written terms of a contract is an independent basis on which Alexander's claim fails. Reliance on parol promises that contradict the express provisions of an integrated written agreement is not justifiable as a matter of law. (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp., supra*, 6 Cal.App.4th at p. 612 [assuming the truth of pleaded facts, plaintiffs could not reasonably rely on cause-only representations that were "contradicted by the existence of the integrated written agreements providing that appellants could be terminated without cause"]; *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 807 [reliance on oral promises of continuing employment was "simply not justifiable" because representations contradict integrated agreement for employment at will].) Alexander presents no authority to the contrary, because there is none.

Because his reliance cannot—as a matter of law—have been justifiable, Alexander's fraud claim could not be premised upon oral promises limiting the right to terminate that conflict with the written Agreement. Such claimed oral promises cannot support the verdict.

C. Alexander's "Litany" Of Other Oral Promises Cannot Independently Support The Judgment.

Alexander argues that the remaining claimed oral promises provide sufficient substantial evidence to support the verdict. (RB 22-23.) He says he was promised that he could operate his business with a minimum of interference, that he could set his own goals, and that he would not be limited in the number of agents he could recruit. (RB 2-3.) The statute of limitations clearly bars reliance on those supposed promises. And it was undoubtedly prejudicial to allow Alexander to couple (indeed subordinate) his jury presentation of those (and other) supposed promises with his unallowable claim of oral promises limiting the right to terminate the Agreement. In any event, the remaining claimed promises cannot possibly justify the verdict.

The opening brief identifies those supposed promises and others (AOB 3- 4), and points to a number of reasons why they cannot possibly support the judgment. It notes the complete absence of evidence that they were false, or that they were or should have been known by those who made them to have been false when made. (AOB 29-30.) Alexander's brief offers no response to these points. They may be taken as conceded.

Alexander now adds another lethal blow to his own theory: he proclaims that he suffered no damage at all until the Agreement's termination in 1995. His only damages theory was that he made less money than he would have made in a sales agent sinecure. His position now is that none of the supposed false promises were enforced against him to his damage. In a word, those promises did not proximately cause him any injury. (*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 ground in *Stout v Turney* (1978) 22 Cal.3d 718, 730.)

The mere fact that a false promise induced a plaintiff to enter into contract that later turned out to be unprofitable does not suffice to establish proximate cause. To establish proximate cause, the falsity of the particular promise must have a connection to why the plaintiff was damaged. (*Pepper v. Underwood, supra*, 48 Cal.App.3d at p. 711 [even if defendants induced plaintiff to buy motel by falsely stating its value, no proximate cause if subsequent foreclosure did not result from overpaying for motel]; see also *Safeco Ins. Co. v J & D Painting* (1993) 17 Cal.App.4th 1199, 1204 [defendant's negligence not proximate cause of loss due to drop in market while repairs being made].)[6]

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[6] This proximate cause requirement is developed in greater detail in federal cases under the label "loss causation." A plaintiff must not only show "transaction causation," that is, reliance on a false representation as the reason for entering a contract, but also "loss causation," that the nature of the matter represented was what led to the claimed damages. (E.g., *McGonigle v. Combs* (9th Cir. 1992) 968 F.2d 810, 820-821; *Bastian v. Petren Resources Corp.* (7th Cir. 1990) 892 F.2d 680, 683-684; see also *First Nationwide Bank v. Gelt Funding Corp.* (2d Cir. 1994) 27 F.3d 763, 769; *Standard Chartered PLC v. Price Waterhouse* (Ariz.Ct.App. 1996) 190 Ariz. 6, 32, 34 [945 P.2d 317, pp. 343-345] [following *McGonigle*]; *Martin v. Heinold Commodities, Inc.* (1994) 163 Ill.2d 33, 58-61 [643

The remaining promises, thus, cannot possibly support the judgment.

III.

REITERATION OF THE SUPPOSEDLY FRAUDULENT REPRESENTATIONS AFTER THE AGREEMENT WAS ENTERED INTO CANNOT SUPPORT THE JUDGMENT.

The judgment cannot be supported by evidence of "representations made subsequent to the agreement," as Alexander suggests. (RB 22.) There are at least three independent reasons.

First, there is no evidence that any such representations were knowingly false when made, nor that Alexander was unaware of any falsity. His brief cites arguments but no evidence that there was any continuing fraud. (RB 31-33.)

Second, there is no evidence that Alexander relied on any post-1982 representations to his detriment, and no evidence that he was injured by any such concealment or reliance. Reiteration of promises after the Agreement was signed could not have induced Alexander's earlier entry into it. Yet damages caused by his entry into the Agreement, rather than by any post-1982 reliance or breach, are the only damages he presented or recovered in this case. (*Armstrong v. Peat, Marwick, Mitchell & Co.*, *supra*, 150

N.E.2d 734, 746-747]; *Criqui v. Pearl Music Company, Inc.* (1979) 41 Ore.App. 511, 516-518 [599 P.2d 1177, 1180-1181].)

App.Div.2d at p. 193 [540 N.Y.S.2d at pp. 802-803] ["If this (repeated assurances) be plaintiff's theory, it is without merit. Clearly, the theory of the complaint is that the damages plaintiff sustained were caused as a result of her leaving her former employment, having been induced to do so by alleged representations. No other theory of reliance and damages is offered in the complaint or anywhere else in the record, such as, for example, that plaintiff rejected other employment offered to her in reliance upon repeated assurances . . ."].)

Third, even if the admission of post-Agreement representations into evidence had been justified, that in no way lessens the prejudicial impact of the erroneous admission of the pre-Agreement parol promises. It is the supposed pre-Agreement promise of cause-only termination that dominated the trial and that formed the basis for all of the damages awarded by the jury. It was from the erroneous admission of that evidence that the bulk of the prejudice arose. Any way it is viewed, Alexander's continuing fraud claim cannot salvage his judgment

IV.

ALEXANDER ALL BUT ADMITS THAT THE JURY AWARDED SPECULATIVE, DUPLICATIVE, AND IMPROPER COMPENSATORY DAMAGES.

A. The Award Of Fraud Damages For Lost Net Earnings Is Based On Speculation.

Alexander warns against "rank speculation" about the jury's reasoning process in reaching its damage determination. (RB 37, fn. 10.) But it would require a suspension of disbelief *not* to infer that the jury adopted Alexander's counsel's invitation to speculate about these matters. The jury found damages totaling precisely the numbers counsel suggested in argument, including the same rounding of the difference between the gross number counsel proposed (and the jury found) and the stipulated offsetting amount earned as a district manager. (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 505 [it is reasonable to assume that jury accepted amounts proposed by counsel, since verdict totaled exactly those amounts]; *Padre Dam Mun. Water Dist. v. Burkhardt* (1995) 38 Cal.App.4th 988, 994-995 [prejudice from improper testimony is established by fact that jury reached almost exact figure]; *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 769 [jury's reliance on improper damages element shown by verdict in amount urged by counsel]; *Center Foundation v. Chicago Ins. Co.* (1991) 227 Cal.App.3d 547, 561 fn. 13 ["little room for doubt" about impact of jury instruction in light of verdict just $1 less than requested]; *Foss v. Anthony Industries* (1983) 139 Cal.App.3d 794, 801 [prejudice from improper expert testimony shown by verdict in exact amount expert testified].)

He suggests no plausible way the jury could have reached its damage determination without engaging in rank speculation. He points to no evidence that he would have or could have worked to age 67, as his counsel's assumptions required; he points to no evidence that his earnings as an agent would have been comparable to those of the particular agents whose earnings were shown, as his counsel's assumptions required (see AOB 35); and he points to no evidence about what his expenses would have been had he remained an agent instead of entering into the 1982 Agreement, to support his counsel's assumptions about his net earnings and damages (see AOB 38). Having invited the jury to speculate about the assumptions that were essential to his damages theories, Alexander cannot now deny that the jury did so in reaching the verdict.

The opening brief noted Alexander's failure to present any evidence on these points, and showed that juries are not entitled to assume facts without evidence. (AOB 34-39.) Alexander's response effectively abandons the damages theory his counsel presented to the jury, all but conceding its error. Rather, Alexander speculates that the jury might have used other, unidentified, calculations, equally without evidentiary support. (See *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 [party may not change theory of case on appeal]; *Mattco Forge, Inc. v. Arthur Young &*

Co. (1997) 52 Cal.App.4th 820, 847 [same].) In place of evidence he improperly relies on supposed facts outside of the record to blame Group, Inc. for his deficiency in proof. (RB 34-37.)[7]

Alexander claims that expert evidence is not always essential. (RB 36 & fn. 9.) But expert or not, *some* evidence is required to support conclusions about what his earnings would have been, to support assumptions that his earnings would have been comparable to those of other agents, or even to show what other agents' average net earnings over the entire period in question had been. (E.g., *Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 163 [plaintiff can rely on data from other enterprises to establish lost profits only if she shows they operate under similar conditions].) Alexander points to no systematic or comprehensive evidence of agents' earnings, and no evidence of comparability. He points instead to one agent's earnings in a couple of years and another agent's earnings in some other years.

Having his counsel make the critical assumptions—assumptions that are beyond the ken of lay jurors—for the first time during closing argument, or speculating on appeal what the jury might have assumed, is no substitute for evidence. It is no substitute for expert testimony that extrapolates meaningful conclusions from available evidence pursuant to a rationally-explained methodology, subject to cross examination. That essential

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[7] Alexander's accusation of "duplicity" (RB 34) is not only intemperate, it is false. There is no evidence or finding in the record to support it. In any event, Alexander cannot rely on an absence of evidence from the defendants to prove his case.

process was short-circuited here. In its place were counsel's unsupported assumptions, offered to the jury without opportunity for cross-examination.

His claims of having shown the requisite *net* lost earnings equally fail. While admitting he had expenses as an agent (e.g., 13 RT 3946-3947), he now argues that perhaps he actually spent only "tens of thousands" of dollars rather than the "hundreds of thousands of dollars" he testified to at trial (13 RT 4049-4050.). Either way, he tacitly concedes that the jury was left to speculate as to his net lost earnings without evidence. (RB 35.) As the plaintiff, Alexander's burden was to prove his *net* loss, not merely his *gross* loss. (*Kids' Universe v. In2Labs* (Jan. 30, 2002, 2d Civ. No. B147455) ___ Cal.App.4th ___ [Slip. Opn. at p. 15]; *Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1700; *Kuffel v. Seaside Oil Co.* (1970) 11 Cal.App.3d 354, 366.) Without evidence to support a *net* loss there is no basis upon which to find any damages at all.

Finally, even were they not speculative, counsel's musings on appeal about what the jury might have assumed about Alexander's lost earnings during the Agreement's tenure cannot support the judgment for another reason: they are fatally inconsistent with his brief's positive representation—judicial admission—that he suffered no damages at all before the Agreement's 1995 termination. (E.g., RB 13, fn. 6, 15, 18, 22.) He can't have it both ways. He can't justify a $2.5 million economic damage award by claiming that the jury did not base its award on assumptions about how long he would have worked or how much income he would have made in the future—contrary to what his counsel argued at trial—and, at the same time, claim that he suffered *no* economic damage before the Agreement was terminated.

B. Alexander Does Not Dispute That His Contract And Tort Damages Are Fatally Inconsistent And Duplicative.

The opening brief did not challenge the $190,126.06 breach of contract, additional district-manager compensation award; it argued rather that the award of the same $190,126.06 as part of Alexander's tort lost-earnings damage award duplicates the contract damage award. The opening brief also noted that the tort damage award embodies a $10,051 arithmetical error. (AOB 39-40.)

Respondent's brief dodges both points, responding only that a plaintiff may recover independent damages for both breach of contract and fraud. (RB 37-38.) That is true, *if* the awards are independent and not legally inconsistent, *if* there is no duplication, and *if* the amounts are arithmetically correct.

Those *ifs* are Alexander's downfall. Without dispute from Alexander, the awards here *are* legally interdependent and inconsistent. One provides additional contract benefits as a district manager; the other (the tort claim) awards lost earnings over and above what was made as a district manager and assumes that no further district manager benefits are paid. Without dispute from Alexander, the verdicts *are* duplicative. The $190,126.06 breach of contract award is not deducted from the gross lost earnings as a sales agent and, thus, is included within the $2.5 million tort verdict. And also without any dispute from Alexander—not a word—the verdict *is* arithmetically overstated by $10,051.

The arithmetical error should be corrected in any event. If the tort award is set aside with directions for entry of judgment in the defendants' favor, the contract award of $190,126.06 may alone be affirmed. But if the tort award is either affirmed or reversed for retrial, then the $190,126.06 contract award must be subtracted from any judgment. (AOB 39-40, fn. 17.)

C. Alexander Silently Concedes The Erroneous Refusal To Instruct As To Proximate Cause.

Although Alexander argues that, as a theoretical matter, fraud can sometimes proximately cause emotional distress damages (RB 39), he never mentions the opening brief's argument that the trial court prejudicially erred by failing to instruct the jury about what proximate cause means in this context. (AOB 40.) The existence of a theoretically supportable legal theory and an instruction to and finding by the jury are two different things. His silence on the instruction issue concedes the error.

D. Alexander Admits That His Emotional Distress Damages Were Not In Fact Caused By the 1982 Fraud.

Alexander fails to demonstrate any causal, let alone proximate cause, link between the claimed fraud and his claimed emotional distress. The only basis upon which Alexander was entitled to recover damages for emotional distress was as a result of the supposed fraudulent inducement to enter into the Agreement in 1982. (20 RT 6035; AA 97[1434].) Even now, he claims that his "damages are based on the injury he suffered because he was induced to leave the secure sales agency he held, and are not based on the loss of his district manager contract." (RB 26-27.)

But Alexander's defense of his emotional distress damages could hardly be more inconsistent with those disclaimers. His emotional distress, he now admits, did not result from the 1982 fraud at all; rather it resulted from Group, Inc.'s later demands on him, "inconsistent with the [oral] promises" that had years earlier induced him to enter into the Agreement. It was Group, Inc.'s *failure to perform* its promises—the post-Agreement "reversal of his expectations" rather than any fraud in 1982—that caused his emotional distress. (RB 39-40.) That admission acknowledges the absence of the essential element of causation. It confesses that his damages were not caused by any fraud in the inducement of the Agreement. Strike One.

Alexander's theory that his damages arose from *breach* of the supposed promises rather than from his 1982 entry into the Agreement rests on a breach of contract theory, not a fraud theory. Emotional distress damages are not recoverable for breach of contract. Strike Two.

Even without that confession, it is impossible without some reasonable basis in the evidence (there is none) to surmise that Alexander's 1995 emotional distress resulted from the claimed fraud—from the induced loss of his sales agency 13 years earlier. To the contrary, he expressly disclaimed having any damages at all before the Agreement was terminated in 1995. (E.g., RB 13, fn. 6, 15, 18, 22.) Thus, he now disclaims any connection between the claimed fraud and his emotional distress award. Strike Three.

V.

THE PUNITIVE DAMAGES CANNOT STAND.

A. The Special Verdict Does Not Support The Punitive Damage Award Against Group, Inc.

1. The instructions erroneously did not require the jury to find that Group, Inc. acted with oppression, malice, or fraud.

Alexander engages in a lengthy characterization of the record, arguing that the defendants waived the trial court's erroneous refusal to instruct that oppression, fraud, or malice "must be on the part of an officer, director, or managing agent of the corporation." (RB 44-45; see AOB 44, citing *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 721, 722-727.) The record is not as he characterizes it.

The jury was not instructed (as Alexander wrongly claims) that an employee "must have managerial authority" for punitive damages to be awarded and the defendants did not concede (as he wrongly claims) that it was. (RB 44.) The jury *was* 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." (20 RT 6029, emphasis added; AA 97 [1436], emphasis added, quoted at AOB 44-45.) It was instructed how to determine when an employee acts in a managerial capacity (20 RT 6034, quoted at AOB 45, fn. 20 & RB 44-45), but Alexander's brief leaves unanswered the charge that the "managerial capacity" test—the most he even claims the jury was instructed—is itself error. (See AOB 45, fn. 20.) Most significantly, he does not contend that the "managerial capacity" instruction given to the jury was in any way tied to what the jury had to find to impose corporate liability for punitive damages: that the individuals who acted with oppression, malice, or fraud must be the corporation's officers, directors, or managing agents. (*College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at pp. 721, 722-727.)

That error alone permitted the jury to award punitive damages without the facts that would justify them. For that error alone, the punitive damages must be set aside.

2. Alexander must bear the burden of his own failure to propose a special verdict and instructions sufficient to support the punitive damage award.

The opening brief challenged the absence of any determination by the jury that an officer, director, or managing agent of defendant Group, Inc. (as opposed to any of other defendant) acted with oppression, fraud, or malice. It cited authority that those findings are essential to support the punitive damages verdict and cannot be implied from anything in the record. (AOB 44-45.) Seeking to attach new meaning to the concept of "invited error," Alexander now argues that *the defendants'* failure to request a special verdict that supports *the plaintiff's* punitive damages waives the special verdict's insufficiency. (RB 42-44.)

Alexander is wrong.

The failure to properly include all of the necessary elements of the punitive damage claim in the instructions or findings is statutorily deemed objected to. (Code Civ. Proc., § 647; *Barber v. Rancho Mortgage & Investment Corp.* (1994) 26 Cal.App.4th 1819, 1840, fn. 25; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 333-334; *Robison v. Leigh* (1957) 153 Cal.App.2d 730, 733 ["The final decision is deemed excepted to (Code Civ. Proc., § 647) and '. . . the insufficiency of the findings to support the judgment may be urged on appeal although appellant neither excepted to the findings nor sought their amendment,'" citations omitted].)

It is Alexander who sought the punitive damage award and therefore it is he who was responsible for obtaining the prerequisite findings—whether the defendants did or did not request them. As in *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960, here too "the jury was neither requested to nor did it make the necessary factual findings" to support the plaintiff's case. For that reason, here too, "an award of punitive damages may not be sustained." (*Ibid.*) Alexander is bound by its own failure to seek the findings essential to his case, and the error requires reversal of the punitive damage award without remand for a new trial. (*Id.* at p. 960, fn. 8.)

In any event, Group, Inc. requested that the jury be instructed that punitive damages could be imposed only if those who acted with oppression, fraud, or malice were officers, directors, or managing agents of a defendant being held liable for punitive damages, and how to make that determination. That instruction was refused. (AA 97[1502]; see AOB 44-45.) Without an instruction on the issue, there was simply no basis for the essential finding.

B. The Jury Instruction On Comparative Reprehensibility Was Improperly And Prejudicially Refused.

The opening brief demonstrated that the trial court prejudicially erred by refusing to instruct the jury that it should evaluate the reprehensibility of the defendant's conduct *by comparison with* other *reprehensible* conduct—conduct motivated by oppression, fraud, or malice—rather than merely with blameless conduct. That is the comparison required by the analyses of the United States and California Supreme Courts with respect to constitutional limitations on punitive damage awards. (See AOB 46-47.) Dismissing that argument, Alexander urges that any comparison of the conduct in this case with other conduct eligible for punitive damages, rather than with blameless conduct, is unsupported and unworkable. (RB 47-49.)

That comparison is neither unsupported nor unworkable. Recently *In re Exxon Valdez (Baker v. Hazelwood)* (9th Cir. 2001) 270 F.3d 1215, 1244, found the concept of relative reprehensibility integral to the United States Supreme Court's analysis in *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589, 1599, 134 L.Ed.2d 809], just as noted in the opening brief. (AOB 46.) In evaluating a $5 billion punitive award arising from plaintiffs' loss of income and livelihoods resulting from an oil spill (the environmental damage was not part of the suit), the Ninth Circuit examined the *comparative* degree of reprehensibility of the defendant's conduct. (*In re Exxon Valdez, supra,* 270 F.3d at pp. 1241-1243.) It compared the $5 billion punitive award, imposed for knowingly permitting an alcoholic sea captain to transport huge quantities of oil through difficult waters, with other similarly reckless but non-violent conduct resulting in unintended economic loss. (*Id.* at p. 1242.) The Ninth Circuit, thus, added its voice to those of the courts cited in the opening brief.

That is the analysis that the refused instruction would have called upon the jury to engage in. Far from being unworkable, that *relative* reprehensibility analysis is what is required to determine the appropriate amount of punitive damages. What is unworkable is giving juries no proper guidance as to how to evaluate punitive amounts. What is unworkable is a system that does not tell juries that they should differentiate a bad paint job (*BMW*) or a loss of income (this case and *Exxon Valdez*) from double murder (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573). The jury was erroneously deprived of that guidance and analysis here; the 9 to 3 margin on the amount of punitive damages highlights the prejudice of that error—prejudice that Alexander does not contest.

C. There Is No Justification For the Exclusion Of Evidence Relevant To The Need For Deterrence.

The jury was instructed to determine the amount of punitive damages required to deter wrongful conduct (21 RT 7223; AA 97 [1443]), but the defendants were barred from presenting evidence relevant to that issue. (AOB 48-49.) The trial court ruled that the *only* factual issue with respect to punitive damages (at least the only factual issue on which *the defendant* would be permitted to present evidence) was wealth. Nothing else. (21 RT 7218-7220.)

Alexander does not dispute that the evidence was unquestionably relevant. The proffered evidence was directed to how much deterrence was required in light of the large compensatory award, a factual issue that the jury was instructed to consider. Its exclusion is not justified by any citation he offers. (RB 49-50.) *In re Exxon Valdez, supra,* 270 F.3d at p. 1244, specifically held the size of a compensatory award or expenses following wrongful conduct "should be considered"—is relevant—in evaluating the extent to which further deterrence is appropriate.

The jury was entitled to determine that Group, Inc. had "gotten the message" as a result of the compensatory award, as the excluded evidence tended to show. The trial court's blanket exclusion of relevant evidence regarding the need for further deterrence was an abuse of discretion. The jury's 9 to 3 split on the amount of punitive damages strongly suggests that such evidence might well have resulted in a more favorable outcome. Alexander does not argue otherwise.

CONCLUSION

The judgment is factually unsupported, procedurally unsound, and internally inconsistent. There was no fraud, and there were no damages. The judgment should be reversed with directions to enter judgment on the plaintiff's fraud claim in favor of Farmers Insurance Group, Inc.

Dated: February 13, 2002

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1), California Rules of Court, I certify that the preceding Appellants' Reply Brief (exclusive of tables and this certificate) contains 12,129 words

Dated: February 12, 2002

Peter O. Israel