2d Civil No. B183426 consolidated with B186025

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BILLY BLANKS, GAYLE BLANKS, and
BG STAR PRODUCTIONS, INC.,

Plaintiffs and Respondents,

v.

SEYFARTH SHAW LLP and WILLIAM H. LANCASTER,

Defendants and Appellants.

Appeal from the Superior Court of California, County of Los Angeles
Honorable Susan Bryant-Deason
Superior Court Case No. BC 308 355

APPELLANT SEYFARTH SHAW LLP'S OPENING BRIEF

Service on Attorney General and District Attorney of Los Angeles County
required by Business & Professions Code § 17209

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State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B183426 consolidated w/B186025

Case Name: Blanks, et al. v. Seyfarth Shaw LLP, et al.

Please check the applicable box:

[ ] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

[X] Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. William H. Lancaster	Co-appellant and partner in Seyfarth Shaw LLP
2. Attorneys' Liability Assurance Society, Inc.	Malpractice insurer for Seyfarth Shaw LLP
3.	
4.	

Please attach additional sheets with Entity or Person Information if necessary.

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

INTRODUCTION

This is a legal malpractice, fraud and breach of fiduciary duty case holding Seyfarth Shaw LLP ("Seyfarth") liable for almost $30,000,000 in compensatory and punitive damages. The case centers on the alleged failure of Seyfarth attorney William Lancaster to timely file a claim under the Talent Agencies Act ("TAA") (Lab. Code, § 1700.5 et seq.) on behalf of plaintiffs Billy and Gayle Blanks and BG Star Productions, Inc. ("the Blankses" or "plaintiffs") against their former business manager Jeffrey Greenfield. Plaintiffs claim that Lancaster deliberately and knowingly delayed filing the TAA claim until after the statute of limitations had expired in order to "churn" the case for unnecessary fees.

The many, many reasons the judgment must be reversed in its entirety are explained in both Lancaster's and this opening brief on Seyfarth's behalf. However, because there is one error that affects Seyfarth alone—the utterly unwarranted imposition of $15,000,000 in punitive damages against the firm alone—we discuss it first in this Introduction. By doing so, we do not mean to diminish the fundamental and prejudicial nature of all the errors raised, which are discussed in their traditional order (liability before damages) in the body of the brief. The errors discussed in this brief include:

1. *Unsupported and excessive punitive damages.* There simply is no evidence that anyone in a position of substantial authority at Seyfarth had the slightest knowledge of any allegedly wrongful churning scheme. To hold an entity such as a law firm liable for punitive damages, Civil Code section 3294 requires that an "officer, director or managing agent" of the firm must have either committed the misconduct or ratified it. The California Supreme Court has expressly held that (1) a "managing agent" under section 3294 must be someone in a *policymaking position* at the firm;

and (2) the evidence must show that that individual had *actual knowledge* of the illicit scheme.

Not a speck of evidence supported those findings here. Contrary to the trial court's viewpoint, the fact that Lancaster was a partner in the firm did not make him a managing agent for punitive damages purposes: The law is clear that mere "partnership" is not enough, since such a rule would nullify the managing-agent requirement by invariably subjecting a firm to punitive damages based simply on the misconduct of a new or non-policymaking partner. The indispensable element of the managing agent requirement is the individual's policymaking authority, and there was not a whisper of evidence that Lancaster possessed that authority.

The only individual with any involvement in the Blanks matter who even arguably had that authority was George Preonas, who had practiced law at Seyfarth for over 35 years and had sat on two of the firm's management committees. But Preonas' sole involvement was limited to spending *fifteen minutes* consulting with an associate on a procedural aspect of the case. There was no evidence he learned of any purported churning scheme at any time; in fact, the undisputed evidence proved the contrary. In sum, there was absolutely no evidence of knowledge or ratification by a managing agent of Seyfarth, and therefore no basis for the punitive damage judgment against the firm.

The $15,000,000 punitive damage judgment must be reversed for another reason. It violates every guideline the United States Supreme Court imposes to determine whether such an award is constitutionally excessive: (1) the underlying misconduct is low on the reprehensibility scale, involving purely economic (as opposed to physical) injury to non-financially-vulnerable individuals; (2) the 30-1 ratio between the punitive award and actual harm far exceeds the single-digit ratio prescribed by the

Court; and (3) the award is thousands of times more than the civil and criminal penalties California prescribes for similar conduct.

2. *Faulty TAA theory.* Central to plaintiffs' liability claim was their legal theory that the TAA confers an unparalleled windfall if timely asserted—according to plaintiffs, an individual who commits even a minor violation of the TAA's licensing provisions must disgorge all monies received within one year of the violation *even if the vast bulk of those monies was lawfully earned.* In the underlying case here, Greenfield had earned almost $10,600,000 lawfully, but had committed a TAA licensing violation that generated $3,334 at most. Plaintiffs claimed (and the jury apparently believed) that because Lancaster had a quick and easy way of collecting $10,600,000 for the Blankses simply by asserting and proving the minor TAA violation, he must have violated the TAA statute of limitations deliberately in order to churn the case.

The problem is, plaintiffs' theory was and is utterly wrong as a matter of law.

As with most licensing statutes, TAA claims are tempered by the doctrine of severability of contracts, which holds that if "the illegality is collateral to and severable from the main purpose of the contract, then severance is appropriate," and a complaining party can recover no more than the illegally obtained fees. (*Marathon Entertainment, Inc. v. Blasi* (2006) 140 Cal.App.4th 1001, 1010-1012.) Here, there is no question the contract was severable, since its main purpose was for Greenfield to manage all the Blankses' business affairs, including hiring all personnel, negotiating business deals and running the Billy Blanks World Karate Center. Procuring entertainment appearances—the only activity for which a talent agent license was required—was a small, and patently collateral, aspect of Greenfield's contractual duties. Since, as a matter of law, the most that could have been recovered under the TAA claim was $3,334, the

fundamental rationale underlying each of plaintiffs' claims is entirely absent, thus requiring reversal of the judgment in its entirety with directions to enter judgment for defendants.

3. *No causation.* There was no causation as a matter of law. All relief available to the Blankses under the TAA claim was *equally* available under the Unfair Competition Law (Bus. & Prof. Code, § 17200) ("UCL"), an alternative claim that Seyfarth had asserted against Greenfield, but that the Blankses' successor counsel had dismissed for a fraction of its worth to clear the path for this malpractice action. As we explain in this brief: (1) a UCL claim borrows the substantive bases for liability from other laws—such as the TAA—thus making proof of liability identical under the TAA and the UCL; (2) the restitution remedy available for a UCL violation would in this case have been identical to any disgorgement remedy available under the TAA; and (3) a UCL claim has its own, four-year, statute of limitations, and therefore the UCL claim indisputably was timely filed. Because any TAA liability was fully compensable under the UCL claim, loss of the TAA claim caused the Blankses no damage as a matter of law.

4. *No trial-within-a-trial.* The trial court butchered the "trial-within-a-trial" procedure that must be used to establish causation and damages when a plaintiff claims injury from loss of a legal claim. As this court explained in *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 839-840, that procedure first requires the parties to present the evidence that would have been presented in the underlying case, and then requires the trial judge to instruct the jury on the law governing the underlying case. Here, however, the trial court, over Seyfarth's repeated objections, permitted plaintiffs' lawyer-expert witnesses to tell the jury what they believed the governing law to be, and then instructed the *jury* to determine the applicable law as if it were an issue of fact. The court further

confused the jury's role by erroneously permitting those same witnesses to lecture the jury on the ultimate factual conclusions they drew from their interpretations of the law, e.g., to tell the jury that because they viewed the TAA claim as a clear and simple way of requiring automatic disgorgement of all monies paid under the Blanks-Greenfield contract, Seyfarth was necessarily guilty of malpractice, fraud and breach of fiduciary duty.

5. *Erroneous compensatory award.* The jury in this legal malpractice action found Seyfarth liable for nearly $10,000,000 in compensatory damages. This amount necessarily included civil penalties against Greenfield the jury found plaintiffs "lost" because Seyfarth did not timely file the TAA claim. But in California, for public policy reasons, "a plaintiff in a legal malpractice action may not recover lost punitive damages as compensatory damages." (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1052-1053.) The same policies apply to non-compensatory civil penalties such as those assessed here.

In sum, the fundamental legal flaws in plaintiffs' and the trial court's conceptualization of the TAA and the UCL require a reversal with directions to enter judgment for Seyfarth. Moreover, the absence of evidence of misconduct or ratification by a managing agent independently requires a reversal with directions of the punitive damage award. But even without these basic errors, the case would have to be reversed for retrial because of the trial court's complete evisceration of the required trial-within-a-trial and because of the improper inclusion of a punitive element in the compensatory award.

STATEMENT OF THE CASE

Seyfarth adopts and incorporates the opening brief of co-defendant William H. Lancaster (Cal. Rules of Court, rule 13(a)(5)), which contains a comprehensive statement of facts at pages 6-28. To avoid redundancy, this brief only briefly describes the relevant facts, setting forth in more detail the evidence relating to the punitive damage award against Seyfarth alone. (See below, pp. 9-10.)

A. The Blankses Sue Seyfarth.

Plaintiffs Billy and Gayle Blanks and BG Star Productions, Inc. had hired Seyfarth Shaw LLP to represent them against Jeffrey Greenfield, their former business manager, seeking both to avoid further payments to him and to recover payments made. Dissatisfied, they discharged Seyfarth and hired other lawyers to wrap up the Greenfield litigation and pursue claims against Seyfarth. (1 AA 1.)

Plaintiffs sued Seyfarth, alleging professional negligence, breach of fiduciary duty, and fraudulent concealment. They sought compensatory damages of $10,600,000 they paid Greenfield between December 1998 and August 2, 1999; fees they paid Seyfarth and Seyfarth's successor counsel; contractual attorney fees under the Seyfarth fee agreement; punitive damages; and prejudgment interest. (*Id*. at pp. 28-29.)

Plaintiffs' negligence claim alleged that Seyfarth's negligent failure to file a Labor Commissioner petition before expiration of the one-year statute of limitations under the Talent Agencies Act ("TAA") prevented them from recovering the funds they had paid Greenfield. Their breach of fiduciary duty and fraudulent concealment claims alleged that Seyfarth concealed both its knowledge that the TAA claim would provide a larger and speedier recovery at lower cost than a superior court action, and its

intention to disregard the TAA statute of limitations to churn the case for unnecessary fees. (*Id*. at pp. 13-18, 24-27.)

Seyfarth denied negligence and asserted that its analysis of the law was correct, or at least was reasonable and reached after diligent legal research. Seyfarth also alleged that plaintiffs' damages, if any, resulted from successor counsel's negligence. (1 AA 35.) Specifically, Seyfarth cited successor counsel's negligent failure to assert the delayed accrual defense to the statute of limitations and their dismissal of other causes of action that could have yielded equal or greater recoveries than the TAA claim in exchange for only $250,000. (See 1 AA 52, 63-69.)

B. The Trial Court Rules Seyfarth Was Negligent As A Matter Of Law.

The trial court ruled in limine that Seyfarth breached the standard of care as a matter of law. Therefore, it held, Seyfarth's negligence was established; the only remaining malpractice issues were causation and damages. (9 RT 604-605, 616-617; 8 AA 1774.)

C. "Trial-Within-A-Trial."

The trial court denied Seyfarth's motion for bifurcation, so the jury heard evidence on the fraud and breach of fiduciary duty claims simultaneously with the trial-within-a-trial of the underlying case against Greenfield. (8 AA 1727.) Over Seyfarth's vigorous objections, the trial court impermissibly allowed the trial-within-a-trial to become a battle of lawyer-experts, who opined on both the governing law and interpretation of the facts, including opinions on Seyfarth's motives and whether its conduct was tortious. (See, below, pp. 37-42.)

Nevertheless, the undisputed evidence showed:

- Under the Blanks/Greenfield agreement, Greenfield was obligated to manage all the Blankses' business affairs—including hiring all personnel, negotiating business deals, and running the Billy Blanks World Karate Center—in exchange for one-third of the profits. (See citations at pp. 15-16, below.)
- The only TAA violation the Labor Commissioner found was Greenfield's unlicensed procurement of two appearances that earned Greenfield no more than $3,334. (6 AA 1381, 1383-1384; see footnote 7, below.)
- After the Blankses discharged Seyfarth, successor counsel settled the underlying case for $250,000. (13 RT 1904.)

The trial court refused Seyfarth's request for the only instruction that explained the jury's role in a trial-within-a-trial—that its task was "to determine what a reasonable judge or jury should have done" in the underlying matter. (12 AA 2628; 29 RT 6921-6927.)

D. The Verdicts And Judgment.

1. Compensatory damages.

The jury concluded: (1) Seyfarth breached its fiduciary duties and fraudulently concealed material facts; (2) plaintiffs would have been awarded $10,634,542.48 if the TAA claim had been timely filed, and would have collected $9,310,971 of that award; (3) Seyfarth's breach of fiduciary duties caused damages of $500,000; (4) Seyfarth's intentional concealment

caused damages of $10,000,000;[1] (5) Seyfarth authorized or ratified the fiduciary breach and intentional concealment, which were committed with malice, oppression or fraud; and (6) plaintiffs were entitled to prejudgment interest. (11 AA 2438-2448, 2459.)

2. Punitive damages.

The jury awarded $15,000,000 in punitive damages against Seyfarth, but not against Lancaster. (11 AA 2474-2475.)

Plaintiffs had sought punitive damages against the firm on the theory that all Seyfarth partners were "managing agents" who could subject the firm to punitive damages, and that at least one partner either committed or knowingly ratified the wrongful conduct. (Civ. Code, § 3294; 31 RT 7558-7559.) Plaintiffs argued three people satisfied these criteria:

a. William Lancaster.

Lancaster had primary responsibility for the Blanks case, including day-to-day management, client communications, and associate supervision. (21 RT 4220-4222, 4264.) Plaintiffs argued, and the trial court agreed, that Lancaster was a "managing agent" because he was a partner and "the top dog on this." (29 RT 6975; 31 RT 7559.)

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[1] The jury initially awarded fraud damages of $3,500,000. (33 RT 8451; 11 AA 2455.) But at least six jurors then reported they understood and intended the fraud award to include punitive damages. (33 RT 8488-8495.) The court found the verdict inconsistent but denied Seyfarth's mistrial motion. (33 RT 8489-8491; 11 AA 2449.) After further instructions (33 RT 8495-8503, 34 RT 8744-8751), the jury found fraud damages—without punitive damages—of $10,000,000. (34 RT 8768-8769; 11 AA 2459, 2461.)

There was no evidence Lancaster served on any Seyfarth committees or played any role in directing firm policy. He had become a partner in May 2000. (22 RT 4503.)

b. Kenneth Sulzer.

Plaintiffs argued that Sulzer was a "managing agent" because he was a partner and billed "30 full minutes" to the Blanks case. (31 RT 7559 ["They're all partners. . . . Every one of them is a managing agent"]; 21 RT 4235-4236.)

There was no evidence Sulzer served on any Seyfarth committees or played any role in directing firm policy, or had knowledge of any purported churning scheme.

c. George Preonas.

Preonas, another partner, served on two firm-wide committees that made decisions about the firm's direction and operations. (22 RT 4614-4615.) His only role in the Blanks case was to consult with an associate about general TAA procedures—but no litigation strategy, discovery, or other specifics of the case—for one-quarter hour. (22 RT 4621-4622, 4624-4625.) Preonas did not know who Blanks was, what the case was about or why Seyfarth was retained. (22 RT 4622- 4629.)

Plaintiffs argued that Preonas ratified Lancaster's conduct by meeting with the associate, reviewing billing reports and having an office near Lancaster's. (31 RT 7558.)

The trial court entered judgment for total compensatory damages of $14,021,958.90 and punitive damages of $15,000,000. (13 AA 2878-2889.)

E. The Appeals.

Seyfarth timely appealed from the judgment, from post-judgment orders for prejudgment interest, from post-judgment awards of costs and attorneys fees, and from denial of its motion for judgment notwithstanding the verdict. (14 AA 2896, 16 AA 3342.)

ARGUMENT

I. THE JUDGMENT MUST BE REVERSED BECAUSE IT IS NECESSARILY BASED ON LEGAL MISCONCEPTIONS CONCERNING THE TALENT AGENCIES ACT.

The legal theory driving plaintiffs' case was that a TAA claim is a "gift from the legal gods" that, if timely asserted, requires disgorgement of even lawfully-earned compensation. (31 RT 7522.) The essence of plaintiffs' lawsuit was that Seyfarth's failure to timely file a TAA claim cost them a recovery of $10,600,000, the vast bulk of which Greenfield lawfully earned. Not surprisingly, that is not how the TAA works.

A. Severability Applies To The TAA And To The Underlying Case As A Matter Of Law.

1. Applicable law.

A contract with several distinct objects, at least one of which is lawful, is valid and enforceable as to the lawful object—if the latter can be severed from the rest. (Civ. Code, § 1599.) Courts must consider the "main objective of the parties' agreement. If the illegality is collateral to and severable from the main purpose of the contract, then severance is appropriate." (*Marathon Entertainment, Inc. v. Blasi* (2006) 140 Cal.App.4th 1001, 1010.) Only if it is impossible to sever the unlawful object is the entire contract illegal and unenforceable. (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 138-139.) The "'overarching inquiry is whether "the interests of justice . . .

would be furthered" by severance.'" (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074.)

Severability applies to contracts regulated by business licensing statutes. (*Birbrower, supra*, 17 Cal.4th at p. 139 [New York law firm was unlicensed in California; unlawful fees for California services severable from lawful fees for New York services]; *Johnson v. Mattox* (1968) 257 Cal.App.2d 714, 719 [unlicensed contractor could recover for lawful sale of goods]; see also *Hardcastle Pointe Corporation v. Cohen* (Fla.Dist.Ct.App. 1987) 505 So.2d 1381, 1383-1384 [commissions recoverable for services not requiring license].)

As with other licensing statutes, a contract that violates the TAA may be severable. (*Marathon, supra*, 140 Cal.App.4th at p. 1011.) Labor Code[2] section 1700.5 requires licensure for anyone who procures engagements for an artist.[3] But that does not mean a TAA violation necessarily results in forfeiture of all fees under the prevailing contract. As *Marathon* explained:

> The fact that a personal manager must comply with the Act's licensing requirements before engaging in the regulated activities of a talent agency does not necessarily mean, however, that a contract for personal manager services must

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[2] All further undesignated statutory references in Section I are to the Labor Code.

[3] Section 1700.5 provides: "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."

A "talent agency" means "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists," subject to exceptions not relevant here. (§ 1700.4, subd. (a).)

"Artists" means "actors and actresses . . . and other artists and persons rendering professional services in . . . entertainment enterprises." (*Id.* at subd. (b).)

> be *completely* invalidated if the personal manager commits even a single violation of the Act. Under the doctrine of severability of contracts, it is possible that Marathon, despite allegedly having violated the Act, may recover a commission on an artist's employment contract that was legally procured.

(*Id.* at pp. 1008-1009, original emphasis.)

The Labor Commissioner, too, has applied severability to TAA-regulated contracts. (*Almendarez v. Unico Talent Management, Inc.* (Cal.Lab.Com., Aug. 26, 1999) No. TAC 55-97, RJN tab 2, pp. 21-24 [contract between unlicensed manager and artist was severable and partially enforceable].)[4]

As the Court of Appeal and the Labor Commissioner have recognized, nothing in the TAA counsels against severability; it thus appears the Legislature intended that usual rule to apply. The TAA regulates only the activities of a "talent agency," and its definition of a talent agency is "narrowly focused" on efforts to secure professional employment for artists. (*Styne v. Stevens, supra,* 26 Cal.4th at pp. 50-51.) The TAA "does not cover other services for which artists often contract," such as management services, "nor does it govern assistance in an artist's business transactions other than professional employment." (*Id.* at p. 51.) When a statute does not cover certain services, "that is an indication that the legislature did not intend to preclude payment for such services that are performed without a license." (*Hardcastle Pointe Corporation v. Cohen, supra,* 505 So.2d at p. 1384.)

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[4] Although Labor Commissioner decisions are citable, they are difficult to access. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 53, fn. 4.) For convenience, all decisions cited in the trial court are bound and identified by tab number in the accompanying Request For Judicial Notice ("RJN").

2. Severability applied to the Blanks/Greenfield contract as a matter of law.

Whether severability applies under particular facts is a question of law. (*Birbrower, supra,* 17 Cal.4th at pp. 137-140; *Keene v. Harling* (1964) 61 Cal.2d 318, 321; *Marathon, supra,* 140 Cal.App.4th at p. 1012.) Severability was raised and fully briefed by both parties below (3 AA 538-546, 615-619, 6 AA 1393-1396, 7 AA 1513-1516, 1804-1814, 1867-1870), and the undisputed evidence compels severance.[5]

Severability applies here because the "main objective" or "central purpose" of the parties' agreement was not unlawful procurement of employment. (See *Marathon, supra,* 140 Cal.App.4th at p. 1010; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 124.) According to plaintiffs, Greenfield contracted to "run all the aspects of our businesses," "especially the Studio," i.e., handling or overseeing all personnel matters, including hiring and setting compensation; budget preparation; instructor certification; gym upkeep; studio expansion; parking arrangements; marketing and sale of clothing and shoe lines; the computer system; forming a foundation; closing a book deal; designing t-shirts; and negotiating entertainment appearances. (Exhs. 15, 37, 1 XApp. 62-63, 176; 11 RT 1349-50, 1357-1358, 1362, 12 RT 1727-1728, 13 RT

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[5] Seyfarth requested—and the court refused—a jury instruction explaining severability. It stated that "Greenfield is not required to return any fees or commissions to Billy Blanks that were not obtained by Greenfield while he was engaged in the occupation of procuring, offering, promising, or attempting to procure employment or engagements under the Talent Agencies Act." (12 AA 2666.)

1874, 1912-1916, 1947, 1957, 16 RT 2738, 2750.)[6] In exchange, Greenfield was to receive one-third of the Blankses' net income, at least on a trial basis. (11 RT 1357-1362; Exhs. 15, 37, 1 XApp. 61-62, 176.)

Moreover, Greenfield earned vastly more for his lawful activities than for his unlawful activities. The only conduct arguably requiring a talent agency license concerned a few entertainment appearances, including the *Battledome* and *TaeBo Squad* projects. Greenfield received no more than $3,334 for procuring the former and nothing for the latter.[7] Thus, without severance, *99%* of the money Greenfield would have had to forfeit (about $10,600,000 less $3,334) was lawfully earned—giving new meaning to the term "windfall." This striking disproportionality is itself a strong reason for application of severability. (*Marathon, supra,* 140 Cal.App.4th at p. 1010 [severance furthers legal and equitable rule disfavoring forfeiture]; *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 50 ["The remedy of disgorgement is grossly disproportionate to the asserted wrongdoing . . . and would constitute a totally unwarranted windfall" to plaintiff].)

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[6] Trial exhibits are cited by number and page of Appellants' Appendix of Exhibits ("XApp.")

[7] Plaintiffs' expert Singer estimated "less than $10,000" was received by the Blankses for *Battledome*. (15 RT 2587:13-22.) Their talent agent, Suzy Unger, believed "it was $5,000." (14 RT 2295:17-23.) Since Greenfield's profit share was then one-third (11 RT 1353), his unlicensed fee was no more than $3,334. Plaintiffs offered no evidence Blanks was paid for any other appearance. *TaeBo Squad* was never produced and never generated revenue. (14 RT 2246:22-24, 2247:25-27.)

3. Severability requires judgment for defendants on all claims.

Severability of the Blanks/Greenfield contract requires reversal with directions to enter judgment for defendants, not just as to the malpractice claim but also as to the breach of fiduciary duty and fraud claims, because, under plaintiffs' theory of the case, all three claims were inextricably intertwined. According to plaintiffs, Lancaster knew that only the TAA claim had value and the other claims were worthless, yet he deliberately disregarded the simple, automatic multi-million-dollar recovery the TAA provided in order to churn the case for fees. (E.g., 14 RT 2170, 1 AA 14-17.) As plaintiffs' counsel argued, "Our fraud and breach of fiduciary duty cases are dependent upon the jury understanding that while the defendants possessed this very iffy, really inapplicable basis for continuing to litigate in superior court, conduct a lot of discovery, spend an awful lot of money, they were confronted at every turn with reasons why their strategy was wrong." (8 RT 331, 24 RT 5243 ["they brought one good claim in the wrong jurisdiction, and 16 really bad, no merit claims in the superior court"].)[8]

Similarly, plaintiffs' witnesses testified that the factual bases of the negligence and intentional tort claims were essentially the same. (See, e.g., 15 RT 2561 [Seyfarth's "many violations" of standard of care included breaching fiduciary duty]; 23 RT 4948-4950 [defendants' failure to timely file TAA petition "failed to meet the standard of care, and it constituted a breach of fiduciary duty"].)

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[8] See also 9 RT 612: "We will argue [as to fraud and fiduciary duty] that the defendants definitely deferred filing of a petition because they wanted to conduct discovery, churn their fees, and conceal their strategy from the plaintiffs . . . ."

The severability cases establish that plaintiffs' theory of simple, automatic disgorgement under the TAA was wrong; their potential recovery under the TAA was at best minimal. Accordingly, no intent to defraud or breach a fiduciary duty could have existed. Seyfarth "had enough law on [its] side to preclude the conclusion that [it] deliberately" misled the Blankses regarding the TAA or was motivated to conceal a better alternative; as a matter of law, no better alternative (other than the other claims Seyfarth was already pursuing) in fact existed. (See *Jalali v. Root* (2003) 109 Cal.App.4th 1768, 1780 ["Root had enough law on his side to preclude the conclusion that he *deliberately* gave 'false' tax advice"].)

Severability also requires reversal with directions because plaintiffs suffered no damages as a matter of law. As explained, plaintiffs' TAA claim was worth no more than $3,334, but they settled their entire lawsuit—including the TAA claim—for $250,000. (13 RT 1904; see 12 RT 1703.) Since plaintiffs claimed all the non-TAA claims were worthless, they received far more for the TAA claim than they could have received had it been fully litigated. Put another way, if defendants failed to comply with the statute of limitations in filing the TAA petition, their failure caused no damages to plaintiffs, as a matter of law.

Plaintiffs' theory of the case was built on a series of assumptions that are false as a matter of law. The judgment must be reversed with directions as to all causes of action.[9]

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[9] For further discussion as to why the intentional tort claims must be reversed along with the negligence claim, see Lancaster's opening brief, pp. 33-38, 61-66.

B. Even If Severability Did Not Apply, Seyfarth Is Entitled To Reversal Because The Court's Instructions And Evidentiary Rulings That The TAA Requires Automatic Disgorgement Were Prejudicial Error.

Over Seyfarth's repeated objections, the trial court allowed evidence and argument, and instructed the jury, that the TAA requires automatic disgorgement of all amounts earned under the contract with the unlicensed talent agent. Even if severability did not apply to the Blanks/Greenfield contract as a matter of law (although, as explained above, it clearly did), plaintiffs' theory of automatic disgorgement was utterly wrong. The trial court's evidentiary rulings and instructions consistent with that theory require reversal.

1. The TAA does not require automatic disgorgement.

a. Language of the statute.

Nothing in the TAA indicates what remedies are available to an artist who proves a person violated the TAA—much less requires automatic disgorgement.

Although the TAA delineates the *procedure* for obtaining a *stay* of "any award for money," it is completely silent on what an "award for money" may consist of. (§ 1700.44, subd. (a).) Neither "disgorgement" nor any similar term is found in the TAA.[10]

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[10] We use "disgorgement," as the parties did below, to mean "the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." (Black's Law Dict. (7th ed. 1999) p. 480.) In this case, (continued...)

Thus there is no support in the statutory language for the Blankses' automatic disgorgement theory.

b. Labor Commissioner.

The Labor Commissioner has interpreted the TAA as conferring "broad discretion in fashioning a remedy that is appropriate under the facts of the case." (*Kilcher v. Vainshtein* (Cal.Lab.Com., May 30, 2001) No. TAC 02-99, p. 27, RJN tab 13, p. 222, citing *Bank of America N.T.S.A. v. Fleming* (Cal.Lab.Com., Jan. 14, 1982) No. 1098 ASC MP-432, RJN tab 3, p. 27.) Thus, even if the Labor Commissioner had the power to order disgorgement, she is not required to do so.

Kilcher illustrates the point. The Labor Commissioner found that Kilcher's manager lacked the requisite license under the TAA and consequently voided the contract *ab initio.* However, the Commissioner *declined* to order *any* disgorgement of the more than $1.8 million Kilcher had paid her manager, explaining: "[I]n recognition of [the manager's] minimal illegal activity, the lack of mal [sic] intent, and the benefit conferred upon Kilcher, it would be inequitable and a windfall for Kilcher to require disgorgement." (*Kilcher, supra*, at pp. 27-28, RJN tab 13, at pp. 222-223; see also *Damon v. Emler* (Cal.Lab.Com., Jan. 12, 1982) No. TAC 36-79, pp. 7-8, RJN tab 8, pp. 102-103 [unlicensed agent was "not required to repay any compensation already received" because repayment "would be disproportionately harsh in proportion to the extent of the illegality"].)

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[10] (...continued)
"disgorgement" is synonymous with "restitution," since any money given up would be restored to the person from whom it was obtained. (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1145.)

As *Kilcher* and other decisions make clear, in determining whether to order any disgorgement at all and if so, in what amount, the Labor Commissioner considers several equitable factors, including whether the contract attempted to circumvent the Act, whether the agent acted maliciously, what benefits the artist received, whether the award would be disproportionate to the violation, and what commissions the agent received from illegal procurement activities. (*Kilcher*, *supra*, at p. 27, RJN tab 13 at p. 222; *Damon, supra*, at pp. 6-8, RJN tab 8 at pp. 101-103; cf. *Pryor v. Franklin* (Cal.Lab.Com., Aug. 12, 1982) No. TAC 17 MP114, pp. 18, 21-22, RJN tab 16, pp. 261, 264-265 [given unlicensed agent's "numerous acts of embezzlement, fraud and defalcation . . . , this is an appropriate case for the exercise of the broadest remedy of restitution"; but as to "purely business and corporate matters" agent may have handled, "we do not find a violation of the Act"].)

c. Case law.

No published California decision has even discussed—much less held—what plaintiffs claim here: that disgorgement is automatic where an artist seeks return of payments already made to an unlicensed agent for work already performed.

Four decisions deal with the reverse situation—managers seeking to collect compensation due from their artist-clients. As discussed, *Marathon* holds that if the main purpose of the contract is lawful, and it is possible to separate the contract's lawful and unlawful portions, an unlicensed manager may recover commissions for services that did not require a license. (*Marathon, supra*, 140 Cal.App.4th at p. 1010.) *Marathon* correctly notes that the TAA "does not expressly prohibit the enforcement of contracts made by unlicensed talent agencies." (*Id.* at p. 1009.)

Three other decisions hold that the TAA prohibits an unlicensed agent from *collecting unpaid* contractual fees, on the theory that courts "'will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act.'" (*Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 250, 261-262 [contract void even when procurement activity was minimal];[11] *Park v. Deftones* (1999) 71 Cal.App.4th 1465, 1470, 1472 [following *Waisbren*, holding contract void "even if no commission is received for the service"]; *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1104 [contract void even as to "entirely legal" activities].)

Even if *Waisbren*, *Park* and *Yoo* were correct in the context they were decided (but see *Marathon, supra*), those decisions would not control this case—which involves disgorgement, not collection. As Justice Cardozo wrote, the situation where the wrongdoer is attempting to collect money is "altogether different" from the situation where "[h]e has received the money, and the plaintiffs are trying to take it away from him. The law may at times refuse to aid a wrongdoer in getting that which good conscience permits him to receive; it will not for that reason aid another in taking away from him that which good conscience entitles him to retain." (*Schank v. Schuchman* (Ct.App.N.Y. 1914) 212 N.Y. 352, 359 [106 N.E. 127]; *Atlantic Coast Line R. Co. v. State of Florida* (1935) 295 U.S. 301, 310 [55 S.Ct. 713, 716-717, 79 L.Ed. 1451] ["The question no longer is whether the law would put [the wrongdoer] in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it"].)

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[11] *Waisbren* was decided by the same court (Second District, Division One) as *Marathon*. *Marathon* held that *Waisbren* should not be interpreted to preclude severance because the doctrine was not discussed there. (*Marathon, supra,* 140 Cal.App.4th at p. 1013.)

California follows the "rule that where an unlicensed person performs a contract for agreed services, and the person benefitted voluntarily pays for such services, the latter cannot recover back the sum paid," even though the contract might be unenforceable by the unlicensed person. (*Walker v. Nitzberg* (1970) 13 Cal.App.3d 359, 367, 369 [unlicensed contractor]; *Richardson v. Roberts* (1962) 210 Cal.App.2d 603, 606-607, 608 [unlicensed real estate broker; to allow disgorgement/restitution here "would give plaintiff the benefit of his bargain and at the same time allow return of the consideration paid. A court of equity does not sit to confer a windfall"]; *Comet Theatre Enterprises, Inc. v. Cartwright* (9th Cir. 1952) 195 F.2d 80, 83 [unlicensed contractor (applying California law); "There is no equitable reason for invoking restitution when the plaintiff gets the exchange which he expected"].)

In short, in California, as in other jurisdictions, "recovery of . . . fees paid to an unlicensed person for completed services is not automatic." (*Remsen Partners, Ltd. v. Stephen A. Goldberg Co.* (D.C. 2000) 755 A.2d 412, 413 [recovery of all fees paid to unlicensed real estate broker denied].)

d. Equity.

Finally, principles of equity compel the conclusion that automatic disgorgement would not apply here.

Statutes "'imposing penalties or creating forfeitures must be strictly construed.'" (*Waterman Convalescent Hospital, Inc. v. Jurupa Community Services Dist.* (1996) 53 Cal.App.4th 1550, 1556; *M.F. Kemper Const. Co. v. City of L.A.* (1951) 37 Cal.2d 696, 705 [statutes construed "against forfeiture wherever possible"].) The authority to impose a forfeiture "should not be lightly inferred, but should be found to exist only if it is *clearly articulated in the authorizing legislation or regulations.*" (*Remsen Partners, supra*, 755 A.2d at p. 419, emphasis added.)

The TAA does not even suggest, let alone "clearly articulate," that every licensure violation triggers automatic disgorgement. In this case, any award to plaintiffs—and certainly any award greater than the amount of compensation attributable to work that required a license (perhaps $3,334)—would constitute an unlawful forfeiture, violating fundamental equitable principles.

2. The trial court prejudicially erred in permitting testimony and argument that disgorgement is automatic under the TAA.

Over Seyfarth's objections, plaintiffs' witnesses were erroneously permitted to tell the jury repeatedly not just that disgorgement of fees for TAA violations was automatic, but that plaintiffs' recovery of the full $10,600,000 would have been "automatic" had the TAA petition been timely filed. (See, e.g., 18 RT 3462:20 [the Blankses would have recovered "an automatic 10.6 million against Mr. Greenfield"], 3462:7 [they "would recover the entire 10.6 million dollars"; 15 RT 2525:8-9 [they "would have got back the $10,200,000"]; 22 RT 4666 ["Disgorgement would be the remedy. They would have gotten back the $11 million dollars"].)

Plaintiffs' counsel hammered the point home during closing argument, telling the jury that "the Act requires disgorgement. . . . The best remedy, the regular remedy, is always to deny all recovery to personal managers, even when the majority of the manager's activities did not require a talent agency license and the activities which did require a license were minimal and incidental." (31 RT 7527, see also 7528 ["Even one transgression, even one attempt, fulfill[s] the objective of the law, disgorge from the violating manager"], 7637 [the TAA "provides for all that disgorgement because that's an appropriate remedy[;] this is the law of the State of California. . . . It is the law. All recovery to personal managers is

denied even when a majority of the manager's activities did not require a talent agent's license and activities which did require a license were minimal and incidental"].)

Permitting this testimony and argument constituted clear prejudicial error: Disgorgement is *not* automatic under the TAA.

3. The trial court prejudicially erred in instructing the jury that disgorgement was automatic.

As this Court observed in similar circumstances, "Once the trial court started down its chosen path, erroneous instructions were sure to follow." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 837.)

a. Errors.

Seyfarth submitted comprehensive instructions informing the jury how a reasonable Labor Commissioner—in whose shoes the jury was supposed to have stood—fashions an appropriate remedy. Specifically: "The Labor Commissioner has broad discretion to fashion a remedy that is appropriate under the facts of the case presented. Even when the Labor Commissioner decides to declare a contract void *ab initio,* he can refuse to render an award of money if he finds that it would be inequitable and would result in a windfall for the artist." (12 AA 2614, 2668.) Seyfarth also submitted an instruction laying out the specific equitable factors the Labor Commissioner takes into account. (12 AA 2671.) The court refused Seyfarth's requested instructions.

Plaintiffs offered and the court delivered an instruction that omitted any mention of the Labor Commissioner's discretion; instead it told the jury that plaintiffs would have automatically recovered $10,600,000 if the TAA

petition had been timely filed: "All recovery to personal managers is denied even when the majority of the managers' activities did not require a talent agency license and the activities which did require a license were minimal and incidental." (12 AA 2543.)

The trial court's rulings constituted reversible error. Delivery of plaintiffs' erroneous instruction let them argue an incorrect version of the law—one that undoubtedly informed the jury's verdict.

b. Prejudice.

An erroneous jury instruction is prejudicial when it is "reasonably probable defendant would have obtained a more favorable result in its absence." (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570, 580; *Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1225-1226 [instructional error not harmless because "it is at the least 'reasonably probable' that the jury[] . . . would not have awarded the Viners $13,291,532 in damages if it had been properly instructed"].)

Had the jury been properly instructed, at a *minimum* the compensatory award would have been a fraction of what it was. Moreover, the instruction given supported plaintiffs' erroneous theory that the TAA was a simple means to automatic disgorgement, thus lending false credence to their claim that Seyfarth deliberately defrauded them and breached fiduciary duties. (See discussion above, pp. 16-18.) The instructional error was thus prejudicial as to all causes of action and warrants a complete new trial.

C. If The TAA Did Require Automatic Disgorgement Of All Monies Paid Greenfield, The Resulting Judgment Would Violate Due Process.

1. Compelling disgorgement of $10,600,000 in lawfully-earned compensation as a penalty for a minor violation of the TAA would have been arbitrary, excessive and unreasonable.

An award against an unlicensed agent for disgorgement of fees under the TAA is not compensatory, because the artist suffered no actual loss as a result of the violation. Rather, it is purely punitive—a state-compelled surrender of property that must pass constitutional muster. (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626 ["the financial penalties to which the unlicensed agent is exposed [under the TAA] are clearly sufficient to raise due process concerns"].) Plaintiffs' theory throughout the case was, as their expert testified, that TAA disgorgement is "intended . . . to be punitive." (22 RT 4663:2-9.)

Due process is violated when a statutory scheme exacts a penalty that is "mandatory, mechanical, potentially limitless in its effect regardless of circumstance" and when "[i]ts severity appears to exceed that of sanctions imposed for other more serious violations. . . ." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 404; see also *Balmoral Hotel Tenants Assn. v. Lee* (1990) 226 Cal.App.3d 686, 692 [automatic trebling of mental anguish damages "would give rise to serious issues of substantive due process"].)

2. The penalty here fails under every constitutional guidepost.

State Farm Mutual Automobile Insurance Co. v. Campbell (2003) 538 U.S. 408 [123 S.Ct. 1513, 155 L.Ed.2d 585] describes the substantive due process limitations on punitive damages/civil penalties.[12] "To the extent an award is grossly excessive," the Court declared, "it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." (*Id*. at p. 417.)

Campbell sets out three "guideposts" for assessing constitutionality: (1) the relative reprehensibility of the defendant's misconduct; (2) the disparity between the plaintiff's actual harm and the punitive award; and (3) the difference between the punitive award and civil penalties authorized in comparable cases. (*Id.* at p. 418.) All three point to a due process violation here.

a. Procuring employment for an artist without a license has a low degree of reprehensibility.

The first guidepost, reprehensible conduct, is the "most important" and the "'primary consideration.'" (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 & fn. 23 [116 S.Ct. 1589, 1599, 134 L.Ed.2d 809].) The controlling question is, what is the "degree of reprehensibility"

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[12] In assessing the constitutionality of a civil penalty, courts look to standards for imposing punitive damages. (See, e.g., *Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1318-1321 [formulating jury instructions for imposing statutory damages under California's "lemon law" by "analogy to standards for imposing punitive damages"]; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1290 [applying "principles applicable to punitive damage awards" to sanctions for violating consent decree].)

of *this* conduct as compared to all reprehensible conduct that may justify punitive damages? (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 219.)

Five factors provide the answer: (1) was the harm physical or merely economic; (2) did the misconduct demonstrate indifference to others' health or safety; (3) was the plaintiff financially vulnerable; (4) was the misconduct an isolated incident; and (5) was there malice, trickery or deceit. (*Campbell, supra,* 538 U.S. at p. 419.)

None of the factors is present here. Under the TAA, any theoretical harm caused by an agent who procures employment without a license would at worst be purely economic and have no effect on the artist's health or safety. The artist here was not financially vulnerable: Blanks had attained immense success, and the Tae Bo trademark alone sold for an estimated $140,000,000. (13 RT 1980, 16 RT 2753.) Greenfield's unlawful procurement involved only isolated incidents. (See 16 RT 2743-2746.) And there was no evidence Greenfield's failure to obtain a license was the result of malice, trickery or deceit. (*Gober, supra*, 137 Cal.App.4th at p. 222 [factor not satisfied where no evidence defendant "*intended* to cause injury" to plaintiffs].)

b. Blanks suffered no actual harm.

The Supreme Court's second guidepost requires a "'reasonable relationship'" between the punitive award and "the actual harm inflicted on the plaintiff." (*Gore, supra*, 517 U.S. at p. 580; *Campbell, supra*, 538 U.S. at p. 425; accord, *Simon v. San Paolo U.S. Holding Co., Inc.* (2006) 35 Cal.4th 1159, 1175.) "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*Campbell, supra,* 538 U.S. at p. 425.)

The penalty of disgorgement of illegally received commissions, though harsh, may be consistent with the remedial purpose of the TAA, i.e., "to protect artists seeking professional employment from the abuses of talent agencies." (*Styne v. Stevens*, *supra*, 26 Cal.4th at p. 50.) But here, the great bulk of the violator's work for the client was not as a talent agent, and most of the remuneration would have been for conduct unrelated to the TAA—to the tune of a 3,179:1 ratio. The harshness of the forfeiture penalty and the utter absence of any proportionality between the penalty and the harm suffered offends due process.

c. A multi-million-dollar disgorgement award would have dwarfed any penalties California imposes for similar conduct.

The third *Campbell* guidepost is the disparity between the punitive award and any civil penalties for similar conduct. (*Campbell*, *supra*, 538 U.S. at p. 428.)

California imposes a civil penalty of up to $2,500 per violation for unfair competition, defined as "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, §§ 17200, 17206, subd. (a).) If Greenfield committed two violations of the TAA, his maximum civil penalty would be $5,000. A $10,600,000 penalty would have been 2,120 times that amount.

California also imposes misdemeanor criminal penalties for practicing certain professions without a license. Typical is the statutory scheme requiring licensure of farm labor contractors. (§ 1683.) The monetary penalty for non-licensure is a fine of $1,000 to 5,000. (§§ 1695.7, subd. (c)(1), 1697, subd. (a).) Similar penalties are imposed on unlicensed public accountants (Bus. & Prof. Code, §§ 5050, 5120); architects (*id*. at

§ 5536); attorneys (*id*. at § 6126); and funeral directors (*id*. at §§ 7718.5, 7719).

If the Blankses *had* indeed obtained a $10,600,000 award from Greenfield based solely on the TAA claim in the underlying case, it would plainly have violated due process under the Supreme Court's guideposts. Seyfarth therefore was entirely correct that the TAA could not be the "gift from the legal gods" the Blankses claimed. For the reasons stated above, the judgment must be reversed.

II. SINCE PLAINTIFFS WOULD HAVE RECOVERED THE SAME AMOUNT FROM THEIR UCL CLAIM AS FROM THE TAA CLAIM, THERE WAS NO CAUSATION AS A MATTER OF LAW.

To establish that loss of the TAA claim caused them injury, plaintiffs had to prove their recovery against Greenfield would have been greater had the TAA claim succeeded. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 ["In a litigation malpractice action, the plaintiff must establish that *but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred"]; *Mattco Forge, Inc., supra*, 52 Cal.App.4th at p. 837.) But Seyfarth had pleaded an alternative claim on behalf of plaintiffs under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. ("UCL")); that claim indisputably was filed timely, though ultimately successor counsel abandoned it for little or nothing in order to set up this malpractice action. (27 RT 6190-6191 [plaintiffs' counsel argues UCL claim had no value when settled], see 14 RT 2156-2158.) Since the UCL claim tracked the TAA claim precisely in terms of

both the basis for liability and the amount of recoverable damages, there was no causation as a matter of law.

A. Greenfield's Liability Under Both The UCL And TAA Claims Would Have Been Based On The Same Evidence And Provided The Same Remedies.

The UCL defines and prohibits "unfair competition," which means "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) "By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) "Its coverage is 'sweeping, embracing "'anything that can properly be called a business practice and that at the same time is forbidden by law.'"'" (*Ibid*.) A UCL claim is "based on precisely the same practice, and subject to much the same legal analysis," as the "borrowed" claim. (*Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 942.) Plaintiffs' UCL claim borrowed, among other statutes, the TAA claim. (Exh. 67, 2 XApp. 285-286.)

1. The facts establishing Greenfield's liability under the TAA also would have established Greenfield's liability under the UCL.

Conduct violating the TAA also violates the UCL, so long as the conduct constituted a "business practice." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*. at p. 180; *Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal.App.4th 28, 32-33 ["An action based on (the UCL) 'borrows' violations of other laws when committed pursuant to business activity"].)

Here, Greenfield's activities were unquestionably a business practice under the UCL. A "business" is an "occupation or employment for gain." (Black's Law Dict. (7th ed. 1999) p. 192.) To establish their TAA claim, plaintiffs had to prove (among other things), that Greenfield had engaged in the "occupation" of procuring work for an artist. (Lab. Code, § 1700.4.) Thus, the evidence establishing the "occupation" element of the TAA would necessarily have established Greenfield's activities as a "business practice" under the UCL.

2. The remedies available under the UCL and TAA were identical.

One available UCL remedy is "to restore to any person . . . any money . . . acquired" by the same "unfair competition" that established the UCL violation. (Bus. & Prof. Code, § 17203; *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126, 138 [landlord must restore improperly collected fees to tenants].) Like all UCL remedies, restitution is "cumulative" to the remedies available under the "borrowed" statute. (Bus. & Prof. Code, § 17205.)[13]

As the Supreme Court explained, "[t]he object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." (*Korea Supply Co., supra*, 29 Cal.4th at p. 1149.) Thus, just as when a contract is voided or rescinded, "[t]he successful plaintiff is entitled to restitution, i.e. to recovery of the consideration that he or she gave and any other compensation necessary to make him or her whole." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 937, p. 1031.)

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[13] We have found no authority suggesting restitution under the UCL can be less than that available under the "borrowed" statute.

Here, plaintiffs and their experts contended that every penny paid pursuant to a contract with an unlicensed talent agent within the statutory period is subject to "disgorgement" under the TAA, because the act of procuring employment for an artist without the requisite license, no matter how incidental to the main purpose of the contract, necessarily taints the entire contract. Under plaintiffs' theory, all money collected by an unlicensed person is received in violation of the TAA; if they are right about that, therefore, it can be recovered under the UCL as well.

In sum, if severability did not apply, restitution under the UCL would have resulted in recovery of all monies Blanks paid Greenfield—the same amount plaintiffs contend was recoverable as "disgorgement" under the TAA. (See pp. 10, 16, 22-24, above.) Therefore, in this case recovery under the TAA and the UCL would have been identical.

B. The UCL Claim Indisputably Was Timely Filed.

Although the UCL "borrows" other statutes for substantive purposes, it does not borrow their limitations periods. The UCL has its own four-year statute of limitations (Bus. & Prof. Code, § 17208) that governs the timeliness of any UCL claim, regardless whether the predicate violation is time-barred. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178-179 ["*Any* action on *any* UCL cause of action is subject to the four-year period of limitations created by that section"].) Indeed, it can be malpractice *not* to prosecute a UCL claim, if the "borrowed" statute has a shorter statute of limitations. (*Janik, supra*, 119 Cal.App.4th at pp. 942-943.) Without question, the UCL claim here was timely filed.

C. Plaintiffs' Failure To Establish Causation Requires Reversal With Directions.

Because the UCL claim had the same value as the TAA claims, plaintiffs failed to establish any injury from loss of the TAA claim. This failure to prove causation requires that the judgment on the malpractice claim and the intertwined intentional tort claims (see above, pp. 18-19) be reversed with directions to enter judgment for defendants.

III. COUNTLESS EVIDENTIARY AND INSTRUCTIONAL ERRORS DESTROYED THE "TRIAL-WITHIN-A-TRIAL."

In *Mattco Forge, Inc., supra*, this Court confirmed that when an attorney is accused of negligently losing a client's legal claim, proof of causation requires a "trial-within-a-trial." (*Mattco Forge, Inc., supra*, 52 Cal.App.4th at p. 839-840.) In the trial-within-a-trial, the plaintiff must prove the underlying "lost" claim, with percipient witnesses testifying to the facts of the underlying case and the trial court instructing on the applicable law. (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 970; 4 Mallen & Smith, Legal Malpractice (2006 ed.) § 33.13, p. 1064.)

Here, improper opinion testimony and inadequate guidance to the jury eviscerated the trial-within-a-trial. Plaintiffs' witnesses were allowed to lecture the jury about the law and to opine how the law applied to the facts; the court also unfairly limited defense witness examinations and evidence, and then refused to adequately instruct the jury.

A. The Trial Court Erroneously Permitted Plaintiffs' Witnesses To Testify About The Law And Interpret The Facts.

1. Opinion testimony is inadmissible on issues of law, the law's application to the facts, and conclusions drawn from the evidence.

It is *always* error for an expert to testify about the law. (Evid. Code, § 801; *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1634-1635.)[14] Nor may a witness testify about conclusions drawn from applying the law to the evidence. (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 290-292 [testimony that evidence shows improper motive inadmissible]; *Piscitelli v. Friedenberg*, *supra*, 87 Cal.App.4th at p. 970 [in legal malpractice action, expert testimony about outcome of underlying action usurps jury's function].)

2. Opinion testimony on the law and its application to the facts was erroneously admitted.

From early on, the court misunderstood its role. When asked to rule on a key legal issue governing the underlying case, the court stated:

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[14] The admission of evidence ordinarily is reviewed for abuse of discretion. (*Piscitelli v. Freidenberg*, *supra*, 87 Cal.App.4th at p. 972.) However "[a]ction that transgresses the confines of the applicable principles of law is outside the scope of discretion" and is an abuse of discretion. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) Whether a ruling transgresses applicable law is an issue of law reviewed de novo. (*Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 14-15.)

> This is a legal question, and . . . I'm not going to stand up here and tell [the jury] what the law is on that. . . . I'll give jury instructions, but only an expert will be able to offer an opinion about this.

(6 RT F-82:8-19.)[15] From this fundamental misunderstanding, prejudicial error permeated the trial.

a. Opinion testimony that Seyfarth caused plaintiffs to lose a $10,600,000 recovery was erroneously admitted.

Plaintiffs' witnesses were permitted to testify that the TAA requires an unlicensed agent to disgorge even lawfully-earned payments received within the one-year statutory period**,** and therefore if Seyfarth had timely filed the TAA petition, plaintiffs would have recovered over $10,600,000. (See above, pp. 25-26.)

b. Opinion testimony that only the TAA presented a viable remedy was erroneously admitted.

Seyfarth's principal causation defense was that the non-TAA causes of action would have yielded the same or more damages than the TAA claim. But plaintiffs' witnesses were permitted to testify that only the TAA claim provided a viable remedy and the other claims were worthless. (E.g., 15 RT 2549 [other claims asserted against Greenfield were of "insignificant" value], 18 RT 3462, 3497-3500, 22 RT 4667-4669 [only

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[15] Seyfarth correctly responded, "I think you are the expert on the law." (6 RT F-82:20-21, 5 RT E-14-15; see *Burkhart v.Washington Metropolitan Area Transit Authority* (D.C. Cir. 1997) 112 F.3d 1207, 1213 ["Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards"].)

TAA claim could have recovered $10,600,000], 4673, 23 RT 4865; see also 23 RT 4844-4846 [UCL claim barred by statute of limitations].)

c. Opinion testimony that Seyfarth intentionally breached its duty to the Blankses was erroneously admitted.

The scope of the fiduciary duties owed by Seyfarth to plaintiffs was an issue of law on which the trial court was required to instruct the jury. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 123 [fiduciary duty applicable to facts presented at trial is question of law]; *Kirschner Brothers Oil, Inc. v. Natomas Co.* (1986) 185 Cal.App.3d 784, 790 [existence and scope of fiduciary duty is question of law].) Similarly, whether Seyfarth breached fiduciary duties to plaintiffs was an ultimate issue of fact on which opinion testimony was inadmissible. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183.)

Nevertheless, the trial court permitted extensive expert testimony on these subjects, not only in violation of the court's own in limine ruling and expert-witness-designation procedures,[16] but more fundamentally at the expense of the trial-within-a-trial procedure itself. Plaintiffs' experts testified not just about the scope of Seyfarth's fiduciary duties to the Blankses (e.g., 22 RT 4673, 23 RT 4940, 4943-4944, 4946-4948, 24 RT 5107-5109), but also why they believed Seyfarth had breached those duties (e.g., 23 RT 4865 [by bringing non-TAA claims in superior court], 4948-4962 [by breaching implied promise], 4966-4967; 24 RT 5102-5104 [by not dismissing superior court claims], 5104-5109 [by failing to advise plaintiffs

[16] Plaintiffs' designations stated their experts would testify on standard of care, not on fiduciary duties. (7 AA 1603, 1632.) Thus, allowing the testimony was error. (Code Civ. Proc., § 2034, subd. (f)(2); *Bonds v. Roy* (1999) 20 Cal.4th 140, 145-146.)

in writing that opponent had asserted statute of limitations defense], 5139-5142, 5152-5156, 5171, 5176-5179 [fiduciary duties breached even where no violation of statutory or ethical rules]).

From the witness box plaintiffs' experts argued their opinions about Seyfarth's conduct, e.g., about "troubling" aspects of Seyfarth's actions (23 RT 4957-4967, 24 RT 5176-5179), about how the evidence demonstrated a "corrupt motive of passion or interest" (23 RT 4967, 24 RT 5102-5103), and generally about what the jury should conclude from the evidence (24 RT 5108-5113). They told the jury that Seyfarth had delayed filing the TAA petition in order to bill unnecessary legal fees (15 RT 2505-2506); that Seyfarth's breaches of duty were knowing and intentional (15 RT 2562-2563); and that Seyfarth's misconduct had damaged the Blankses (15 RT 2559 ["The bottom line is, this law firm handled a case [where] it's clear they did not have the experience, the expertise. They caused a client over $10 million in damages"]).[17]

Thus, the jurors were advised repeatedly—by witnesses identified as experts on the law, with the court's obvious imprimatur—what "the law" was and what conclusions they should reach from the evidence.

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[17] They also improperly testified to scores of other legal opinions and opinions on ultimate issues. (E.g., 15 RT 2468-2476 [meaning and applicability of *Styne* decision], 2501, 2503, 2513-2514 [interpretation of TAA], 2510-2514 [Greenfield's partnership claim did not impact Blankses' right to disgorgement], 2542 [evidence shows TAA violations], 2561-2564 ["it doesn't take a brain surgeon to read this statute"]; 18 RT 3350-3351 [TAA requires filing within one year of each payment]; 22 RT 4657 ["That's what you have to do first. You can't go to the Superior Court first"], 4667 [TAA's one-year limitation is "absolute bar" to obtaining UCL recovery]; 23 RT 4860-4861 [labor commissioner ruling was correct, "entirely consistent with the law," and "no surprise"], 4948-4967 [evidence showed Seyfarth did no research and did not advise the Blankses about risks of delaying TAA petition]).

3. Seyfarth preserved its objections.

Seyfarth sought exclusion of this testimony about issues of law by pretrial motion (5 AA 1240) and as it arose. With rare exceptions, Seyfarth's objections were overruled.

Seyfarth objected that: the testimony violated in limine rulings prohibiting testimony on the law (e.g., 15 RT 2497, 2499, 22 RT 4666, 23 RT 4802-4805, 18 RT 3349-3351; see 6 RT F-121-F-123); legal conclusions violated Evidence Code section 310, subdivision (a), and encroached on the court's duty to instruct the jury (e.g., 5 RT E14-E15, 15 RT 2496-2498, 2500-2501, 2509, 2510, 2511-2512, 2515, 2527, 2529-2530, 2536, 2548-2549, 2557, 2558, 18 RT 3343-3344, 3350-3351, 3517, 22 RT 4662, 4663, 4666, 23 RT 4802, 4809-4810, 4863, 4947); witnesses' legal opinions and conclusions were irrelevant (e.g., 15 RT 2505, 2506, 2526-2527, 2537, 2559-2560, 17 RT 3001-3007, 18 RT 3343-3345, 3459, 3461-3462, 22 RT 4656, 4657, 4665, 4672-4673) and beyond witnesses' expertise (e.g., 15 RT 2496, 2506, 2536, 2559-2560, 2561, 17 RT 3007-3008, 22 RT 4661, 23 RT 4802, 4940); testimony was speculative and lacked foundation (e.g., 15 RT 2498, 2525, 22 RT 4661, 23 RT 4860); testimony constituted improper argument (e.g., 14 RT 2294-2295, 15 RT 2558; see also 8 AA 1792, 1828, 1837; 21 RT 4202-4203, 23 RT 4801-4808).

Eventually, as the erroneous rulings and the resulting prejudice mounted, Seyfarth stepped back. To do otherwise would have compounded the errors' prejudicial impact by emphasizing the adverse rulings. Once a court has plainly ruled, repeating objections to the same class of evidence "is time-wasting and a source of irritation" and is unnecessary to preserve the objection. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 381, pp. 472-473; *People v. Antick* (1975) 15 Cal.3d 79, 95; *Summers, supra*, 69 Cal.App.4th at p. 1184.)

4. Erroneous admission of the opinion evidence was prejudicial.

Erroneous admission of the above evidence resulted in a trial dominated by the plaintiffs' witnesses instructing the jury on the law and encroaching on the court's fact-finding function—unmistakable prejudicial error. (*Piscitelli v. Friedenberg, supra*, 87 Cal.App.4th at pp. 970-971 [prejudicial error to admit testimony of experts on what would have occurred without attorney's negligence], 972 [receiving such testimony "would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses"].)

Legally right or wrong, such testimony had no place in the trial. (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841-842 [lawyers' testimony about application of law to the facts "results in no more than a modern day 'trial by oath'"].) Improper testimony on legal issues coming from a party's witnesses with the court's approval enhances those witnesses' credibility and that party's standing in the jury's eyes. Here, it deprived Seyfarth of its right to a trial-within-a-trial. (*Piscitelli v. Friedenberg, supra*, 87 Cal.App.4th at p. 973.)[18]

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[18] Compounding the prejudicial impact of the court's improper rulings was their uneven application: The court permitted many of plaintiffs' witnesses to give narrative answers interrupted only sporadically by questions (e.g. 15 RT 2461-2463, 2496-2497, 2500-2502, 2559-2561, 2564-2566, 18 RT 3350-3351, 21 RT 4381-4382, 22 RT 4662-4664, 25 RT 5468) and admonished Seyfarth's counsel for objecting to that procedure (e.g. 15 RT 2548, 2559-61, 2565-2566, 18 RT 3342, 3350 [ignoring objection, court instructs: "Don't interrupt the witness"]). Seyfarth's witnesses, however, were cut short. (E.g., 19 RT 3630, 20 RT 4066, 21 RT 4295-4298, 27 RT 6057 [court admonishes defendants' witnesses sua sponte to avoid narrative testimony].)

B. The Trial Court Committed Prejudicial Error By Erroneously Admitting Evidence About The Underlying TAA Proceedings And Then Excluding Seyfarth's Explanatory Evidence.

1. The Labor Commissioner determination was irrelevant and inadmissible.

In the underlying matter, the Blankses' successor counsel had presented their claim against Greenfield to a Labor Commissioner hearing officer. The hearing officer determined that (1) Greenfield was entitled to no further payments; and (2) although Greenfield had violated the TAA with respect to two employment solicitations, no disgorgement of commissions would be ordered because all payments were received more than a year before the petition was filed. (6 AA 1381, 1387-1388.)

That factual determination was irrelevant to the outcome of the Blankses' claim against Greenfield, because the requests by all parties for superior court trial de novo divested the Labor Commissioner's determination of any continuing validity: Under the TAA, "the appealing party is entitled to a complete new hearing—a complete new trial—in the superior court that is in no way a review of the prior proceeding." (*Buchwald v. Katz* (1972) 8 Cal.3d 493, 502; *REA Enterprises v. California Coastal Zone Conservation Com.* (1975) 52 Cal.App.3d 596, 612 [in trial de novo under TAA, superior court will determine case "as if it had never been before the labor commissioner"].)

Moreover, the hearing officer's particular determination was irrelevant to—indeed, totally at odds with—the trial-within-a-trial concept. (*Mattco Forge, Inc., supra,* 52 Cal.App.4th at p. 840 ["trial-within-a-trial method does not 'recreate what a particular judge or fact finder would have done'"].) Nothing the hearing officer said or did in the underlying

proceeding had any legitimate role in the jury's determination of what should have resulted if the Blankses' claim had been presented to an objective tribunal untainted by any claimed malpractice.

2. The trial court's erroneous ruling that the Labor Commissioner's determination would be "what [the trial is] about" was prejudicial.

The trial court ruled that the hearing officer's determination would be admitted and would be what the trial "is about":

> Well, I'm going to deny [defendants' motion in limine], because I think that this is what it's about. It's about the Labor Commissioner's ruling and the basis of the Labor Commissioner's ruling. . . . [N]ot only are we going to talk about the Labor Commissioner's ruling, but I think that you all should stipulate to it, and if you choose not to, then I think I should take judicial notice of it . . . because that is what this is about.

(6 RT F-143:5-24, F-150.)

This emphatic ruling signaled the trial's early departure from the objective trial-within-a-trial procedure. Having unsuccessfully sought to keep the evidence out (12 RT 1699-1704; see 5 AA 1221), nothing more was required to preserve Seyfarth's objections to it. (*Summers, supra*, 69 Cal.App.4th at p. 1184.)[19]

The underlying Labor Commissioner ruling largely became what the trial was "about." Plaintiffs touted the decision as "perhaps the most important, relevant evidence in this action" for precisely the purpose it

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[19] Seyfarth nevertheless continued to object when the subject of the hearing officer's decision again arose. (12 RT 1703:22-24; see 12 RT 1699-1703, 13 RT 1801-1803, 22 RT 4664-4665, 23 RT 4860-4861.) The court denied Seyfarth's request for a limiting instruction advising the jury to disregard the evidence in determining what an objective tribunal would or should have done. (13 RT 1804.)

should have been *inadmissible*—to establish "the amount of monetary relief that would have been awarded to Plaintiffs but for Defendants' failure to timely file the Petition." (6 AA 1308:9-10, 1310:14-15.) The jury was then inundated with narratives and opinions about the underlying proceeding. (E.g., 13 RT 1803-1804, 14 RT 2169, 15 RT 2490, 2503-2504, 2510-2513, 2518-2523, 2525-2528, 2531-2540, 2549-2558, 18 RT 3345-3372, 22 RT 4665-4666, 23 RT 4860-4862, 28 RT 6362-6363.)

Admission of the underlying decision relieved the jury of having to evaluate the strengths and weaknesses of the scant independent evidence plaintiffs offered to show what should have been the outcome of an untainted adjudication—the *sine qua non* of a trial-within-a-trial. This error effectively discharged plaintiffs' burden of proving that Greenfield had violated the TAA and that they should have received a substantial award if the petition had been filed earlier.

C. The Trial Court's Refusal Of Seyfarth's Instruction Explaining The Jury's Trial-Within-A-Trial Duties Was Prejudicial Error.

The trial court also erroneously refused to give the most basic trial-within-a-trial instruction. Seyfarth requested the jury be instructed "to determine what a reasonable judge or jury should have done" in the underlying matter. (9 AA 2003, 2052, 12 AA 2628; see 29 RT 6921-6927.) This was a correct statement of the law. (*Mattco Forge, Inc., supra,* 52 Cal.App.4th at p. 840.) Nevertheless, and although this was the only comprehensible instruction on the jury's trial-within-a-trial duties, the trial court denied the request.

Left in the dark regarding the objective determination the law requires and flooded with inadmissible opinions and conclusions of the plaintiffs' witnesses and testimony about the underlying proceedings, the

jury could not possibly have made the "burdensome and complicated" determinations demanded by the trial-within-a-trial. (*Id*. at p. 832.) Defendants did not receive the trial to which they were entitled, and the judgment therefore must be reversed.

IV. THE PUNITIVE AWARD MUST BE REVERSED WITH DIRECTIONS TO ENTER JUDGMENT FOR SEYFARTH BECAUSE (A) THERE IS NO EVIDENCE THAT ANY "MANAGING AGENT" RATIFIED ANY WRONGDOING, AND (B) THE AWARD IS CONSTITUTIONALLY EXCESSIVE.

A $15,000,000 punitive damage judgment was entered against Seyfarth, even though no "managing agent" engaged in or ratified the alleged churning scheme and the award is wildly excessive by every constitutional standard. The award cannot stand.

A. Seyfarth Is Entitled To Judgment on the Punitive Damage Claim Because No Managing Agent Knowingly Ratified Improper Conduct.

To recover punitive damages against a law firm, the evidence must show a "managing agent" either committed the wrongdoing or "authorized or ratified" it. (Civ. Code, § 3294, subd. (b); *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1159.) Ratification requires that a managing agent "had *actual knowledge* of the malicious conduct and its outrageous

character." (*Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 168; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 726.)[20]

Plaintiffs' theory of punitive damages was that Lancaster "deliberately deferred the filing of the petition to churn more fees" and deliberately concealed his strategy from plaintiffs. (24 RT 5229:16-20, 5230:8-11.) For Seyfarth to be liable for punitive damages, plaintiffs had to prove either that Lancaster was a "managing agent," or that another "managing agent" actually knew about and ratified the alleged churning scheme.

Not a shred of evidence—let alone the requisite clear and convincing evidence—supports the award. It must be reversed with directions to enter judgment in Seyfarth's favor.

1. Neither Lancaster nor Sulzer was a "managing agent."

A "managing agent" is someone who "exercises substantial discretionary authority over decisions that ultimately determine the policy" of the firm. (12 AA 2600 [BAJI No. 14.74]; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-567, 573; *Cruz v. HomeBase, supra*, 83 Cal.App.4th at pp. 163, 167 ["Corporate policy" means "the broad principles and rules of general application which govern corporate conduct" and are "intended to be followed consistently over time in corporate operations"].)

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[20] Punitive damages must be proved by "clear and convincing evidence" (Civ. Code, § 3294, subd. (a)), and "trial and appellate courts must view the evidence 'with that higher burden in mind.'" (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 59.) That standard requires a probability "'so clear as to leave no substantial doubt' [and] 'sufficiently strong to command the unhesitating assent of every reasonable mind.'" (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Although Lancaster had primary responsibility for the Blanks case and supervised associates working on the case, there was no evidence he exercised any authority over Seyfarth's policy. Lancaster had become a Seyfarth partner (one of hundreds) only in May 2000, and there was no evidence he had any role in firm-wide management. (22 RT 4503.) He was not a "managing agent" within the meaning of Civil Code section 3294.

Nonetheless, the trial court erroneously concluded that Lancaster's role in managing the Blanks case and his being a partner made him a "managing agent." (29 RT 6971 ["he's the managing person on this case"], 6972 ["he's the managing agent"], 6975 [Seyfarth liable for punitive damages "because Mr. Lancaster is a partner. . . . He was the top dog on this"].) Plaintiffs' counsel was erroneously permitted to argue to the jury that "any" partner is a "managing agent" whose wrongdoing or ratification can subject the firm to punitive damages. (31 RT 7559.)

Plaintiffs' argument was an utter distortion of the law. Lancaster's supervisory role was completely irrelevant to the "managing agent" inquiry. The *only* relevant question was whether Lancaster was in a position to set law firm policy. (*White v. Ultramar, Inc., supra,* 21 Cal.4th at p. 577 ["[S]upervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents . . ."]; *Cruz v. HomeBase, supra,* 83 Cal.App.4th at p. 168 ["There was not a hint of evidence that [supervisor] exercised authority over corporate principles or rules of general application in the corporation"]; cf. *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1209 [supervisory employee who could merely enforce employer's policies but not set them was not "managing agent"; *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 63 [supervisor and corporate vice-president not "managing agent" where no evidence showed "position in Lockheed's corporate hierarchy"].)

Nor does mere partnership, especially in a large firm, automatically confer "managing agent" status. (See *White v. Ultramar, Inc., supra*, 21 Cal.4th at pp. 566-567 ["[T]he Legislature intended the term 'managing agent' to include only those . . . who exercise substantial independent authority and judgment . . . so that their decisions ultimately determine . . . policy"]; *Weeks v. Baker & McKenzie, supra*, 63 Cal.App.4th at pp. 1159, 1160, 1161 [distinguishing law firm partner guilty of sexual harassment from firm's "managing agents" for purposes of punitive damages]; cf. *Clackamas Gastroenterology Associates, P.C. v. Wells* (2003) 538 U.S. 440, 446 [123 S.Ct. 1673, 1678, 155 L.Ed.2d 615] ["Today there are partnerships that include hundreds of members," but "control is concentrated in a small number of managing partners"]; *E.E.O.C. v. Sidley Austin Brown & Wood* (7th Cir. 2002) 315 F.3d 696, 702-703 [law firm of more than 500 partners cannot be treated as if entire partnership were directing the firm].) Such a rule would defeat the purpose of the "managing agent" requirement by making every entity liable for punitive damages because of wrongdoing by the most junior partner or supervisor.

Since there was no evidence whatsoever Lancaster engaged in policymaking at Seyfarth, he was not a "managing agent" whose conduct could subject the firm to punitive damage liability.[21]

2. Preonas did not ratify the alleged scheme.

Plaintiffs also argued that partner George Preonas ratified Lancaster's alleged misconduct. (31 RT 7558-7559.) But even assuming Preonas' service on Seyfarth committees made him a "managing agent"

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[21] The same applies to Kenneth Sulzer, who plaintiffs contended was a managing agent because he was a partner and billed "30 full minutes" to the Blanks case. (31 RT 7559.) There was no evidence Sulzer was a policymaker at the firm.

(22 RT 4614-4615), there was no evidence he had the requisite "actual knowledge" of the alleged churning scheme "and its outrageous character," much less that he "confirm[ed] and accept[ed]" the scheme. (See BAJI No. 14.73.1, 12 AA 2599.)

Preonas' sole involvement with the case was that he billed one-quarter hour for legal research and a conference with an associate about general procedures for TAA hearings. (22 RT 4615-4622; 26 RT 5758-5749.) Preonas did not know who Blanks was or what his claims were. (22 RT 4622-4629.) Preonas did not oversee Lancaster's or any other lawyer's conduct in the case. (See 22 RT 4611, 4620, 4627.) Indeed, as the trial court concluded, Preonas' testimony made it "clear that there really wasn't, there didn't seem to be any oversight much at all." (29 RT 6975.)

Despite the complete dearth of evidence of ratification, plaintiffs argued to the jury that because Preonas met with the associate, routinely reviewed billing reports, and had an office close to Lancaster's, he "knew it all" but didn't "speak up." (31 RT 7558.) But there is no evidence or inference that whatever Preonas knew included a purported scheme to deliberately delay filing the TAA petition or to churn fees. In any event, evidence that routinely-submitted reports "might have provided the occasion for further investigation, possibly leading to discovery of employee misconduct," is insufficient to establish ratification. (*Cruz v. HomeBase, supra*, 83 Cal.App.4th at p. 168.)

The Supreme Court's unanimous decision in *College Hospital, Inc., supra*, 8 Cal.4th 704, compels reversal here. In that case, a patient claimed sexual improprieties by a hospital employee and sought punitive damages from the hospital on the theory that its administrator, Westbrook, ratified the misconduct when he heard the employee had a "relationship" with the patient, warned the employee, and took no further action. (*Id*. at p. 726.) The Supreme Court disagreed, holding that "under no view" of the evidence

could "Westbrook's conduct be considered as ratification. . . . [P]laintiffs have presented no evidence that Westbrook knew about" any sexual improprieties. The Court determined, "as a matter of law, plaintiffs have failed to state or substantiate a claim that Westbrook knowingly approved" the employee's alleged misconduct. (*Id.* at p. 727.)

Preonas knew far less than Westbrook. There was no evidence he knew anything at all about any statute of limitations issue or alleged

churning scheme; thus, as a matter of law, he cannot have ratified any such alleged misconduct.[22]

Finally, plaintiffs argued that Seyfarth ratified Lancaster's alleged wrongdoing by making Lancaster a partner, sending plaintiffs two bills within seven days, and cross-complaining against plaintiffs for unpaid fees: "Is that ratification? Of course it is," counsel told the jury. (31 RT 7559-7560.)

No, it's not. No evidence showed that any managing agents who might have taken these actions had "actual knowledge" of any "outrageous" misconduct or that anyone engaged in policymaking at Seyfarth had the slightest knowledge of any alleged wrongdoing. A law firm "cannot confirm and accept [i.e., ratify] that which it does not actually know about." (*Cruz v. HomeBase*, *supra*, 83 Cal.App.4th at p. 168.)

There was no evidence that Lancaster was a "managing agent" of Seyfarth, that any managing agent had the requisite knowledge, or that any managing agent with the requisite knowledge authorized or ratified the supposedly malicious conduct. The punitive damages judgment must therefore be reversed with directions to enter judgment for Seyfarth.

B. The Punitive Damage Award Is Constitutionally Excessive.

The federal and California constitutions prohibit civil punishment that is "grossly excessive or arbitrary." (*Campbell*, *supra*, 538 U.S. at p. 416; *Hale v. Morgan*, *supra*, 22 Cal.3d at pp. 392, 399-400, 404.) As described in Section I.C., above, *Campbell* clarified the due process limitations on punitive damage awards, relying on three "guideposts":

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[22] The same is true of Sulzer, who plaintiffs argued also ratified the scheme. (31 RT 7559.)

(1) the relative reprehensibility of the defendant's misconduct; (2) the disparity between the plaintiff's actual harm and the punitive award; and (3) the difference between the punitive award and any analogous civil penalties.

The $15,000,000 punitive award here against Seyfarth flunks all the constitutional criteria. It is grossly excessive and arbitrary.

1. The reprehensibility factors weigh strongly against a multi-million-dollar punitive award.

As described above, the most important of the three constitutional guideposts is the relative reprehensibility of the defendant's conduct, which is determined by consideration of five factors. (*Campbell, supra,* 538 U.S. at p. 419.) Here the $15,000,000 punitive award for breach of fiduciary duty and fraud meets none of the reprehensibility tests:

- The harm to plaintiffs was purely economic, not physical.
- No one's health or safety was threatened.
- Plaintiffs were hardly financially vulnerable—they were millionaires many times over.
- The claimed misconduct was an isolated incident.
- Not a speck of evidence showed that anyone in a policy-making position at Seyfarth had knowledge of any claimed misconduct.

In sum, the misconduct asserted here—a lawyer supposedly "churning" a case for excess fees without the knowledge of the firm against which punitive damages were imposed—is at the very lowest end of the relative-reprehensibility scale. (See *Simon v. San Paolo, supra,* 35 Cal.4th at p. 1181 ["In the universe of cases warranting punitive damages under

California law," defendant's affirmative fraudulent misrepresentations "have to be regarded as of relatively low culpability"].)

2. The 30:1 ratio of the punitive award to actual harm indicates constitutional excessiveness.

The second constitutional guidepost—the ratio between the punitive award and the harm to the plaintiff (see above, pp. 30-31)—reveals the award's gross excessiveness.

Here the bulk of the "compensatory" judgment consisted of the almost $10,000,000 the jury found plaintiffs would have recovered had the TAA petition been timely filed, plus prejudgment interest. The other major component of the compensatory judgment was the $500,000 award for breach of fiduciary duty, apparently for the attorney fees plaintiffs paid Seyfarth and successor counsel.

Only the $500,000 award should be considered in analyzing the ratio guidepost, because only those out-of-pocket amounts, paid by plaintiffs for attorney fees, could be considered actual "harm" to them. The sum they would have received in a TAA action is in no realistic sense "compensatory," because it does not reflect any recompense for harm actually suffered. (Plaintiffs offered no evidence they failed to benefit from Greenfield's TAA violations.) Rather, the TAA is a regulatory scheme that enforces compliance with its licensing requirements by voiding contracts under which unlicensed activities were performed—even if the illegal activities caused plaintiffs no harm. (*Yoo v. Robi, supra,* 126 Cal.App.4th at p. 1104; *Waisbren, supra,* 4l Cal.App.4th at pp. 250, 261-262; see 22 RT 4663 [TAA intended to be punitive].) The evidence here was undisputed that plaintiffs made tens of millions of dollars, at least in part as a result of Greenfield's activities. Any TAA award to plaintiffs would have been a windfall, not a make-whole remedy.

Thus the ratio of the $15,000,000 punitive award to the *actual* harm suffered by the plaintiffs is 30 to 1—far in excess of the constitutionally permissible ratio for a case involving purely economic injury. (*Campbell, supra,* 538 U.S. at p. 423 ["A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business"]; *Simon v. San Paolo, supra,* 35 Cal.4th at p. 1182 ["ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than nine or 10 to one are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause"].)

3. The punitive award vastly exceeds any civil penalties California imposes for similar conduct.

The third *Campbell* guidepost is the disparity between the punitive award and any analogous civil penalties. (See above, pp. 31-32; *Campbell, supra,* 538 U.S. at p. 428; *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1084-1085.)

This case is not one where "the tort duty closely parallels a statutory duty for breach of which a penalty is provided." (*Simon v. San Paolo, supra,* 35 Cal.4th at p. 1184.) In similar circumstances in *Simon*—a case like this one involving a fraud judgment—the Supreme Court looked to a variety of statutes involving fraudulent and/or deceptive business practices: Business and Professions Code section 17206—$2,500 penalty for unfair competition; Civil Code sections 1947.10 and 3345—treble damages for fraudulent eviction and for deceptive practices that injure the elderly or disabled; Penal Code sections 182, 484 and 672—fine of $1,000 for misdemeanor fraud and $10,000 for felony fraud. (*Ibid.*)

The monetary penalty for *felony* fraud is $10,000. (Bus. & Prof. Code, § 10175.2, subd. (d).) The $15,000,000 punitive damage award here dramatically overwhelms that figure. It is *1,500 times* the maximum criminal penalty and *6,000 times* the maximum civil penalty for comparable conduct subject to statutory punishment.

The $15,000,000 punitive damage award in this case is grossly excessive, arbitrary and irrational, and is unconstitutional under every test specified by the United States Supreme Court. It must be reversed.

V. THE COMPENSATORY AWARD MUST BE REVERSED BECAUSE IT NECESSARILY INCLUDES A PURELY PUNITIVE COMPONENT NOT RECOVERABLE IN THIS LEGAL MALPRACTICE ACTION.

As explained above, and as plaintiffs' expert testified, any TAA award to Blanks from Greenfield in the underlying case would not have compensated for any loss—it would have been a civil penalty. But under California law, a legal malpractice plaintiff may *not* recover lost civil penalties in the underlying case as compensatory damages.

The California Supreme Court has held, for public policy reasons, that "a plaintiff in a legal malpractice action may not recover lost punitive damages as compensatory damages." (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1052-1053.)

The policies cited by the high court prohibiting compensatory awards of lost punitive damages include:

- "Imposing liability for lost punitive damages on negligent attorneys would . . . neither punish the culpable tortfeasor . . .

nor deter that tortfeasor and others from committing similar wrongful acts in the future." (*Id.* at p. 1047.)

- "[T]he amount of the award bears no relation to the gravity of the attorney's misconduct or his or her wealth," which is "'contrary to the public purpose of punitive damages.'" (*Id.* at p. 1047.)
- Punitive damages depend on "moral judgments," which are "inherently speculative." Thus, "a jury cannot objectively determine whether punitive damages should have been awarded" or their amount "with any legal certainty." (*Id.* at p. 1049.)
- "Because legal malpractice plaintiffs are made whole for their injuries by an award of lost compensatory damages," allowing them to recover lost punitive damages "would give them an undeserved windfall." (*Id.* at p. 1051.)

The same policies apply here: (1) punishing *Seyfarth* for *Greenfield's* non-licensure neither punishes the guilty party nor deters him or others from committing similar acts; (2) the award bears no relation to the gravity of *Seyfarth*'s misconduct or its wealth; (3) whether the Labor Commissioner should have made a moral determination to punish Greenfield is "inherently speculative"; and (4) because plaintiffs suffered *no actual injury* from Greenfield's non-licensure, the punitive element of their compensatory damages award would have been an "undeserved windfall."

The compensatory damage judgment in this legal malpractice action must be reversed or reduced to exclude any amount awarded as a penalty for Greenfield's misconduct; indeed, in light of the $250,000 settlement plaintiffs obtained, the compensatory award should be reduced to zero.

CONCLUSION

The legal assumptions underlying this judgment are wrong as a matter of law, and the punitive damage award is unsupported by substantial evidence, requiring judgment for Seyfarth. Moreover, this trial bore no reasonable resemblance to a legal malpractice trial. There was no trial-within-a-trial, there was no trial on breach of duty, and what trial there was consisted almost entirely of a battle of experts on both legal and factual issues. The judgment must be reversed.

Dated: August 28, 2006

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CERTIFICATION

Pursuant to California Rules of Court, Rule 14(c), I certify that this **Appellant Seyfarth Shaw LLP's Opening Brief** contains 13,990 words, not including the Certificate of Interested Entities or Persons, tables of contents and authorities, caption page, signature blocks, or this Certification page.

Dated: August 28, 2006

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