4th Civ. No. D044695

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

POINTE SAN DIEGO RESIDENTIAL
COMMUNITY L.P., et al.,

Plaintiffs, Respondents and Cross-Appellants,

vs.

W.W.I. PROPERTIES, LLC, et al.,

Defendants, Appellants and Cross-Respondents.

Appeal from the San Diego County Superior Court
Case Nos. 726145 and GIC753184
Honorable Robert May, Judge Presiding

APPELLANTS' OPENING BRIEF
[Accompanied By Application To File Appellants' Opening Brief Exceeding 14,000 Words]

GREINES, MARTIN, STEIN & RICHLAND LLP
Irving H. Greines (SBN 39649)
Barbara W. Ravitz (SBN 86665)
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036-3626
310-859-7811 // Fax 310-276-5261

Attorneys for Defendants, Appellants and Cross-Respondents
PALOMBA WEINGARTEN and ATLAS HOLDINGS GROUP, INC.

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 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)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

APPELLANTS' APPENDIX INDEX

APPELLANTS' APPENDIX INDEX (continued)

APPELLANTS' APPENDIX INDEX (continued)

APPELLANTS' APPENDIX INDEX (continued)

APPELLANTS' APPENDIX INDEX (continued)

APPELLANTS' APPENDIX INDEX (continued)

INTRODUCTION

This appeal is from a judgment in excess of $9 million entered against defendant Palomba Weingarten. It arises from a series of disputes concerning the contemplated development of property in San Diego County. Following a multi-phase trial, the judgment directed Ms. Weingarten to pay $2 million in compensatory damages to Astra Management Corp. ("Astra"); $3.3 million in punitive damages to Pointe San Diego Residential Community, L.P. ("Pointe"); $400,000 to Gosnell Builders of California ("GB") and $ 4.1 million to Pointe SDMU, L.P. ("PSDMU"). After entry of judgment, the court granted Pointe a limited new trial.

The judgment and new trial order are unlawful—in elementary ways, including the following:

First, the $2 million compensatory-damages judgment in favor of Astra, for breach of fiduciary duty, must be reversed with directions to enter judgment in favor of Ms. Weingarten. The reason: There is no evidence—absolutely none—that Astra suffered any injury or damages as a result of Ms. Weingarten's conduct. Although there is evidence that another defendant, WW1 Properties, LLC ("WW1"), did suffer injury, WW1 never sued, and Astra cannot permissibly recover damages for injury suffered by another person.

Second, the $3.3 million punitive-damages judgment in favor of Pointe, based on the same fiduciary breaches that yielded the compensatory award to Astra, must be reversed, also with directions to enter judgment in favor of Ms. Weingarten. Reversal is required because Pointe was merely a nominal plaintiff—a shareholder who brought a derivative suit on behalf of Astra—and thus was not entitled to recover damages for itself. Since Pointe neither alleged nor proved that it suffered injury, and recovered no

compensatory damages, the $3.3 million punitive award to Pointe is nothing but an illegal gift. It is also unconstitutional since the ratio of punitive damages to Pointe's injury or compensatory damages ($3.3 million to zero) is incalculable.

Third, the $400,000 breach of contract judgment against Ms. Weingarten in favor of GB must be reversed, again with directions to enter judgment in favor of Ms. Weingarten. The contract was solely between GB and WW1; Ms. Weingarten was not a party to the contract or to the cause of action against WW1 for its breach. Her liability is based entirely on a finding that she was the "alter ego" of WW1. The alter ego award is barred by several dispositive principles, including lack of evidentiary support, estoppel and denial of due process (the alter ego theory was never pleaded, depriving Ms. Weingarten of the guaranteed rights to notice and the opportunity to be heard).

Fourth, the $4.1 million judgment against Ms. Weingarten in favor of PSDMU, also based on alter ego, for the intentional torts of conversion, non-permanent trespass and permanent trespass committed by Atlas Homes, LLC, must be reversed with directions to enter judgment in favor of Ms. Weingarten. This portion of the judgment, too, is unconstitutional (again suffering from fundamental due process flaws), and it is not supported by evidence sufficient to uphold the imposition of alter ego liability.

Fifth, the $3 million permanent trespass portion of the alter ego tort judgment must be reversed with directions to enter judgment for Ms. Weingarten (and Atlas Homes) because the claim was never pleaded and was asserted for the first time on the eve of trial. As a matter of law, the claim is barred by the statute of limitations. The imposition of liability against Ms. Weingarten is also unconstitutional: She was impermissibly saddled with a $3 million judgment on an intentional tort that was never

pleaded in an action in which she was never even sued. A more unlawful award is hard to fathom.

Sixth, the order granting Pointe a limited new trial—based on so-called "newly discovered evidence" purportedly relevant to Astra's suit for breach of fiduciary duty—must be reversed with directions to deny the order. Not only is Pointe—a purely nominal plaintiff—precluded by law from recovering any damages in this case (see "Second," above), but the evidence Pointe proffered to support the motion was neither newly discovered, diligently produced, material nor admissible. Indeed, some of the evidence could not possibly have been "newly discovered" because it was indisputably duplicative of testimony given by Ms. Weingarten in this very case. The order never should have been granted.

For these and other reasons fully explained below, the judgment must be reversed with directions to enter judgment in favor of Ms Weingarten.

STATEMENT OF FACTS AND OF THE CASE

The record in this case is long and complex, involving multiple parties, proceedings, claims, issues and rulings. For clarity in presentation, we limit our recitation of the facts to those pertinent to the issues raised by this appeal; we do not recite the facts relating solely to rulings that were favorable to appellants or that are not challenged on appeal. Certain facts are stated more fully in the legal discussion of the issues to which they relate.

A. Background.

In the 1980's, plaintiff Gosnell Builders Corporation of California ("GB") began developing land in San Diego County; the project was to include both residential and commercial components. (Appellants' Appendix ["AA"] 123.) GB was one of a nationwide conglomerate of more than 40 affiliated companies owned by developer Robert Gosnell. (RT 7542-7544, 8534.)

In 1992, GB and a related entity, plaintiff Pointe San Diego Residential Community, L.P. ("Pointe"), ran into financial problems. Their lender withdrew funding, leaving them owing the bank $108 million. (AA 123-124, 74-75; RT 2627, 7588.)

To try to get out of their financial difficulties, GB and Pointe designed a transaction that "would enhance the economic value of the property by hopefully providing some tax benefits to go along with it." (AA 124; RT 4688.)

In 1995 Pointe began negotiations with defendant Palomba Weingarten. (RT 2629-2630.) Ms. Weingarten believed the troubled development project was a good investment opportunity and would provide significant tax benefits. (RT 2702, 2748.)

B. The Parties Enter Into Agreements: 1995-1996.

The negotiations resulted in a series of complex agreements entered into between December 1995 and January 1996, including the following:

1. Defendant Atlas Holdings Group, Inc. ("AHG")—of which Ms. Weingarten was CEO, President and sole director—purchased Pointe's bank note at a deep discount, for $3.8 million. (AA 124.)[1]

2. Pointe conveyed the grant deed on the residential component of the property to defendant Astra Management Corp. ("Astra") in exchange for 1000 shares of Class A common stock in Astra. Ms. Weingarten was Astra's CEO, President and director. (AA 124 [Astra mistakenly referred to as "AHG"]; Trial Exhibits ["Ex."] 59, 45, 50; RT 2691.)

3. Astra sold a 31 percent interest in the residential component of the property to B.R. Family Partners, L.P. ("BRFP"), for $1.8 million. (AA 124; Ex. 44.)

4. Astra and BRFP formed defendant WW1 Properties, LLC ("WW1"), with Ms. Weingarten as manager; Astra was a 75 percent member of WW1 and BRFP was a 25 percent member.[2] WW1's purpose was to acquire, own, develop and sell residential property. (AA 124-125; RT 2691, 2792; Ex. 46.)

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[1]Ms. Weingarten owned 97 percent of the shares of AHG; her children and grandchild owned the remaining shares. (AA 124; RT 2698.)

[2]A limited liability company ("LLC") like as WW1 is "'a hybrid business entity formed under the Corporations Code and consisting of at least two "members" who own membership interests. . . . Its form provides members with limited liability to the same extent enjoyed by corporate shareholders . . . .'" (*PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 963 [citations omitted]; Corp. Code, § 17000 et seq.) An LLC may be managed by one or more "managers," who may or may not be members. (Corp. Code, § 17151, subd. (a).)

5. WW1 purchased the residential property from Astra and BRFP. (*Ibid*.)

6. WW1 and GB entered into a Development Management Agreement ("DMA"), whereby WW1 hired GB to perform services for the residential property. (AA 125; Ex. 47.)

C. The Litigation: 1998-2005.

After signing the contracts, the parties got into a number of business and personal disputes. (See, e.g., RT 3754, 5134, 5275, 7645, 10118, 10290; Ex. 2503.)[3] In April 1997, WW1 informed GB that WW1 was terminating the DMA. (RT 7582; Ex. 143.)

Litigation commenced in 1998. It consisted of two cases—the "residential" case (No. 726145) and the "mixed-use" case (No. GIC 753184). (AA 1, 49.)

Trial proceeded in two phases. In Phase I, some of the issues in the residential case were tried. In Phase II, the mixed-use case and the remaining issues in the residential case were tried.

D. The Phase I Trial And Outcome.

1. The "residential" complaint.

Phase I involved claims brought by Pointe and GB against WW1, Astra, Atlas Homes, AHG, and Ms. Weingarten, among others. (AA 1, 72, 74.) The relevant causes of action in the operative First Amended Complaint are: (1) second cause of action: breach of the DMA—brought by GB against WW1; (2) sixth cause of action: breach of fiduciary

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[3]One dispute concerned AHG's 1997 formation of Atlas Homes, LLC ("Atlas Homes"). AHG was an 85 percent member of Atlas Homes, and Ms. Weingarten's relatives were 15 percent members. Ms. Weingarten was its manager. WW1 transferred portions of the residential property to Atlas Homes. (AA 125.)

duty—brought by Pointe against Ms. Weingarten and AHG; (3) seventh cause of action: breach of fiduciary duty—brought by Pointe derivatively on behalf of Astra against Ms. Weingarten and AHG; and (4) eleventh cause of action: accounting—brought by Pointe against all defendants. (AA 81-88.)[4]

2. The trial and decision.

Phase I was tried by the court, which ruled as follows:

a. Pointe has no standing to pursue the sixth cause of action for breach of fiduciary duty against Ms. Weingarten and AHG. Pointe failed to prove it had a "separate direct claim, because damages, if any, to Pointe were subsumed in and were incidental to damage, if any, suffered by Astra," as alleged in the seventh cause of action derivatively brought by Pointe on Astra's behalf. (AA 127, 85-86.)

b. Pointe, as a shareholder of Astra, has standing to pursue the seventh derivative cause of action for breach of fiduciary duty against Ms. Weingarten and AHG. (AA 127-130.)

c. Regarding the seventh cause of action, Ms. Weingarten breached her fiduciary duties and caused damages by (1) taking a 2-1/2 percent commission on certain sales of residential property owned by WW1 and (2) charging "to the project" (i.e., WW1) certain defense costs (accounting and legal), paid on behalf of Ms. Weingarten, Atlas Homes, and others. (AA 128, 135, 140-141.)[5]

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[4]The residential complaint also sought rescission of the original transactions and of certain transfers of property made by WW1 in 1997. (AA 83, 86-87.) These causes of action were dismissed after the effects of the transfers were voluntarily undone. (AA 93, 123, 126, 138, 139; RT 5208-5209; Ex. 2429, 280.)

[5]The court also found that Ms. Weingarten and AHG had breached fiduciary (continued...)

d. On the seventh cause of action, Ms. Weingarten is liable for compensatory damages (measured by out of pocket loss, to be determined by an accounting), and punitive damages (having acted with malice and fraud). (AA 136-137, 142-144.)

3. The accounting to determine compensatory damages.

The court appointed an expert accountant to determine the amounts of (a) the commissions taken by Ms. Weingarten and (b) the legal and accounting fees paid on behalf of Ms. Weingarten, AHG, and others ("Ms. Weingarten et al."). (AA 147.)

The accountant concluded that (a) the improperly-taken commissions totaled $635,869 and (b) from November 1997 through June 2002, legal and accounting fees were paid on behalf of Ms. Weingarten et al., in the amount of $955,182. The total amount was $1,591,051. (AA 339; Ex. 749.)

E. The Phase II Trial And Outcome.

1. The "mixed-use" complaint.

In 2000, PSDMU sued Atlas Homes. PSDMU is the owner and developer of the "mixed-use" (commercial, multi-family, golf course and resort) portion of the project. (AA 49-50, 341.)[6] The causes of action relevant to this appeal are (1) trespass (entering onto a portion of PSDMU's property and dumping and storing materials there without consent) and

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[5](...continued)
duties in other respects, but determined those breaches caused no damages. (AA 132-135, 138-140.)

[6]Astra and BRFP are the limited partners of PSDMU. (AA 341.) The general partner is an entity controlled by Robert Gosnell. (RT 8796.)

(2) conversion (taking dirt from a portion of PSDMU's property by grading it without consent). (AA 54-56.)[7]

2. Trial and decision.

Like Phase I, Phase II was tried to the court. (AA 329, 350.) It ruled as follows:

a. The residential case.

On the second cause of action for breach of the DMA, the court found in favor of GB and against WW1, setting damages at $394,438.80. (AA 331-335.)

On the seventh cause of action for breach of fiduciary duty, the court found that Ms. Weingarten had "diverted at least $1,591,051 for her own interests," and this conduct was reprehensible. It ruled that Pointe should recover from Ms. Weingarten $3 million in punitive damages. (AA 338-340.)[8]

b. The mixed-use case.

On the conversion claim, the court found in favor of PSDMU and against Atlas Homes, setting damages at $720,000, the value of the dirt taken. (AA 341-344.)

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[7]On the eve of trial, over defense objections, PSDMU was allowed to expand the scope of its claims to include assertions of "permanent" trespass based on "encroachment" by slope grading. (See below, § IV.)

[8]On the third cause of action, for breach of the WW1 Operating Agreement, the court found in favor of WW1 and against Pointe and GB. (AA 336-337.) On the accounting claim, the court found that "a full accounting of the project, since January 1996 to the present, is required . . . ¶ . . . to determine whether distributable profit[s] have been realized." (AA 340.)

On the "non-permanent trespass claim" (i.e., dumping), the court found in favor of PSDMU and against Atlas Homes, setting damages at $137,795 for past and future clean-up costs. (AA 344.)

On the "permanent trespass claim" (discussed in detail in § IV, below), the court found in favor of PSDMU and against Atlas Homes, setting damages at $2,688,800 for the cost of building two retaining walls. (AA 345-346.)

F. Post-Trial Events.

1. The second accounting.

The court appointed referee Ann Wilson to perform "a full and complete accounting," from January 1996 through March 31, 2003, of "Net Cash Flow and any resulting Cash Distributions, if any, required to be made to the W.W.I members pursuant to the W.W.1 Operating Agreement." (AA 353.)[9] Ms. Wilson performed the accounting and concluded that the residential project had experienced a "negative Net Cash Flow" of over $37 million, and thus "there is no cash for distribution to W.W.1 members." (AA 357-358.) The court then determined that "[p]laintiff has not met its burden that, as of March 31, 2003, cumulative 'Net Cash Flow' had been realized to trigger cash distributions." (AA 399.)[10]

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[9]The Operating Agreement defines "Net Cash Flow" as "the *excess*, if any, of (a) all cash revenues and funds received by [WW1] from operations . . . *minus* (b) the sum . . . of all operating or other cash expenditures of [WW1] . . . plus all payments . . . with respect to [WW1] indebtedness . . . plus the . . . [WW1] reserves. . . ." (AA 388; Ex. 46, p. 34.)

[10]Subsequently, the court declared that although Ms. Wilson had fulfilled the scope of her appointment, the scope was not broad enough. (AA 406.) Therefore, notwithstanding its prior ruling that net cash flow had not been proven, the court stated it declined to rule on the question "whether there was distributable 'net cash flow' as of March 31, 2003." (*Ibid*.) No further accounting assignment was given. Later, the court

(continued...)

2. Post-trial rulings.

On April 5, 2004, the court issued what purported to be a "judgment," largely tracking the rulings in its previous decisions. (AA 426-431.) However, the court subsequently acknowledged that the April 5 "judgment" was not the final judgment. (AA 484 ["The final judgment will incorporate the Court's rulings set forth herein . . ."].)[11]

Soon after the April 5 "judgment," plaintiffs moved to amend it to make all the defendants the co-debtors of each other. (AA 433.) The motion was granted in part and denied in part. The court made Ms. Weingarten a co-debtor on the judgments against WW1 and Atlas Homes, but refused to make the defendant corporations (Astra, AHG, Atlas Homes, WW1) co-debtors for each other's liabilities or for Ms. Weingarten's personal liabilities. (AA 481-482.)

Defendants requested a statement of decision, which was filed July 8, 2004. (AA 486, 491.)

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[10](...continued)
ruled, "There has been no finding that 'net cash flow' has been realized up through March 31, 2003. The Court cannot assume that there will be 'Net Cash Flow' in the future." (AA 481.)

[11]In fact, the purported judgment was not a judgment because substantive issues remained to be resolved. For example, in the purported judgment, the trial court had ruled that the $1.59 million in compensatory damages on the seventh cause of action was to be placed in a constructive trust, without specifying any beneficiary. (AA 428.) The "second"—final—judgment awarded these funds to Astra. (AA 506.)

G. The Final Judgment.

On September 22, 2004, the court filed what "is intended by this Court to constitute the final Judgment in this action." (AA 506.) The judgment makes the following awards:[12]

1. To the "derivative plaintiff" Astra against Ms. Weingarten, for breach of fiduciary duties, the sum of $2,036.420.20 (seventh cause of action, residential complaint);

2. To Pointe against Ms. Weingarten, for breach of fiduciary duties, punitive damages of $3,330,821.91 (seventh cause of action, residential complaint);

3. To GB against WW1 and Ms. Weingarten, jointly and severally, for breach of the DMA, $394,068.73 (second cause of action, residential complaint);

4. To PSDMU against Atlas Homes and Ms. Weingarten, jointly and severally, for conversion, $966,752.86; for non-permanent trespass, $152,990.22; for permanent trespass, $2,985,304.66 (first and second causes of action, mixed-use complaint);

5. To various plaintiffs and cross-defendants against WW1, Astra, AHG, Atlas Homes and Ms. Weingarten, for costs in the amount of $94,497.22. (AA 506-508.)[13]

H. Post-judgment Motions And Limited New Trial Order.

Ms. Weingarten and AHG, along with other defendants, brought various motions for a new trial and to set aside, vacate or modify the judgment on multiple grounds, attacking both the original purported

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[12]The amounts stated in this section and elsewhere in the brief include prejudgment interest through September 22, 2004, and are usually rounded off.

[13]The award of costs is the only portion of the judgment ordering any payment by AHG. (See below, §VII.)

"judgment" and the final judgment. (AA 480, 482-484, 780.) These motions pointedly attacked the punitive damages award on grounds including that it was unconstitutionally excessive. (AA 524.1, 524.4, 780.)

Pointe, too, moved for a new trial, limited to damages, contending it had come upon "newly discovered evidence" relevant to the "tax benefits" and "real estate profits" issues asserted in Phase I under the dismissed sixth and tried seventh causes of action for breach of fiduciary duty. (AA 525; RT 15173.) The court granted the motion in part, ruling that Pointe would have a new trial limited to the seventh cause of action and that both liability and damages must be tried. (AA 786.)

I. The Appeals And Statement Of Appealability.

On October 1, 2004, AHG, Astra, Atlas Homes and WW1 timely appealed from the September 22, 2004, judgment. (AA 509-520.)

On October 12, 2004, Pointe, GB and PSDMU appealed from the September 22, 2004, judgment and from an August 20, 2004, order denying attorney fees. (AA 521-524.)

On February 18, 2005, Ms. Weingarten timely appealed from the September 22, 2004, judgment, and Ms. Weingarten and AHG appealed from the January 25, 2005 order, granting Pointe a partial new trial.[14] (AA 789-791.)

On March 16, 2005, Pointe and GB appealed from the partial new trial order. (AA 794.)

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[14]Ms. Weingarten filed a Chapter 11 bankruptcy petition on October 1, 2004, effectuating a stay of all proceedings. The stay was lifted by the bankruptcy court on November 2, 2004, to permit Ms. Weingarten to prosecute and defend the post-trial motions and appeals in this case. (AA 657-661 [Notice Of Order Granting Limited Relief From Automatic Stay, filed in this Court, at its request, on December 29, 2004].)

The September 22, 2004, judgment is appealable as a final judgment. (Code Civ. Proc., § 904.1, subd. (a)(1).) The January 25, 2005, order granting a partial new trial is appealable. (*Id.* at subd. (a)(4).)

LEGAL DISCUSSION

I. THE $2 MILLION COMPENSATORY DAMAGES JUDGMENT IN ASTRA'S FAVOR ON THE DERIVATIVE SEVENTH CAUSE OF ACTION MUST BE REVERSED WITH DIRECTIONS: AS A MATTER OF FACT AND LAW, ASTRA SUFFERED NO LEGALLY COGNIZABLE INJURY AND CANNOT BE AWARDED DAMAGES.

The seventh cause of action for breach of fiduciary duty, brought by Pointe derivatively on behalf of Astra, yielded a judgment of over $2 million in Astra's favor. (AA 506.)[15] Pointe claimed it was entitled to sue derivatively because it held an interest in Astra, and it alleged "injury and damage to Astra." (AA 85.) However, all the alleged fiduciary breaches involved land owned by WW1, not Astra and not Pointe. (AA 128.) The trial court found that Ms. Weingarten had taken unauthorized real estate commissions from WW1 and had improperly charged certain defense costs "to the project," meaning the WW1-Atlas Homes project. (AA 140-142.)[16]

Neither WW1 nor Atlas Homes was a party to the seventh cause of action. Neither sued directly, and no one brought a derivative suit on either's behalf.

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[15]A derivative suit is one brought by a shareholder "'on behalf of the corporation for injury to the corporation for which it has failed or refused to sue.'" (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 312.)

[16]Ms. Weingarten testified she charged defense costs to "the project" (RT 2722), sometimes to WW1 (RT 3469) and sometimes to Atlas Homes (RT 3514, 3491). There was no evidence, and Pointe never contended, that improper charges were ever made to Astra.

Astra proved no case against Ms. Weingarten. There is no conceivable basis for affirming Astra's damages award, as we next explain.

A. Astra Is Not Entitled To Damages Because It Suffered No Legally Compensable Injury.

Astra is precluded from recovering anything from Ms. Weingarten—not even a penny—for the most elementary of reasons: There was no evidence that Astra suffered any injury or damages. Period.

As our Supreme Court has made clear, in a derivative suit, "if the evidence shall establish that the corporation itself has suffered no wrong, . . . no recovery can be had . . . ." (*Turner v. Markham* (1909) 155 Cal. 562, 570.) Stated otherwise, damages cannot be awarded unless the party who sues is the injured party and proves it is entitled to an award. (See, e.g., *Valdez v. Taylor Automobile Co.* (1954) 129 Cal.App.2d 810, 821 [only party that sustains actual injury may recover damages]; Civ. Code, § 3333 [purpose of tort damages is to compensate for injury].) There is no such proof here.

Bottom line: Because Astra cannot recover damages for an injury it never suffered, the $2 million judgment must be reversed. And since no case for compensatory damages was proved by Astra (or Pointe), the judgment must be reversed with directions to enter judgment in favor of Ms. Weingarten. (*McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661 ["where the plaintiff's evidence is insufficient as a matter of law to support a judgment for plaintiff, a reversal with directions to enter judgment for the defendant is proper"].)

B. The Fact That Astra Had An Investment Interest In WW1 Does Not Entitle Astra To Recover For Itself Damages Suffered By WW1.

Astra may claim on appeal that it is somehow entitled to recover for WW1's injuries because, as a member of WW1, it could have sued derivatively on behalf of WW1. These claims are untenable.

1. Astra did not sue derivatively on WW1's behalf and, thus, cannot recover in this action for any injury that WW1 may have suffered.

Of course, if WW1 suffered harm by reason of any fiduciary breaches committed against it, then WW1 would be the party aggrieved. It could have sued directly; or, a member, such as Astra, could have sued derivatively on WW1's behalf. (Corp. Code, §§ 17003, subd. (b), 17501, subd. (a).)

Indeed, the only person entitled to any recovery under the seventh cause of action would have been WW1 if it had elected to sue. After all, it was WW1's money that was found to have been improperly diverted and charged. (See above, p. 8.) But WW1 did not sue, directly or derivatively. Therefore, no valid issue was presented as to WW1's damages and no recovery could be had for any injury it might have suffered.

The controlling principle is this: Only a party aggrieved may sue. (*Valdez v. Taylor Automobile Co.*, *supra*, 129 Cal.App.2d at p. 821.) Astra is not an aggrieved party by reason of WW1's injury. The $2 million judgment in Astra's favor is void.

2. Even if Pointe or Astra had sued derivatively on WW1's behalf, neither would have been entitled to recover damages for any injury suffered by WW1.

Let's make a giant assumption: That Astra (or Pointe) had brought a derivative action on behalf of WW1 to recover for WW1's injuries. This,

of course, never happened. But, even if it did, neither Pointe nor Astra could have recovered damages for WW1's loss.

This is so not merely because, as just demonstrated, neither entity was aggrieved by reason of WW1's injury, but also because someone who sues derivatively on behalf of another is merely a *nominal* party who can never recover damages belonging to the aggrieved party.

This Court recently recited this exact principle, declaring:

> Shareholders may bring two types of actions, "a direct action filed by the shareholder individually . . . for injury to his or her interest as a shareholder," or a "derivative action filed on behalf of the corporation for injury to the corporation for which it has failed or refused to sue . . . . The two actions are mutually exclusive: i.e., the right of action and recovery belongs *either* to the shareholders (direct action) *or* to the corporation (derivative action)." When the claim is derivative, the "shareholder is merely a nominal plaintiff. . . . [T]he corporation . . . is the real party in interest . . . ."

(*Schuster v. Gardner, supra,* 127 Cal.App.4th at pp. 311-312; citations and emphases omitted.) Other cases are in precise accord.[17]

These principles establish that no one other than WW1 itself can recover damages for injuries suffered by WW1. The person who brings a derivative suit on behalf of the injured corporation is, in effect a non-party; a judgment for or against a non-party is void. (*Fazzi v. Peters* (1968) 68 Cal.2d 590, 591, 594 [reaffirming "the seemingly self-evident proposition that a judgment in personam may not be entered against one not

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[17]See *Thomson v. Mortgage Investment Co.* (1929) 99 Cal.App. 205, 212 (shareholder who brings derivative action is "a mere nominal plaintiff, the corporation is the real party in interest, and any judgment recovered inures to its benefit"); *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 21 ("the particular stockholder who brings the suit is merely a nominal party plaintiff"); *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107 (in corporate derivative suit, the corporation is "'the real plaintiff and it alone benefits from the decree'").

a party to the action"]; *Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 469 [same].)

California courts have consistently applied this rule in the exact context of this case. The decisions uniformly hold that a plaintiff who brings a derivative action on another's behalf is a nominal plaintiff, not the "real," "actual," or "aggrieved" party and, therefore, cannot recover individually under a judgment.

For example, in *Whitten v. Dabney* (1915) 171 Cal. 621, 630-631, the Supreme Court declared:

> [T]hese plaintiffs have no personal wrongs for which they are entitled to seek redress in this action. "The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action *is his* or because *he* is entitled to the relief sought. He is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court*". . . . [A] plaintiff in such an action . . . is a trustee pure and simple, seeking in the name of another a recovery for wrongs that have been committed against that other.

Similarly, *First Security Bank of Cal. v. Paquet* (2002) 98 Cal.App.4th 468 also held that a shareholder-plaintiff in a derivative action is a party in name only. There, the Paquets brought a shareholder derivative action on behalf of a corporation against several defendants, including a bank. The bank cross-complained against the Paquets in their individual capacities. (*Id.* at pp. 471-472.) The Court of Appeal held that the Paquets were parties in two entirely different capacities—as representatives of the corporation when derivatively pursuing the complaint, and as individuals when defending the cross-complaint. (*Id.* at pp. 473-474.) In the derivative action, "the cause of action being asserted belongs to the corporation, not to the plaintiff shareholder." (*Id.* at p. 474.) Accordingly, the Court of Appeal ruled that the Paquets "*are not the actual*

parties to the complaint"; they "are parties to the derivative complaint *in name only*" and, "[i]n substance, *they are not parties at all*." (*Id.* at p. 475, emphases added.)

Accordingly, even if Astra or Pointe had brought a derivative suit on WW1's behalf, neither would be permitted to recover personally for injuries suffered by WW1.

Since Astra suffered no injury as a matter of fact and law, it was entitled to no damages.

3. The rule that only the injured corporation, not the nominal plaintiff, may recover applies even if a corporate recovery would benefit a wrongdoing shareholder.

The rules stated above are indisputable. They are founded on the most fundamental of principles: If a corporation suffers injury, only the corporation should recover—no matter who brings suit on its behalf. Any other result would allow someone else to pocket money belonging solely to the corporation.

These rules and principles are so deeply entrenched that they compel a corporate recovery in a derivative suit even where such recovery would enhance the wrongdoing shareholder's interest in the corporation. Consider, for example:

- *Baker v. Pratt* (1986) 176 Cal.App.3d 370: This case involved a shareholder's derivative action brought on behalf of the corporation. The judgment ordered the wrongdoing defendant shareholder to pay damages directly to the plaintiff shareholder. (*Id.* at pp. 377-378, 381.) The Court of Appeal reversed, holding that the judgment must award "the entire sum . . . to the corporation in order that it be split among the parties." (*Id.* at pp. 381, 385.) This was so even though one of the

beneficiaries of the corporate recovery was the wrongdoing shareholder—the very shareholder who "had misappropriated corporate funds and property" and had "used the corporation's goodwill to his own advantage[,] which is a breach of fiduciary duty owed to the corporation." (*Id.* at pp. 379, 381.)

• *Rankin v. Frebank Co.* (1975) 47 Cal.App.3d 75: In this action for involuntary dissolution, accounting and distribution of assets, as well as for derivative relief, the plaintiff shareholders argued that certain damages, including an excessive salary that had been paid improperly to a wrongdoing shareholder, defendant Bankey, should be awarded to them individually.[18] (*Id.* at pp. 82, 83, 95-96.) The Court of Appeal disagreed,

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[18]The court in *Rankin* recognized the action as being either a shareholder derivative action or "incidental outgrowths of the dissolution proceeding." (*Id*. at pp. 90-92.) Of course, the whole purpose of a dissolution proceeding is to wind down corporate affairs, pay debts and distribute assets to shareholders. (See Corp. Code, § 2004 [corporate assets distributed upon dissolution].) Had *Rankin* not involved a corporation in dissolution, the return of the improperly paid salary would have gone to the corporation. (See *Schuster v. Gardner, supra*, 127 Cal.App.4th at p. 312 [corporation is real party in interest].) In our case, there is no dissolution

(continued...)

holding that the claim was derivative in nature, rather than individual, and, thus, that the returned excessive salary should "be distributed among *all* the shareholders of the corporation," which included the wrongdoing shareholder, Bankey. (*Id.* at pp. 95-96, emphasis added.)[19]

The $2 million award to Astra violates the settled rule that in a derivative action the injured corporation (here, WW1) is the only legitimate recipient of a recovery, even if such recovery will benefit a wrongdoing shareholder.

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[18](...continued)
proceeding (AA 481); thus, any recovery would have to go to the injured party, i.e., WW1, had it sued.

Rankin also permitted Bankey, the wrongdoer, to share in the distribution of another item of damages—dividends and retained earnings that *Bankey* had wrongfully diverted. As to these, the court—acting again in a dissolution context—authorized payments directly to the wrongdoer Bankey and the two plaintiff shareholders. However, it refused to give dissolution proceeds to a fourth person—an innocent shareholder (McCoy)—because that shareholder had previously been paid his fair share, so that paying him more dissolution proceeds now would result in an undeserved double recovery. (*Id*. at p. 96.)

Another court has questioned *Rankin*'s holding that the action was derivative, not individual. (*Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1255-1257.) That court, however, did not question the rule or the principle that if the action is derivative, then no individual recovery is permitted.

[19]Other states are in accord. For example, in *Glenn v. Hoteltron Systems, Inc.* (1989) 74 N.Y.2d 386, 392 [547 N.E.2d 71, 74], New York's highest court ordered a corporate recovery even though it would allow the wrongdoer to "ultimately share in the proceeds of the damage award." As the court explained, "[T]hat prospect exists in any successful derivative action in which the wrongdoer is a shareholder of the injured corporation. An exception based on that fact alone would effectively nullify the general rule that damages for a corporate injury should be awarded to the corporation." (*Ibid.*)

C. Even If Astra Could Somehow Overcome These Fatal Obstacles To Its Recovery, The Judgment In Its Favor Would Still Have To Be Reversed.

Even if Astra could somehow overcome the fatal hurdles against recovery just discussed, it still would not be entitled to a judgment, nor one even close to $2 million. Here's why:

- Even if, contrary to fact, WW1 had sued and recovered against Ms. Weingarten, Astra would not be entitled to any funds because WW1 is not in dissolution and nothing compels it to distribute its assets at this time. Indeed, the court expressly determined that WW1 did not breach the WW1 Operating Agreement—the sole source of any possible claim by Astra for a distribution from WW1. (See above, fn. 8.)

- Under the WW1 Operating Agreement, Astra—as a member of WW1—would not be entitled to receive any WW1 distributions unless and until WW1 realized "net cash flow." (Ex. 46, pp. 8-9; defined above, fn. 9.) The trial court stated there was no finding that any "net cash flow" had been realized, and it refused to assume there would be "net cash flow" in the future. (AA 481.)

- Even if, contrary to the court's rulings, there were net cash flow and a distribution were in order, there is simply no way Astra would be entitled to the full $2 million the court awarded it, as Astra's ownership interest in WW1 is not 100%. Based on the distribution formula prescribed in the WW1 Operating Agreement, Astra could not recover more than approximately $318,000. (AA 467-468, 477.)

For all these reasons, each dispositive, the $2 million judgment in Astra's favor should be reversed with directions ordering that judgment be entered in Ms. Weingarten's favor on the compensatory damages portion of the judgment entered on the seventh cause of action.

II. THE $3.3 MILLION PUNITIVE DAMAGES JUDGMENT IN POINTE'S FAVOR ON THE SEVENTH CAUSE OF ACTION MUST BE REVERSED WITH DIRECTIONS BECAUSE POINTE SUFFERED NO INJURY ON WHICH A PUNITIVE AWARD COULD BE PREMISED; MOREOVER, THE AWARD VIOLATES DUE PROCESS.

On the seventh cause of action—the derivative claim brought by Pointe, as nominal plaintiff, on behalf of Astra for damages Astra never suffered—the trial court awarded Pointe $3.3 million in punitive damages based on the same fiduciary breaches that prompted it to award $2 million in compensatory damages to Astra.

The process of reasoning that led to this result is utterly bizarre. It cannot withstand the slightest scrutiny:

- WW1 lost $2 million, including interest, because Ms. Weingarten improperly charged it with $955,182 for certain defense costs, took $635,869 in commissions, and acted maliciously and fraudulently in doing so.
- But WW1 never sued directly to recover the loss, nor was derivative relief sought on its behalf. So, no issue was ever presented as to whether WW1 was the victim of a tort or was entitled to recovery.
- Rather than holding that no one should recover because WW1 never sued and because no evidence showed that those who did sue suffered injury, the trial court concluded that someone should recover.
- So, the trial court arbitrarily picked Astra and Pointe as the beneficiaries to receive a windfall recovery based on WW1's

losses. It might just as well have picked strangers, such as charities, as the windfall recipients.

- The court awarded Astra $2 million in compensatory damages based on WW1's loss, and it awarded Pointe $3.3 million in punitive damages based on misconduct directed solely at WW1.

This makes no sense at all. Awarding Pointe $3.3 million in punitive damages is a travesty, even greater than the travesty of awarding $2 million to Astra. The punitive damages award must be summarily reversed, for many dispositive reasons. Here are some of them.

A. The Recovery Of Punitive Damages By Pointe Is Even More Unlawful Than The Recovery Of Compensatory Damages By Astra.

As demonstrated in Section I above, Astra cannot recover compensatory damages for multiple reasons, including that (a) it suffered no legally compensable injury; (b) it merely had an investment interest in the entity that did suffer injury (WW1); (c) it did not sue to recover for injury to WW1; (d) even if it had sued derivatively on WW1's behalf, it could not have recovered any damages because it would have been merely a nominal plaintiff (not a real party in interest); (e) California law does not permit recovery by a nominal plaintiff, even when adherence to the strict rule of corporate recovery would benefit the wrongdoer; (f) this is not a corporate wind-up situation, where distribution of dissolution assets to the nominal plaintiff may sometimes be appropriate; and (g) there was no evidence or

finding that there is "net cash flow" that might trigger a distribution of WW1 assets to Astra or anyone else.[20]

Each of these reasons applies, but with greater strength, to Pointe because Pointe is one step further removed from the damages (i.e., the injury to WW1) than was Astra. Pointe owned *no* interest in WW1: Pointe was merely a shareholder of Astra, which, in turn, was a member of WW1. Pointe was only the nominal plaintiff in a derivative action and, thus, was entitled to no recovery as a matter of law and fact.[21]

But this is just the tip of the iceberg. The award of punitive damages to Pointe is illegal for additional dispositive reasons, including grave constitutional infirmities.

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[20]And, just like Astra, even if Pointe could somehow overcome all the fatal obstacles to its recovery, in no way would it be entitled to recover *100%* of the $3.3 million punitive damages award. Rather, Pointe's recovery would be dictated by the distribution formulas set forth in the parties' agreements. (Ex. 46, 50 [Pointe's share would amount to about $660,000].)

[21]Nor is there merit in Pointe's contention below (and the trial court's finding) that these bedrock principles may be circumvented by calling this a "double derivative" action. (RT 14763:9-10; AA 129.) It is not a double derivative action, i.e., an action brought by a shareholder on behalf of *one* corporation to recover for injury to *another* corporation. (See *Gaillard v. Natomas Co.* (1985) 173 Cal.App.3d 410, 419, fn. 7.) Rather, the seventh cause of action was brought on behalf of one corporation (Astra) to recover for injury to *itself.* (AA 85.) The "double derivative" concept has no application here.

B. Pointe Cannot Recover *Punitive* Damages Because It Did Not Prove That It Suffered Any *Actual* Damages Or Injury.

The judgment awards Pointe punitive damages of $3.3 million, but no compensatory damages. This alone is plenty strange.

There was neither evidence nor a finding that Pointe suffered actual damages or injury. Without such finding, the punitive damages award in Pointe's favor is facially unlawful, as we explain.

1. Actual damages are an essential predicate for punitive damages.

Unless the plaintiff proves that it suffered actual damages or injury, the plaintiff cannot recover punitive damages. This is black letter law.

Our Supreme Court has consistently so held: "[A]ctual damages are an absolute predicate for an award of exemplary or punitive damages." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004 [punitive damages may be awarded "so long as 'actual, substantial damages' have been awarded"]; *Mother Cobb's Chicken Turnovers, Inc. v. Fox* (1937) 10 Cal.2d 203, 205 [punitive damages require "'a showing which would entitle the plaintiff to an award of actual damages. Actual damages must be found as a predicate for exemplary damages'"]; see also Civ. Code, § 3294, subd. (a) [where defendant guilty of oppression, fraud or malice, "the plaintiff, *in addition to the actual damages*, may recover" punitive damages, emphasis added].)

"[O]ur highest court requires that any award of exemplary damages be accompanied by an express award of compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [reversing judgment awarding no actual damages but $92,000 in punitive damages].) Without compensatory damages, a punitive damage award is "invalid." (*Jackson v.*

Johnson (1992) 5 Cal.App.4th 1350, 1355 [reversing judgment awarding no actual damages but $20,000 in punitive damages].)[22]

2. Pointe is not entitled to punitive damages because it suffered no actual damages or injury, as a matter of law and fact.

Both the law and the evidence demonstrate that Pointe suffered no actual damages or injury. Pointe therefore, is precluded from recovering punitive damages. Since Pointe was merely a nominal plaintiff in a shareholder derivative suit, it is not entitled to recover damages, as a matter of law. And since Pointe failed to prove it suffered any injury separate and apart from that suffered by the injured corporation on whose behalf it sued, it is not entitled to recover damages, as a matter of fact.

There is not a single legal authority or fact that would support Pointe's obtaining anything. The $3.3 million gift to Pointe must be reversed.

3. The trial court's findings preclude any suggestion that Pointe suffered individual injury.

The only party found (improperly, we have shown) to be entitled to compensatory damages based on Ms. Weingarten's breaches of fiduciary duty is Astra. (AA 480 ["The damage was to Astra"]; 483 [the "injured

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[22]See also *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 238-239 ["An award of actual damages, even if nominal, is required to recover punitive damages"; since neither of the plaintiffs "can recover actual damages" from the defendant, neither "can recover punitive damages"]; *Los Angeles County Metropolitan Transp. Authority v. Superior Court* (2004) 123 Cal.App.4th 261, 276 ["a court cannot award punitive damages if the plaintiff has suffered no actual damages"].)

party" is Astra, to which Ms. Weingarten is ordered to "return" $1,591,051 plus interest]; 506.)[23]

Punitive damages may be awarded "*only* to the immediate person injured." (*People v. Superior Court* (1973) 9 Cal.3d 283, 286-287, emphasis added [Attorney General not entitled to punitive damages when suing on behalf of consumers for false advertising or unfair competition]; *French v. Orange County Inv. Corp.* (1932) 125 Cal.App. 587, 591 [assignee of cause of action not entitled to punitive damages].) "[I]f there is no wrong resulting in compensable injury to *this* plaintiff, there can be no exaction of punitive damages." (*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 746.)

The trial court's findings absolutely preclude any conclusion that Pointe suffered injury and may recover punitive damages.

C. The Punitive Damage Award Must Be Reversed Because It Is Unconstitutional.

This Court needn't explore further to conclude that the punitive damage award must be reversed. But there is more that compels reversal if the Court needs further convincing.

1. The punitive award is unconstitutional because it is not supported by a showing that Pointe suffered injury.

As a matter of federal constitutional law, the punitive award cannot stand. As the United States Supreme Court has held, only the real

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[23]As we have demonstrated, there is no evidence to sustain a finding that Astra suffered damages. If anyone was damaged, it was WW1, not Astra. (See above, pp. 15-16.)

plaintiff—the person who suffered actual injury or damages as a result of conduct found reprehensible—can constitutionally collect punitive damages based on such conduct. (*State Farm Mut. Auto. Ins. Co. v. Campbell* ("*Campbell*") (2003) 538 U.S. 408 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

Campbell held that "the conduct that harmed" the plaintiff—the injured party—"is the *only* conduct relevant to the reprehensibility analysis." (*Id.* at p. 424, emphasis added.) The Court explained:

> A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.

(*Id.* at p. 423; accord, *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1054 [under *Campbell,* conduct that did not harm the plaintiff "cannot provide a legitimate basis for the plaintiff's punitive damages award"].)

These constitutional principles preclude punitive damages here. Since the recipient of the punitive award, Pointe, was not harmed by any conduct of defendants, Pointe cannot recover punitive damages.

2. The punitive award is unconstitutional because it is excessive.

Both the federal and California constitutions prohibit imposing punishment on a tortfeasor that is "grossly excessive or arbitrary." (*Campbell*, *supra*, 538 U.S. at p. 416; *Hale v. Morgan* (1978) 22 Cal.3d 388, 392, 399-400, 404.) The award here is grossly excessive and arbitrary; it flunks each and all of the governing constitutional criteria.

Campbell clarified the substantive due process limitations on punitive damage awards, relying on the three "guideposts" it had previously

described in *BMW of North America, Inc. v. Gore* (*"Gore"*) (1996) 517 U.S. 559, 575 [116 S.Ct. 1589, 5998-5999, 134 L.Ed.2d 809]: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and any civil penalties authorized in comparable cases. (*Campbell, supra*, 538 U.S. at p. 418; *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172.)

Applying these guideposts here demonstrates that the $3.3 million punitive damage award in favor of Pointe cannot withstand scrutiny. It is grossly excessive and arbitrary, especially when one considers that the party who received the award suffered neither injury nor damages.

a. The reprehensibility factors weigh conclusively against a multi-million dollar award in Pointe's favor.

The first guidepost, reprehensible conduct that causes injury to the party seeking punitive damages, is the "'most important'" and the "'primary consideration.'" (*Campbell*, *supra*, 538 U.S. at p. 419; *Gore*, *supra*, 517 U.S. at pp. 575-576 & fn. 23.)

This factor alone compels reversal of the award. Pointe suffered no injury at all as a result of any conduct by Ms. Weingarten. Since Ms. Weingarten committed no act (reprehensible or otherwise) directed at Pointe, *Campbell* precludes Pointe from recovering anything, even if someone else (i.e., WW1) might have been victimized by reprehensible conduct.

But even if Pointe had proved it suffered some injury, the reprehensibility factors would still militate overwhelmingly against a multi-million dollar award.

Punitive damages must be proportionate to the severity of the offense, because "some wrongs are more blameworthy than others." (*Gore*, *supra*, 517 U.S. at pp. 575-576 [conduct that is violent, affects health or safety, or involves "'trickery and deceit'" is more reprehensible than conduct that is nonviolent, causes only economic harm or is negligent].) Thus, the question is not whether the defendant's conduct was or was not "reprehensible" in the abstract (all conduct meriting punishment is necessarily reprehensible). Rather, the question requires determination of the *relative reprehensibility* of such conduct vis-à-vis all tortious conduct that may justify punitive damages.

Building on *Gore*, *Campbell* articulated five factors courts should consider to measure the relative reprehensibility of the tortfeasor's conduct: (1) whether the harm was physical or economic; (2) whether the misconduct demonstrated an indifference to or reckless disregard of others' health or safety; (3) whether the plaintiff was financially vulnerable; (4) whether the misconduct was repeated or an isolated incident; and (5) whether the harm resulted from intentional malice, trickery or deceit—or mere accident. (*Campbell*, *supra*, 538 U.S. at p. 419.)

The fewer factors present, the less reprehensible the conduct. (*Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1083 [reducing punitive award in part because misconduct caused only economic harm, did not affect plaintiff's health or safety, and plaintiff was not financially vulnerable].) If only one factor is present, the award may not be sustainable. (*Campbell*, *supra*, 538 U.S. at p. 419.) The absence of all the factors "renders any award suspect." (*Ibid.*)

Here, the punitive damage award does not meet any of the tests for reprehensibility. Not one of them:

- The harm—to WW1—was purely economic, not physical.

- No one's health or safety was impacted.
- Neither Astra nor Pointe was financially vulnerable; again, WW1 was the only injured party.
- The award was based on only two instances of misconduct—improperly taking commissions and charging defense costs to the project. Moreover, the only person recovering compensatory damages was Astra, the entity found to be the alter ego of Ms. Weingarten. (AA 482.) In other words, Ms. Weingarten's "reprehensible" conduct was directed at herself. How reprehensible can Ms. Weingarten's conduct possibly be if it mostly injured herself and AHG, as Astra's majority shareholder?[24]
- There is no evidence that Ms. Weingarten's conduct resulted from intentional, affirmative, malice, trickery or deceit. (Compare *Simon v. San Paolo*, *supra*, 35 Cal.4th at p. 1181 [factor satisfied where jury found defendant intended to defraud plaintiff and did so "through affirmative misrepresentation, not merely nondisclosure"].)

While a breach of fiduciary duty is never laudable, the type found here—a fiduciary's taking unauthorized commissions and improperly charging defense costs to the project—is at the very low end of the relative reprehensibility scale. (See *ibid*. ["In the universe of cases warranting punitive damages under California law," defendant's fraudulent promises that led to liability here "have to be regarded as of relatively low culpability"]; compare *Romo v. Ford Motor Co.*, *supra*, 113 Cal.App.4th at p. 755 [Ford's conduct in placing defectively designed vehicles on the market, causing a high risk of potential physical harm or even death to masses of consumers, was "highly reprehensible"]; *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1692-1695 [intentionally marketing a dangerous, addicting and deadly product and defrauding the public,

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[24]The same analysis would apply to WW1 if someone had sued on its behalf.

including minors, about the product's safety is "'extremely reprehensible'"; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 623-624 [committing "two deliberate, vicious murders" has the "greatest [reprehensibility] legally possible"].)

The reprehensibility factors weigh conclusively against upholding a $3.3 million (or any) punitive award to Pointe.

b. Since Pointe sustained no injury and recovered no compensatory damages, the "ratio" guidepost demonstrates the award is unconstitutional on its face.

Turning to the second guidepost, the Supreme Court has held there must be a "'reasonable relationship'" between the punitive damages award and "the actual harm inflicted *on the plaintiff*." (*Gore*, *supra*, 517 U.S. at p. 580, emphasis added; *Campbell*, *supra*, 538 U.S. at p. 425; accord, *Simon v. San Paolo*, *supra*, 35 Cal.4th at p. 1175 ["(W)e must determine independently the relationship between the harm done plaintiff and the amount awarded in punitive damages"].)

The high Court has determined that "few 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.)

Here, the punitive damages award is literally off the charts. The party to which punitive damages were awarded—Pointe—suffered *no* actual harm and recovered *no* compensatory damages. The pertinent ratio is thus between $3.3 million and *zero.* The ratio factor mandates that the punitive award be reversed.

c. 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 civil penalties authorized or imposed for similar conduct. (538 U.S. at p. 428.)

While violations of common law tort duties do not easily "lend themselves to a comparison with statutory penalties" (*Continental Trend Resources, Inc. v. OXY USA Inc.* (10th Cir. 1996) 101 F.3d 634, 641), courts must attempt to find the closest civil penalty for comparison. (See, e.g., *Campbell, supra*, 538 U.S. at p. 428 [most relevant civil sanction under Utah state law is $10,000 fine for act of fraud, "an amount dwarfed by the $145 million punitive damages award"]; *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh*, *supra*, 118 Cal.App.4th at pp. 1084-1085 ["Insurance Code only imposes a maximum fine of $10,000 for willful misconduct by insurers"; reducing already reduced punitive award from $1.7 million to $360,000].)

The present case is 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.) Here, the most relevant civil sanction under California law appears to be Business and Professions Code section 10175.2, which permits imposition of a monetary penalty on real estate brokers for breaches of fiduciary duty that include such things as commingling another's funds with the broker's, or claiming or taking "any secret or undisclosed amount of compensation, commission or profit" or "any other conduct . . . which constitutes fraud or dishonest dealing." (Bus. & Prof. Code, §§ 10175.2, 10176, subds. (e), (g), (i); *Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 163 [section 10176 duties are fiduciary]; cf. *Estrin v. Watson* (1957) 150 Cal.App.2d 107, 108-109

[real estate broker breached fiduciary duties under section 10176 by, inter alia, failing to tell client he purchased her home for himself and took a commission on the sale].)

The maximum monetary penalty for violation of this statute is $10,000. (Bus. & Prof. Code, § 10175.2, subd. (d).) The $3.3 million punitive damage award here dramatically overwhelms that figure. It is *330 times* the maximum civil penalty for comparable breaches of fiduciary duty subject to statutory punishment.

In sum, the punitive award here fails under *all* of the *Campbell* guideposts: (a) Ms. Weingarten engaged in no conduct that resulted in injury to Pointe, the recipient of the punitive award; her conduct towards Pointe and Astra was nonexistent; towards WW1, which never even sued, it was at the very lowest end of the relative reprehensibility scale; (b) the ratio of the $3,000,000 punitive award to Pointe's nonexistent compensatory damages or actual harm is infinite—constitutionally off the charts; and (c) the most relevant civil penalty for similar conduct is a maximum of $10,000.

Pointe's multi-million dollar award is unconstitutional under every test specified by the Supreme Court. It is grossly excessive, arbitrary and irrational. It must be reversed.

III. THE COURT PREJUDICIALLY ERRED IN AMENDING THE JUDGMENT TO MAKE MS. WEINGARTEN A CO-DEBTOR OF WW1 AND ATLAS HOMES.

Even though Pointe sued only WW1 for breach of the DMA, and PSDMU sued only Atlas Homes for conversion and trespass, the court added Ms. Weingarten to the judgment as "co-debtor" defendant on those claims on an "alter ego" theory, increasing her personal liability by nearly

$4.5 million. (AA 481-482, 492, 507-508.) Despite the fact that at all times plaintiffs knew of Ms. Weingarten's existence and the roles she played in the underlying transactions and events, they never sued her or served her with summons and complaint on these claims.

Below we demonstrate that the alter ego ruling was prejudicially erroneous. First we explain the general legal principles governing the alter ego doctrine (subsection A). Then we show that the alter ego judgment against Ms. Weingarten must be reversed because it violates due process (subsection B) and, due process aside, because it contains fatal flaws with respect to the breach of contract claim (subsection C) and the tort claim (subsection D).

A. Legal Principles.

The law allows individuals and organizations "to limit their business risks through incorporation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249.) The corporation formed is a discrete legal entity, "separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.)

Only under certain "narrowly defined circumstances" will the corporation's separateness be disregarded, by use of the "alter ego doctrine." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 301.) Since the doctrine is an exception to the usual rule of insulation from liability, "it is an extreme remedy, sparingly used." (*Sonora Diamond Corp., supra,* 83 Cal.App.4th at p. 539; *Wenban Estate, Inc. v. Hewlett* (1924) 193 Cal. 675, 696; *Las Palmas Associates, supra,* 235 Cal.App.3d at p. 1249 ["Sound public policy dictates that imposition of alter ego liability be approached with caution"].) The plaintiff bears the burden to overcome

the usual rule of separate corporate existence. (*MacPherson v. Eccleston* (1961) 190 Cal.App.2d 24, 27.)

California requires the plaintiff to prove two separate conditions before the "corporate veil" will be pierced by invoking the alter ego doctrine. First, there must be such a "unity of interest and ownership" between the corporation and its shareholder, officer or director that their separate personalities no longer exist. (*Mesler v. Bragg, supra,* 39 Cal.3d at p. 300; *Sonora Diamond Corp., supra,* 83 Cal.App.4th at p. 538.) Second, the plaintiff must establish that "an inequitable result will follow" if the acts in question are treated as those of the corporation alone. (*Ibid.*) Both prongs of the test must be satisfied before alter ego will be applied. (*VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 Cal.App.4th 228, 244-245.)

In addition, due process requires that the individual or entity found to have used the original corporate defendant as its "alter ego" must have had the "opportunity to litigate" the corporation's underlying liability by having "controlled the litigation." (*Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1421.) As this Court has explained, these due process considerations "are in addition to, *not in lieu of,* the threshold alter ego issues." (*Ibid.*, original emphasis.)[25]

[25]Thus, in holding that the opportunity to litigate and to control the litigation are not substitutes for the alter ego doctrine, but rather additional requirements, this Court has squarely rejected plaintiffs' argument below that "even without an alter ego finding," Ms. Weingarten could be added as a judgment debtor because she "actively controlled all aspects of the litigation." (AA 452-453.)

B. The Imposition Of Alter Ego Liability On Ms. Weingarten By Post-judgment Amendment—Without Pleading Or Hearing—Violates Both Federal And California Due Process Guarantees; To the Extent Code Of Civil Procedure Section 187 Permits This Result, It Is Unconstitutional As Applied.

1. The pertinent facts.

The residential complaint remained pending for six years, and the mixed-use complaint for four years (having been filed in 1998 and 2000, respectively), before judgment was entered in 2004. (AA 1, 49, 504.) During the entire prejudgment pendency of the action, Ms. Weingarten was never named or sued as a defendant—either on GB's claim for breach of contract against WW1 in the residential case (although she was a defendant on other claims in that case), or on PSDMU's claims for conversion and trespass against Atlas Homes in the mixed-use case (where she was not a defendant on any claim). Yet Ms. Weingarten's relationship to WW1 and Atlas Homes, including her role as the sole manager of both, was known to all concerned. There was never an alter ego allegation or any effort to amend either complaint to impose alter ego liability on Ms. Weingarten. In short, for six years, no pleading gave Ms. Weingarten a single clue that she might be subjected to personal liability on an alter ego theory.

Despite this complete lack of notice and opportunity to be heard, Ms. Weingarten was saddled with a $4.5 million alter ego judgment by post-judgment motion. It happened like this: After completion of the Phase II trial and accounting and entry of "judgment" on April 5, 2004,[26] plaintiffs moved to amend the judgment to impose alter ego liability on Ms.

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[26]As explained, the April 2004 judgment was not the final judgment. (See above, p. 11.)

Weingarten and others. (AA 433.) They filed their motion on May 7, 2004—nearly six years after commencement of the residential case and nearly four years after commencement of the mixed-use case. The court granted the motion in part, naming Ms. Weingarten as a co-debtor, on an alter ego theory, with WW1, Atlas Homes and other defendants. (AA 482.) The final judgment reflected these findings, imposing personal, joint and several, liability on Ms. Weingarten for the $4.1 million tort judgment against Atlas Homes and for the $400,000 breach of contract judgment against WW1. (AA 507-508.)

In sum, Ms. Weingarten was hit with $4.5 million in liability even though she was never named as a defendant *at all* in the mixed-use complaint, and was not named as a defendant on the contract cause of action in the residential complaint.

Due process prohibits such a result.

2. The problem in a nutshell.

The right to procedural due process guaranteed by the Unites States and California constitutions requires that an individual be afforded notice and an opportunity to be heard before being deprived of a significant property interest. (*Randove v. Appellate Department* (1971) 5 Cal.3d 536, 541.) By any measure, a $4.5 million judgment is a "significant property interest." Yet here it was imposed without proper notice or opportunity to be heard.

As a general rule, alter ego or, at a minimum, the facts giving rise to alter ego liability must be pleaded. (*Meadows v. Emett S. Chandler* (1950) 99 Cal.App.2d 496, 499; *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 749 ["In order to prevail in a cause of action against individual defendants based upon disregard of the corporate form, the plaintiff must plead and prove" unity of interest and inequity].)

We acknowledge, however, that some California courts have carved out an exception to the rule. The exception derives from Code of Civil Procedure section 187, which provides that courts may use "all the means necessary to carry [their jurisdiction] into effect." Applying that general statute, some courts have jettisoned the pleading requirement and permitted the addition of a new "alter ego" defendant to a judgment on the rationale that "the new defendant is really one and the same as the original defendant." (*Oyakawa v. Gillett* (1992) 8 Cal.App.4th 628, 631.) When due process concerns are addressed at all in these cases, they are brushed aside on the theory that "the amendment did not add a new defendant to the judgment, but merely set forth the correct name of the real defendant." (*Mirabito v. San Francisco Dairy Co.* (1935) 8 Cal.App.2d 54, 57; *Thomson v. L.C. Roney & Co.* (1952) 112 Cal.App.2d 420, 425 [courts may "correct clerical errors"].)

Ironically, when the complaint *does* plead alter ego, the defendant is entitled to the full panoply of due process rights, "*even though the alter ego defendant is considered to be identical with, i.e., the 'other self' of, the defendant named in the original complaint*." (*Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1359-1360, emphasis added.) How completely unfair: A plaintiff who hides the ball (i.e., by violating the rule that alter ego claims must be pleaded and proved) can obtain an alter ego judgment after trial more easily than one who follows proper procedures.

Why should the rule be any different when the complaint does *not* plead alter ego or provide any notice whatever that an alter ego theory is being pursued? Of course, it shouldn't. As the leading commentator on California corporations puts it:

> It is certainly a strange state of affairs where a person is entitled to due process if he is sued as a defendant, but is not in a situation where he hasn't even been sued.

(Marsh's California Corporation Law (4th ed. 2000 Supp.) § 16.06 [J], p. 16-95.)

Marsh finds no justification for imposing alter ego liability on a shareholder (or other corporate principal) if the person was not sued: "[T]he courts have permitted themselves to be so misled by their own rhetoric and epithets as to hold that the plaintiff does not even have to sue the shareholder." (*Id.* at p. 16-91.) Marsh calls "nonsense" the notion that an unsued alter ego defendant is afforded notice and a hearing simply because he or she "is" the corporation, and the corporation litigated the underlying issues. (*Id.* at p. 16-92.) Under these circumstances, the alter ego defendant "has been afforded no notice or opportunity to defend that assertion of liability in a proceeding conforming to the requirements of due process." (*Ibid.*)

Marsh is absolutely right. Fundamental due process rights to notice and hearing cannot be circumvented through circular reasoning, word games and bootstraps. And to the extent Code of Civil Procedure section 187 permits post-judgment alter ego amendments of defendants who could have been sued, it is unconstitutional as applied.

3. Recent United States Supreme Court authority demonstrates that California courts have strayed from fundamental due process principles.

a. The state of California law.

The paradigmatic alter ego case is one where the plaintiff has secured a judgment against a corporation, but is unable to collect it, and then discovers it was misled into suing the wrong corporation and should have sued a different corporation (e.g., the parent or subsidiary of the named defendant). For example, in *Mirabito v. San Francisco Dairy Co., supra,* 8 Cal.App.2d 54, the plaintiff discovered his judgment against a subsidiary corporation was uncollectible because—unbeknownst to the plaintiff—the defendant had transferred all its assets to its parent three years before the subject traffic accident. (*Id.* at pp. 56-57.) The court allowed the parent corporation to be added to the judgment as an "alter ego," in order "to correct a misnomer," and so as not to reward the defendant for "acts and conduct which have misled a litigant." (*Id.* at p. 60.) Other courts have approved the use of post-judgment alter ego amendments to prevent awarding "a premium to a litigant's capacity to conceal his real identity" (*Thomson v. L.C. Roney & Co., supra,* 112 Cal.App.2d at p. 427) or where "the named defendants conducted themselves as though they were the proper defendants, then sought to use [plaintiff's] mistake to shield the entity which should have been named" (*Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14, 22-23).

Other Courts of Appeal, however, have eschewed any reliance on a fraud rationale. They have approved the addition of alter ego defendants by post-judgment amendment so long as the new defendant "controlled" the underlying litigation, reasoning that such "control" satisfies due process concerns. (See, e.g., *Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1029 ["It is now settled that '. . . the authority

of the court will be exercised to impose liability under a judgment upon the *alter ego* who has had control of the litigation'"].)

The California Supreme Court has never so held. The one and only time the court directly addressed the constitutional implications of amending a judgment to add alter ego defendants was nearly half a century ago, and then it *rejected* the amendment as violative of due process. In *Motores De Mexicali v. Superior Court* (1958) 51 Cal.2d 172, the court held that the names of three individuals could not be added to a final judgment against a corporation. (*Id*. at p. 176.) The court reasoned that even if they were alter egos of the corporation, they "in no way participated in the defense of the basic action" because the judgment was entered "strictly by default." (*Id.* at pp. 175-176.) Therefore, to add them to the judgment "without allowing them to litigate any questions beyond their relation to the allegedly *alter ego* corporation would patently violate" due process. (*Id.* at p. 176.) The court rejected the suggestion that the individuals "should have intervened" in the action; they "were under no duty to appear and defend personally in that action, since no claim had been made against them personally." (*Ibid.*)[27]

Three years after *Motores*, the Supreme Court again addressed post-judgment alter ego amendments (without mentioning due process), and again *rejected* the amendment. In *Minton v. Cavaney* (1961) 56 Cal.2d 576, the court reversed a judgment holding a corporate director/officer/attorney personally liable on the judgment entered against the corporation. (*Id*. at pp. 581-582.) The court held that even if the individual were the

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[27]The court distinguished *Mirabito* and *Thomson* on the ground that the corporations added to the judgment in those cases had been "effectively present throughout the entire litigation"—by hiring "attorneys who represented both companies," paying some of the legal fees and being "fully aware of the progress of the legal proceedings." (*Id.* at p. 175.)

corporation's alter ego, he could not be held personally liable because he "was not a party to the action" and did not "control[] the litigation leading to the judgment." (*Id.* at p. 581.) The court emphasized that to show "control" of the litigation, it is not sufficient that the individual "'supplies the funds for the prosecution or defense'" or "'appears as a witness or cooperates.'" (*Ibid.*)

Significantly, both Supreme Court cases that have considered (and rejected) post-judgment alter ego amendments have resulted in the exoneration of *individuals*, not corporations. As Marsh points out, "If there are any fictions involved in this situation, it can hardly be said that the individual is a fiction. The basis of his liability is completely different than that of the corporation." (Marsh's California Corporation Law, *supra*, at p. 16-92; see also *Miserandino v. Resort Properties, Inc.* (Md. 1997) 345 Md. 43, 60, 691 A.2d 208, 216 ["the [due] process that must be afforded a corporation may differ from that required in the case of an individual"].)

b. As the United States Supreme Court recently reaffirmed, due process affords *every* person against whom a claim is stated the *actual* opportunity to defend.

In *Nelson v. Adams USA, Inc.* (2000) 529 U.S. 460 [120 S.Ct. 1579, 146 L.Ed.2d 530], the defendant corporation ("Adams") had prevailed in a patent infringement suit and was awarded attorney fees against the plaintiff corporation ("OCP"). Fearing OCP would be unable to pay, Adams moved to recover the fees personally from Donald Nelson, OCP's president and sole shareholder. (*Id.* at pp. 462-463.) The District Court granted the motion, "simultaneously making Nelson a party and subjecting him to judgment." (*Id.* at p. 463.) The Court of Appeals affirmed, holding there was "sufficient identity between Nelson and OCP to bind Nelson, without

further ado, to a judgment already entered against OCP." (*Id.* at pp. 463, 470.) The Court of Appeals noted that Nelson was OCP's president and sole shareholder; that Nelson's deceitful conduct precipitated the fee award; that Nelson was the "'effective controller' of the litigation for OCP"; and that Nelson had "personally participated as a witness at the hearing." (*Id.* at pp. 463, 464, 470.)[28]

The United States Supreme Court unanimously reversed. It held that "[d]ue process . . . required that Nelson be given an opportunity to respond and contest his personal liability for the award after he was made a party and before the entry of judgment against him." (*Id.* at p. 463.) Without affording Nelson full due process, Adams cannot "reach beyond OCP's corporate till into Nelson's personal pocket." (*Id.* at p. 469.)

The Court rejected the Court of Appeals' rationale that Nelson would not have litigated the case any differently if he had been named as a party:

> [J]udicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated. . . . "The law, at its most fundamental, does not render judgment simply because a person might have been found liable had he been charged." (*Id.* at p. 471.)

The Court also rejected the notion that Adams' failure to sue Nelson personally could be deemed a "mistake." "Adams made no such mistake. It knew of Nelson's role and existence and . . . chose to assert its claim for costs and fees only against OCP." (*Id.* at p. 467, fn. 1.)

Nelson makes absolutely clear that due process is not a matter of labels, epithets or rhetoric which, we submit, characterizes and confuses so

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[28]*Nelson* did not deal with the alter ego doctrine, as Adams did not seek to pierce OCP's corporate veil. (*Id.* at pp. 470-471.) But even if the doctrine were involved, the high Court's reasoning still would apply.

much of the case law in California on the alter ego doctrine. It is a matter of affording all individuals a real, meaningful, actual opportunity to defend themselves against all charges brought against them personally, especially where the plaintiff knew of their existence and role from the outset but chose not to sue them. Due process cannot be satisfied with the legal fiction that a corporation and its director or sole shareholder or president are "one and the same."

4. The trial court's alter ego ruling denied Ms. Weingarten fundamental due process.

As pointed out above, having actual notice of charges and the opportunity to respond to them is the bulwark of due process. The two rights go hand-in-hand. Adequate notice ensures "that the opportunity for a hearing is meaningful." (*City of West Covina v. Perkins* (1999) 525 U.S. 234, 240 [119 S.Ct. 678, 681, 142 L.Ed.2d 636].)

Here, Ms. Weingarten was saddled with $4.5 million in liability without ever having received notice that she was being charged personally with breach of contract, conversion and trespass or the opportunity to defend herself against those charges. *No* justification existed for such flouting of due process rights: there was no evidence or hint that she ever "misled" plaintiffs about who they were dealing with—the historical justification for post-judgment alter ego amendments. When plaintiffs filed their complaints, they knew who she was and what her precise roles were with respect to WW1 and Atlas Homes. Nothing prevented plaintiffs from following the normal procedures, i.e., alleging alter ego and proving their case at trial.

And even if it could be said that Ms. Weingarten "controlled" the underlying litigation against WW1 and Atlas Homes (in fact, there was no such finding), how could that possibly substitute for actual notice and

hearing in a proceeding where she knew her *personal* liability was at stake? Had she been sued, she might have retained separate counsel to defend her personal interests and might well have advanced arguments that counsel for the corporate defendants opted not to advance. As explained, the California Supreme Court has never held that "control" trumps due process, but rather has been vigilant in protecting the constitutional rights of individuals found to be the alter ego of corporations.

Finding by motion that Ms. Weingarten was the "alter ego" of WW1 and Atlas Homes and impliedly that she "controlled" the litigation against them, without any notice or opportunity to defend herself personally, does not comport with due process, as the United States Supreme Court made clear in *Nelson.* In light of *Nelson,* there is no way California's vaguely worded and extremely broad statutory procedure of amending judgments to add defendants who could have been sued but weren't can pass constitutional muster. To the extent Code of Civil Procedure section 187 is read as permitting the imposition of alter ego liability without affording constitutional safeguards of notice and a right to be heard, that statute, as applied, should be declared unconstitutional.

The judgment must be reversed to the extent it rests on unconstitutional alter ego findings.

C. The Portion Of The Judgment Adding Ms. Weingarten As A Co-Debtor Of WW1 On The Breach Of Contract Claim Is Prejudicially Erroneous And Must Be Reversed.

On GB's second cause of action in the residential case—against WW1 for breach of contract (the DMA)—the court amended the judgment to name Ms. Weingarten as a co-debtor with WW1, concluding that she was the alter ego of WW1. (AA 482, 492, 507.)

This ruling is doubly flawed. Not only is GB estopped by its own conduct from relying on the alter ego doctrine, but there can be no injustice from recognizing WW1's separate corporate existence because it is undisputed GB will be able to collect its judgment against WW1, should that judgment withstand appellate scrutiny.

1. GB is estopped to assert alter ego.

The alter ego doctrine is less applicable when the underlying liability stems from a breach of contract rather than a tort. Because contract claimants have voluntarily dealt and contracted with the corporation, they have had the opportunity to ascertain the corporation's creditworthiness and to seek or obtain guarantees, security agreements, liens, or other means of protecting themselves should the contract be breached. (*Cascade Energy & Metals Corp. v. Banks* (10th Cir. 1990) 896 F.2d 1557, 1577.) Thus, in a contract situation, California courts look to the knowledge of the parties at the time they entered the agreement when deciding whether to disregard the corporate entity. (*Lynch v. McDonald* (1909) 155 Cal. 704, 706 [party that contracted with corporation may not assert corporate president and majority stockholder was alter ego of corporation where party "was thoroughly familiar with all the facts concerning the president's relation to the corporation"]; cf. *Harris v. Curtis* (1970) 8 Cal.App.3d 837, 843 [no alter ego where plaintiff "was not led to believe that he was dealing with the officers and shareholders as individuals as distinguished from dealing with the corporation"].)

Here, from the outset, GB—an experienced, sophisticated business entity—knew exactly who it was contracting with: WW1, not Ms. Weingarten. GB knew the facts concerning WW1's status and Ms. Weingarten's relation to WW1 and knew that neither Ms. Weingarten nor anyone else was obligated to make any loan or advance any money to

WW1. (AA 132, fn. 19, 136-137, 405-406; RT 7647; Ex. 45, p. 129-5 & Ex. E thereto, p. 129-73; Ex. 46, p. 133-28, § 12.12.) If GB wanted to make Ms. Weingarten a contracting party, or if it wanted her guarantee, it should have insisted on such an arrangement. But it didn't.

By entering into the contract solely with WW1, without insisting on additional safeguards, GB is estopped from asserting alter ego. (See *Petersen v. Cloverdale Egg Farms* (1958) 161 Cal.App.2d 792, 797-798 [plaintiffs estopped to deny defendant's corporate existence where they transacted business with corporation, billed corporation, received and cashed checks from corporation, and did not allege in complaint corporation was alter ego of individual owners].)

For this reason alone, the $400,000 judgment against Ms. Weingarten for breach of the DMA, based on a finding that she was the alter ego of WW1, cannot stand.

2. There can be no alter ego liability here because GB did not prove that any injustice will result from recognizing WW1's corporate existence.

Even assuming arguendo that substantial evidence supports the "unity of interest" prong of the alter ego doctrine, that doctrine still is inapplicable because no evidence supports the second prong—that an inequity will result from recognizing WW1's separate corporate existence. The trial court's conclusory statement that "an unequitable result will follow" (AA 482, fn. 2) is unsupported by substantial evidence.

This Court's own decisions establish the guiding principle. In *VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.*, *supra*, 99 Cal.App.4th at p. 245, this Court held: "[E]ven if the unity of interest and ownership element is shown, alter ego will not be applied absent evidence that an injustice would result from the recognition of separate corporate identities."

And in *Shapoff v. Scull* (1990) 222 Cal.App.3d 1457, 1470, this Court held: "[E]ven where no estoppel would arise," and the facts establish the necessary "unity of interest and control," "disregard of the corporate entity is in no sense automatic."

The only injustice plaintiffs claimed would follow if Ms. Weingarten were not made the alter ego of all the defendant entities is that plaintiffs might not be able to enforce their judgment. (AA 434, 445.) Even if this were a legitimate basis for imposing alter ego liability (but see below, § D.1), there is no evidence demonstrating it should be imposed here. Indeed, the evidence uniformly establishes it should not.

Uncontroverted evidence established that WW1 has ample assets to satisfy the $400,000 judgment against it. Specifically, the record reveals that WW1 owns a substantial portion of the unsold residential land, worth millions of dollars. (AA 125:6-8, 126:6-8; p. 5:6-8, 4:6-8; Ex. 2429.) Moreover, corporate surety bonds are in place with respect to GB's judgment against WW1, thus assuring absolutely that if the judgment against WW1 is affirmed, GB will promptly recover every penny of its judgment from WW1. (AA 508.1-508.9.)

GB is fully protected. No conceivable inequity or injustice could result from maintaining the separate identities of WW1 and Ms. Weingarten. For these reasons, the alter ego judgment against Ms. Weingarten on the contract claim is unlawful—utterly without factual or legal foundation. It should be reversed.

D. It Was Prejudicial Error To Add Ms. Weingarten As A Co-Debtor Of Atlas Homes On The Tort Claims.

In addition to making Ms. Weingarten a co-debtor of WW1, the court made her a co-debtor of Atlas Homes, which was found liable to

PSDMU for the intentional torts of conversion and trespass in the "mixed-use" case. (AA 482, 495, 507-508.)

Again, we will assume arguendo that substantial evidence supports the "unity of interest" prong of the alter ego doctrine. Nonetheless, we will demonstrate that no evidence supports the "inequitable result" prong, and that there is no other basis on which to hold Ms. Weingarten liable for the acts of Atlas Homes.

1. There is no alter ego liability; difficulty in enforcing a judgment does not establish the requisite "inequitable result."

The only injustice plaintiffs claimed would result from adhering to Atlas Homes' separate corporate identity was an inability or difficulty in enforcing the judgment against Atlas Homes, which plaintiffs contended was "undercapitalized." (AA 434, 443, 445, 447-448.) But there was no evidence of undercapitalization. The evidence showed that Atlas Homes was formed with equity capitalization of $100,000, and had significant cash resources, including proceeds from lot sales. (AA 133, fn. 22, 359-360.)

However, even if the evidence had established undercapitalization, that factor, by itself, is insufficient to establish the requisite "inequitable result" to support an alter ego finding.

As this Court has made clear, alter ego requires evidence of an injustice flowing from the recognition of the corporation's separate identity, and "'*[d]ifficulty in enforcing a judgment or collecting a debt does not satisfy this standard.*'" (*VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.*, *supra*, 99 Cal.App.4th at p. 245, emphasis added, quoting *Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th at p. 539.) Another court explained:

> [I]t is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an "inequitable result." In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor.

(*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 842.)

Neither the record nor the law supports the judgment against Ms. Weingarten as an alter ego of Atlas Homes. Accordingly, the judgment must be reversed.

2. Contrary to PSDMU's contention below, there is no basis for imposing direct tort liability on Ms. Weingarten where, as here, she was not sued as a defendant on the tort claim.

PSDMU contended below that Ms. Weingarten could be added to the $4.1 million tort judgment against Atlas Homes, even "without employing the alter ego doctrine," because "she personally engaged in the tortious misconduct." (AA 453 [citing cases holding that corporate officers, directors and shareholders "may be held personally liable if they ordered, authorized or participated in the entity's conduct"].)[29]

PSDMU misses the mark. If Ms. Weingarten engaged in tortious conduct, PSDMU had to sue her and serve her with summons and complaint (like any alleged tortfeasor) if it wanted to impose tort liability on her and obtain a tort judgment against her. (Code Civ. Proc., § 389, subd (a) [requiring joinder of necessary parties]; Civ. Code § 1714, subd. (a) [all

[29]It is not clear whether the trial court adopted PSDMU's position. It cited testimony that Ms. Weingarten was aware of and consented to the conduct underlying the conversion and trespass claims. (AA 495.)

persons are liable for their own torts].) These are the minimal requirements of due process. (*Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 120-121.)

If PSDMU believed Ms. Weingarten was a tortfeasor, that is all the more reason why she had to be sued and served with summons and complaint as to all asserted claims, so she could defend herself against the asserted claims. Liability for tort cannot be imposed without notice and the opportunity to be heard. (See above, § III.B.)

None of the cases relied on by PSDMU suggests otherwise. In none of them was the tortfeasor added to the judgment as a *post-judgment debtor* pursuant to Code of Civil Procedure section 187. In every case, the individual was named in the complaint as a defendant, and thus had notice and an opportunity to defend consistent with due process.[30]

Section 187 cannot be used to circumvent basic rules of tort liability, fairness and due process. As this Court explained, section 187 does not allow "imposition of liability on an entity which was never a party to the action. Cases which have used section 187 to add new parties as additional judgment debtors have always been rooted in the 'alter ego' concept that the original party and the new party were one and the same." (*Triplett v. Farmers Ins Exchange*, *supra*, 24 Cal.App.4th at p. 1420; *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.*, *supra*, 75 Cal.App.4th at p. 116 [same].)

In short, section 187 simply cannot be extended "to permit addition of a defendant by post-judgment motion *except* where the added defendant

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[30]*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 779-782 (liability against individuals based on theory of civil conspiracy, pleaded in complaint); *Filet Menu, Inc. v. C.C.L. & G., Inc.* (2000) 79 Cal.App.4th 852, 865-866 (corporate shareholder named as individual defendant in complaint); *McGuire v. Brightman* (1978) 79 Cal.App.3d 776, 779 (corporation and its president both named as codefendants in action).

was found to be the alter ego of the original defendant." (*Triplett, supra,* 24 Cal.App.4th at p. 1420.) (But see § III.B., above.) To do so is a "rather straightforward denial of due process." (*Tokio Marine, supra,* 75 Cal.App.4th at p. 121.) As Justice Zebrowski observed in reversing the judgment, "[T]he proceedings moved in one step from a motion against a nonparty . . . to judgment against a nonparty. There was no service of summons or complaint setting forth the issues to be joined, no discovery, no setting of a trial date, no opportunity to brief and be heard on the legal issues raised, no opportunity to cross-examine adverse witnesses, and no trial (either jury or nonjury)." (*Id*., at pp. 120-121.)

For all the reasons stated above, the judgment making Ms. Weingarten a co-debtor with Atlas Homes on PSDMU's tort claims must be reversed.

IV. THE $3 MILLION JUDGMENT FOR "PERMANENT TRESPASS" AGAINST ATLAS HOMES MUST BE REVERSED BECAUSE THE COURT PREJUDICIALLY ERRED IN DETERMINING THE CLAIM WAS ADEQUATELY PLEADED IN THE MIXED-USE COMPLAINT AND IN NOT DETERMINING THE CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS.

As just demonstrated, Ms. Weingarten cannot be held liable as an "alter ego" of Atlas Homes. Obviously, if this Court agrees, then it need not address the argument presented here.

This argument is directed toward Atlas Homes' underlying liability for the $3 million "permanent trespass" portion of the tort judgment. If there is no basis for holding Atlas Homes liable, it follows that Ms.

Weingarten cannot be held liable as Atlas Homes' alter ego. (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 894 [alter ego action no longer viable once underlying judgment reversed on appeal].)

A. Factual Background.

Under the heading "Access Roads, Dumping and Habitat Disturbance," PSDMU's complaint pleaded a claim for trespass, alleging Atlas Homes had, without permission, created and used access roads on the mixed property, stored materials and dumped trash there. (AA 54.) The parties and court referred to this claim as "non-permanent trespass." (See, e.g., AA 344.)[31]

But the scope of PSDMU's claim expanded dramatically on the eve of trial. In a brief served November 8, 2002, four days before trial, PSDMU asserted—for the very first time—a separate and additional claim, entitled, "Atlas Homes' Permanent Trespass Upon Pointe SDMU's Property." (AA 156.) In opening statement, PSDMU explained the new claim, contending that Atlas Homes had graded the pads on its residential property so that the slopes encroached on PSDMU's property in two locations, where PSDMU hoped to build a restaurant/parking lot and a golf course. (RT 7350-7352.)

Atlas Homes filed a brief objecting to the insertion of the new, unpleaded, "permanent trespass" claims into the case. Atlas Homes requested the court to exclude any evidence relating to the new claim and to reject any effort by PSDMU to amend its complaint. (AA 180.) Atlas Homes asserted that any proposed amendment for permanent trespass would necessarily state a new and different cause of action and therefore

[31]The non-permanent trespass claim ultimately yielded a judgment against Atlas Homes for $153,000. (AA 507.)

would prejudice Atlas Homes, which would have had no opportunity to prepare a defense to the new claim. (AA 181-184.)

Three days after Atlas Homes filed its brief, PSDMU moved to amend the complaint "to conform to proof." (AA 186.) PSDMU contended it had "only recently" learned about the alleged encroachments on the golf course and restaurant sites, and it urged the court to permit the amendment. (AA 187-188.)

Trial proceeded without the court's ruling on the motion to amend. Atlas Homes vigorously and repeatedly objected to having to try the unpleaded permanent trespass claim without having an expert or a meaningful opportunity to contest the claims (RT 9957, 9982, 11109-11111), and it contended that the proposed amendment would be futile because it was barred by the three-year statute of limitations for permanent trespass, Code of Civil Procedure section 338, subdivision (b). (RT 12801-12803; AA 297-301.)

PSDMU again conceded it had not pleaded the encroachment claims because it had discovered them only *after* filing the complaint. (AA 262.) And it continued to urge the court to allow the amendment. (AA 263 [the "amendment must be granted . . . ."].)

The court neither granted nor denied the amendment. Rather, it ruled that general allegations in the complaint were "sufficient to allow the permanent trespass issues to remain." (AA 345.)

The court found in favor of PSDMU on the newly-asserted permanent trespass claim, awarding nearly $3 million in damages. It found that Atlas Homes knowingly trespassed on PSDMU's property without consent and was entitled to recover the reasonable cost of remedying any damage caused. Not surprisingly, given Atlas Homes' inability to defend against the claim (i.e., not having designated an expert in anticipation of an unpleaded claim), the court found Atlas Homes presented "no viable

evidence" to rebut plaintiff's expert's opinions, the expert's testimony was "uncontradicted," supporting damages of nearly $3 million for the cost of building two retaining walls at the planned restaurant and golf course sites. (AA 345-346.)

B. The Complaint Did Not Afford Atlas Homes Fair Notice Of The Claims Against It.

1. A complaint must give the defendant sufficient notice to prepare its case, especially when alleging an intentional tort.

In California, pleadings must meet the "fair-notice test." (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 608.) As our Supreme Court has explained, "The essence of the matter is *fairness in pleading* to give the defendant such notice by the complaint that he may *prepare his case*." (*Leet v. Union Pac. R. R. Co.* (1944) 25 Cal.2d 605, 619, emphases added; *Committee On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211-212 [a civil complaint must "frame and limit the issues" and "apprise the defendant of the basis upon which the plaintiff is seeking recovery"].) Since "[t]he purpose of a complaint is to furnish the defendants with certain definite charges which can be intelligently met," the "accuser must place his finger squarely and directly upon whatever dereliction is relied upon." (*Lavine v. Jessup* (1958) 161 Cal.App.2d 59, 69.)

Moreover, intentional torts (such as the unalleged permanent trespass here) are subject to even stricter rules of pleading and proof than negligence-based torts. (*Williams v. Wells & Bennett Realtors* (1997) 52 Cal.App.4th 857, 864.) While negligence may be generally pled, intentional torts must be specifically pled. (*Charpentier v. Von Geldern* (1987) 191 Cal.App.3d 101, 114 [a "longstanding rule of pleading" makes it

"'necessary to specify the particular acts upon which the wilful misconduct of a person is charged'"]; *Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 361 [same]; 4 Witkin, Cal. Procedure (4th ed. 1996) Pleading, § 569, p. 665 ["Where liability is based on more culpable conduct (than negligence), the cases appear to require some kind of specific pleading"].)

2. Atlas Homes had no notice it was being charged with permanent trespass.

PSDMU's complaint did not come close to pleading the required facts to provide Atlas Homes with fair notice of any alleged permanent trespass on the restaurant and golf course sites. On the contrary, the complaint apprised Atlas Homes only that PSDMU would assert *non*-permanent trespass claims based on Atlas Homes' purported creation of access roads on PSDMU property, stockpiling of building materials, and dumping of trash. (AA 54.) Consistent with those allegations of *non*-permanent trespass, the only harm alleged was that caused by creating "unsightly conditions," jeopardizing "fragile ecological habitats," and thus hindering PSDMU's "ability to attract investors" and sell the property. (AA 54-55.) No harm was alleged about PSDMU's losing parking spaces at the restaurant site or having to redesign the golf course site. (See AA 345.) In short, the complaint never mentions *any* encroachment on or harm to the "golf course" or "restaurant" sites.

The reason is simple: PSDMU, by its own admission, did not even learn of the purported "permanent trespass" until *after* filing its complaint. (AA 187, 262.) PSDMU's "permanent trespass" theory was obviously a complete afterthought.

Even though it was clear that no claim for permanent trespass had been asserted, the trial court ruled that PSDMU *had* pleaded permanent

trespass on the golf course and restaurant sites by incorporating by reference general allegations that Atlas Homes had "otherwise disturbed the mixed-use property" and engaged in "other wrongful incursion." (AA 345.) These general allegations are found in the complaint under the heading, "Access Roads, Dumping and Habitat Disturbance," which have nothing whatever to do with the claimed encroachment on the restaurant and golf course sites by improper slope grading. (AA 54.)

Given the requirements that every complaint must provide the defendant with sufficient information to prepare a defense, and that intentional torts must be specifically pleaded, there is simply no fair way to view the references to "otherwise disturbed" or "other wrongful incursion," which expressly relate to "Access Roads, Dumping and Habitat Disturbance," as also including something totally different, i.e. permanent encroachment by means of improper slope grading on the restaurant and golf course sites.

3. The court improperly expanded the scope of the complaint.

Not only did the court deprive Atlas Homes of fair, specific, notice of "definite charges which can be intelligently met," but it improperly expanded the complaint beyond its reasonable scope. The recent case of *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, illustrates the point.

There, the Raiders sued the NFL for breach of fiduciary duty, among other claims, and sought resolution of three specific alleged breaches (the "Additional Claims"), despite having failed to plead them in the complaint. (*Id.* at pp. 628, 646-647.) Appealing from a summary judgment, the Raiders argued it had pleaded the "Additional Claims" sufficiently. (*Id.* at p. 647.) The Court of Appeal disagreed. It found the Raiders' general

incorporation of previous paragraphs to be inadequate because "these prior, nonspecific paragraphs" did not discuss the particular breaches of fiduciary duty alleged in the Additional Claims. (*Id.* at p. 649, fn. 25.) Further, the appellate court stressed that the complaint contained three pages alleging very specific acts of asserted fiduciary breaches, yet said nothing about the Additional Claims. (*Id.* at pp. 648-649.) The court "readily" concluded that "the Additional Claims were beyond the scope" of the complaint. (*Id.* at p. 648.)

So too, here. PSDMU's complaint failed to provide Atlas Homes with the requisite notice of the nature of the claims against it, both because of its utter absence of allegations or fair notice concerning the permanent trespass claim and because of its very specificity concerning the *non*-permanent trespass claim. The trial court should never have allowed PSDMU to try its case on a theory asserted at the last minute based on "allegations" that all parties acknowledge were not in the complaint.

For this reason alone, the $3 million permanent trespass claim should not have been allowed to proceed; the judgment based on that claim must be reversed.

C. The Trial Court Erred In Allowing The Permanent Trespass Claim To Be Tried And In Not Holding It Was Barred By the Statute Of Limitations.

The applicable statute of limitations "to recover damages or for the removal of an encroachment" is three years. (6 Miller and Starr, California Real Estate (3d ed. 2000) Adjoining Landowners, § 14.14, p. 40; Code Civ. Proc., § 338, subd. (b); *CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1533.) If the action is commenced "more than three years after the trespass was committed the cause of action is barred by the statute of limitations." (Miller and Starr, *supra*, § 14.14 at p. 44.)

Furthermore, "[w]here the injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is suffered or the trespass committed." (*Rankin v. DeBare* (1928) 205 Cal. 639, 641; *CAMSI IV, supra*, 230 Cal.App.3d at p. 1534 ["'if the defendant's act causes *immediate and permanent* injury' to the property the statute would run from the date of the act"]; Miller and Starr, *supra*, § 14.14, p. 40 ["When an injured party files an action for damages . . . *and* the encroachment is *permanent*, the action must be instituted within three years from the inception of the encroachment, and not upon discovery of the encroachment"].)[32]

Here, undisputed evidence established that the purported encroachment (i.e., slope grading) on the restaurant and golf course sites was completed more than three years before November 2004, the date PSDMU first raised the encroachment claim and moved to amend its complaint to plead it. (RT 11483 [grading completed in 1998 on restaurant site]; RT 11479, Ex. 247 [grading completed by October 28, 1999 on golf course ("Challenger Circle") site].) Therefore, the statute of limitations barred the permanent trespass cause of action, and the court grievously erred in not so ruling.

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[32]As a matter of law and undisputed fact, the encroachment claimed here constituted a permanent, not a "continuing" trespass (which may be subject to a different limitations period). (*Bertram v. Orlando* (1951) 102 Cal.App.2d 506, 508 [a permanent encroachment is "one which may not be readily remedied, removed, or abated at a reasonable expense . . ."]; Miller and Starr, *supra*, § 14.9 at p. 25 ["When an encroachment actually rests on adjoining land, it constitutes a permanent trespass"].) Pointe's own evidence and the court's findings and judgment establish the purported encroachment was permanent, not "continuing." (See, e.g., RT 8021, 8023, 8423-8424; AA 300, 345, 508 [judgment awarding over $3 million in damages for "permanent trespass"].)

D. Atlas Homes Was Obviously And Severely Prejudiced By The Court's Errors.

1. Entering judgment on a barred claim improperly increased Atlas Homes' liability by $3 million.

When a court erroneously allows a claim to proceed to judgment even though it was not pleaded, and the claim would have been barred by the statute of limitations had it been pleaded, the error is inherently prejudicial. (Cf. *Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 71 [statutes of limitations are "adamant rather than flexible in nature" and their application "requires no showing of prejudice"]; *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 362 [statutes of limitations represent the Legislature's determination of the point when the right to be free of stale claims prevails over the right to prosecute them].)

2. Atlas Homes was prevented from presenting expert evidence on a more favorable measure of damages.

Even if a specific showing of prejudice were needed to reverse a judgment entered despite being barred by the statute of limitations, Atlas Homes would have no trouble making that showing.

The usual measure of damages for a permanent trespass is the *lesser* of the cost of repair/restoration or the diminution in value of the property. (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 ["Courts will normally not award costs of restoration if they exceed the diminution in value of the property; the plaintiff may be awarded the lesser of the two amounts"].)

Once apprised of the new claim—just four days before trial—Atlas Homes strenuously advocated for the diminution of value measure of damages, contending it yielded a result far less than cost of repair. (See, e.g., AA 175; RT 8441.) Yet although Atlas Homes had expert and other witnesses prepared to testify on other aspects of the land-related torts (e.g.,

RT 10884, 11002, 11200), it could not present an expert on diminution of value because of the late assertion of the claim. (See, e.g., RT 11109 [defense counsel objected Atlas Homes could not "obtain an expert on these issues [before] trial because these claims were not disclosed"]; 8778-8779.) Of course, the deadline to exchange expert witnesses had long passed. (AA 92.)

PSDMU attempted to rebut Atlas Homes' repeated objections of prejudice by pointing out that Atlas Homes had not conducted discovery on this issue or deposed PSDMU's damages expert, Mr. Summers. (E.g., AA 190.) But what good what that have done? Mr. Summers admitted he was not asked to form an opinion on the encroachment issue until a few weeks before trial and that he didn't perform any work to form his opinion until a week before trial or even during trial itself. (RT 8436-8438.) Obviously, Ms. Summers' expert designation did not mention any encroachment on the restaurant or golf course sites. (RT 11236.) Plainly, a pre-trial deposition of PSDMU's expert would have been utterly useless.[33]

Inability to present expert testimony that otherwise likely could support a different judgment constitutes clear prejudice. (See, e.g., *Smith v. State Bd. of Pharmacy* (1995) 37 Cal.App.4th 229, 243-244 [finding prejudice when pharmacist was unable "to present expert testimony on the appropriate standard of care" due to lack of adequate notice that he was being charged with negligence] and *People v. Dougherty* (1983) 143 Cal.App.3d 245, 247-248 [delay shortening time to prepare for trial

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[33]Without waiving any objections, Atlas Homes tried to salvage its case by cross-examining Mr. Summers. (RT 8429.) Atlas Homes also attempted to designate one of its percipient witnesses, Mr. Furey, as an expert. (RT 10901.) The court denied the request. (RT 11109-11111.) Not surprisingly, and utterly unfairly, the court concluded that "Defendant presented no viable evidence regarding any alternative to Mr. Summers' opinions." (AA 345-346.)

was prejudicial because it left "insufficient time to secure the appointment of medical experts"].)

A defendant has "a right to go to trial relying on the allegations . . . found in the complaint as being the only matters on which [the defendant] is required to produce evidence." (*Mayer v. Beondo* (1948) 83 Cal.App.2d 665, 669.) "The admission of evidence as to matters not within the pleadings is prejudicial error." (*Id.* at p. 668.) Because Atlas Homes had no fair notice of PSDMU's permanent trespass claim and no opportunity to designate an expert witness on the "diminution of value" measure of damages, the trial court used the "cost of repair" method by default. (AA 345-346.) This was prejudicial error.

V. THE COURT ERRONEOUSLY ORDERED A NEW TRIAL ON THE GROUND OF "NEWLY DISCOVERED EVIDENCE."

A. Factual Background.

Pointe, claiming to have discovered new evidence, moved for a new trial limited to damages for breach of fiduciary duty in the residential case. (AA 525.)[34] The purported new evidence consisted of (1) cancelled checks indicating AHG had actually received approximately $4 million in tax benefits from the I.R.S., and (2) documents produced in another case that, according to Pointe, were relevant to "real estate profits" issues tried in the

[34]The motion was made on behalf of Pointe and GB; GB, however, was not a party to any breach of fiduciary duty cause of action, and, thus, had no standing to move for a new trial on that cause of action.

present case.[35] (AA 533-536.) Pointe contended that Ms. Weingarten concealed this evidence during the trial in this case. (AA 537.)

The court granted Pointe's motion, but agreed with defendants that any new trial on these two issues must include liability as well as damages and must be limited to the seventh (derivative) cause of action for breach of fiduciary duty. (AA 786.)

It was prejudicial error to grant Pointe's motion. This is so for multiple dispositive reasons.

B. Pointe Can Recover No Damages On The Seventh Cause Of Action.

We have conclusively demonstrated that Pointe cannot recover *any* damages on the derivative seventh cause of action because, as a matter of law, Pointe was merely the nominal plaintiff in that action. (See § II, above.) Moreover, Pointe did not demonstrate or even claim that any of its so called "newly discovered evidence" showed injury to *Astra*, the only party on whose behalf suit was brought and the only party legally entitled to recover under the seventh cause of action (assuming proof of injury). (See § I, above.) This Court need look no further than these basic legal rules to reverse the new trial order. But there is more.

A party seeking a new trial on the ground of newly discovered evidence must demonstrate *each* of the following three essential elements: (1) the evidence, in fact, is newly discovered; (2) the moving party exercised reasonable diligence in discovering and producing the evidence;

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[35]The other case is known as "Pointe II," San Diego County Case. No. GIC 809277, filed April 17, 2003, in which Pointe, GB and PSDMU sued Ms. Weingarten, WW1, AHG and Astra, attempting to relitigate the issues on which they lost in the present case, "Pointe I." Pointe II has been stayed, pending the outcome of the present appeal.

and (3) the evidence is material to the moving party's case. (*Plancarte v. Guardsmark, LLC* (2004) 118 Cal.App.4th 640, 646; Code Civ. Proc., § 657, subd. (4).) The law looks with disfavor on claims of newly discovered evidence and demands "a strong showing of the essential requirements." (*Page v. Insurance Co. of North America* (1969) 3 Cal.App.3d 121, 129.)

Pointe did not establish even one of the required elements, let alone all of them, as we now demonstrate.

C. The Evidence Of Actual Receipt Of Tax Benefits Was Not Newly Discovered, Diligently Produced Or Material; Thus, It Cannot Justify A New Trial.

1. The evidence was not newly discovered because Ms. Weingarten expressly testified *in this case* that the Whitehall sale produced about $4 million in tax benefit refunds.

Pointe contended that Ms. Weingarten concealed evidence of her entities' "*actual receipt* of tax benefits from the 1997 Whitehall sale."[36] (AA 778.4.) Pointe is mistaken. Far from concealing such evidence, *Ms. Weingarten testified about it in this very case.* Specifically, in Phase I, in January 2002, Ms. Weingarten, responding to questions on direct examination from her own counsel, testified as follows:

> Q. What tax benefit generated as a result of the Whitehall realty sale?
> A. Generated another loss.
> Q. To whom?
> A. To Atlas Holding Group.
> Q. *Did Atlas Holding Group receive tax benefit from that transaction?*

[36]In March, 1997, WW1 sold a portion of its residential property to Whitehall Realty Corp. ("Whitehall"). (AA 4:6-7; Ex. 118.)

A. *Yes, it did.*
Q. How much?
A. *About $4 million.*
Q. *Was that in cash that it received back from the IRS?*
A. *Yes, it was.*"

(RT 5180-5181, emphases added.)

In short, Pointe's counsel knew that tax benefits had been received and he was free to explore the issue further in cross-examining Ms. Weingarten. He did not do so. (RT 5213-5302.)

Pointe knew of this evidence for almost three years. There is nothing about it that was new or newly discovered; nor, obviously, was it concealed.[37] As a matter of law and common sense, a new trial cannot be granted on the ground of "newly discovered evidence" where evidence on the identical subject was revealed and presented in the record. (Cf. *Estate of Loucks* (1911) 160 Cal. 551, 557 [no new trial where purported "new evidence" came from same witnesses who "testified fully" at trial, to same effect].) The order granting a new trial must be reversed on this ground alone.

2. Pointe did not employ diligence.

Even if Pointe's motion did not founder for lack of newly discovered evidence, it still must fail.

The party moving for a new trial has a "heavy burden" to demonstrate "'strict diligence'" both in discovering new evidence and in

[37]It appears the trial judge did not remember the above-quoted testimony, given three years earlier. Nor did he remember Pointe's expert's testimony that AHG had received approximately $18 million to date (12/6/01) in tax benefits from the Whitehall sale and another sale. (RT 4748; see RT 15190 [court stated at hearing on new trial motion: "There is no evidence at all that (tax refunds) were obtained prior to the trials in these matters"].)

producing it. (*Fletcher v. Pierceall* (1956) 146 Cal.App.2d 859, 866; Code Civ. Proc., § 657, subd. (4).) Pointe exercised neither.

Pointe did not bring the tax refund evidence to the court's attention until December 27, 2004, when it filed its papers in support of its motion for new trial. (AA 525.) Yet Pointe knew of the evidence at least from the moment Ms. Weingarten testified about it on January 17, 2002—almost *three years* earlier. (RT 5111, 5180-5181.) Waiting three years is simply not diligent.[38]

Once again, the new trial order is improper.

3. The tax benefits evidence is not material.

To be material, newly discovered evidence cannot be "merely cumulative," and the proponent must show the new evidence likely would have made a difference in the outcome of the case. (*Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 910.)

Pointe's supposed "newly discovered" evidence concerning receipt of tax benefits in the amount of approximately $4 million from the Whitehall sale is entirely cumulative of Ms. Weingarten's exact trial testimony on that subject.

[38]Even if Pointe—as it claimed—did not "discover" the tax refund evidence until July 8, 2004 (AA 533), Pointe made no effort to bring it promptly to the court's attention, or at least before final judgment was entered (on September 22, 2004), but instead waited almost *six months* to notify the court.

D. There Was No Admissible Evidence Of "Real Estate Profits" To Support The New Trial Order—Nor Was The Inadmissible Evidence Newly Discovered Or Diligently Produced.

Pointe's second ground for seeking a new trial was its asserted "discovery" of documents purportedly showing "real estate profits." (AA 778.10.) However, this ground cannot possibly support a new trial because there was *no evidence* that supported the motion—the trial court having correctly sustained objection to virtually all Pointe's submitted evidence. In addition, Pointe failed to prove the evidence was newly discovered or diligently produced.

1. The evidence was inadmissible, as the trial court correctly found, and therefore cannot support the new trial order.

"Newly discovered evidence" must be admissible to support a new trial on that ground. (*Plancarte v. Guardsmark, supra,* 118 Cal.App.4th at p. 647 [discovery of inadmissible hearsay not ground for new trial]; *In re Joaquin S.* (1979) 88 Cal.3d 80, 85 ["'Newly discovered evidence must be admissible to form a basis for granting a new trial'"]; *Schultz v. Mathias, supra,* 3 Cal.App.3d at p. 910 [reversible error to grant new trial where declaration of movant's attorney "was fatally deficient in material respects"]; Wegner, et al., Civil Trials and Evidence (The Rutter Group 2004) ¶ 18:153.1, p. 18-34 ["the evidence must be admissible"]; cf. *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 910 [new trial cannot be based on inadmissible juror declaration].)

Ordinarily the granting of a new trial on the ground of newly discovered evidence is committed to the trial court's discretion, but if the

evidence is inadmissible, "there is no basis for the exercise of discretion." (*Schultz v. Mathias, supra,* 3 Cal.App.3d at p. 910; *Slemons v. Paterson* (1939) 14 Cal.2d 612, 615-616 [same].) That is the case here.

Defendants objected to every piece of "real estate profits" evidence that Pointe submitted in support of its new trial motion. (AA 668:11-669:19 [Exs. G, H, I, J], 595-603.) It did so on grounds including hearsay, lack of relevance or authentication, and inadmissible opinion. (*Ibid*.)[39] The trial court *sustained* nearly every objection, gutting any relevant evidence that would support the motion. (AA 786-787.) Yet it still granted Pointe a new trial. (AA 784.)

This was prejudicial error. As the above authorities mandate, once the court determined Pointe had failed to adduce sufficient admissible evidence to support a new trial, it was obligated to deny the motion, not allow Pointe to proceed to retrial and *then* try to produce some admissible evidence. The court got it exactly backwards.

2. Pointe did not prove the evidence was newly discovered or diligently produced.

Even if Pointe's evidence of "real estate profits" had been admissible, it would not entitle Pointe to a new trial because Pointe did not demonstrate it was newly discovered or diligently produced.

Omitting all dates, Pointe's attorney declared that he discovered certain documents in a subpoenaed file of a witness in Pointe II.[40] Counsel vaguely declared that "following" the witness's deposition, counsel had the

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[39]For example, one of the documents bore a handwritten note; Pointe's counsel declared that he "believe[d]" the handwriting . . . is that of Ms. Villa," Ms. Weingarten's accountant. (AA 545:10-21.)

[40]As explained (fn. 35), "Pointe II" is a lawsuit related to the present one.

file copied and didn't receive it back until "several weeks or even months" after the deposition. (AA 545:3-9.) But this doesn't mean the file was not read at the time it was received. Indeed, counsel did not even state the date of the deposition, whether or not he read the file, the date he took the file for copying, the date he received the file back, or the date he discovered the documents. Obviously, if those dates could have established that the evidence was "newly discovered" or diligently produced, Pointe would have boldly set them forth. It didn't.

Such vague and unspecific averments cannot establish that evidence was truly newly discovered or diligently produced. To be "newly discovered," evidence "must be specific, and if it is not, a new trial cannot be granted." (*Cansdale v. Board of Administration* (1976) 59 Cal.App.3d 656, 667.) "The moving party must state the *particular acts or circumstances* which establish diligence." (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 154, emphasis added.) Without the dates that the acts occurred, it is impossible to determine diligence. (Cf. *Putnam v. Clague* (1992) 3 Cal.App.4th 542, 556 ["'An overview of the critical dates shows a singularly impressive record of delay and lack of diligence . . .'"].)

Pointe plainly failed to carry its burden to demonstrate that the "real estate profits" evidence was truly "newly discovered" or diligently produced.

VI. THE JUDGMENT HOLDING MS. WEINGARTEN LIABLE ON AN ALTER EGO THEORY MUST BE REVERSED IF THE UNDERLYING JUDGMENT ON WHICH ALTER EGO LIABILITY IS PREMISED IS REVERSED.

Ms. Weingarten has been held liable as an alter ego on the judgments against WW1 and Atlas Homes. If, in those entities' appeals, the judgment

is reversed as to either or both, the judgment likewise must be reversed as to Ms. Weingarten. (*Robbins v. Blecher, supra*, 52 Cal.App.4th at p. 894 [alter ego action no longer viable once underlying judgment reversed on appeal].)

VII. THE JUDGMENT AGAINST AHG FOR COSTS IS UNLAWFUL BECAUSE IT IS UNACCOMPANIED BY ANY JUDGMENT OF LIABILITY AGAINST AHG.

The judgment's only award against AHG is for costs. (AA 508.) Although AHG was named as a defendant, along with Ms. Weingarten, on the breach of fiduciary duty claim (AA 85), the judgment awards damages on that claim only against Ms. Weingarten. (AA 506-507.) The cost award against AHG is therefore unlawful, since it is well established that "costs 'are allowed solely as an incident of the judgment given upon the issues in the action.'" (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677.) Put another way, the cost award is unlawful because no plaintiff was a "prevailing party" against AHG under the rule governing recovery of costs. (Code Civ. Proc., § 1032, subds. (a)(4), (b).)

Nor can the cost award against AHG be justified on the theory that AHG is a "co-debtor' on the judgment against Ms. Weingarten. The court expressly determined that the corporate defendants, including AHG, should not "be co-debtors for the torts and contractual liabilities of each other or for Ms. Weingarten's personal liabilities." (AA 482.)

For this reason, the cost award against AHG must be reversed with directions to enter judgment for AHG.[41]

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[41]If, contrary to law and fact, this Court determines that AHG is somehow liable (continued...)

CONCLUSION

For all the reasons stated, appellants Palomba Weingarten and Atlas Holdings Group, Inc. respectfully request that this Court:

A. Reverse the judgment against Ms. Weingarten with directions to enter judgment in favor of Ms. Weingarten as to:

1. The $2 million award to Astra for compensatory damages for breach of fiduciary duty;
2. The $3.3 million award to Pointe for punitive damages for breach of fiduciary duty; alternatively, if the Court determines that the punitive damages are unconstitutionally excessive, then remand the matter to the Superior Court with instructions to reduce the punitive damages to an amount consistent with due process;
3. The alter ego judgment against WW1 awarding $400,000 in damages to GB for breach of contract;
4. The alter ego judgment against Atlas Homes awarding $4.1 million in damages to PSDMU for conversion and trespass; and
5. The $3 million award to PSDMU for "permanent trespass";

B. Reverse the order granting Pointe a limited new trial;

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[41](...continued)
for some portion of the judgment awarding damages against another defendant, and that portion of the judgment is reversed on appeal, then it must also be reversed as to AHG. (See *In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1221-1222.)

C. Reverse any portion of the judgment holding Ms. Weingarten liable as an alter ego of WW1 or Atlas Homes if the judgment establishing liability against either of those entities is reversed; and

D. Reverse the judgment for costs against AHG with directions to enter judgment in favor of AHG.

Dated: October 24, 2005

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Irving H. Greines
Barbara W. Ravitz

By_____
Irving H. Greines

Dated: October 24, 2005

By_____
Barbara W. Ravitz

Attorneys for Defendants, Appellants and Cross-Respondents PALOMBA WEINGARTEN and ATLAS HOLDINGS GROUP, INC.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

Pursuant to California Rules of Court, rule 14(c)(1), I certify that this brief contains 19,672 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: October 24, 2005

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Barbara W. Ravitz