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

COMBINED CROSS-RESPONDENTS' BRIEF AND APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs offer an "open prayer to end this litigation *now*," asking this Court to "modify" the judgment by adding an extra $40 million to the compensatory damages award—without ordering a new trial, without making any independent factual determinations, and without needing to decide the issues in defendants' own appeal. (X-AOB/RB 113, 120.)[1] Granting plaintiffs' "prayer" would require wholesale repudiation of the usual appellate rules, the governing standards of review, and the controlling statutory and case law. Plaintiffs' plea is so untenable and misguided that it can have but one explanation—to make any alternative disposition in their favor seem lawful and reasonable by comparison. But the reality is that plaintiffs are not entitled to an increased judgment; they are not entitled to a new trial; and they are not entitled to keep their multi-million dollar judgment.

Ordinarily, we would place our "Appellants' Reply Brief" before our "Cross-Respondents' Brief." We would first explain the many reasons the judgment should be reversed with directions to enter judgment in defendants' favor, and then show why each of plaintiffs' issues on cross-appeal is without merit. We reverse the usual order here because plaintiffs have reversed the normal briefing order, devoting the first 81 pages of their

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[1] "X-AOB/RB" is the abbreviation we use for the "Combined Cross-Appellants' Opening Brief and Respondents' Brief [Re: Brief filed by Palomba Weingarten and Atlas Holdings Group]," submitted by plaintiffs The Pointe San Diego Residential Community, L.P., Gosnell Builders Corporation of California, and Pointe SDMU, L.P. We sometimes abbreviate the plaintiffs' names as "Pointe," "GB" and "PSDMU," respectively. Palomba Weingarten and Atlas Holdings Group, Inc. (or "AHG") are sometimes referred to as "defendants."

The monetary amounts referred to in this brief are approximate and usually do not include pre- or post-judgment interest.

combined brief to their cross-appeal. Given plaintiffs' contention that the issues presented in their cross-appeal stem from "threshold" and "fundamental" errors that "moot" and "obviate" defendants' appeal (X-AOB/RB 1, 2, 40, 83), we think it most helpful to the Court to respond to plaintiffs' arguments in the unusual order they have chosen to present them.

In fact, none of plaintiffs' so-called "threshold" arguments has merit. Each fails for elementary reasons. For example:

- Plaintiffs claim their "central" issue—on which all else supposedly hinges—involves an asserted *legal* error in denying them compensatory damages measured by the "benefit-of-the-bargain." In fact, the trial court's ruling that plaintiffs did not lose the benefit of any bargain was entirely *factual*, amply supported by substantial evidence that is unchallenged by plaintiffs on appeal and, thus, binding on appeal. This alone refutes plaintiffs' asserted entitlement to a $40 million additur.

- Plaintiffs' "set-aside" claim is equally devoid of merit. The trial court's rejection of the claim is correct for two separate and independent reasons: The named plaintiffs had no standing to sue, and the complaint did not allege a breach (or even the existence) of the "set-aside" agreement. No amendment could lawfully cure either fatal flaw.

- As to plaintiffs' claims regarding attorneys' fees, the trial court acted well within its discretion in denying plaintiffs' motion for a lump-sum fee award. The court gave plaintiffs three chances to prove the existence and amount of their allowable fees, and it concluded each time that they failed to do so.

- The trial court correctly determined, based on the record, that Pointe (a shareholder of Astra Management Corp.) failed to prove it had a

direct claim for breach of fiduciary duty because damages, if any, to Pointe, were incidental to damages, if any, to Astra.

For these and other reasons delineated in detail below, plaintiffs' cross-appeal should be rejected in its entirety.

The second half of our brief addresses the appeal of Ms. Weingarten and AHG, whose opening brief demonstrated the fundamental errors underlying the judgment, including (1) awarding $1.6 million in compensatory damages to Astra, a party that indisputably suffered no injury or damages and thus is entitled to no recovery, whatever the measure of damages; (2) awarding $3 million in punitive damages to Pointe on the shareholder derivative claim it brought on behalf of Astra, where Pointe indisputably suffered no injury or damages and was merely a nominal plaintiff; (3) finding, in an unsupported and unconstitutional post-judgment ruling, that Ms. Weingarten was the alter ego of the other defendant entities and thus was personally liable for the $340,000 award against defendant WW1 for breach of contract and the $3.5 million award against Atlas Homes for conversion and trespass; (4) awarding $2.7 million to PSDMU for permanent trespass despite the fact that the claim was barred by the statute of limitations; and (5) granting Pointe a new trial for "newly discovered evidence" even though it is indisputable that the evidence submitted was not new or material (Ms. Weingarten and plaintiffs' own expert had testified to the same thing at trial) and that the trial court (correctly) found much of the evidence inadmissible.

For the most part, plaintiffs dodge these arguments and the authorities that support them. They hope that, by claiming their own cross-appeal somehow magically "moots" defendants' appeal, the multiple prejudicial errors in the judgment will disappear.

When these appeals are viewed in light of the record, the law and the correct standards of review, the results that should follow are clear: The judgment against Ms. Weingarten and AHG should be reversed with directions to enter judgment in their favor. If it is not reversed with such directions, it must be reversed with remand for a retrial. Plaintiffs' appeal should be rejected in its entirety; under no circumstances may the Court "modify" the judgment as plaintiffs urge or in any other way.

CROSS-RESPONDENTS' BRIEF

I. POINTE DEMONSTRATES NO ERROR IN THE TRIAL COURT'S REFUSAL TO AWARD BENEFIT-OF-THE-BARGAIN DAMAGES.

The Seventh Cause of Action, a claim for breach of fiduciary duty against Ms. Weingarten and AHG, was brought derivatively on behalf of Astra Management Corp. (Astra) by its shareholder Pointe San Diego Residential Community, L.P. (Pointe). (1 Appellants' Appendix (AA) 85.)[2] The judgment awards Astra $1,591,051 in compensatory damages for this claim. (2 AA 506.)[3]

Pointe asks this Court to "modify" the award by increasing it to $38,513,376[4]—*a 24-fold increase*—or at least to grant a new trial on damages. Pointe's requests are utterly without merit. They ignore the

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[2] In its brief, Pointe frequently lumps all the plaintiffs together under the rubric "The Pointe." This cannot be done. The plaintiffs are different persons and entities and must be treated as such in this case. Pointe was the only plaintiff—and merely a nominal plaintiff at that—on the Seventh Cause of Action.

[3] In her appeal, Ms. Weingarten demonstrates that the compensatory damages award must itself be reversed on numerous grounds, including that Astra indisputably suffered no legally-cognizable injury. (See AOB 15-23 and below, pp. 45-46.) The fact that Ms. Weingarten is appealing the compensatory damages award lays bare the fallacy underlying plaintiffs' cross-appeal that the issues presented there "obviate most of the legal issues" raised on appeal by defendants. (X-AOB/RB 1, 40, 81, 83.) In fact, the issues are separate and entirely independent. No matter what, the judgment in Astra's favor must be reversed.

[4] This is the sum of the "real estate profits" ($26,646,217) and "lost tax benefits" ($11,867,159) Pointe contends should have been awarded. (X-AOB/RB 120.)

record and the law, including the inviolate principles governing appellate review of factual determinations.

A. Contrary To Pointe's Assertion, The Trial Court Did Not Reject Benefit-Of-The Bargain Damages As A Matter Of Law, But Instead Determined That The Evidence Did Not Warrant Such An Award.

Pointe contends the trial court made a "legal error" in applying an out-of-pocket measure of damages instead of the "benefit-of-the-bargain" measure it sought, and that this is a "pure issue of law, entitled to *de novo* review" by the appellate court. (X-AOB/RB 41.) Pointe is wrong.

The controlling issue is purely one of fact, reviewed under the deferential substantial evidence standard. Since Pointe did not attack the damages award as inadequate in the trial court, and advances no substantial evidence argument on appeal, its claim to $38 million in benefit-of-the-bargain damages fails for elementary reasons.[5]

1. Pointe fails to accurately characterize the trial court's ruling.

Remarkably, Pointe appeals from a ruling, but ignores what the ruling says. This is inexcusable. (*Sacramento County Dept. of Health and Human Services v. Kelly E.* (2006) 138 Cal.App.4th 396, 460 ["An

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[5] Pointe's failure to move for a new trial on the ground of inadequate damages prevents it from raising that issue on appeal. (Code Civ. Proc., § 657, subd. (5); *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122 [claim of excessive or inadequate damages cannot be raised on appeal unless error was first urged in motion for new trial, but there is exception for failure to apply proper measure of damages].)

appellant must fairly set forth all the significant facts, not just those beneficial to the appellant"].)

Pointe pretends that rejection of benefit-of-the-bargain damages was a legal error. (X-AOB/RB 41.) Not so. The record shows the ruling was based solely on the resolution of *factual* matters. It expressly recites:

> Plaintiff argues that defendants should pay to Astra the May 1997 projected profits from the development, whether they have been realized or not. *Under our facts*, however, these breaches do not and should not trigger the substantial "benefit of bargain" damages sought by plaintiff.

(1 AA 136, emphasis added.)

This purely *factual* ruling is supported by the trial court's further findings that, as a matter of *fact*, Pointe never lost the benefit of any bargain and was saved from financial ruin by Ms. Weingarten's and AHG's investment. For example, the trial court found:

a. "The Pointe, beginning in 1992, was in serious financial difficulty and had filed for bankruptcy protection. It had lost its lender and development activities had basically ceased." (1 AA 136.)[6]

b. As a result of obtaining AHG and Ms. Weingarten as equity partners in January 1996, "Pointe *benefitted* by avoiding foreclosure, bankruptcy and had obligations assumed and retired by AHG and PW (LTCB loan, back taxes, Hansen Trust)." (*Ibid.*, emphasis added.)[7]

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[6] See, e.g., 31 RT 2627 (Pointe's financial difficulties); 2628 (Pointe's bankruptcy); 27 RT 2380 (Pointe's counsel's admission that Pointe defaulted on $108 million note); 2382 (Pointe's counsel's admission that this property was "under water" and "needed to be recapitalized").

[7] See, e.g., 27 RT 2385 (counsel agree that Pointe avoided foreclosure when AHG purchased Pointe's $108 million note for $3.8 million); 31 RT 2752-2754 (payments by Astra); 2 Respondents' Appendix (RA) 517 (Trial Exhibit 62; WW1 assumed or retired Pointe's obligations relating to, e.g., (continued...)

c. In January 1996 (when the parties entered into their agreements), "Pointe knew that PW [Ms. Weingarten] was investing, in part," to obtain tax benefits and "knew that the transaction documents did not require AHG or PW to invest personal money or to obtain financing or to obligate a particular development strategy." (*Id.* at pp. 136-137.)[8]

d. In the January 1996 transaction, Pointe received 1000 shares of Astra stock; at that time, "[t]he future and any success of the development was unknown. . . . If Astra made a profit (including tax benefits), Pointe would receive a distribution. If it did not make a profit, Pointe knew it would not receive a distribution." (*Id.* at p. 137.)[9]

e. There was no evidence that "distributable profits, as defined in Exhibit 46[[10]] have been realized" and "no evidence as to what tax

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[7] (...continued)
property taxes, reimbursement of expenses, escrow and title costs, interest on CD repayment and insurance bond payments).

[8] See, e.g., 38 RT 5039-5040 (testimony of Rick Kafka [Pointe's President, 31 RT 2642] as to "our understanding that Pam's organization was looking . . . to shelter some ordinary income"); 2 WW1's Appendix (WA) 388 (Ex. 46, WW1 Operating Agreement ["[N]o Member shall be obligated to make any loan or advance" to WW1]).

[9] See, e.g., 31 RT 2691 (stock); 42 RT 5425-5426 (Pointe's counsel's admission that the "reasonable expectations at the time that the agreement was entered into in January of '96 was to receive a percentage of [profits] in the way of a dividend," but "you don't get it until it's realized").

[10] Exhibit 46, the WW1 Operating Agreement, is the document that entitles Astra (and therefore Pointe) to receive profits (in the form of "Net Cash Flow") and tax benefits from WW1, if any are realized. (2 WA 369, 394-395.) The trial court found that WW1 did *not* breach the Operating Agreement. (1 AA 82, 336-337.)

benefits, it any, would be available to Pointe," based on actual events, not projections. (*Ibid*.)[11]

The court further found—"*[b]ased upon the record*,"—that the May 1997 projections "were formulated *after* the January 1996 transaction," that the parties had "no understanding" that "this plan was to be followed," that "Pointe had no reasonable expectations in January 1996 or in May 1997 that it had the right to rely upon this plan as a basis for damages," and that "no net profits have been shown" that would trigger the distribution provisions in Exhibit 46. (*Ibid.*, emphasis added.)

Pointe inexcusably ignores these findings. They conclusively refute Point's argument that the trial court's refusal to award benefit-of-the-bargain damages stemmed from legal error. The benefit-of-the-bargain issue is purely factual in nature.

2. Pointe's failure to advance any substantial-evidence attack on the trial court's factual determination that Pointe failed to prove benefit-of-the-bargain damages makes that determination impervious to appellate attack.

Pointe does not argue (or even suggest) that the evidence is insufficient to support the trial court's determination that Pointe failed to prove benefit-of-the-bargain damages. Accordingly, the finding that there were no such damages is binding and conclusive on appeal.

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[11] See, e.g., 1 AA 137, fn. 28 ("All testimony [of Pointe's experts] was based upon the WW1 Business Plan projections"); 36 RT 4515, 4583 (Mr. Nevin's testimony basing analysis on projections); 4653-4656 (Mr. Nevin's recognition that business risks could affect existence or degree of profitability); 37 RT 4758, 4761 (Mr. Athy's testimony that he relied on Mr. Nevin's calculations); 36 RT 4710-4711, 4722 (Mr. Walla's testimony regarding uncertainty of projected tax benefits).

The governing principles—ignored by Pointe—are set forth by the Supreme Court in *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, as follows:

- "[T]he power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support" the trial court's factual findings. (*Id.* at p. 881, emphases in original, internal quotation marks omitted.)
- "It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact." (*Ibid*., internal quotation marks omitted.)
- If an appellant chooses to attempt to rebut this presumption, the appellant must ". . . demonstrate that there is *no* substantial evidence to support the challenged findings." (*Ibid*., emphasis in original, internal quotation marks omitted.)
- "A recitation of only [appellant's] evidence is not the 'demonstration' contemplated" by the standard of review. (*Ibid*.)
- If appealing parties contend that "some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived." (*Ibid*., emphases in original, internal quotation marks omitted.)

Since Pointe makes no effort to satisfy these standards, the factual determination that Pointe failed to prove benefit-of-the-bargain damages must be affirmed. This alone completely disposes of Pointe's claimed right to $38 million in benefit-of-the-bargain damages.

3. Pointe misstates the standard of review.

Pointe asserts there is "more than sufficient" evidence to award over $26 million in "benefit-of-the-bargain" damages for anticipated profits, and "undisputed" evidence to award over $11 million in anticipated tax benefits. (X-AOB/RB 52, 56, 57, 120.) But Pointe supports its argument by relying on evidence the trial court rejected.[12] (*Id*. at pp. 54-57, 115-118.)

Pointe has it exactly backwards. Its own evidence is irrelevant. When reviewing a trial court's findings of fact, the appellate court "'*looks only at the evidence supporting the successful party, and disregards the contrary showing.*'" (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60; *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881; *McCauley v. Howard Jarvis Taxpayers Assn.* (1998) 68 Cal.App.4th 1255, 1266 ["If one is going to make a 'the-facts-compel-that-I-win-as-a-matter-of-law' argument, one's brief must fairly state all the evidence"].)

This Court cannot reweigh the evidence as Pointe urges. (X-AOB/RB 56-57.) Because Pointe failed to mount any substantial-

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[12] For example, Pointe cites testimony of its expert, Michael Walla, even though the trial court expressly found such evidence did not support any award of projected profits or tax benefits. (1 AA 137, fn. 29 [noting Mr. Walla testified that "if there were no profits from the project, then there would be no direct tax benefits to Astra or Pointe"]; 36 RT 4710:27-4711:9; see also 4722:18-20 [Mr. Walla's testimony: "My opinion is that I cannot say with any reasonable care that . . . those tax benefits (from the 1997 sales) would be available"].)

evidence attack, it must be presumed that there is substantial evidence to support the court's ruling on benefit-of-the-bargain damages. In any event, the trial court's ruling is indisputably supported by substantial evidence. (See footnotes 6-11, above.) Pointe's appeal must be rejected.[13]

B. Pointe's Argument Also Fails Because There Is No Evidence Of Any Causal Connection Between The Acts Found To Be Breaches Of Fiduciary Duty And Pointe's Claim That It Lost A "Benefit-Of-The-Bargain."

Pointe's challenge to the benefit-of-the-bargain determination fails for another reason as well—lack of evidence of causation.

The benefit-of-the-bargain damages Pointe seeks are "the equivalent of contract damages," i.e., loss of a bargain supposedly promised by the breaching party. (1 AA 136 [Decision After Court Trial, Mar. 4, 2002].) Under elementary contract principles, "the nonbreaching party is entitled to

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[13] None of Pointe's other assertions alters this outcome:

(1) Pointe asserts that damages "can" or "may" be based on business projections. (X-AOB/RB 52-53.) This is beside the point. That a court *can* find something does not mean that it *must.* What a court has discretion to do it also has discretion not to do. (*De Anza Enterprises v. Johnson* (2002) 104 Cal.App.4th 1307, 1321; *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 871.) Here, the trial court found there was *no* factual ground for awarding damages based on projections.

(2) Pointe notes it was granted a new trial on the basis of "newly discovered evidence" of profits and tax benefits. (X-AOB/RB 57.) This fails to help Pointe for two equally dispositive reasons. First, the new trial order is erroneous and must be reversed, as defendants demonstrate in their own appeal. (See AOB 66-74 and below, pp. 81-89.) Second, Ms. Weingarten has not been found *liable* for any conduct concerning tax benefits or profits, as the trial court acknowledged in ordering a new trial as to *both* liability and damages. (3 AA 786.) "[A] finding on liability is a predicate to assessing damages." (*Sagi Plumbing v. Chartered Const. Corp.* (2004) 123 Cal.App.4th 443, 449-450.)

recover only those damages, including lost future profits, which are 'proximately caused' by the specific breach." (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1709.) "[T]he breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain." (*Ibid.*; *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038, 1061.)[14]

None of the five acts the trial court specifically identified as breaches deprived Pointe (or anyone else) of *any* "bargain," let alone $38 million in projected lost profits and tax benefits that the trial court found were never proven. Indeed, the court found three of the breaches caused *no damages at all*. (1 AA 138-140; 3 AA 786 [(1) failure to collect money owed by Whitehall and forgiveness of that debt; (2) sale of property from WW1 to Atlas Homes—later rescinded; and (3) the B.R. Family Partners' transaction].)

As for the other two breaches, the court found Ms. Weingarten wrongly paid herself $635,869 in commissions and wrongly charged $955,182 to the project for legal and accounting fees. (1 AA 128, 135,

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[14] Even Pointe's own authorities (X-AOB/RB 48-53) are in accord. (See, e.g., *Shoemaker v. Acker* (1897) 116 Cal. 239, 244 [prospective profits must "flow[] in a direct line from the breach"]; *James v. Herbert* (1957) 149 Cal.App.2d 741, 749, emphases added [the non-breaching party must show that prospective profits are "the natural and direct consequences of the breach" and were "taken into consideration and deliberated upon *before* the contract was made, and formed"; damages need not be established with certainty so long as there was "reasonable probability that the profits would have been earned *except for* the breach"].) Here, there was no evidence of any connection between the breaches found and the profits sought—let alone evidence that such profits were reasonably probable.

140-141; 2 AA 339.) The judgment requires Ms. Weingarten to repay those sums, thus compensating for any and all loss incurred. (2 AA 506.)

On appeal, Pointe does *not* challenge any of the above findings.[15] Nor does it even attempt to argue the existence of a causal link between any of the five specifically-found breaches and its unsupported bid for benefit-of-the-bargain damages. Pointe simply claims it should be awarded the unproven profit projections because it wants them. This doesn't suffice. All the damages found to be suffered were ordered paid and those damages found not to be suffered were properly rejected. (Cf. *Norte & Co. v. R.L. Huffines* (2d Cir. 1969) 416 F.2d 1189, 1190 [fiduciaries who cause damage to the corporation "must make up the difference to the corporation"].) Pointe could not reasonably expect more, nor has it demonstrated an entitlement to more.

C. This Court Should Not Be Misled By Pointe's Irrelevant References To The Court's Prior Decision In This Case.

Asserting that the out-of-pocket measure is "particularly inappropriate" because Ms. Weingarten "intentionally thwarted reasonable discovery related to damages," Pointe relies on this Court's decision in *Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268. (X-AOB/RB

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[15] Indeed, Pointe stresses that "the trial court got the *facts* relating to Weingarten's breaches of fiduciary duty *so right* . . . ." (X-AOB/RB 57, original emphases.)

48, 50-51, see also 2, 27, 28, 58.)[16] That decision is irrelevant to the issues Pointe raises; it has no tenable bearing on the disposition of this appeal.

First, the trial court refused to award benefit-of-the-bargain damages because Pointe failed to prove them.[17] Nowhere does Pointe show, claim or even hint that the discovery derelictions referred to in *Weingarten* had any bearing on its failure to prove an entitlement to any amount more than the $1.6 million in compensatory damages awarded.

Second, Pointe's remedy for any discovery violations was to seek and obtain appropriate sanctions in the trial court. (Code Civ. Proc., § 2023.030 (former § 2023, subd. (b)) [authorizing issue, evidentiary and terminating sanctions]; *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1183-1184 [terminating sanctions imposed for discovery abuses].) Pointe never obtained any such sanctions. It cannot do so for the first time on appeal.[18]

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[16] *Weingarten* holds that the trial court did not abuse its discretion in ordering Ms. Weingarten to produce her tax returns during the punitive damages phase of trial, given the court's awareness of Ms. Weingarten's past conduct concerning efforts to obtain discovery. (102 Cal.App.4th at pp. 271, 276.)

[17] The authorities Pointe cites, dealing with the degree of certainty with which lost future profits need be calculated (X-AOB/RB 48-50), are beside the point. Before a court can award such profits—however calculated—there must be proof that the plaintiff actually made a bargain to receive them, as well as proof of a causal connection between the breaches of duty found and any loss of profits or tax benefits. Pointe failed to prove these elements.

[18] The trial court rejected Pointe's attempt to use *punitive* damages as a substitute for discovery sanctions. (71 RT 12216:22-12218.) There is no possible justification to use *compensatory* damages as such a substitute.

Third, Pointe does not even tell the whole *Weingarten* story. It omits all mention of the aftermath of the decision: The trial court *reversed* its discovery order![19]

The transparent purpose of Pointe's *Weingarten* argument is to "poison the well." Pointe hopes that its repeated references to *Weingarten* and the findings concerning Ms. Weingarten's financial record-keeping (X-AOB/RB 50-51) will induce this Court to award Pointe $37 million more than the trial court found to be justified by the evidence. The ploy should be rejected. The controlling fact is that Pointe failed to prove any entitlement to benefit-of-the-bargain damages. Pointe should not be allowed to undermine the trial court's factual findings by obtaining on appeal the very relief the trial court rejected based on Pointe's failure of proof.

D. Even If There Were Support For Pointe's Benefit-Of-The-Bargain Claim, No Authority Empowers This Court To "Modify" The Judgment By Adding $37 Million (Or Any Other Amount) To The Damages Or To Order A New Trial On The Measure Of Damages.

Despite the trial court's determination that Pointe failed to prove benefit-of-the-bargain damages, Pointe asks this Court unilaterally to

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[19] The court took seriously this Court's advisement that if "there are any changed circumstances that are relevant to the propriety of tax return disclosure, this is a matter for the trial court's consideration upon remand." (102 Cal.App.4th at p. 277, fn. 1.) Upon remand, there *were* changed circumstances. Ms. Weingarten produced nine boxes of financial records, obviating any need to examine her tax returns. (51 RT 6821 [THE COURT: "I'm going to change my determination that was made before this matter went up to the Court of Appeal because I think there have been changed circumstances"].)

increase the compensatory damages awarded for breach of fiduciary duty from $1,591,051, as determined by the trial court, to a "conservative" $38,513,376—without a new trial, without any appellate fact finding, and without having moved for a new trial on the ground of inadequate damages.[20] (X-AOB/RB 57, 120.) In short, Pointe wants this Court to trump the trial court on purely factual issues.

There is absolutely no authority for any modification, nor for this Court to award a new trial on the measure of damages. The law is directly to the contrary.

1. Pointe's requested modification is impermissible.

As a general proposition, an appellate court may affirm, reverse, or modify a judgment. (Code Civ. Proc., §§ 43, 906; Cal. Const., Art. VI, § 11.) However, its power to modify is limited, as the Supreme Court made clear in *Boyle v. Hawkins* (1969) 71 Cal.2d 229. There, the Court of Appeal had modified a judgment from $6,359 to $109, concluding the evidence was insufficient to support the larger amount. (*Id.* at p. 232, fn. 3.) The high court held this was doubly erroneous. First, there was substantial evidence to support the original judgment, and thus affirmance was required. (*Id.* at pp. 232, 235-238.) Second, even if the Court of Appeal had correctly evaluated the evidence, it could not unilaterally modify the amount of damages: "Modification is improper" where "'the record does not clearly show what the correct judgment should be. . . .'" (*Id.* at p. 232, fn. 3.)

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[20] Pointe also asks the Court to increase the judgment by an additional $2,482,982—representing damages under the "set-aside claim." (X-AOB/RB 120.) The trial court ruled against Pointe on this claim—correctly so, we demonstrate. (See below, pp. 20-30.)

The same principles apply here. First, as demonstrated, the trial court determined, as a matter of fact, that Pointe was not entitled to "benefit-of-the-bargain" damages, and since Pointe advances no substantial-evidence attack on that factual determination, it must be accepted as established on appeal. Second, the record does *not* show the correct judgment should be $38 million for compensatory damages on the Seventh Cause of Action. The trial court determined the correct judgment was $1.6 million (but see below, pp. 44-52). This Court is not the trier of fact and it cannot second-guess the trial court's resolution of factual issues. (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429, fn. 5, internal quotation marks omitted, original emphases ["So long as there is 'substantial evidence,' the appellate court *must affirm* . . . even if the reviewing justices personally would have ruled differently had they presided over the proceedings below, and even if other substantial evidence would have supported a different result. . . . [T]he reviewing court has *no power to substitute its deductions*"].) Since the trial court determined that the facts did not support a benefit-of-the-bargain award, the record compels *rejection* of such damages. Modification is impermissible.

Pointe's modification request fails for another reason. In very rare instances, an appellate court will modify an appealed judgment under its limited authority to make independent factual findings on appeal pursuant to Code of Civil Procedure section 909 (former section 956a). (*Crocker Nat. Bank v. Emerald* (1990) 221 Cal.App.3d 852, 865 [refusing to modify judgment]; *City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 813-814 [modifying judgment to correct stipulated computational error].) The party requesting appellate findings under section 909 must file a formal noticed motion including the proposed findings. (Cal. Rules of Court,

rule 22(b); Eisenberg, et al., California Appeals and Writs (Rutter Group 2004) § 5:185, p. 5-44.14.) Pointe filed no such motion here.[21]

Pointe essentially wants this Court to reverse the trial court's factual findings (even though Pointe does not challenge the sufficiency of the evidence to support them) and then to reweigh the evidence and make its own factual findings (even though Pointe did not bring a motion requesting that it do so). This the Court cannot do. An appellate court cannot "abrogate the general rule respecting the powers of the trial court in its determination of questions of fact or the rule that the reviewing court is bound by the findings of the trial court if based upon substantial evidence." (*Tupman v. Haberkern* (1929) 208 Cal. 256, 265-266; *Kerr Land & Timber Co. v. Emmerson* (1969) 268 Cal.App.2d 628, 636-637 ["the reviewing court is not to use its fact finding powers to make determinations of fact from conflicting evidence presented to the trial court"].)

Pointe's "modification" argument is meritless. It should be rejected.

2. Pointe's alternative request for a new trial on damages is untenable.

As an alternative to modification, Pointe asks this Court to "affirm the trial court's findings with respect to all of Weingarten's breaches of fiduciary duty," but to "reverse for a new trial on compensatory and

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[21] All but one of Pointe's authorities (X-AOB/RB 58-59) arose in the context of appellate court fact-finding under former section 956a, and all of them arose before 2003, when the rule requiring a formal motion was added. (See Advisory Com. com, Cal. Rules of Court, rule 22(b) [formerly, appellate findings could be requested by application or in a brief. "Although such findings are rare, when they are made they can be dispositive of the appeal. For this reason," the revised rule "requires any request for such findings to be presented by the more formal process of serving and filing a motion, with the consequent right of the adverse party to serve and file an opposition"].)

punitive damages with respect to those claims, using a proper, benefit-of-the-bargain measure of damages." (X-AOB/RB 121.) This is impermissible.

For all the reasons already stated, there is no basis for this Court to revisit the trial court's factual determinations that the compensatory damages for breach of fiduciary duty were approximately $1.6 million and that the evidence did not warrant awarding more. There is no basis for a new trial.

* * * * *

Pointe's benefit-of-the-bargain argument—which it touts as the "central," "lead" and "predominant" issue on appeal, the one that supposedly "obviates" defendants' own appeal (X-AOB/RB 1, 2, 40, 83)—collapses to nothing when correctly analyzed. Since Pointe has failed to demonstrate any legal or factual error in the trial court's compensatory damages determinations, Pointe has not established any basis for this Court to change the amount of damages, either by modifying the judgment or reversing and remanding for a new trial on damages.

II. THE TRIAL COURT CORRECTLY RULED IN WW1'S FAVOR ON THE THIRD CAUSE OF ACTION FOR BREACH OF CONTRACT.

Pointe asserts the trial court erred in ruling in favor of Ms. Weingarten on the "set-aside" claim supposedly alleged in the Third Cause of Action. (X-AOB/RB 60, 11, 118.) The argument is without merit.[22]

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[22] Ms. Weingarten is not named as a defendant on the Third Cause of Action; her claimed liability rests on the finding that she is WW1's alter ego. (2 AA 482.)

A. Background.

In the Third Cause of Action for breach of contract, Pointe and Gosnell Builders ("plaintiffs" in this section) sued WW1 for breaching the January 10, 1996 WW1 Operating Agreement (Exhibit 46) by allegedly making certain decisions without Gosnell Builders' approval. (1 AA 82; 2 WA 362 [Ex. 46].) They pressed this claim until the eve of trial even though (1) neither was a party to the WW1 Operating Agreement, (2) the agreement itself created "No Third Party Rights" (2 WA 389 ["This Agreement is intended to create enforceable rights between the parties hereto only, and creates no rights in, or obligations to, any other Persons whatsoever"],) and (3) no rights under the Operating Agreement had been assigned to plaintiffs.[23]

Undoubtedly recognizing the futility of proceeding with their facially untenable Third Cause of Action, plaintiffs abruptly shifted theories during their opening statement at trial. They then argued for the first time that WW1 had breached an entirely different agreement—the so called "set-aside" letter. (54 RT 7322:3-13.) In that letter, sent by WW1 to Pointe, a week after the execution of the WW1 Operating Agreement, WW1 confirmed it would pay certain expenses of the project that Pointe was obligated to pay to certain third parties. (2 RA 517-518 [Ex. 62].) WW1 believed its obligation was limited to two years, and stopped the payments after two years. (69 RT 11719:8-11.) Pointe San Diego Mixed-Use, L.P. ("PSDMU" or "Pointe SDMU") then made the payments. (55 RT 7528:16-7529:2; 7539:24-28.) Neither Pointe, Gosnell Builders nor PSDMU made any demand on WW1 (or on Ms. Weingarten) to continue the payments. (66 RT 10544:27-10545:2.)

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[23] Pointe eventually admitted it was not asserting a claim under the WW1 Operating Agreement. (61 RT 9296:18-20.)

The trial court rejected plaintiffs' belatedly-asserted claim. The court held that neither Pointe nor Gosnell Builders was a proper plaintiff because neither had suffered any damages, neither had made any payments under the set-aside letter, and neither had received an assignment of rights from PSDMU—the entity that did make the payments but was not a party to the lawsuit. Further, the court found it was too late to add PSDMU as a party plaintiff because any claim it might have had was barred by the statute of limitations. (2 AA 337, 507:8-10.)[24]

As we demonstrate below, the trial court was absolutely correct to find for WW1 on the Third Cause of Action. Neither Pointe nor Gosnell Builders suffered any damages or had standing to sue as an assignee, and the statute of limitations had run as to PSDMU.

B. The Trial Court Properly Refused To Grant Relief On Plaintiffs' Third Cause Of Action.

1. Pointe and Gosnell Builders lacked standing to sue because any obligation to make payments under the set-aside letter was fulfilled by PSDMU.

The trial court concluded Pointe and Gosnell Builders lacked standing to sue for breach of the set-aside agreement because "[t]here is no evidence that either GB [Gosnell Builders] or Pointe paid any money and therefore no evidence they have been damaged." (2 AA 337:13-14.) Rather, "Pointe SDMU is the entity which made the payments after WW1

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[24] The trial court also found that the Third Cause of Action, assertedly for breach of the WW1 Operating Agreement, was sufficiently broad to include an allegation of breach of the "set-aside" letter, and even if it wasn't, the court would grant plaintiffs' "verbal request" to amend the complaint to allege such a breach. (2 AA 336; see below, pp. 28-30.)

stopped its payments." (*Id.* at lines 2-3 & fn. 8 [citing Exhibit 630, which "reflects total payments by Pointe SDMU of $2,482,982.76"].) In short, the trial court ruled that if any person had a right to be reimbursed for the payments made, it was PSDMU, but PSDMU was not a party to the lawsuit.

Plaintiffs contend the court was "wrong" to find Pointe was not damaged (X-AOB/RB 63), but they make no attempt to show this finding is legally incorrect or unsupported by substantial evidence. Therefore, the finding cannot be attacked on appeal. (*Foreman & Clark Corp v. Fallon, supra,* 3 Cal.3d at p. 881; see above, p. 10.) In any event, the finding is amply supported by substantial evidence. (4 RA 903 [Ex. 630]; 55 RT 7539:24-28, 58 RT 8494:22-23.)[25]

Despite the evidence and finding that plaintiffs made no payments, plaintiffs argue they somehow had standing to sue because Pointe was a party to the set-aside agreement and Gosnell Builders was its beneficiary. (X-AOB/RB 61-62.) But this does not establish damages or standing. "[S]tanding to invoke the judicial process requires" that the plaintiff "has either suffered or is about to suffer an injury." (*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314-315.) To have standing, the plaintiff must seek recompense for its *own* injury, not someone else's. (*Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.*

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[25] Pointe and Gosnell Builders point to evidence, they claim, shows that they made the payments. (X-AOB/RB 63.) But that evidence was not credited by the trial court, being contrary to evidence that PSDMU made all the payments, as plaintiffs' brief admits. (*Id*. at pp. 32, 62; 55 RT 7539:24-28.) The evidence that PSDMU made the payments is binding on appeal. (*Campbell v. Southern Pacific Co., supra,* 22 Cal.3d at p. 60 [appellate court "'*looks only at the evidence supporting the successful party, and disregards the contrary showing*'"].)

(2005) 132 Cal.App.4th 666, 672.) Plaintiffs suffered no injury and had no standing to seek to recover for injury, if any, to PSDMU.[26]

2. There was no assignment by PSDMU of its right to sue, if any.

Since Pointe and Gosnell Builders might have had standing had they been assignees of PSDMU (see Code Civ. Proc., §§ 367, 368), the trial court sought to determine if PSDMU had assigned to them any claim it may have had to recover the set-aside payments.[27] In response to vague testimony from plaintiffs' witnesses about some sort of assignment (e.g., 58 RT 8495:7-9), the trial court pressed for details, repeatedly inquiring if the assignment was in writing, when it was made, whether it was authorized by the board of directors, whether there were minute entries, was it discussed at a formal meeting, etc. (58 RT 8497:28-8498:2; 66 RT 10549:11-14.) No such evidence or testimony was forthcoming, and the court concluded, "There is no evidence of an assignment by Pointe SDMU to pursue this claim." (2 AA 337:12-13.)

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[26] Plaintiffs also suggest that evidence of *why* PSDMU made the payments was relevant to the question whether Pointe and Gosnell Builders suffered damages, and such evidence was wrongly excluded on that ground. (X-AOB/RB 63-64.) But the court *overruled* defense objections on relevance grounds, and the testimony came in. (See, e.g., 66 RT 10543:19-10544:6, 65 RT 10452 [Mr. Midtun (an officer of various Gosnell entities): "If Pointe SDMU did not make these payments, . . . they would probably lose the land"]; 58 RT 8498:26-8499:19 [Mr. Gosnell: PSDMU made the payments "to protect Pointe SDMU against foreclosure on the property"; "PSDMU has an interest"].)

[27] On appeal, plaintiffs contend PSDMU *had* no "direct claim" against WW1 because PSDMU was not a party to the set-aside agreement. (X-AOB/RB 61, 62-63.) Below, PSDMU relied on a third-party beneficiary theory. (1 RA 27:19.)

Plaintiffs do not and cannot point to any such evidence. Rather, they refer to testimony of an agreement between Mr. Gosnell and Mr. Midtun that if Gosnell Builders recovered on this claim, Gosnell Builders would give the money to PSDMU. (X-AOB/RB 64.) But the trial court considered this testimony and expressly rejected it. (2 AA 337:14-17.) Properly so. Even if this Court could second-guess the trial court's factual and credibility determinations (it can't, of course), plaintiffs fail to explain how such an agreement could confer standing on *them* to pursue a claim that belonged to someone else.

3. The trial court did not abuse its discretion in refusing to substitute PSDMU for Pointe and Gosnell Builders as the sole party plaintiff.

Plaintiffs contend that even if they were not the proper plaintiffs, "equity" required amendment of the complaint to substitute PSDMU as the sole plaintiff. (X-AOB/RB 64-65, citing Code Civ. Proc., § 473, subd. (a)(1) [authorizing courts to allow amendments to pleadings "by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect"].) Their contention fails for two reasons. First, there is nothing equitable about giving PSDMU a right to sue WW1, when plaintiffs contend PSDMU did not have a claim against WW1 in the first place (see above, fn. 27).

Second, plaintiffs fail to demonstrate that the trial court abused its discretion in refusing to allow them to completely change the party plaintiff almost five years after the asserted breach.

The trial court's denial of plaintiffs' request to amend (2 AA 337) was absolutely correct and well within its discretion. The cases uniformly hold that "amendment after the statute of limitations has run is not

permitted when the result is to drop one party [plaintiff or defendant] to the action and add another who up to the time of the amendment was not a party to the proceedings." (*Stephens v. Berry* (1967) 249 Cal.App.2d 474, 478; *Chitwood v. County of Los Angeles* (1971) 14 Cal.App.3d 522, 525; *Kerr-McGee Chemical Corp. v. Superior Court* (1984) 160 Cal.App.3d 594, 598-599; *Diliberti v. Stage Call Corp.* (1992) 4 Cal.App.4th 1468, 1470-1471; *Meller & Snyder v. R & T Properties, Inc.* (1998) 62 Cal.App.4th 1303, 1313, fn. 5.)

It is undisputed that PSDMU was not a party to the proceedings in Case No. 726145 (see 1 AA 72) and that the four-year statute of limitations for breach of a written contract had run (Code Civ. Proc., § 337).[28] Nor do plaintiffs contend this was a case involving mistake or misnomer that might have justified an amendment. (*Kerr-McGee Chemical Corp. v. Superior Court, supra,* 160 Cal.App.3d at p. 599, fn. 3 ["it is important to maintain the distinction between correcting an honest error in the name of a correctly named party and joining a new party in the litigation for the first time under the guise of a claim of misnomer"]; *Stephens v. Berry, supra,* 249 Cal.App.2d at p. 478 [same].)[29]

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[28] WW1 stopped making payments under the set-aside letter when it believed its two-year obligation was ended—in January 1998. (55 RT 7528:16-7529:2, 69 RT 11719:8-11.) Plaintiffs first requested leave to substitute in PSDMU as the party plaintiff in November 2002 (1 RA 27, fn. 7)—almost five years later.

[29] Plaintiffs ignore these authorities, even those expressly cited by the trial court. (2 AA 337.) They cite a mishmash of cases; only two deal with the statute of limitations, and neither is on point. (X-AOB/RB 65-66.) Both involved *adding* an extra party, not *substituting* one for another. (See *Citizens Assn. For Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 160 [permitting the "mere addition of a party plaintiff"—a citizens association—to 20 other plaintiffs].) And in

(continued...)

In order to demonstrate an abuse of discretion, plaintiffs would have to establish the discretionary decision "exceeded the bounds of reason" or was "arbitrary . . ., capricious . . . or whimsical." (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1449.) They don't even try. Here, it was perfectly rational for the trial court to refuse to allow an amendment making PSDMU the sole plaintiff. This is not a case of merely adding one more party to existing parties, or of a technical defect, or of misnomer or mistake. Rather, it is one of failing to name the right party as the plaintiff. The trial court did not abuse its discretion in denying, after expiration of the statute of limitations, an amendment to substitute PSDMU—a stranger to the action and one plaintiffs contend had no claim against WW1—for Pointe and Gosnell Builders as the sole plaintiff on the Third Cause of Action.

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[29] (...continued)
Pasadena Hospital Assn., Ltd. v. Superior Court (1988) 204 Cal.App.3d 1031, 1033, an amendment was permitted to add a doctor's solely-owned corporation as a plaintiff along with the doctor, where the two were "essentially the same." The court stated this was not a matter of adding "an entirely new and different party," but rather "merely remedying a technical defect." (*Id.* at p. 1036.)

C. The Trial Court's Refusal To Grant Relief On Plaintiffs' Third Cause Of Action Is Also Correct Because That Claim Did Not Allege—And Could Not Timely Be Amended To Allege—A Breach of The Set-Aside Letter.[30]

1. The Third Cause of Action did not allege a breach of the set-aside letter.

The trial court found that the Third Cause of Action sufficiently alleged a breach of the set-aside letter (Exhibit 62), citing paragraphs 14, 15, 42 and 43 of the complaint. (2 AA 336.) However, nothing in those paragraphs or any other identifies the set-aside letter or even suggests its existence, let alone its breach. Nothing in the complaint converted this claim for breach of the WW1 Operating Agreement into one for breach of the set-aside letter.

The two documents are entirely different. The WW1 Operating Agreement is a 38-page document executed by Astra Management Corp. and B.R. Family Partners L.P., dated January 10, 1996, concerning the organization of WW1, its ownership, financing, management and other operational provisions. (2 WA 362-400 [Ex. 46].) The set-aside letter is a one-page letter from WW1 to Pointe, dated January 17, 1996, entitled "Re: Payment of Additional Expenses," in which WW1 promised to pay certain additional expenses of the project. (2 RA 517 [Ex. 62].)

The paragraphs in the complaint the trial court cited do not refer—directly or indirectly—to the set-aside letter. Paragraphs 42 and 43 concern only the WW1 Operating Agreement. (1 AA 82.) Paragraph 14

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[30] A respondent may assert any legal theory—including errors in the trial court's ruling—that may result in affirmance of the ruling. (Code Civ. Proc., § 906; *California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7.)

alleges the existence and terms of *nine* separate transactions—but *not* the set-aside letter. (1 AA 75-76.) And paragraph 15 alleges that after "the completion of the *above transactions*"—*not* including the set-aside letter—Pointe "was relieved of any payment obligations arising from the *Residential Note*." (*Id.* at p. 76:13-17, emphases added.) The Residential Note had nothing to do with the set-aside letter.[31] Moreover paragraph 15 contains no allegation of *breach*, *performance* or *damages* as to *any* contract.

It is impossible to read the complaint and accurately conclude it states a cause of action for breach of the set-aside letter.

2. The Third Cause of Action could not be amended to allege a breach of the set-aside letter.

Obviously concerned that the Third Cause of Action did not allege a breach of the set-aside letter, plaintiffs requested leave to amend to conform to proof. (54 RT 7401:14-15, 61 RT 9292:4-7; 1 RA 25, 28:16-18.) The court granted the request, on the sole ground that "defendants are not prejudiced based upon the lengthy discovery devoted to this issue." (2 AA 336:20-23.)

But "lack of prejudice alone is an insufficient ground upon which to ignore the statute of limitations." (*Coats v. K-Mart Corp.* (1989) 215 Cal.App.3d 961, 968, fn. 5.) The statute of limitations exists "independent of the existence of prejudice to the defendant." (*Lobrovich v. Georgison* (1956) 144 Cal.App.2d 567, 575 [fact that delay in bringing

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[31] The "Residential Note" was a promissory note executed by Pointe and other entities in 1990 in favor of the Long Term Credit Bank of Japan for $108,000,000. (1 AA 75:1-3.) The set-aside letter concerned entirely different obligations, relating to the Hansen Ranch Trust, H&S Investments, and bond premiums. (2 RA 517 [Ex. 62]; 2 AA 336.)

action "did not prejudice respondent is irrelevant"].) That the court here found no prejudice is not determinative.

Irrespective of prejudice, a complaint may not be amended after the statute of limitations has run unless the amendment "relates back" to the original complaint. "The relation-back doctrine requires that the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409.) Put another way, "a plaintiff who changes the essential facts upon which recovery is sought is not entitled to the benefits of the relation-back doctrine." (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 416.)

Here, the differences could not be more stark between the original complaint and the amendment plaintiffs proposed (but never submitted). The claims involved different contracts on different dates of different lengths between different parties, as well as different alleged breaches and different alleged injuries. The essential facts are entirely changed.

Thus, there are two separate and independent reasons to affirm the judgment against plaintiffs on the Third Cause of Action: The named plaintiffs had no standing to sue, and the complaint does not allege a breach of the set-aside letter. Neither defect could be cured by amendment.

III. PLAINTIFFS' MOTION FOR ATTORNEYS' FEES WAS PROPERLY DENIED.

Plaintiffs contend that the trial court had the "wrong" beliefs and came to the "wrong" conclusions in denying their request for attorneys' fees. (X-AOB/RB 72.) The contention is meritless.

The denial of a motion for attorneys' fees is reviewed for abuse of discretion. (*Corbett v. Hayward Dodge, Inc.* (2004) 119 Cal.App.4th 915, 927.) Although plaintiffs give partial lip-service to the correct standard,[32] they fail to apply it. As noted, to be entitled to relief on appeal from an alleged abuse of discretion, the appellant must demonstrate the discretionary decision "exceeded the bounds of reason" or was "arbitrary . . ., capricious . . . or whimsical." (*Estate of Gilkison, supra*, 65 Cal.App.4th at pp. 1448-1449.)

Plaintiffs don't come close to meeting the governing standard.

A. The Pertinent Facts.

Plaintiffs provide an incomplete chronology of what occurred below regarding their efforts to obtain a fee award. (X-AOB/RB 68-71.) The real story is that the trial court gave them three chances to prove an entitlement to attorneys' fees and concluded each time that plaintiffs failed to do so. Here is what happened:

1. Plaintiffs' first chance.

Gosnell Builders (GB), Pointe and PSDMU sought an attorneys' fee award "of the full $2,849,802.70 incurred by all of them in this case" under three theories they claimed applied: proof-of-costs sanctions, common fund/substantial benefit, and contractual fees under the Development Management Agreement (DMA). (1 RA 94; 2 AA 500.) They provided no breakdown or allocation of fees according to claims on which fees were

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[32] Their heading states, "The Trial Court Erred as Matter of Law, or at Least Abused Its Discretion, in Denying The Pointe's Motion for Fees." (X-AOB/RB 67.) Plaintiffs provide no authority or argument for the "Matter of Law" heading, and thus have waived the point. (Cal. Rules of Court, rule 14(a)(1)(B).)

recoverable and those on which they were not, or according to legal theory, or according to claims they won and claims they lost. They argued that no apportionment was necessary because everything was "intertwined." (1 RA 196.)

The trial court was at a loss, informing plaintiffs that a "breakdown" and more "specificity" were needed. (93 RT 14776:18-20, 14777:1-3, 14-15 ["I'm not going through approximately 1000 pages of billing and doing it on my own"].) The court rejected plaintiffs' argument that all the issues were intertwined, expressly finding, for example, that the contract cause of action for breach of the DMA was not intertwined with the causes of action for breach of fiduciary duty and rescission, and that no fees could be awarded for the latter after the date of rescission.[33]

Plaintiffs' counsel requested "an opportunity to provide the requested information to the court." (93 RT 14795:24-27.) The court warned, "If I give this second bite," there "won't be a third one." (*Id.* at p. 14791:12-14.) Counsel agreed and asked for one week. The trial court gave him *two* weeks, to ensure sufficient time "to build this correctly." (*Id.* at pp. 14796:14-15, 14797:10-11, 14798:24-25.)

2. Plaintiffs' second chance.

Plaintiffs filed supplemental briefing and a declaration of prior counsel, reasserting that their claims were really intertwined. They purported to allocate, "to the extent possible, virtually all of the attorney

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[33] The Second Cause of Action, for breach of the DMA, was brought by GB against WW1 for improperly terminating GB as the Development Manager. (1 AA 81.) The Seventh Cause of Action, for breach of fiduciary duty, was a shareholder derivative claim brought by Pointe as the nominal plaintiff on behalf of Astra against Ms. Weingarten and AHG. (*Id.* at p. 85.) The Eighth and Ninth Causes of Action were derivative claims for rescission. (*Id.* at pp. 86-87.)

fees incurred in this case to the intertwined issues" of breach of fiduciary duty and breach of the DMA, contending that these issues "predominated" the litigation. (1 RA 243.) Plaintiffs did not attempt to allocate fees between recoverable and non-recoverable claims, and among legal theories of recovery, as the trial court had requested; they simply ignored the trial court's finding that the issues were not intertwined.

The court conducted a second full hearing, during which defendants pointed out the many infirmities in plaintiffs' request for a lump-sum fee award, e.g., that fees were requested for claims on which plaintiffs lost at trial and for claims that did not support a right to attorneys' fees. (94 RT 14840:16-14841:2, 14843:1-2.)

The court found that although there were theories on which some fees might have been awarded, plaintiffs had failed to meet the "foundational requirements." (2 AA 501:20.) Specifically,

> [T]he Court has not been given an allocation by plaintiff. Such an allocation is required as the Court finds that not all the issues are so intertwined as to prevent a reasonable apportionment.

(*Id.* at p. 502:14-16, 26 ["No attempt at a breakdown of fees has been given"].) In conclusion, the court found:

> [I]n this mixed contract/tort case, the claims are not so interrelated to justify the failure to attempt a reasonable apportionment. Having failed to satisfy their burden of proving both the existence and the amount of fees to be apportioned to the recoverable claims, the Court denies fees . . . .

(*Id.* at p. 503:3-6.)

3. Plaintiffs' third chance.

Plaintiffs moved for reconsideration, which the court *granted* over defense objections that the motion was not based on new or different law or facts. (95 RT 15016:21-23; 2 RA 369; Code Civ. Proc., § 1008.) Again, plaintiffs submitted briefs and additional evidence. Again, the court held a full hearing, but it found the new submissions no more helpful than the old ones. (95 RT 15002:2-10 [counsel's declaration is based on "estimation" and "opinion" and speculation with "nothing . . . to back it up"].) The court observed that the case involved both equitable and contractual theories, "some you won on, some you didn't win on." (*Id.* at lines 24-26.) The court reiterated that what was needed was an "allocation," not "a guess and by golly" (*id.* at p. 15003:12-13), and concluded it still did not have the "allocation necessary in order to award fees" (*id.* at p. 15016:24-26).

Following reconsideration, the court affirmed its denial of fees. The court explained that because the case involved "multiple parties and multiple causes of actions," as well as multiple theories of fee recovery against "different parties and pockets," "the Court absolutely requires an allocation of attorney fees as opposed to a lump sum award of fees." (2 RA 422 & fn. 1.)

B. The Record Amply Supports The Trial Court's Exercise Of Discretion In Denying Attorneys' Fees.

The trial court bent over backwards to allow plaintiffs full opportunity to prove an entitlement to attorneys' fees. Its decision to deny fees was reasoned, laborious and painstaking. (95 RT 15016:7-9 ["I have to be intellectually honest when I look at what's presented to me, and I can't" "make favorites" or "take sides"].) It was as far from "arbitrary . . .,

capricious . . . or whimsical" or "exceeding the bounds of reason" as it could be. (*Estate of Gilkison, supra*, 65 Cal.App.4th at pp. 1448-1449.) There was no abuse of discretion. Plaintiffs simply failed to prove their case.

1. An allocation was necessary because plaintiffs' claims were far from inextricably intertwined.

Decisions as to whether an apportionment or allocation of attorneys' fees is necessary and what that apportionment should be are committed to the sound discretion of the trial court. (*Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1083; *Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 505; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.) This is so because the trial court is in the "best position to understand" the relationship between, and the importance of, the claims that were the subject of the litigation. (*Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 423; *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 997.)[34]

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[34] If a trial court determines the issues are "inextricably intertwined" it *may* award attorneys' fees without an allocation. (See, e.g., *Abdallah v. United Savings Bank, supra*, 43 Cal.App.4th at p. 1111.) However, if the issues are not "inextricably intertwined," it can be an abuse of discretion *not* to require an allocation, as this Court has held on at least three occasions. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686 [reversing fee award because there was no allocation between recoverable and nonrecoverable fees]; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1297 [reversing award imposing all fees on one defendant in multi-defendant case].) And as this Court held recently in the context of anti-SLAPP litigation, a party "should not be entitled to obtain *as a matter of right* his or her entire attorney fees incurred on successful and unsuccessful claims merely because the attorney work on those claims

(continued...)

Here, the trial court correctly determined an allocation was essential. Three different plaintiffs asserted many different claims in two different cases on different legal theories;[35] plaintiffs won some claims and lost others;[36] some of the asserted claims permitted an award of attorneys' fees while others did not;[37] and plaintiffs voluntarily dismissed some claims

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[34] (...continued)
was overlapping." (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 334 [reducing fee award because "defendants were only partially successful"].)

[35] "Residential" case (No. 726145): Claims included declaratory relief (plaintiff was GB); breach of contract [DMA] (plaintiff was GB); breach of contract [WW1 Operating Agreement/set-aside letter] (plaintiffs were Pointe and GB); breach of fiduciary duty (plaintiffs were Pointe on direct claim, Astra on derivative claim); rescission of Exchange Agreement (plaintiff was Pointe); rescission of sales to Atlas Homes and to Whitehall (plaintiff was Astra); accounting (plaintiff was Pointe). (1 AA 81-88.)

"Mixed-use" case (No. 753184): Claims were conversion and trespass (plaintiff was PSDMU on all claims). (1 AA 49.)

[36] Claims plaintiffs won: Breach of the DMA, breach of fiduciary duty (derivative), accounting, conversion, trespass; punitive damages.

Claims plaintiffs lost: Breach of contract (WW1 Operating Agreement/set-aside letter), breach of fiduciary duty (direct); measure of damages for breach of fiduciary duty. (1 AA 127; 2 AA 337, 504-508.)

Plaintiffs assert, and the trial court found, that the set-aside claims—which plaintiffs lost—involved "extensive" briefing and "lengthy discovery." (X-AOB/RB 61, fn. 15; 1 RA 21-24, 2 AA 336.)

[37] Fees permitted: Breach of the DMA (contractual theory); breach of fiduciary duty (common fund/substantial benefit theory).

Fees not permitted: Breach of the WW1 Operating Agreement/set-aside letter (neither agreement provided for attorneys' fees for breach of the agreement) (2 WA 362; 2 RA 517-518); conversion, trespass (*Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 550 [tort claims carry no award of attorneys' fees]).

before trial.[38] Requiring an allocation in these circumstances was both rational and legally correct.

Making no effort to demonstrate that the trial court's decision defied reason, plaintiffs simply reiterate the identical argument the trial court rejected, namely, that "no allocation was necessary in this case" because the court "surely knew" that the claims for which plaintiffs were entitled to recover fees "predominated the litigation." (X-AOB/RB 72, 73.) Not so.

In determining that this case "absolutely requires an allocation of attorney fees as opposed to a lump sum award of fees" because "not all the issues are so intertwined as to prevent a reasonable apportionment" (2 RA 422, fn. 1; 2 AA 502:14:16), the court exercised its discretion exactly in the manner this Court recently held it should. (*Mann v. Quality Old Time Service, Inc.*, *supra*, 139 Cal.App.4th at p. 347 ["allowing partially successful defendants to recover virtually all of their fees because the facts and legal theories are so 'intertwined' that they 'cannot' be segregated underestimates the ability of attorneys and experienced trial judges to evaluate the value of legal services associated with limited success"].)

The trial court correctly determined an allocation was necessary in this case. Plaintiffs have not shown the trial court abused its discretion in doing so.

2. The trial court properly found that plaintiffs failed to submit the necessary allocation.

Plaintiffs argue that even if an allocation was necessary, their presentation was sufficient. (X-AOB/RB 75.) They contend the trial court's denial of fees was an "abdication of responsibility" and a failure to

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[38] Dismissed claims: GB's claim for declaratory relief, Pointe's claim for rescission, Astra's claims for rescission. (1 AA 123.)

exercise discretion, because the court "could have—and *should have*—drawn its own conclusions." (*Id*. at pp. 77-78.) Plaintiffs are wrong.

The court *did* draw its own conclusions—just not the conclusions plaintiffs wished for; and it *did* exercise its discretion—just not the way plaintiffs wanted.

The party seeking fees bears the burden of documenting the hours spent; the trial court may require that party "to produce records sufficient to provide a proper basis for determining how much time was spent on particular claims." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020, internal quotation marks omitted.) That is exactly what the court did here. It gave plaintiffs three chances to provide an allocation before finally concluding they failed to do so.

In none of plaintiffs' three chances to provide an allocation did they submit clear, non-speculative, admissible evidence demonstrating what fees they incurred for each cause of action on which they were entitled to fees. This is not surprising, since plaintiffs eventually admitted their timekeepers did "not allocate time to specific causes of action at issue in the case." (2 RA 355:14-15.) That plaintiffs did not keep records sufficient to permit appropriate allocation is their fault, not the trial court's. (See, e.g., *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 813 [parties who anticipate seeking attorneys' fees in mixed contract/tort cases must "'keep careful time records'"].)

As the trial court found, plaintiffs submitted evidence replete with speculation,[39] authentication problems, hearsay, duplicate entries and block billing,[40] estimations, opinions, approximations and assumptions, with

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[39] 93 RT 14786:16; 2 AA 502:19.

[40] 93 RT 14787.

"nothing . . . to back it up."[41] (See *Olson v. Automobile Club of Southern California* (2006) 139 Cal.App.4th 552, 561 ["block billing (i.e., describing all tasks performed on a day and giving the total time spent that day) made it difficult or impossible" to determine how much time was spent on successful claims], citing *Bell v. Vista Unified School Dist., supra*, 82 Cal.App.4th at p. 689 [trial court has discretion to "simply cast . . . aside" block billings].) Plaintiffs even included hours spent on *different* litigation. (93 RT 14787:6-8, 14792:25-28.)

The trial court did not abuse its discretion in determining plaintiffs "failed to satisfy their burden of proving both the existence and amount of fees to be apportioned to the recoverable claims." (2 AA 503.)

C. Equity Does Not Demand An Award Of Attorneys' Fees Where The Trial Court Determined An Allocation "Absolutely" Was Required And Plaintiffs Failed To Provide One.

Nor does equity salvage plaintiffs' case, as they suggest. (X-AOB/RB 78.) An award of fees cannot be based on guesswork; it must be premised on factual proof consistent with a viable legal theory. (*Johnson v. Tago, Inc.* (1986) 188 Cal.App.3d 507, 517-518.) As shown, the law places the burden for demonstrating the existence and amount of attorneys' fees squarely on the party seeking them, and gives the trial court broad discretion to determine whether the moving party met its burden.

All the cases plaintiffs rely on (X-AOB/RB 78-79) merely confirm the trial court's broad discretion to award or deny attorneys' fees and

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[41] 95 RT 15002:2-10, 15017:1-11; 2 RA 360:4-14.

determine their amount.[42] Not one suggests there is anything inequitable about requiring a party who seeks attorneys' fees to prove their existence and amount to the trial court's satisfaction. That did not happen here. The order denying fees must be affirmed.

IV. THE TRIAL COURT CORRECTLY FOUND POINTE HAD NO CLAIM FOR DIRECT RELIEF.

A. Background.

Pointe brought two causes of action for breach of fiduciary duty against Ms. Weingarten and AHG; each stated "the same claim." (1 AA 127.) The only difference is that Pointe sued directly for relief for its own injuries on the Sixth Cause of Action, and sued derivatively for relief on behalf of Astra on the Seventh Cause of Action. (*Ibid.*) The trial court entered judgment against Pointe on the Sixth Cause of Action, finding:

> Based upon the evidence presented, Pointe has no separate direct claim, because damages, if any, to Pointe were subsumed in and were incidental to damage, if any, suffered by Astra. Benefits, including tax losses, inure to Astra and in turn, based upon the Articles of Amendment and Restatement

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[42] *Serrano v. Priest* (1977) 20 Cal.3d 25, 47, 49 (affirming award of attorneys' fees); *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 225 (affirming order denying attorneys' fees); *Montgomery v. Bio-Med Specialties, Inc.* (1986) 183 Cal.App.3d 1292, 1297-1298 (affirming award of fees in amount less than party sought, noting trial court's "wide latitude in determining the amount of an award of attorney's fees"); *Beverly Hills Properties v. Marcolino* (1990) 221 Cal.App.3d Supp. 7, 12 (affirming award of attorneys' fees); *Trope v. Katz* (1995) 11 Cal.4th 274, 277, 293 (affirming order denying attorneys' fees); *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1088 (affirming award of attorneys' fees); *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 752 (reversing "premature" order limiting amount of attorneys' fees and holding "the trial court must reconsider the question of attorney fees" after the case is over).

> of the Articles of Incorporation, (Exhibit 45)[,] are to be distributed to the shareholders as dividends.

(*Ibid.* & fn. 8 ["the facts at trial do not show" injury to Pointe separate from injury to corporation].)

The court's ruling rested on black-letter law, recently summarized by this Court: "An individual cause of action exists only if damages to the shareholders were not *incidental* to damages to the corporation." (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 313, citing *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107; *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124.) Here, any recovery by Astra for damages it suffered would necessarily inure to the benefit of Astra's shareholders.

Pointe does not challenge the law, but rather the trial court's *factual* finding that Pointe failed to demonstrate any injury separate from Astra's. Accordingly, Pointe's challenge fails.

B. The Trial Court's Unchallenged Finding That Pointe Failed To Prove It Suffered Damages Is Binding On Appeal.

Once again, Pointe misunderstands the standard of review. To challenge the trial court's *factual* determination that Pointe had no separate injury, it is Pointe's burden on appeal to argue and demonstrate there is no substantial evidence to support the trial court's ruling. Pointe does neither. Pointe simply concludes there was "more than sufficient evidence of individual loss" to find a separate injury, specifically "loss to The Pointe of any of the tax loss benefits it was to have received as part of the Basic Deal." (X-AOB/RB 80.) Once again, Pointe is looking through the wrong end of the telescope. (*Campbell v. Southern Pacific Co., supra,* 22 Cal.3d at p. 60 [when reviewing a trial court's factual findings, appellate court

looks only at evidence supporting the judgment and disregards the contrary showing]; *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

Even if Pointe had challenged the trial court's determination for lack of substantial evidence, its argument would fail. As the court found, and as Pointe conceded below, benefits in the form of tax losses supposedly suffered by Astra would inure directly to Astra and would flow to Astra's shareholders only if and when Astra declared them as dividends. (36 RT 4694:19-21 [plaintiffs' counsel: "[T]he tax benefits flow from Astra and then . . . are distributed to the shareholders as a dividend"]; 2 WA 315, 317 [Ex. 45, Astra's Articles of Amendment and Restatement of the Articles of Incorporation]; 32 RT 2788 [testimony establishing that Articles of Amendment is source of Pointe's right to tax benefits and conditions entitling Pointe to a dividend].) Pointe cites no contrary evidence, just its counsel's *argument.* (X-AOB/RB 80; 36 RT 4703-4705.) It omits all mention of the Articles of Amendment and does not include it in its Appendix, even though the trial court expressly relied on it. (1 AA 127.)[43]

Equally off-base is Pointe's argument that the order granting Pointe a new trial on the tax-benefits issue amounts to an implied "acknowledgement" of its "individual loss." (X-AOB/RB 81.) To the contrary, the new trial was expressly limited to the *derivative* claim Pointe asserted on Astra's behalf; it did not pertain to Pointe's direct claim. (3 AA 786 ["The new trial is limited to the Seventh Cause of Action"].)

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[43] The two cases Pointe cites do nothing to advance its cause. (X-AOB/RB 80, 81.) *Smith v. Tele-Communication, Inc.* (1982) 134 Cal.App.3d 338, 341, simply reversed a demurrer because the plaintiff had *pleaded* a right to individual damages, and *Low v. Wheeler* (1962) 207 Cal.App.2d 477, 482, 487, *affirmed a jury finding* that the plaintiff suffered individual wrong. Here, the issue was not the adequacy of the pleading but of the evidence, and the trier of fact found the plaintiff suffered *no* individual wrong.

Moreover, the trial court acknowledged that the question whether there was any breach of fiduciary duty in connection with tax benefits was never adjudicated. (*Ibid.* [ordering new trial on *liability* as well as damages].) Pointe does *not* claim any errors with respect to these rulings in its own appeal.[44]

Pointe's final contention—that its direct claim is "appropriate" based on the fiduciary duty owed by a parent corporation to minority shareholders and subsidiaries (X-AOB/RB 81)—is equally meritless. Pointe failed to prove it suffered damages even if there were a duty.

The judgment on the Sixth Cause of Action must be affirmed.

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[44] We show that the court erred in granting Pointe new trial, even a limited one. (See below, pp. 81-89.)

APPELLANTS' REPLY BRIEF

I. THE COMPENSATORY DAMAGES AWARD TO ASTRA MUST BE REVERSED.

Defendants demonstrated that the approximately $1.6 million compensatory damages awarded to Astra on the derivative Seventh Cause of Action for breach of fiduciary duty cannot stand for fundamental reasons.[45] Those reasons include: (1) Astra did not prove it suffered any compensable injury; (2) neither Astra nor anyone else sued derivatively on behalf of the only party that could have suffered injury (WW1, an LLC of which Astra is a member); and (3) Astra's investment interest in WW1 did not entitle Astra to recover damages on WW1's behalf. (AOB 15-23.) Pointe has no tenable response.

A. Contrary To Pointe's Assertion, The Compensatory Damages Issue Is Not Moot.

Pointe contends that its benefit-of-the-bargain argument, if successful, would "moot" defendants' challenge to the compensatory damages because those damages are based on an out-of-pocket measure. (X-AOB/RB 83.) But as demonstrated above (pp. 5-20), Pointe's benefit-of-the-bargain argument is meritless. Therefore, it "moots" nothing.

The controlling fact—ignored by Pointe's "mootness" argument—is that Astra may not recover *any* damages, under *any* measure, because it was not injured.

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[45] The actual award (without post-judgment interest) is the sum of $635,869 (for taking real-estate commissions) and $955,182 (for charging defense costs to the project). (2 AA 339.)

B. Astra Suffered No Compensable Injury.

In our opening brief, we demonstrated that the $1.6 million awarded to Astra did not compensate for any injury suffered by Astra. (AOB 15-16, citing, e.g., *Turner v. Markham* (1909) 155 Cal. 562, 570 ["if the evidence shall establish that the corporation itself has suffered no wrong, . . . no recovery can be had . . . ."].)

Rather than confront the argument made, Pointe sidesteps it. Pointe argues that the $1.6 million that Ms. Weingarten "wrongfully diverted from WW1 to pay her own attorneys and accountants clearly qualified as 'Net Cash Flow' under the WW1 Operating Agreement," and that such amount "was supposed to have been distributed by WW1 100% to Astra." (X-AOB/RB 84.) The argument is riddled with flaws.

First, the argument directly contravenes the trial court's factual findings, based on undisputed evidence, that there was no proof of "Net Cash Flow."[46] Pointe ignores these findings and does not attack them for lack of substantial evidence. The findings, therefore, are binding on appeal. (*Foreman v. Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

Second, even if (contrary to the findings) there had been proof of "Net Cash Flow," that would not necessarily entitle Astra to a distribution. Distributions are governed by the Operating Agreement, which provides that all actions, expenditures and decisions concerning "Distributions of Net Cash Flow" must be approved by WW1's Management Committee.

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[46] "Net Cash Flow" is defined in the WW1 Operating Agreement as the excess of income over expenses, i.e., profits. (2 WA 395.) The trial court expressly found there was no evidence that "distributable profits, as defined in [the WW1 Operating Agreement], have been realized." (1 AA 137 ["no net profits have been shown to the Court which would trigger the distribution provisions" of the WW1 Operating Agreement"]; 2 AA 481 [there is no finding that any "net cash flow" has been realized and court refuses to assume there will be "net cash flow" in the future].)

(2 WA 372, ¶ 5.1(c)(iv).) Thus, even if realized, distributions of Net Cash Flow are not automatic under the Operating Agreement. This, of course, is consistent with the governing law: "Shareholders do not own and have no right to receive corporate profits, except in limited circumstances . . . . Shareholders own stock in the corporation, from which they derive income only upon liquidation of the corporation or the declaration of a dividend by the corporate directors." (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 229; *Nelson v. Anderson*, *supra*, 72 Cal.App.4th at p. 126.)[47]

Third, the trial court *rejected* Pointe's cause of action against WW1 for alleged breach of the WW1 Operating Agreement. (1 AA 82; 2 AA 336-337.) Since the WW1 Operating Agreement is the only source of Astra's right to a distribution of "Net Cash Flow," the finding that there was no breach means no distributions were "supposed" to be made by WW1.

There is simply no proof that Astra suffered damages totaling $1.6 million (or any other amount). The law and the record combine to preclude any award of compensatory damages to Astra.

C. Astra, A WW1 Member, Is Not Entitled To Recover Damages For Any Injuries Suffered By WW1.

Pointe asserts that even if Astra suffered no injury or damages, Astra should still recover the $1.6 million compensatory damages award, apparently on the theory that Astra is a shareholder (i.e., member) of WW1, the injured party. (X-AOB/RB 82-88.) Pointe is wrong. As we demonstrated, the governing rule is that if a corporation suffers injury, only

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[47] "Members" (such as Astra) of an LLC (such as WW1) are the equivalent of shareholders of a corporation. (See AOB 5-6, fn. 2.)

the corporation can recover damages, no matter who brings suit on its behalf. (See AOB 17-22.) Here, the injured entity (WW1) didn't sue, directly or derivatively, and the corporation on whose behalf suit was brought (Astra) wasn't injured. (AOB 15-16 and see above, pp. 45-46.) Pointe's argument that Astra should recover anyway contravenes California law, equity and common sense.

Pointe contends that California recognizes an exception to the rule of corporate recovery in cases where such recovery would result in a benefit to a wrongdoer. (X-AOB/RB 85-88.) There is no merit to this contention. The only on-point California decisions directly refute it. (*Baker v. Pratt* (1986) 176 Cal.App.3d 370, 377-379, 381, 385 [rule of corporate recovery followed in derivative action despite fact that such a recovery would benefit the wrongdoing shareholder who breached fiduciary duties]; *Rankin v. Frebank Co.* (1975) 47 Cal.App.3d 75, 82-83, 95-97 [wrongdoing shareholder, Bankey, allowed to retain his ownership interest in corporate recovery of excessive salary he paid to himself and dividends he wrongfully diverted]; see AOB 20-22, discussing *Baker* and *Rankin*].)

Pointe cites three treatises to support its contention concerning the exception to the rule of corporate recovery. (X-AOB/RB 85-86.) None does. Two of the treatises (19 Am.Jur.2d Corporations, § 2140, pp. 264-265 and 13 Fletcher, *Cyclopedia of the Law Of Private Corporations*, § 6028), though footnoted with citations, contain *no* citations to California law—a fact Pointe obscures by stating they contain "citations to cases from all over the country." (X-AOB/RB 85.) Nor is Pointe's argument advanced by the third treatise (Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2006) ¶ 6:606-6:610, pp. 6-133 to 6-134) ["Friedman"]).

It is true that Friedman refers to California law, as well as cases from other jurisdictions. But Friedman is hardly reliable authority to support an exception to the rule of corporate recovery. For one thing, Friedman miscites the law in its very first example. (*Id.* at pp. 6-133 to 6-134, citing *Halprin v. Babbitt* (1st Cir. 1962) 303 F.2d 138, 141 [applying Massachusetts law].) *Halprin* has *nothing* to do with a shareholder's right to share in a corporate recovery. The "single issue presented" is whether the plaintiff-shareholder pleaded an adequate demand on the corporation as a prerequisite for bringing a derivative suit. (*Halprin, supra,* 303 F.2d at p. 140.)

More significantly, neither the single California case Friedman cites (*Rankin*) nor a case cited in *Rankin* (*Perlman v. Feldman* (2d Cir. 1955) 219 F.2d 173 [applying Indiana law]) would allow a party, such as Astra, to retain a corporate recovery suffered by a different corporation. Friedman cites these cases for the proposition that in "unusual circumstances," a court may grant individual recovery to some shareholders if a corporate recovery "would result in a windfall benefit to some undeserving shareholders." (Friedman at p. 6-133.) However, neither case supports individual recovery here. In each, courts permitted direct payment to certain shareholders solely to prevent another shareholder, who had previously received a payment or gained a certain benefit, from receiving a second, duplicate payment or benefit—a "windfall"—by reason of the corporation's recovery. In neither *Rankin* nor *Perlman* did the court carve out an exception to corporate recovery for the purpose of forfeiting a

shareholder's legitimate ownership interest in the corporation or the corporate recovery.[48]

Friedman also cites a Maryland case, *Matthews v. Headley Chocolate Co.* (1917) 130 Md. 523, 100 A. 645. (Friedman, p. 6-134.)

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[48] As fully explained in our opening brief, *Rankin v. Frebank Co., supra*, 47 Cal.App.3d 75, prevented an innocent shareholder (McCoy) from sharing in a corporate recovery because McCoy would then receive the same benefit twice. However, the court permitted a wrongdoing shareholder (Bankey) to share in a corporate recovery. (See AOB 21-22 & fn. 18.) Bankey was not required to forfeit any of his interest in the corporation or the corporate recovery.

Moreover, *Rankin* does not really state an exception to the corporate recovery rule because the corporation was in dissolution. In that circumstance, direct payment to shareholders is sometimes permitted as it "would facilitate the distribution of assets." (13 Fletcher, *Cyclopedia of the Law of Private Corporations, supra,* § 6028.)

In *Perlman v. Feldmann, supra,* 219 F.2d 173, 178, shareholders sold a controlling corporate interest at a premium price to a new shareholder, Wilport. The court held that the sellers should share the bonus paid by Wilport with the minority shareholders, because permitting a corporate recovery would confer a windfall on Wilport.

To the extent the *Perlman* majority opinion (over a strong dissent) supports an exception to the corporate recovery rule, its rationale has been soundly rejected. (See, e.g., *Bokat v. Getty Oil Co.* (Del. 1970) 262 A.2d 246, 250 [if *Perlman* "holds that stockholders in a derivative action are entitled to recover in their own right, [it] is not persuasive, for such is not the law of Delaware"].) Moreover, the same court that decided *Perlman* has declared it was not really a derivative action, but rather a direct shareholder action, thus making clear that *Perlman* created no exception to the rule of corporate recovery. (*Norte & Co. v. R.L. Huffines* (2d Cir. 1969) 416 F.2d 1189, 1190-1191 [in *Perlman*, "the plaintiffs were individually injured"; "there was no injury to the corporation but only to the few minority stockholders and it was appropriate that they should recover individually"].)

Matthews does not cite, and has never been cited by, any California decision. Moreover, other courts have refused to follow it.[49]

Finally, Friedman cautions that individual shareholder recovery, at the expense of corporate recovery, might be inappropriate if it prejudiced the corporation's creditors, citing a case from New York's highest court. (Friedman, p. 6-134, citing *Glenn v. Hoteltron Systems, Inc.* (1989) 74 N.Y.2d 386, 392 [547 N.E.2d 71, 74].) We cited *Glenn* in our opening brief. (AOB 22, fn. 19). Pointe fails to respond.

If Friedman teaches anything, it is that recovery by Astra for WW1's loss would be impermissible. Courts should not bestow windfalls on persons who have suffered no loss. Giving WW1's damages to Astra would afford Astra a huge and undeserved windfall. Nothing in Friedman suggests that wrongdoing shareholders, in addition to being required to return the funds taken, should also be forced to forfeit their shareholder interest in the corporation or in the restored funds.

There is simply no legal justification or authority that would permit Astra to pocket a recovery that WW1 itself never sued to obtain and never recovered.

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[49] For example, the Supreme Court of Delaware criticized *Matthews* for relying on an Illinois case that the Illinois Supreme Court subsequently refused to follow. (*Keenan v. Eshleman* (1938) 23 Del. Ch. 234, 254 [holding that in a derivative action, "brought for the benefit of a going corporation, equitable principles demand . . . the whole recoverable amount be decreed to be paid to the corporation"].) The Illinois Supreme Court case, *Voorhees v. Mason* (1910) 245 Ill. 256, 265 [91 N.E. 1056, 1059], applied the "rule" that when a corporate officer wrongfully withholds funds, he must repay "the corporation and not the stockholder" who filed suit. (See also *Zimmerman v. Bell* (4th Cir. 1986) 800 F.2d 386, 391 [distinguishing *Matthews* and applying "the usual rule that a derivative recovery goes to the corporation"].)

D. The Determination That Weingarten Is WW1's Alter Ego Does Not Justify Astra's Recovery.

Pointe next argues that the California authorities (*Baker v. Pratt, supra*, 176 Cal.App.3d 370, and *Rankin v. Frebank Co., supra*, 47 Cal.App.3d 75) and the rule mandating corporate recovery should be disregarded because Ms. Weingarten was found to be WW1's alter ego. (X-AOB/RB 87-88.) Pointe reasons that the trial court "understood" that if the award were made to WW1 or a related entity, Ms. Weingarten "would never declare a distribution to Astra" under the WW1 Operating Agreement, "so that The Pointe would never receive a penny." (*Ibid.*) The argument is specious.

First, the alter ego finding is irrelevant because WW1 never sued defendants or sought any recovery. (See AOB 17.)

Second, the record is directly contrary. The trial court found there was no proof that any distribution was owed by WW1. (See above, pp. 45-46.)

Third, the argument is purely speculative. Since there were no distributable profits, the question of how WW1 or Ms. Weingarten would act if there were "Net Cash Flow" was neither presented nor decided. What might (or might not) happen in the future is of no moment here.

Fourth, Pointe misunderstands the purpose of the alter ego doctrine—to disregard a corporation's separate identity under certain "narrowly defined circumstances." (AOB 38-39.) Pointe cites no case, and we have found none, suggesting that the separateness of a corporation or LLC (WW1) may be disregarded in order to bestow a windfall recovery on a shareholder or member (Astra) that didn't even prove it suffered injury.

E. Far From Supporting Pointe's Position, "Equity" Defeats It.

Pointe asserts that "equity" supports the $1.6 million compensatory award to Astra. (X-AOB/RB 88-89.)[50] Just the opposite is true.

There is no conceivable equitable reason why a person (Astra), who suffered no injury, should be entitled to a $1.6 million windfall. To allow a party to recover "an unjust windfall in the name of equity" is "a result abhorrent to modern jurisprudence." (*In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 659; *Richardson v. Roberts* (1962) 210 Cal.App.2d 603, 608 ["A court of equity does not sit to confer a windfall"].)

Nor can a court of equity fashion an award or remedy contrary to law. "[E]quity is bound by rules of law; it is not above the law; it cannot controvert the law." (*Floyd v. Davis* (1893) 98 Cal. 591, 601; *Johnson v. Tago, Inc.*, *supra*, 188 Cal.App.3d at p. 518 ["[E]quity follows the law. [Citations.] A court of equity cannot grant relief which the law denies"]; *Culbertson v. Cizek* (1964) 225 Cal.App.2d 451, 463 [courts of equity do not possess "jural omnipotence unfettered by rules of law"].)

The law is crystal clear: A corporation cannot recover damages in a shareholder derivative action unless it was injured, and a shareholder cannot recover damages for an injury suffered by the corporation. The evidence conclusively reveals that Astra was not injured. The judgment in Astra's favor must be reversed.

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[50] Pointe cites *Koshaba v. Koshaba* (1942) 56 Cal.App.2d 302, 312 (court of equity is "not dependent on precedents" when it comes to "'enforcing its decrees'"). All this means is that a court of equity may enforce its own orders by any appropriate means, even if there is no direct precedent. (*Id.* at pp. 310-312 [trial court properly issued writ of execution to compel defendant to pay fees of court-appointed accountant].)

II. THE PUNITIVE DAMAGES AWARD TO POINTE MUST BE REVERSED.

As defendants demonstrated, the judgment awarding $3 million in punitive damages directly to Pointe even though Pointe failed to prove any direct claim is unlawful. Unlike Astra, Pointe recovered no compensatory damages, and thus Pointe is even more removed than Astra from any entitlement to damages. (AOB 24-37.)

Pointe has no tenable response. It dodges—either in whole or in critical part—every one of defendants' arguments and authorities demonstrating the invalidity of the punitive damages award. For example: (A) Pointe completely ignores that it was merely a nominal plaintiff on the derivative Seventh Cause of Action and therefore is not entitled to recover *any* damages in its own right; (B) Pointe ignores controlling California authorities holding a person cannot recover *punitive* damages without having suffered actual injury caused by the defendant's tortious act; (C) Pointe ignores the trial court's express findings that Pointe suffered no injury on the Seventh Cause of Action; and (D) Pointe ignores most of the guideposts and factors the United States Supreme Court requires be considered in assessing the constitutionality of punitive damages awards.

Pointe fails to mount any serious defense of its punitive damages award. The award must be reversed.

A. Pointe Was Merely A Nominal Plaintiff And Cannot Recover Individual Damages, As A Matter Of Law.

A person (e.g., a shareholder) who sues derivatively on behalf of another (e.g., a corporation) is merely a *nominal* party who can never recover damages belonging to the aggrieved party. Defendants cited *eight* California decisions establishing this bedrock principle, including five

Supreme Court cases and this Court's recent decision in *Schuster v. Gardner, supra*, 127 Cal.App.4th 305. (See AOB 18-20, 26, 28.) Pointe does not respond to even one of them.

Pointe does not and cannot contend it is anything but a nominal plaintiff on the Seventh Cause of Action. That is reason alone to reverse the award to Pointe.

B. Actual Damages Are An Essential Predicate For Punitive Damages.

Citing and quoting from seven California decisions, as well as the controlling punitive damages statute, defendants established that a plaintiff such as Pointe, that neither proved nor recovered any actual damages, cannot recover punitive damages as a matter of law. (AOB 27-28.) As the Supreme Court has put it, punitive damages may be awarded "so long as 'actual, substantial damages' have been awarded" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004), and "actual 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). (See also 6 Witkin, Summary of Cal. Law, Torts (10th ed. 2005) § 1607, p. 1111 ["it is settled in California that punitive damages cannot be awarded unless *actual* damages were suffered, the theory being that they are in addition to compensatory damages"].)

The law defines "actual damages" as "compensatory damages" or their "equivalent," such as nominal damages, presumed damages, restitution or equitable relief. (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1676-1677 & fn. 8.) Whatever their form, actual damages must rest on proof of actual injury. (*Kizer v. County of San Mateo*, *supra*, 53 Cal.3d

at p. 147 ["Even nominal damages, which can be used to support an award of punitive damages, require actual injury"].)

Pointe disagrees, but advances no coherent explanation. Without referring to or attempting to distinguish even one of defendants' authorities, Pointe claims this "proposition" is "not exactly accurate," and cites four decisions of its own. (X-AOB/RB 92-93.) However, Pointe never explains why defendants' cited cases do not correctly state the law; indeed, Pointe's own authorities are completely consistent with that law. In each case, the plaintiff was found to have suffered some actual injury as a result of the defendant's tortious conduct, and it obtained some relief, as a predicate to recovering punitive damages for the same conduct.[51]

A person may not recover punitive damages without having recovered an award of compensatory damages or its equivalent. The $3 million punitive damages award to Pointe is not supported by an underlying compensatory award in Pointe's favor, nor could it be—since Pointe was merely a nominal plaintiff. For this reason, too, the punitive damages award must be reversed.

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[51] *Ward v. Taggart* (1959) 51 Cal.2d 736, 741-742 (plaintiffs recovered compensatory damages of $72,049.20 as restitution); *Topanga Corp. v. Gentile* (1967) 249 Cal.App.2d 681, 691 (plaintiff corporation suffered actual damages from defendants' fraudulent stock transactions and was granted equitable relief including reformation and cancellation of shares); *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 793, 802-803 (plaintiffs recovered compensatory damages); *Werschkull v. United California Bank* (1978) 85 Cal.App.3d 981, 991-992, 1002 (plaintiffs suffered actual damages in unspecified amount and were awarded $1 in nominal damages).

Pointe also cites a decision that has nothing to do with punitive damages. (X-AOB/RB 93, citing *Menefee v. Oxnam* (1919) 42 Cal.App. 81, 88 [complaint alleged actual injury to plaintiffs].)

C. Pointe Concedes It Suffered No Actual Damages On The Seventh Cause Of Action, The Only Count For Which Punitive Damages Were Awarded.

Pointe argues that the trial court found it *did* suffer direct, actual damages—by incurring attorneys' fees to pursue the Eight and Ninth Causes of Action, for rescission, although no fees were ever awarded. (X-AOB/RB 90-92.) This argument is without merit, for a plethora of reasons.

1. Pointe failed to prove the existence or amount of its attorneys' fees.

While Pointe and the other plaintiffs sought attorneys' fees for all their claims, including the Eighth and Ninth Causes of Action for rescission, they didn't recover any. The trial court found plaintiffs "failed to satisfy their burden of proving both the existence and the amount of fees to be apportioned to the recoverable claims," including the rescission claims. (2 AA 503.)[52] In other words, the record contains no substantial evidence to support any finding that Pointe "incurred" attorneys' fees in pursuing the rescission causes of action. (See X-AOB/RB 90-91.)

Pointe's failure to prove that it incurred attorneys' fees dooms its argument.

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[52] Although plaintiffs challenge this ruling on appeal (X-AOB/RB 67-79), defendants demonstrate it was entirely correct. (See above, pp. 30-40.)

2. The actual damages required to justify punitive damages must be awarded under the same cause of action and for the same wrongful conduct that gave rise to the punitive damages.

Pointe recovered punitive damages under the *Seventh* Cause of Action, for breach of fiduciary duty against Ms. Weingarten. The attorneys' fees Pointe claims it incurred were for the *Eighth* and *Ninth* Causes of Action, for rescission of certain actions taken by WW1. (1 AA 86-87.) Pointe dismissed the rescission claims before trial, after the actions were undone. (1 AA 123, 126, 138, 139.)[53]

The dismissed rescission claims cannot furnish support for punitive damages awarded under a *different* cause of action. The actual damages required to justify a punitive damages award must be recovered under the *same cause of action* as the one that established the liability for the punitive award. (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1056, fn. 35 [the only compensatory damages that can support punitive damages are those awarded on the "cause[s] of action providing a basis for punitive damages in this case"]; *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1084 [same].) Pointe cannot recover punitive damages under the *Seventh* Cause of Action without proof that it suffered actual damages under the *Seventh* Cause of Action. Pointe does not and cannot even attempt to make the required showing.

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[53] Pointe fails to mention the trial court's express finding that the act sought to be rescinded in the Ninth Cause of Action (transfer to property to Whitehall) was *not* a breach of fiduciary duty. (1 AA 138:9-12.) If an action is not even a breach of fiduciary duty, how can attorneys' fees supposedly incurred to rescind that action support punitive damages? Pointe doesn't say.

Similarly flawed and contrary to law is Pointe's implied argument that *conduct* different from that giving rise to the punitive damages award can underlie such an award. To the contrary, punitive damages "must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case.*" (*Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 68; BAJI 14.71 [to award punitive damages, jury must consider "the conduct on which you base your finding of liability"].)

Here, the wrongful conduct for which punitive damages were awarded under the Seventh Cause of Action (taking unearned commissions and paying legal and accounting fees from the project, see 2 AA 339) was entirely *different* from the wrongful conduct alleged in the Eighth and Ninth Causes of Action (transferring property for inadequate consideration, see 1 AA 86-87).

3. Pointe recovered no compensatory damages or its equivalent.

Even if Pointe had been awarded attorneys' fees on the Seventh Cause of Action, those fees could not support an award of punitive damages because Pointe neither suffered nor was awarded actual damages. The trial court itself acknowledged that the punitive award to Pointe was not based on any actual injury to Pointe but rather on a desire not to confer a "windfall" on Ms. Weingarten. (2 AA 481:5-6.)

As explained, the "actual damages" that must accompany an award of punitive damages means compensatory damages or some equivalent form of compensatory relief; Pointe recovered neither. We know of no authority—Pointe cites none—holding or suggesting that attorneys' fees constitute a form of compensatory damages in our context. As a general rule, attorneys' fees are considered "costs," not damages (e.g., Civ. Code,

§ 1717), and the few exceptions to the rule are inapplicable here (see *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 750-751).

4. The rescission claims were dismissed, not litigated, and therefore did not (and could not) result in "actual damages."

The purpose of actual or compensatory damages is to compensate an injured party for detriment suffered. Unless and until a claim is tried and the trier of fact determines that damages are to be awarded, there are no "damages." (See Civ. Code, § 3281.) Here, the rescission claims were never tried and, thus, damages were not (and could never have been) awarded.

We have found no authority holding that the actual damages required to support punitive damages may be based on claims—like the Eighth and Ninth Causes of Action for rescission—that were dismissed before trial and never litigated. In an analogous case, the Supreme Court reversed a punitive damages award because no compensatory damages were imposed. (*Mother Cobb's Chicken T., Inc. v. Fox* (1937) 10 Cal.2d 203.) The court rejected the argument that the "actual damages" requirement was satisfied because the plaintiff succeeded in getting an injunction; the defendants had *stipulated* to the injunction before trial. (*Id.* at pp. 204, 206.)

Pointe states it was "obviously" injured and damaged by Ms. Weingarten's conduct. (X-AOB/RB 94.) The only thing obvious—from the undisputed evidence and black letter law—is that Pointe suffered no actual injury or damages that would entitle it to recover punitive damages.

D. The Punitive Damages Award Is Unconstitutional.

In our opening brief, we demonstrated that the $3 million punitive damages award to Pointe is unconstitutional for multiple dispositive reasons. (AOB 29-37.) Pointe disregards most of our discussion and authorities, making a cursory argument that is short on substance and long on rhetoric. (X-AOB/RB 94-95.)

1. Only conduct that harmed the plaintiff can constitutionally support a punitive damages award to that plaintiff.

Our opening brief demonstrated that only the plaintiff who suffered actual injury as a result of reprehensible conduct can constitutionally collect punitive damages. (AOB 30.) Pointe ignores this independent reason to reverse the punitive award and the authorities that support it. The point is unassailable. As this Court recently cautioned: "[A] defendant should be punished for the conduct that *harmed the plaintiff*." (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 221, emphasis added, citing *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423 [123 S.Ct. 1513, 1523, 155 L.Ed.2d 585, 604].) Here, Pointe was not the real plaintiff. End of story.

Pointe contends it was harmed because there was a "*potential* loss to The Pointe—e.g., the $37 million profits Weingarten attempted to divert to herself." (X-AOB/RB 95.) This is nonsense.

The record (which, understandably, Pointe does not cite) completely disproves the statement. As demonstrated above (pp. 45-46), the controlling fact that Pointe opts to ignore is that the trial court *rejected* the claim for lost-profits damages, expressly finding that such damages were

never proven. Not only was there no "potential" loss, as Pointe claims, there was no loss at all.[54]

The only harm the trial court found under the derivative Seventh Cause of Action (diversion of $1.6 million in commissions and fees away from WW1) indisputably was *not* harm to Pointe, nor even to Astra. Pointe could not have recovered for such harm. Thus, punitive damages in Pointe's favor cannot legally be based on such harm.

Under fundamental constitutional principles, a plaintiff cannot recover punitive damages for conduct that harmed only someone else. Pointe has no meaningful response.

2. Pointe ignores two of the three guideposts that govern the constitutionality of punitive damages awards.

Pointe fails to respond to defendants' arguments that the $3 million punitive damages award cannot pass constitutional muster under either the "ratio" guidepost or the "comparable civil penalty" guidepost. Consideration of all three guideposts is not optional. The United States Supreme Court has "mandated that appellate courts . . . engage in 'exacting' de novo review of punitive damages awards and make 'an independent assessment'" of each of the three guideposts. (See *Johnson v. Ford Motor Co.* (2005) 135 Cal.App.4th 137, 144.)

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[54] Moreover, the cases Pointe cites to support its "potential loss" argument (X-AOB/RB 95) hold only that potential harm can sometimes be considered to *increase* a punitive damages award or justify a high ratio. The law is not and cannot be that potential harm alone, without any actual harm to the plaintiff, establishes the right to *receive* a punitive damages award in the first instance.

The punitive award here flunks the "ratio" guidepost. Under that test, "the starting point is necessarily the compensatory damages award" (*id.* at p. 149) or "the actual harm inflicted *on the plaintiff*" (*Gober v. Ralphs Grocery Co., supra,* 137 Cal.App.4th at p. 222, emphasis added). Here, Pointe was not the "plaintiff"; and both the compensatory damages awarded to Pointe and its actual harm are *zero.* The ratio between $3 million and zero is incalculable and cannot justify any award of punitive damages. (See AOB 34-35.)

The punitive award also fails to satisfy the "comparable civil penalties" test. Pointe does not and cannot offer any response to the fact that under the most comparable civil statute, Business and Professions Code section 10175.2, the maximum civil penalty is $10,000. (AOB 36.) A punitive damages award *300* times that amount is constitutionally excessive as a matter of law.

3. Point fails to meaningfully address the "reprehensibility" requirement.

The reprehensibility of the defendant's conduct is the "'most important'" prong of the three-pronged constitutional test. (*State Farm Mut. Auto. Ins. Co. v. Campbell, supra*, 538 U.S. at p. 419 [123 S.Ct. at p. 1521].) Pointe evades it.

It is not enough to conclude, as Pointe does repeatedly, that Ms. Weingarten's conduct was "reprehensible." (X-AOB/RB 94-95.) All conduct that merits punitive damages is reprehensible. The controlling constitutional question is, what is the "degree of reprehensibility" of *this* conduct as compared to all reprehensible conduct that may justify punitive damages? (AOB 32, 34; *Gober v. Ralphs Grocery Co., supra,* 137 Cal.App.4th at p. 219.) And the answer lies in an exacting analysis of

the five reprehensibility factors. (137 Cal.App.4th at pp. 219-222.)[55] This Pointe fails to do.

By its silence, Pointe concedes (as it must) that the first two factors—physical rather than economic harm and disregard of health or safety—are missing here. And while Pointe asserts that "The Pointe *was* vulnerable" (X-AOB/RB 95), the assertion is unaccompanied by any citation to the record, and therefore is waived. (Cal. Rules of Court, rule 14(a)(1)(B) & (C); *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 [court will disregard factual assertions in appellate briefs not supported by proper citations to record].) In any event, the record proves the opposite. The trial court found that although Pointe had previously been in "serious financial difficulty and had filed for bankruptcy protection," when it gained Ms. Weingarten and AHG as equity partners, "Pointe benefitted" financially in numerous significant ways. (1 AA 136.)

Pointe also fails to respond to the fourth and fifth factors (repeated vs. isolated conduct and intentional malice vs. accident). The record is undisputed that the punitive damages award was based on only two instances of misconduct—improperly taking commissions and charging certain defense costs to the project (2 AA 339)—and that there is no evidence or finding that Ms. Weingarten *intended* to injure Pointe or

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[55] To determine the "degree of reprehensibility" of the conduct that produced the punitive award, "courts *must* consider whether: [1] 'the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; [5] and the harm was the result of intentional malice, trickery, or deceit, or mere accident.'" (*Gober v. Ralphs Grocery Co.*, *supra*, 137 Cal.App.4th at p. 219, emphasis added.)

anyone else in engaging in such conduct. (*Gober v. Ralphs Grocery Co., supra,* 137 Cal.App.4th at p. 222 [no evidence or finding that "Ralphs *intended* to cause injury to the plaintiffs"].)

The reprehensibility factors—and Pointe's failure to rebut (let alone address) them—weigh conclusively against upholding a $3 million (or any) punitive award to Pointe.

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Contrary to Pointe's assertion, it is not Ms. Weingarten that is "in denial" about the punitive damages award. (X-AOB/RB 94.) It is Pointe. Pointe never even begins to explain how a mere nominal party can ever be awarded any kind of damages (let alone punitive damages), or how a non-injured party can ever recover punitive damages. The $3 million punitive-damages windfall bestowed on Pointe must be reversed.

III. THE ALTER EGO RULING MUST BE REVERSED.

Plaintiffs[56] devote the bulk of their alter ego argument to matters that are not in dispute, i.e., some California appellate courts have upheld the use of Code of Civil Procedure section 187 ("section 187") to add nonsued

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[56] Here, plaintiffs' reference to "The Pointe" as the plaintiff on the alter ego claims (e.g., X-AOB/RB 96) is a complete misnomer. Pointe was not a plaintiff on any of the causes of action for which alter ego liability was imposed; the plaintiffs were Gosnell Builders (contract claim) and PSDMU (tort claims). (1 AA 81, 49.) Accordingly, we use "plaintiffs" in this section to mean Gosnell Builders and/or PSDMU.

"alter ego" defendants to a judgment; and there is substantial evidence in the record to support the "unity-of-interest" prong of the alter ego test.[57]

Plaintiffs, however, fail to address what matters.

They ignore (A) defendants' *constitutional* challenge to section 187 (except for attempting to distinguish the leading United States Supreme Court case on the subject—and misstating the facts), and (B) the specific undisputed evidence and law that require reversal of the alter ego judgment on both the breach of contract and tort claims.

A. Plaintiffs Ignore The Constitutional Infirmities In California's Statutory Procedure That Allows Persons To Be Added As Judgment Debtors By Post-Judgment Motion.

As defendants demonstrated, California follows the rule that alter ego liability or the facts giving rise to it must be pleaded, but some courts of appeal have carved out a narrow exception, based on section 187, dispensing with the pleading requirement where the "alter ego" defendant is "really one and the same as the original defendant." (AOB 41.)

Defendants further demonstrated, citing case law and a leading treatise, that this exception is completely at odds with the treatment afforded a defendant against whom alter ego *is* pleaded: *that* defendant is

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[57] Elsewhere in their brief, plaintiffs assert that Ms. Weingarten "has not challenged the trial court's findings" that she was the alter ego of WW1 or Atlas Homes. (X-AOB/RB 110.) This is incorrect. Ms. Weingarten has not challenged the first prong of the alter ego doctrine ("unity of interest"), but she has challenged the second prong ("inequitable result"). Both prongs must be proven to prevail. (See AOB 38.) In addition, Ms. Weingarten has established that plaintiffs are estopped to rely on the alter ego doctrine on the contract claim. (AOB 49-52; and see below, pp. 68-71.)

guaranteed the full panoply of due process rights—including specific notice that *it* is being sued and a right to defend itself at trial, on the merits—even though it is claimed to be "one and the same" as the original defendant. (*Id.* at pp. 42-43.)

Finally, drawing on *Nelson v. Adams USA, Inc.* (2000) 529 U.S. 460 [120 S.Ct. 1579, 146 L.Ed.2d 530]), defendants showed that due process demands that every separate person against whom a claim is stated—no matter how close or similar to an existing party—is entitled to actual notice of the claim by pleading and the actual opportunity to defend himself, herself or itself. The high court agreed with defense counsel's remarks that "'it's legally wrong to subject the individual, nonserved, nonsued, nonlitigated-against person to liability for that judgment. Because there are rules. The rules say that if you want a judgment against somebody, you sue them, you litigate against them, you get a judgment against them.'" (*Id*. at p. 470, fn. 4 [120 S.Ct. at p. 1586, fn. 4].)

Nelson holds that due process does not permit adding a party to a lawsuit or cause of action and simultaneously imposing liability on that person. (*Id.* at p. 462 [120 S.Ct. 1579 at p. 1582] [due 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* entry of judgment against him," emphases added].) The procedure permitted under section 187 suffers from a more egregious infirmity—the "alter ego" defendant *never* has to be sued and yet is subjected to personal liability by motion, at the very moment it is added to the judgment.[58] To the extent

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[58] That is what happened here. Ms. Weingarten was not a party at all in the "mixed-use" (tort) case (1 AA 50), and was not a party to the breach of contract cause of action in the "residential" case (1 AA 81).

section 187 is interpreted to authorize this procedure, it violates due process and it must be declared unconstitutional.

Plaintiffs do not defend the constitutionality of section 187. They merely contend that due process was satisfied because Ms. Weingarten was "present and testified" at trial and was "'in control of the litigation and was actually represented in the lawsuits.'" (X-AOB/RB 103.) But plaintiffs miss the point: Ms. Weingarten had no notice that she was a liability target on these claims, had no opportunity to defend herself against the imposition of liability, and no opportunity to cross-examine or challenge her accusers. An opportunity to participate in the defense of a sued corporation is not the same as an opportunity to defend oneself.

The same factors that plaintiffs rely on here were present in *Nelson* and were held not to pass constitutional muster: Nelson was the president and sole shareholder of OCP (the named party); liability was based on Nelson's conduct and his conduct alone; he was the "'effective controller'" of the litigation; and he "personally participated as a witness at the hearing on whether OCP had engaged in inequitable conduct." (*Nelson v. Adams USA, Inc., supra,* 529 U.S. at p. 470 [120 S.Ct. at p. 1587]; AOB 46.) Nevertheless, a unanimous Supreme Court found Nelson was denied due process because *he* was not added to the pleading, or permitted to contest his *personal* liability, before judgment was entered against him.

Misstating the true facts of *Nelson,* plaintiffs assert *Nelson* is "unavailing" because Nelson "was added to a *default judgment* on the day the default judgment was entered, and so never had the opportunity *at all* to appear at either the underlying procedure on the 'merits' of the case, *or* at the hearing where the amendment issue was presented." (X-AOB/RB 103-104, original emphases.) But as the decision and our opening brief made

clear, *Nelson* did not involve a default judgment, and Nelson did appear as a witness in the underlying proceeding.

Ms. Weingarten was denied due process when she was held liable by motion, without prior notice or opportunity for trial, for over $4.5 million solely as an "alter ego" under the authority of section 187. No pleading was ever filed naming her as a defendant on those claims, despite the fact that plaintiffs knew at all times who she was and what her involvement was. If they wanted a judgment against Ms. Weingarten as an alter ego, they should have sued her on an alter ego theory. That is what due process demands.

B. Plaintiffs Ignore The Undisputed Evidence And Law That Require Reversal Of the Alter Ego Rulings.

As noted, the judgment imposes alter ego liability on Ms. Weingarten for both contract and tort causes of action, i.e., GB's contract claim against WW1 for breach of the DMA and PSDMU's tort claims against Atlas Homes for conversion and trespass. (2 AA 507:11-508:6.) Just as plaintiffs obfuscate by trying to lump themselves together as "The Pointe," they lump the contract and tort claims together, and thereby avoid addressing the specific arguments that compel reversal as to each one.

1. Contract: Undisputed evidence of estoppel and sufficient assets preclude the imposition of alter ego liability.

Citing undisputed evidence and applicable case law, defendants showed that GB was estopped to assert alter ego with respect to its breach of contract claim against WW1 because GB—an experienced, sophisticated business entity—knew exactly who it was contracting with—WW1, not

Ms. Weingarten; and if GB wanted to make Ms. Weingarten a party to the DMA, or a guarantor of it, it could and should have insisted on such an arrangement. (See AOB 49-51.) Plaintiffs have no response. (X-AOB/RB 100-102.) Defendants' argument is correct and precludes the imposition of alter ego liability on the contract cause of action.

Defendants also showed there could be no "inequitable result" from recognizing WW1's separate corporate existence, and therefore no alter ego liability, because uncontroverted evidence established that WW1 had ample assets to satisfy the $400,000 judgment against it. (See AOB 52.) Again, plaintiffs have no response. Again, the argument is correct and compels reversal of the judgment against Ms. Weingarten for breach of the DMA.

By their silence, plaintiffs effectively concede that GB's alter ego judgment against Ms. Weingarten for breach of the DMA cannot stand.

2. Tort: No injustice from failure to recognize Atlas Homes' separate existence.

Plaintiffs had the burden of proving there would be "'an inequitable result if the acts in question'"—conversion and trespass—were "'treated as those of [Atlas Homes] alone.'" (*VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 Cal.App.4th 228, 244-245; *MacPherson v. Eccleston* (1961) 190 Cal.App.2d 24, 27.) Below, the only specific injustice plaintiffs claimed was a possible difficulty in enforcing the judgment because Atlas Homes was "undercapitalized." (2 AA 447-448.) In their opening brief, defendants showed there was no evidence of undercapitalization and, in any event, difficulty in enforcing a judgment does not establish the "inequitable result" required to impose alter ego liability. (AOB 53-54.)

On appeal, plaintiffs shift gears. Now, they drop any pretext of demonstrating that some specific injustice would result if Atlas Homes'

separate existence were recognized. Rather, painting with the broadest of brushes, they assert that the "equity inquiry" should focus on "Weingarten's ability and her willingness—indeed, her *determination*—to maliciously and fraudulently manipulate the finances of *each* of her entities to prevent The Pointe from ever receiving a penny." (X-AOB/RB 100-101.) This argument has several fatal flaws:

- "The Pointe" is not a party to the claims that resulted in the alter ego ruling. Neither GB nor PSDMU—the real parties in interest—had any investment interest in any of the defendant entities that would give them even a theoretical right to "receive a penny."

- There is no evidence that Ms. Weingarten, in Pointe's words, "maliciously and fraudulently manipulate[d] the finances of each of her entities to prevent The Pointe from ever receiving a penny." The record, as shown, is exactly to the contrary. The trial court found there was no evidence that distributable profits had been realized, and it refused to assume there would be any profits (or lost profits) in the future. (1 AA 137; 2 AA 481.) Plaintiffs do not attack these findings for lack of substantial evidence, which makes them binding on appeal.

- Plaintiffs do not attempt to hide their view that the alter ego ruling is a means of *punishing* Ms. Weingarten generally. But the alter ego doctrine is not a substitute for the findings necessary to impose punishment on a defendant by means of punitive damages. (Civ. Code, § 3294.) Plaintiffs *sought* punitive damages against Ms. Weingarten on the conversion and trespass claims (73 RT 12760:1-22), but the trial court *rejected* them (2 AA 341-346). Plaintiffs do *not* challenge that ruling on appeal. Plaintiffs cannot recover through the back door what was denied them through the front.

- In order to disregard the corporate entity and impose alter ego liability on Ms. Weingarten for acts of conversion and trespass committed by Atlas Homes, plaintiffs had to show that Ms. Weingarten improperly used the legal shield of Atlas Homes to accomplish the torts. (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 579; *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 993.) There is no such evidence. Indeed, plaintiffs' theory below was that Ms. Weingarten had *direct* liability for the torts (and therefore should be punished for them). (73 RT 12760:1-22.) This is not a proper use of the alter ego doctrine.

Plaintiffs failed to carry their burden to demonstrate that some inequity will result unless the separate corporate existence of Atlas Homes is disregarded. No substantial evidence supports the $3.5 million alter ego tort judgment for conversion and trespass; it cannot stand.

IV. THE TRIAL COURT ERRED IN RULING PSDMU'S COMPLAINT ALLEGED A WRONG AGAINST ATLAS HOMES THAT PSDMU ADMITTED IT HAD NOT EVEN DISCOVERED WHEN THE COMPLAINT WAS FILED.[59]

A. The Complaint Afforded Atlas Homes No Legal Or Actual Notice It Was Being Sued For Permanent Trespass/Encroachment.

1. As a matter of law, as well as simple logic, a complaint cannot possibly be read to allege a wrong that the plaintiff had not yet discovered.

In July 2000, PSDMU sued Atlas Homes for the intentional torts of conversion and trespass, the latter cause of action alleging certain specific non-permanent acts of trespass, such as using access roads and dumping materials on PSDMU's property. (1 AA 54.) PSDMU urges the complaint can properly be construed to include an additional claim for an entirely different type of conduct—permanent trespass by slope grading so as to encroach onto PSDMU's planned restaurant and golf course sites. (Plaintiffs' Combined Cross-Appellants' Opening Brief and Respondents' Brief Re: Brief filed by Atlas Homes (RBAH) 12-22.)

The complaint *cannot* be so construed because PSDMU *admits it did not discover the slope encroachments until years after it filed its complaint.* (1 AA 262 ["*After* filing its complaint, PSDMU discovered trespasses upon

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[59] As explained in the opening brief, Ms. Weingarten's sole liability on this claim is as an "alter ego" of Atlas Homes. The argument becomes moot and need not be addressed in Ms. Weingarten's appeal if the alter ego ruling is determined to be erroneous. (AOB 56.) Of course, the issue must be considered in Atlas Homes' separate appeal.

both its future Pointe resort and golf course sites"], original emphasis; 187 [PSDMU "only recently learned" (as of November 21, 2002) about the "two substantial encroachments onto" PSDMU's future golf course and restaurant sites].) PSDMU never grapples with this fatal deficiency.

A complaint cannot conceivably give the defendant fair notice of an alleged wrong the plaintiff didn't know about when the complaint was filed. (*McCauley v. Howard Jarvis Taxpayers Assn.* (1998) 68 Cal.App.4th 1255, 1258, 1262 [one cannot be sued for "as yet *undiscovered*" wrongs]; cf. *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 201, 206, 214 [one cannot be sued for wrongs one has not yet done].) This is because a complaint must plead "the *facts* from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the *facts* which constitute the defendant's delict or act of wrong." (*Davaloo v. State Farm Ins. Co.*, *supra*, 135 Cal.App.4th at p. 415, internal quotation marks omitted.) A complaint that fails to allege these facts is "the functional equivalent of no complaint at all" because it contains "no specifics" and thus no "ultimate facts" regarding the plaintiffs' claims. (*Id.* at pp. 415, 417.)[60]

It is logically impossible to plead the *facts* constituting a supposed wrong if the plaintiff doesn't know the wrong occurred. Any complaint the plaintiff files under those circumstances necessarily contains "no operative

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[60] PSDMU's contentions that a complaint need "merely" contain "'a statement of facts constituting the cause of action'" and need "only" plead "'ultimate fact'" (RBAH 15) overlook settled law giving content to the elementary requirement of "notice" pleading, i.e., the complaint must apprise the defendant "'squarely and directly'" of the alleged wrong. (AOB 59.) PSDMU ignores every authority defendants cited on this point, as well as those establishing stricter pleading rules for intentional torts. (See AOB 59-60; see also *Colich & Sons v. Pacific Bell* (1988) 198 Cal.App.3d 1225, 1241 [when alleging willful misconduct, plaintiff must "state facts more fully" than in negligence cases].)

facts at all" about the undiscovered wrong. (*Id.* at p. 416.) Moreover, any such complaint would be subject to a claim of malicious prosecution because it would lack the required element of probable cause, which is determined "on the basis of the facts *known* to the defendant." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 883, emphasis added; *Puryear v. Golden Bear Ins. Co.* (1998) 66 Cal.App.4th 1188, 1195.) PSDMU's admission that it didn't know about any act of encroachment when it filed its complaint also admits lack of probable cause.

PSDMU's assertion that Atlas Homes could have learned about PSDMU's claim for permanent trespass/encroachment by engaging in "meaningful pre-trial discovery" (RBAH 16-17) makes no sense at all. If PSDMU didn't know about the claim, discovery directed at PSDMU would have been meaningless. Discovery is not a substitute for adequate pleading.

2. PSDMU's argument that various allegations in the complaint gave Atlas Homes notice it was being sued for permanent trespass/encroachment is misleading and incorrect.

PSDMU quotes a number of allegations in the complaint, contending they should have put Atlas Homes on notice it was being sued for permanent trespass/encroachment by slope grading on the undeveloped restaurant and resort sites. (RBAH 14-15.) How Atlas Homes could conceivably have divined such a claim from these allegations—when even PSDMU wasn't aware of such a claim—defies imagination.

Not surprisingly, the language of the complaint cannot be construed to allege such a claim. PSDMU fails to mention that the allegations it cites describe *very specific acts*—acts constituting "conversion," and non-

permanent trespasses relating to "access roads, dumping and habitat disturbance." (1 AA 51-56.) PSDMU confuses the issue by quoting allegations that contain the word "grading" (RBAH 14), without noting that the *alleged* claim for *conversion/theft* by grading on one part of the property had nothing to with the *unalleged* claim for *trespass/encroachment* by grading on another part.[61]

Nor do generic allegations that defendants "otherwise disturbed" or "damaged" the property or committed "other wrongful incursions" (RBAH 14-15) fill the gap. (See *Davaloo v. State Farm Ins. Co., supra,* 135 Cal.App.4th at p. 417 ["generic allegations . . . fall[] far short of apprising State Farm of the factual basis of the claim"]; *McCauley v. Howard Jarvis Taxpayers Assn., supra,* 68 Cal.App.4th at p. 1263 [complaint's use of phrase "and others" must be read in context and "cannot . . . possibly encompass separate" violations not mentioned in complaint].)

This is also the teaching of *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, discussed at AOB 61-62. PSDMU's attempt to distinguish the case is unavailing. (RBAH 16, fn. 5.) In *Oakland Raiders,* the plaintiff pleaded a cause of action for breach of

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[61] In the conversion cause of action, PSDMU alleged that Atlas Homes converted (i.e., stole) dirt from PSDMU's property by purporting to "grade" it, but the "grading" was "merely a pretext for Defendants to illicitly obtain soil and other fill material. . . ." (1 AA 51-52, 154-155.) The complaint nowhere alleges that Atlas Homes committed a trespass or any other tort by grading the slopes of *its own property* so as to encroach on PSDMU's property. Moreover, by PSDMU's own descriptions, the alleged conversion and the unalleged trespass/encroachment took place at entirely different places. (1 AA 155 [conversion occurred at "East Apartment Site"], 156-157 [permanent trespass/encroachment occurred at "the south eastern corner of the east mountain site" and "on the west side of the development"].)

fiduciary duty, alleging several specific breaches. The plaintiff later urged that the complaint should be read to include three *different* breaches of fiduciary duty. The Court of Appeal disagreed, reasoning that the complaint's prior allegations were either too general or too specific to include the newly claimed breaches. (*Id.* at p. 649, fn. 25.) So, too, in this case, PSDMU's complaint alleged very specific acts of conversion and trespass as well as generic "other" allegations; the complaint cannot be construed to include an entirely *different* form and different acts of trespass—especially those PSDMU wasn't even aware of when it filed its complaint.

PSDMU never alleged a claim for permanent trespass/encroachment by slope grading. Nor, as we next demonstrate, did PSDMU cure the defect by amendment.

B. PSDMU's Proposed Amendment Did Not (And Could Not Possibly) Relate Back To The Original Complaint And Thus Was Barred By The Statute of Limitations.

After trial began and after the statute of limitations indisputably had run on any claim for permanent trespass/encroachment by slope grading, PSDMU moved to amend its complaint to allege such a claim. The trial court neither granted nor denied the motion, erroneously ruling instead the conduct was encompassed within the generic allegations of the original complaint. (See AOB 57-58, 62-63; 2 AA 345.) On appeal, PSDMU argues that its motion was an "unnecessary safeguard" and, alternatively, that the proposed amendment (if allowed) would have related back to the original complaint because it concerned "the same general facts." (RBAH 17-18.) Pointe is wrong on each front: As just demonstrated, the amendment was necessary because the original complaint did not include a

cause of action for trespass by encroachment; and the proposed amendment could not have been allowed, as the claim it embodied was barred by the statute of limitations.

There is no merit in Pointe's claim that any amendment would have related back. This is so for two principal reasons.

1. The proposed amendment involved different acts, locations, wrongs, injuries and damages than those alleged in the original complaint.

PSDMU misunderstands how the "relation-back" rule works. As previously explained, "An amended complaint relates back to a timely filed original complaint, and thus avoids the bar of the statute of limitations, only if it rests on the same general set of facts and refers to the same 'offending instrumentalities,' accident and injuries as the original complaint." (*Davaloo v. State Farm Ins. Co., supra,* 135 Cal.App.4th at p. 415, citing cases including *Barrington v. A.H. Robins Co.* (1985) 39 Cal.3d 146, 151.)

It is a "wholly unremarkable proposition" that "different acts leading to distinct injuries are *not* part of the 'same general set of facts' even though they may be part of the same 'story.'" (*McCauley v. Howard Jarvis Taxpayers Assn., supra,* 68 Cal.App.4th at pp. 1262-1263 [amendment alleging statutory reporting violation concerning one ballot proposition did not relate back to original complaint alleging reporting violation concerning different proposition]; *Lee v. Bank of America, supra,* 27 Cal.App.4th at pp. 208-209, 214 [amendment alleging wrongful termination did not relate back to original complaint alleging wrongful demotion, despite common retaliatory motive]; *Coronet Manufacturing Co. v. Superior Court* (1979) 90 Cal.App.3d 342, 347 [amendment alleging decedent was electrocuted by one manufacturer's lamp socket did not relate back to original complaint

alleging electrocution by another manufacturer's defective hair dryer, despite "a single death at a single location"]; *Kim v. Regents of University of California* (2000) 80 Cal.App.4th 160, 168-169 [amendment alleging age discrimination did not relate back to original complaint alleging overtime violations].)

The relation-back doctrine requires a comparison between the factual allegations in the original and amended complaints. (*Davaloo v. State Farm Ins. Co., supra,* 135 Cal.App.4th at p. 416.) Here, the comparison demonstrates irrefutably that PSDMU's proposed amendment concerned different and distinct acts, locations, wrongs, injuries and damages than those alleged in the original complaint:

	Original complaint	Proposed amendment[62]
Act:	Non-permanent trespass[63]	Permanent trespass[64]
Location of Act:	On PSDMU's property	On Atlas Homes' property
Nature of Wrong:	Creating and using access roads, stockpiling building materials, dumping trash[65]	Grading of slopes[66]
Injury:	"Unsightly conditions," jeopardizing "fragile ecological habitats"; impeding future sale of East Apartment site[67]	Encroachment on PSDMU's adjoining property at the planned restaurant and golf course sites[68]
Damages Awarded:	$152,990.22 for past and future clean-up costs[69]	$2,985,304.66 for building two retaining walls[70]

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[62] PSDMU did not submit an actual amendment or amended complaint, so we cite to PSDMU's motion to amend and its trial brief and to the court's rulings.

[63] Both PSDMU and the trial court distinguished between acts of non-permanent and permanent trespass. (1 AA 54 [original complaint regarding "Access Roads, Dumping and Habitat Disturbance"], 156-157 [PSDMU's trial brief differentiating between "Access Roads, Dumping and Habitat Disturbance" and "Permanent Trespass"]; 2 AA 344-345 [tentative decision], 507-508 [judgment].)

[64] 1 AA 156-157.

[65] 1 AA 54.

[66] 1 AA 156-157.

[67] 1 AA 54-55.

[68] 1 AA 156-157.

[69] 2 AA 344, 507.

[70] 2 AA 345-346, 508.

There is nothing alike about the original complaint and proposed amendment. Given such fundamental differences, the amendment cannot lawfully relate back to the original complaint. The trial court would have abused its discretion had it permitted the amendment.

2. An amendment cannot relate back to the original complaint, where the newly-alleged wrong was as yet undiscovered when the complaint was filed.

The second reason the relation-back doctrine could not apply here is that PSDMU knew nothing about any encroachment claim when it filed its complaint. (See above, pp. 72-74; *Davaloo v. State Farm Ins. Co., supra,* 135 Cal.App.4th at p. 416 ["Going from nothing to something is as much at odds with the rationale for allowing an amended pleading to relate back to the filing of the original documents as changing from one set of facts to a different set"].)

C. Pointe Has No Response To The Case Law Establishing That An Error In Applying The Statute Of Limitations Mandates Reversal Without Any Showing Of Prejudice.

Defendants demonstrated that the $3 million judgment against Atlas Homes for permanent trespass was both inherently and actually prejudicial. (AOB 64-66.)

PSDMU ignores the authorities we cited establishing that reversal for misapplication of the statute of limitations—e.g., permitting the filing of an amended complaint based on different facts and injuries than in the original after expiration of the limitations period—"requires no showing of prejudice." (AOB 64.) This is settled law in California. (See also *Castro v. Sacramento County Fire Protection Dist.* (1996) 47 Cal.App.4th 927, 933 [rejecting plaintiff's argument that allowing relief from late filing of

complaint would not have prejudiced defendants because they were already on notice of plaintiff's claim; "application of a limitations statute, unlike the equitable doctrine of laches, requires no showing of prejudice"]; *Lobrovich v. Georgison, supra,* 144 Cal.App.2d at p. 575 [statute of limitations exists "independent" of prejudice, which is "irrelevant"]; see above, pp. 29-30.)

Despite the no-prejudice rule, PSDMU argues no prejudice. It claims Atlas Homes was on notice of the permanent trespass/encroachment claim or could have learned about it by deposing PSDMU's expert before trial, requesting a continuance to depose the expert during trial, or making better use of its own experts. (RBAH 16, 19-22.) PSDMU misses the point. Relation-back is a pleading doctrine; it necessarily relates only to pleadings, not to general knowledge outside of the pleadings. It is the *complaint*—not the universe of facts that might be learned from discovery or other sources—that must contain all the required elements of the cause of action. (Code Civ. Proc., § 425.10, subd. (a).) If, as here, the complaint does not allege a particular claim (and cannot do so because the plaintiff didn't know about it), and a late amendment does not relate back because it alleges different acts and injuries, the fact that the defendant could have found out about the claim through other means is irrelevant.

V. POINTE IS NOT ENTITLED TO A NEW TRIAL ON THE GROUND OF "NEWLY DISCOVERED EVIDENCE."

While trial courts ordinarily have broad discretion in ruling on motions for new trial on the ground of newly discovered evidence, "there is no basis for the exercise of discretion" where the moving party fails to prove all of the required statutory elements or to present adequate evidence

in support of the motion. (Code Civ. Proc., § 657, subd. (4)[71]; *Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 909-910 [reversing order granting new trial where evidence was not "newly discovered," there was no showing of diligence, and evidence was cumulative of evidence produced at trial and hence not material]; *Slemons v. Paterson* (1939) 14 Cal.2d 612, 615-616 [reversing order granting new trial where plaintiffs' affidavit "is so lacking in essential particulars that it afforded no basis for the exercise of the discretion of the trial court in granting the motion"].)

Both flaws are present in this case. With respect to the assertedly newly discovered "tax benefit" evidence (section B, below), *all* the required statutory elements are missing. With respect to the supposedly newly discovered "real estate profits" evidence (section C), most of the elements are missing and there is no admissible evidence to support a new trial.

Pointe fails to come to grips with these truths, attempting instead to blur the distinctions between the two categories of evidence and ignoring *every one* of the *eleven* cases cited in the opening brief (AOB 66-73), even though they refute Pointe's assertions.

A. Pointe Is Not A Real Party In Interest On Any Issue That Is The Subject Of The Ordered New Trial.

Our opening brief demonstrated that (1) Pointe *cannot* recover damages in its own right in any new trial because the trial is limited to the derivative Seventh Cause of Action, in which Pointe is merely a *nominal plaintiff*, and (2) Pointe made no claim that the purported "newly discovered evidence" showed any injury to Astra, the real party in interest. (AOB 67-

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[71] That provision states that a new trial may be granted on the ground of "*[n]ewly discovered evidence, material* for the party making the application, which he *could not, with reasonable diligence, have discovered and produced at the trial*." (Emphases added.)

68.) Pointe ignores this showing, continuing to obfuscate by asserting that "The Pointe" is entitled to a new trial. (X-AOB/RB 105.) It isn't.

B. As A Matter Of Fact And Law, The "Tax-Benefits" Evidence Was Not Newly Discovered Because It Was Both Discovered And Produced At The Trial.

1. There is nothing "newly discovered" here: Undisputed evidence at trial established that AHG had received millions of dollars in tax benefits.

Pointe contends that in July 2004, after trial but before final judgment, *for the first time* it discovered evidence indicating that AHG had received (and Ms. Weingarten had concealed) about $4 million in tax benefit refunds from the I.R.S. (See AOB 67.) The record refutes this contention.

Ms. Weingarten, as well as Pointe's *own expert*, testified to the same fact at trial over two years earlier:

- Ms. Weingarten testified, in direct examination by her counsel, that AHG received "about $4 million" in cash tax benefits from the I.R.S. (40 RT 5180-5181 (January 2002).)
- Mr. Walla, plaintiffs' tax expert, testified on cross-examination that AHG had received "something less than 18 million" in cash tax benefits from the I.R.S. He was unable to say whether any of the tax benefits was owed to Pointe. (36 RT 4688, 4747-4748 (December 2001).)

Obviously, evidence produced at trial cannot be "newly discovered" after trial. Pointe has no effective response; it is silent about its own expert's testimony, and it attempts to dismiss Ms. Weingarten's testimony

by claiming she was required to produce the evidence in discovery. (X-AOB/RB 108.)[72] But Pointe's attempt (without citation of authority) to redefine "newly discovered evidence" to mean evidence not produced in discovery even though *produced at trial* is unavailing.

The law is clear that no new trial may be had for "newly discovered evidence" if the evidence on the identical subject was presented at trial. (*Schultz v. Mathias, supra,* 3 Cal.App.3d at pp. 908-910 [evidence of defendant's statement to newly discovered witness did not support new trial because statement was "substantially the same" as statement defendant made to another witness, who testified at trial]; *Baran v. Goldberg* (1948) 86 Cal.App.2d 506, 513 [evidence of property's value was not "newly discovered" because same value was specifically referred to in cross-examination of defense expert]; *Bennington v. National Packing Co.* (1932) 122 Cal.App. 313, 318 ["a new witness with the same evidence" presented at trial is not "new evidence" that will support a new trial].)

Even when evidence is *not* produced at trial because a party forgot about it or failed to realize its significance, the evidence is not considered "newly discovered" and cannot form the basis of a new trial. (*Durbin v. Hillman* (1920) 50 Cal.App. 377, 381 ["Mere forgetfulness that the evidence existed without any showing that tends to excuse the forgetfulness does not entitle a party to a new trial"]; *Slemons v. Paterson, supra*, 14 Cal.2d at p. 615 [failure to recognize relevance or significance of evidence ("mistake of law") is not grounds for a new trial under Code of Civil Procedure section 657].) The same result is all the more compelled

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[72] Pointe asserts its counsel's cross-examination would have been "far more memorable" if Ms. Weingarten had produced the tax benefits evidence before trial. (X-AOB/RB 108.)

where, as here, evidence *was* produced at trial, but a party (or the court) forgets about or doesn't recognize its significance.

New means new. There is nothing new here. As a matter of law, Pointe did not and could not establish the essential element that its claimed newly discovered evidence "could not . . . have been discovered and produced at the trial." (*Estate of Horman* (1968) 265 Cal.App.2d 796, 811.) Because it was.

2. Pointe did not establish diligence or materiality.

The new trial order flunks not only the "newly discovered" test but also the diligence and materiality tests. As for diligence, Pointe merely responds that it did not receive the "documentary evidence" until July 2004, "long after the trial ended." (X-AOB/RB 108.) But that response misses the essential points: (a) the evidence was substantially identical to the trial testimony of Ms. Weingarten and Pointe's own expert *years* earlier—of which counsel is deemed to have been aware, and (b) counsel waited nearly *six months*—until after final judgment was entered—to bring the "documentary evidence" to the trial court's attention. "It is settled that a party may not rely on 'newly discovered evidence' as a ground for a new trial unless he has made his prejudice known to the court *at the earliest possible moment.*" (*Baron v. Sanger Motor Sales* (1967) 249 Cal.App.2d 846, 860-861, emphasis added [reversing order granting new trial where party waived right to request new trial by not acting diligently].) Under no circumstances did Pointe act with reasonable diligence.

As for materiality, Pointe relies on the trial court's remark that if the evidence is ultimately admitted, "it would be of the type of evidence that is likely to bring about a different result in the trial court." (X-AOB/RB 108-109; 3 AA 785:7-9.) But the fact that the judge did not recall that identical testimony *was* admitted does not make the proffered evidence "material"

within the meaning of the statute. The evidence was still cumulative, and hence, not material. (*Schultz v. Mathias, supra,* 3 Cal.App.3d at p. 910 ["merely cumulative" evidence cannot be material].)

C. As A Matter Of Fact And Law, The Evidence Of "Real Estate Profits" Is Insufficient To Justify A New Trial.

1. Defendants' objections were sustained as to *every bit* of relevant evidence—not just "meaningless portions," as Pointe contends.

Defendants demonstrated that the evidence presented in support of a motion for new trial on the ground of newly discovered evidence must be admissible. (AOB 71-72; see also Cal. Judges Benchbook: Civil Proceedings: After Trial (2005) § 2.23, pp. 59-60 ["newly discovered evidence . . . must . . . be admissible"].) Defendants then showed that no relevant evidence of "real estate profits" remained after the trial court properly sustained the bulk of defendants' evidentiary objections to plaintiffs' counsel's declaration. (AOB 71-72; 3 AA 787:4-15 [sustaining objections on basis of "inadmissible opinion and lack of authentication"].)[73]

Pointe does not disagree with the rule requiring admissible evidence, nor does it challenge the trial court's evidentiary rulings. Rather, Pointe

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[73] A motion for new trial on the ground of newly discovered evidence must be made upon affidavit. (Code Civ. Proc., § 658.) The affidavit, if based on information and belief, is "not competent evidence." (*Sitkei v. Frimel* (1948) 85 Cal.App.2d 335, 338-339 [reversing order granting new trial on ground of newly discovered evidence where affidavits were made on information and belief]; *Schomaker v. Provoo* (1950) 96 Cal.App.2d 738, 741 ["an affidavit on information and belief has no evidentiary value on motion for new trial"].)

contends that only "meaningless portions" of the evidence were stricken. (X-AOB/RB 109.) Pointe is wrong. The evidentiary rulings *gutted* Pointe's evidence.[74]

For example, Pointe asserts that one of the exhibits reveals that "Atlas Homes received millions of dollars that had not been previously accounted for." (X-AOB/RB 109.) Aside from the fact that neither the exhibit (3 AA 600-601) nor counsel's declaration relating to it (2 AA 546:4-10) says any such thing, Pointe ignores that the trial court sustained objections to the *entire content* of the exhibit, leaving nothing but the fact that it was "lodged" and the circumstances of its production. (3 AA 787:11-12.) *No* evidence remains of any conduct that would support a new trial on breach of fiduciary duty or any other claim.

Similarly, Pointe asserts that another exhibit reveals that "Weingarten was in receipt of certain financial reports, but that they 'should not be produced due to the litigation.'" (X-AOB/RB 109.) But here, too, the court struck all averments attempting to identify the document as a financial report or to link it to Ms. Weingarten. (3 AA 787:4-7, 598; 2 AA 545:10-21.) The only remaining substantive averment is that the document contains a "handwritten note" indicating that "'Per Peter—all of these reports exist but should not be produced due to the litigation.'" (*Ibid.*)[75] But there is no evidence as to who "Peter" is, who wrote the note, who received it or what "reports" existed. Nothing meaningful is left; the mere

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[74] The evidence consisted of Exhibits G-J to the declaration of Michael Vivoli, plaintiffs' counsel. (2 AA 545-546 [declaration, ¶¶ 6-9]; 3 AA 595-603 [Exhibits G, H, I, J]; 688-689 [defendants' objections to paragraphs 6-9]; 787:4-15 [court's ruling on evidentiary objections].)

[75] The trial court erred in not sustaining defendants' objection to the handwritten note; it was inadmissible on hearsay grounds, and no exception applied. (3 AA 688:18-21.)

existence of the note proves nothing. (See *Smithers v. Fitch* (1889) 82 Cal. 153, 158-159 [new trial properly denied where affidavit, which stated that one Markwood signed a petition, "does not pretend to declare that the affiant knows as a fact that Markwood signed the petition, or that the signature purporting to be his is in his handwriting"].)

Pointe doesn't even mention the other two exhibits, impliedly and correctly conceding they provide no evidence to support a new trial. Contrary to Pointe's contentions, the trial court's evidentiary rulings eliminated all substantive averments in all the exhibits. (See 3 AA 787:8-10, :13-15; 596, 603; 2 AA 545:22-546:3 and :11-19.)

Pointe apparently views the court's evidentiary rulings as superfluous because the proffered documents might be "ultimately authenticated at the new trial." (X-AOB/RB 109.) This view does not satisfy the admissible-evidence requirement. Under the law, the evidence must be admissible *at the time of the motion.* Any other rule would render meaningless the statutory affidavit requirement and the established procedures for objecting to evidence and ruling on objections.

The order granting a new trial on the issue of "real estate profits" must be reversed. (See *Mason v. Lake Dolores Group, LLC* (2004) 117 Cal.App.4th 822, 831 [where trial court bases its new trial order on an "'erroneous concept of legal principles,'" the order "'will be reversed'"].)

2. Pointe does not contest that the evidence was neither newly discovered nor diligently produced.

As the opening brief demonstrated, counsel's declaration concerning the "new" evidence of real estate profits omitted all dates—making it impossible to determine when the documents were discovered and how long counsel waited before bringing them to the trial court's attention. (AOB 73-74.)

Pointe offers no response, conceding it cannot establish the evidence purportedly relating to "real estate profits" was newly discovered or diligently produced. (*Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 979, fn. 5 [respondent waives issue by not contesting appellant's argument on appeal].)

VI. PLAINTIFFS PROPERLY CONCEDE THAT THE JUDGMENT AGAINST AHG CANNOT STAND.

We demonstrated that because the only judgment against AHG is for costs, not liability, it is unlawful and cannot stand. (AOB 74-75.) Plaintiffs agree. (X-AOB/RB 111.)

However this Court decides the issues raised by the defendants who *were* found liable, its opinion should expressly state that the judgment against AHG is reversed with directions to enter judgment in favor of AHG. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776 [appellate courts may order retrial of fewer than all issues].)

CONCLUSION

For all the reasons stated in this brief and in their opening brief, appellants Palomba Weingarten and Atlas Holdings Group, Inc., respectfully request that the Court (a) reverse the judgment against them and enter judgment their favor (as delineated in their AOB at pages 75-76); (b) reverse the order granting Pointe a limited new trial; (c) reverse any portion of the judgment based on an alter ego finding if the underlying liability finding is reversed; (d) reverse the judgment for costs against AHG with directions to enter judgment AHG's favor; (e) affirm the judgment as to the issues raised in plaintiffs' cross-appeal; and (f) affirm the order denying plaintiffs' motion for attorneys' fees.

Dated: June 16, 2006

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By_____
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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 24,221 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: June 16, 2006

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Barbara W. Ravitz