Court of Appeal, Second Appellate District
Daniel P. Potter
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Court of Appeal, Second Appellate District
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2d Civil No. B303094

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 3

FIRST MOTOR GROUP OF ENCINO, et al.

Plaintiffs and Appellants,

v.

ENCINO MOTORCARS, INC., et al.

Defendants and Respondents.

Appeal from Los Angeles Superior Court
Case No. LC106723
Honorable Virginia Keeney

RESPONDENTS' BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.:	B303094
Superior Court Case No.:	LC106723
Case Name: *First Motor Group Of Encino, et al. v. Encino Motorcars, Inc., et al.*	

Please check the applicable box:

☒ There are no interested entities or parties that must be listed in this Certificate under California Rules of Court, Rule 8.208.

☐ Interested entities or parties required to be listed under California Rules of court, Rule 8.208 are as follows:

Name of Interested Entity or Person	Nature of Interest

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INTRODUCTION

After a lengthy trial that asked whether respondents misrepresented the financial condition of the automobile dealership they sold to appellants, the jury answered "No." Extensive evidence supports that answer, and appellants do not even attempt to argue otherwise. In fact, their opening brief barely mentions the evidence supporting the verdict.

Instead, appellants claim instructional error. But there is a fatal problem: All of the challenged instructions relate to matters that the jury never reached. So even if the instructions were erroneous—they were not, and in any case appellants agreed to and waived objections to several of them—there is no reasonable probability that the outcome would have been different absent those instructions.

The Court should affirm.

STATEMENT OF THE CASE

A. The Parties.

Plaintiffs and appellants, the buyers of the automobile dealership, are First Motor Group of Encino LLC and Trophy Automotive Dealer Group LLC. (1CT/38.) Their principal is Nassar Watar. (35CT/8990.)

Defendants and respondents, the sellers, are Encino Motorcars, LLC, David L. Peterson, and Stephen Zubieta. (1CT/38-39; 35CT/8990.)

B. Encino Motorcars Follows Accounting Practices Dictated By Mercedes-Benz.

Encino Motorcars operated Mercedes-Benz of Encino, a Mercedes-Benz automobile dealership. (22RT/6111-6112.)

Mercedes-Benz USA requires its dealerships to regularly submit financial statements so that it can compare the dealerships' performance and watch for red flags. (27RT/7631.) The company's credit arm, Mercedes-Benz Financial, requires the submission of financial statements to assess whether the dealerships have sufficient cash flow to repay loans. (27RT/7632.)

Respondents' financial statements were prepared "in accordance with the Mercedes-Benz USA reporting requirements and do[] not strictly follow US GAAP." (22RT/6054; 37CT/9327.) This meant that respondents sometimes adjusted their financials after closing the prior month's accounting period—a common practice. (26RT/7310; 23RT/6467.)

C. Appellants Offer $40 Million For The Goodwill Of Mercedes-Benz Of Encino Before Doing Any Formal Due Diligence.

Mr. Watar owned businesses around the world involving finance and automobiles (20RT/5508-5512), but he dreamed of owning hundreds of auto dealerships in the United States (20RT/5515, 5517; 30RT/8405). At a hotel in early 2013, he stumbled upon a meeting of dealership owners and operators. (20RT/5513-5514.) He told one of them that he was interested in buying a dealership. (20RT/5515.)

That person introduced Mr. Watar to brokers Mike Sims and Bill Scrivner. (20RT/5517.) Mr. Watar told the brokers that his partner was very well off and could afford large stores. (27RT/7525-7527.) The national economy and the auto industry were doing well (27RT/7548), and he was eager to "catch this wave" (27RT/7535).

The brokers immediately tried to find potential sellers. (20RT/5517-5519, 5521-5522.) Although they brought many prospective sellers to Mr. Watar (30RT/8407), no deals came together until the one at issue here (22RT/6097-6100; 27RT/7552; 30RT/8417). The problem was that Mr. Watar had never owned a dealership (20RT/5498), so he had no credibility in the U.S. market—many sellers do not want to deal with buyers who are not yet dealers (27RT/7546).

The brokers finally found a potential dealership for sale in Mercedes-Benz of Encino. (20RT/5519.) Mercedes-Benz is one of the most coveted luxury brands, and Southern California is a major market. (27RT/7547.) Encino was a top-10 dealership in the country (29RT/8257), top-20 in volume nationwide, and located near affluent buyers (27RT/7548). It had just been remodeled. (27RT/7549.) Mr. Watar was immediately interested. (20RT/5536.)

Mr. Watar viewed the Encino dealership as a potential "trophy" store—a "diamond opportunity." (20RT/5543; 21 RT/5834.) He believed that he could immediately grow the business by 20 percent. (27RT/7543.) And owning a dealership like this would give him the clout to get other deals. (27RT/7546.)

After visiting the dealership, Mr. Watar told the brokers that he was interested, so they sent him the dealership's 2011 and 2012 financial statements. (20RT/5538.) These financial statements were not prepared for Mr. Watar; they were prepared for Mercedes-Benz well before Mr. Watar entered the picture. (20RT/5538.) Mr. Watar understood this—indeed, he claimed that it was important to him because financial statements prepared for Mercedes-Benz would be accurate. (20RT/5539.)

Mr. Sims told Mr. Watar that the majority owner of Mercedes-Benz of Encino, David Peterson, was a willing but not motivated seller (21RT/5815; 27RT/7536-7537; 35CT/8920), and that Mr. Peterson wanted $50 million for the goodwill of the dealership (20RT/5539).

Mr. Watar and Mr. Peterson first spoke on a videoconference in late May 2013. (21RT/5736-5737.) On that call, Mr. Peterson said that he would take $100 million for the dealership. (30RT/8447.) He did not divide that figure into separate portions for real estate and goodwill. (30RT/8447.)

About a month later, Mr. Watar and Mr. Peterson met in person. (21RT/5739-5740.) There, Mr. Watar offered $40 million for the dealership's goodwill. (21RT/5842; 27RT/7560-7561; 35CT/8948.) He did not explain how he arrived at that number. (27RT/7562.) It was a lump sum, and he did not say that he calculated it based on a multiple of earnings. (27RT/7568; 30RT/8422, 8452.)

Mr. Peterson was surprised by how quickly the discussion of price came up during the meeting—within 15 minutes. (30RT/8451.) He thought that Mr. Watar's offer sounded like a firm one. (30RT/8451.)

When Mr. Watar made the offer, he had received some financial statements from respondents, but his internal audit team had not done any formal analysis. (21RT/5864.) Mr. Watar would go on to conduct formal due diligence, but he never attempted to renegotiate the purchase price. (21RT/5843-5844; 27RT/7567-7568.)

D. The Parties Enter Into An Asset Purchase Agreement With Mutual Representations And Warranties.

The parties signed an Asset Purchase Agreement (APA) on January 17, 2014. (35CT/8990.) Both parties represented and warranted that all documents provided to the other side would be truthful.

1. Respondents warrant the accuracy of their financial statements.

Central to this litigation are Sections 7.6 and 7.22 of the APA, in which respondents warranted the accuracy of the dealership's financial statements. (35CT/9006, 9014.)[1]

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[1] Section 7.6 says: "Seller has heretofore delivered to Buyer its annual financial statements for the prior two (2) years, as well as the monthly year-to-date financial statements of the Seller all in the form required by the Manufacturer (the 'Financial Statements'). Except as set forth on Schedule 7.6, the Financial Statements have been prepared in a manner consistent with the Seller's past practices and in accordance with the financial reporting standards of the Manufacturer consistently applied throughout the periods covered thereby, and fully and fairly represent the financial condition and results of operations of the Business in all material respects as of and for the respective periods covered thereby. . . ." (35CT/9006.)

Section 7.22 says: "No representation or warranty made by the Seller in this Agreement, and no statement contained in any agreement, instrument, certificate or Schedule furnished or to be furnished by the Seller pursuant hereto, contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary in order to make such

(*Footnote Continues On Next Page*)

Section 8.1 of the APA further required that "[a]ll of the representations and warranties of the Seller herein contained shall be true and correct in all material respects on and as of the Closing Date as if made on and as of the Closing Date . . . ." (35CT/9014.)[2]

2. Appellants warrant that their certificate of satisfaction with due diligence is truthful.

Under the APA, appellants were entitled to conduct due diligence. (35CT/9016 [§ 8.15].) Due diligence was important to appellants because it allowed them to explore the financial condition of the business and walk away from the deal if they were not satisfied. (See 35CT/9024-9025 [§ 10.13(a)(v)].)

Appellants' due diligence was also important to respondents, because they wanted to know that they had a done deal at closing—that appellants were actually satisfied with their due diligence and would honor their commitments. (30RT/8479.)

Because appellants' satisfaction with due diligence was so important to respondents, an explicit condition precedent to respondents' obligations to close the deal was appellants' signing of a certificate of satisfaction with due diligence. (35CT/8990 [the

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representation or warranty or such statement not misleading." (35CT/9014.)

[2] The opening brief mistakenly cites section 9.1 as stating this promise (AOB 20-21), but that section applies to appellants, not respondents (35CT/9017).

deal was “specifically conditioned upon and subject to the Buyer’s written satisfaction of its due diligence review”], 9017 [Article IX, “Conditions Precedent to Obligations of the Seller”], 9018 [§ 9.11, “Written Satisfaction concerning Due Diligence Review”]; 27RT/7579-7580.)

And this certificate had to be truthful. Appellants represented and warranted that no certificate contains “any untrue statement of a material fact or omits or will omit to state a material fact necessary in order to make such representation or warranty or such statement not misleading.” (35CT/9004 [§ 6.4]; see also 35CT/9017 [§ 9.1] [a condition precedent to respondents’ obligations was that appellants’ representations and warranties “shall be true and correct in all material respects on and as of the Closing Date as if made on and as of the Closing Date,” and the seller was to receive a certificate from the buyer to that effect].)

To Mr. Peterson, the certificate of satisfaction was the fulcrum of the entire contract. (30RT/8460.) He made clear that Mr. Watar could take as long as he wanted to do due diligence, but once he signed off, it was a done deal. (27RT/7580.) Mr. Watar understood that his satisfaction with due diligence was the “point of no return” for both him and the sellers. (22RT/6046.)

E. Appellants' Due Diligence.

Appellants hired KPMG to conduct due diligence. (21RT/5752-5753, 5856.) KPMG spent more than 400 billable hours on the project. (21RT/5858.) Separate teams worked on financial due diligence and tax due diligence. (26RT/7216.) They did not compare the dealership's tax returns with its financial statements. (26RT/7222.)

Mr. Watar also relied on his own team for due diligence. (21RT/5752-5753, 5827.) He asked Stephen Lee, the head of his mergers and acquisitions and internal audit team, to review the financials. (20RT/5540.)

During the due diligence process, appellants learned that respondents' financial statements were prepared "in accordance with the Mercedes-Benz USA reporting requirements and do[] not strictly follow US GAAP." (22RT/6054-6055 [Watar testimony regarding Ex. 60, KPMG's draft report]; 37CT/9327 [Ex. 60].) KPMG's financial due diligence team manager, Hideharu Kojima, understood that this meant respondents made post-closing adjustments to their financials—which, he said, is "not unusual. Most of the companies do that." (26RT/7214, 7310; see 23RT/6411, 6466-6467 [Leslie Slaman, respondents' and then appellants' accountant, testifies that it is "common for net earnings on the financial statements before adjustment to be higher than net earnings per tax returns"].)

Mr. Watar himself knew "at the time of closing that the net income on the financial statements was different than the net income on the tax returns." (29RT/8120.) And others would later testify that this difference was immediately apparent when one compared the two documents. (See, e.g., 24RT/6736, 6741-6742.)

F. Appellants' Dissatisfaction with KPMG's Due Diligence Work.

Unbeknownst to respondents, appellants were not satisfied with the due diligence. (21RT/5791.) After receiving KPMG's first draft report—which Mr. Lee called "the worst due diligence report" he had seen in 15 years (26RT/7322)—appellants intended to "terminate the whole engagement" (26RT/7339). Later, Mr. Lee told KPMG that Mr. Watar "is not satisfied with how the FDD [financial due diligence] proceeded." (26RT/7339.) He said that "the financial due diligence was totally mismanaged," and he wanted KPMG's internal committee to review the work. (26RT/7339-7340.)

Three days before appellants signed their certificate of satisfaction with due diligence, Mr. Lee told KPMG that appellants "reserve our legal rights against your firm, including noncompletion of work done, any damages caused as a result of the delay in the financial due diligence and any losses we may suffer as a result of us not having a complete and proper due diligence report as part of our M and A transaction relating to Encino Mercedes-Benz." (26RT/7339-7341; 37CT/9563.)

G. Notwithstanding Their Dissatisfaction With Due Diligence, Appellants Certify Their Satisfaction, And The Deal Closes.

Even after repeatedly telling KPMG that they were unsatisfied with the due diligence, appellants certified their "satisfaction" with it on February 3, 2014: "In accordance with and in satisfaction of Sections 9.11 and 10.11 of the Purchase Agreement, Buyer hereby delivers this written notice of satisfaction of Buyer's due diligence in connection with the Transaction, and requests that Seller notify Mercedes-Benz USA, LLC, of the Transaction pursuant to Section 10.11 of the Purchase Agreement." (35CT/8871-8872.)

The deal closed on April 17, 2014. (36CT/9232.)

H. For Several Years, Appellants Prepare Their Financial Statements Just As Respondents Did—Even While Claiming That Respondents' Statements Overstated The Dealership's Financial Condition.

After taking over the dealership, appellants kept all the employees and maintained similar operating and accounting practices. (21RT/5795; 23RT/6467-6468; 26RT/7362.) For example, at the start of a new year, they would make an adjustment to the prior year's financials by moving some performance bonus income from December to January to reflect when that income was actually earned. (26RT/7362-7363.) That adjustment was made because of how Mercedes-Benz reported performance bonuses to its dealers. In the first few days of a new year, the dealership would receive a report from Mercedes-Benz about performance bonuses earned during the prior quarter. (26RT/7347-7349.) The report would typically characterize some vehicles as having been sold in December when the sale date was actually in January. (26RT/7350.) These adjustments meant that a person looking at the financial statement for, say, December 31, 2015, would see a number higher than would appear in January or February 2016, after adjustments. (26RT/7362-7363.)

A year after the deal closed, Victoria McLaughlin, the dealership's financial controller, noticed that profits for January 2015 looked low, so she went to Mr. Watar to review the financial statement. (26RT/7355.) She surmised that the performance bonus (and, as a result, profits) could be low because some 2015 sales had been booked in December 2014. (26RT/7355-7356.) After telling Mr. Watar that the prior owners had made a "year-end adjustment" to bring income into January, Mr. Watar told her to continue doing that. (26RT/7357, 7361.)

This adjustment complied with Mercedes-Benz's expectations and procedures, and Ms. McLaughlin was never criticized for making the adjustment. (26RT/7357-7358.) She made adjustments in the same fashion for the next two years. (26RT/7358-7359.)

Despite his instruction to Ms. McLaughlin in 2015 to continue making the adjustments, at trial, Mr. Watar claimed that the adjustments were what led him to conclude that respondents' financial statements were inaccurate and that he had overpaid for the dealership (21RT/5795-5798), a claim he had his lawyers present to respondents about a year later (21RT/5839).

Then, in 2018—nearly two years after appellants notified respondents of their claim that they overpaid, but right about when plaintiffs filed this action (1CT/36 [complaint filed Jan. 12, 2018])—Mr. Watar told Ms. McLaughlin not to make the adjustment (26RT/7360). He did not explain. (*Ibid.*)

I. Trial Court Proceedings.

Appellants sued respondents in 2018 (1CT/36) and proceeded to a jury trial on a claim of breach of contract. They contended that respondents breached the APA's warranties by providing financial statements that did not accurately reflect the dealership's financial condition. (2RT/8.) This, they alleged, caused them to overpay. (1CT/38.)

1. Evidence regarding the financial statements' accuracy.

Appellants claim that "the fact that the Financial Statements were inaccurate was virtually uncontested at trial." (AOB 30.) This isn't even remotely true.

As Robert Davis, respondents' accounting expert who specializes in automotive dealerships, explained, the financial statements met the requirements of APA section 7.6, because for purposes of determining whether the financial statements omitted any "material fact," materiality is tied to the expected user of the financial statement—Mercedes-Benz, not appellants. (29RT/8146; see 29RT/8128-8129 & 35CT/8960 [Davis's qualifications and resume].) And that was just part of the extensive evidence supporting the financial statements' accuracy. Witness after witness attested to their accuracy, including *appellants'* Chief Financial Officer:

1. Mr. Davis

    - The financial statements met the requirements of section 7.6. (29RT/8133-8134.)
    - Adjustments did not cause the financial statements to not fully and fairly reflect the results of operations. (29RT/8166-8167.)
    - Adjustments ultimately get reported in a statement, and they don't cause earnings to be inaccurate. (29RT/8143.)
    - Materiality is key in APA section 7.6 because all of the adjustments were posted, so there was no material error from the lack of posting those in the financials. (29RT/8146.)
    - He agrees with Ronald Sompels (appellants' expert; see below) that materiality is tied to the user for whom the financial statement is prepared—which here was Mercedes-Benz, not

appellants. (29RT/8146 [Davis]; 24RT/6769-6773 [Sompels].)

- He disagrees with Mr. Sompels' opinion that a manufacturer doesn't really know if a dealership's financial statement is accurate or not, so there are no consequences to submitting an inaccurate financial statement to Mercedes-Benz. (29RT/8152-8153.) In fact, "there could be serious consequences," and he has seen manufacturers try to terminate a dealer for accounting issues. (29RT/8153.)
- Contrary to Mr. Sompels' opinion, adjusting entries can be made for reasons other than correcting errors, such as prepaids, depreciation, or wire transfers, which arise in everyday car dealership transactions. (29RT/8154-8156.)

2. Jeffrey Canizaro, Senior Manager of Dealer Credit at Mercedes-Benz Financial Services USA, LLC

    - The financial statements reflected the real results of the operation of the dealership. (28RT/7939.)
    - That an adjustment is not reflected in a financial statement does not render it

invalid or misleading; adjustments are common. (28RT/7930.)

- He never had any material concerns about the way respondents maintained their financial statements; no one at Mercedes-Benz ever determined that they were misleading in any way or inconsistent with Mercedes-Benz's expectations. (28RT/7938.)

3. Dr. Mark Schmitz, Ph.D. in economics

    - The financial statements complied with APA section 7.6. (28RT/7907.)
    - The adjustments were not misrepresentations. (28RT/7853.)
    - He has never seen a dealership that didn't have to make year-end adjustments; adjusted financials aren't necessarily a more reasonable representation of profitability than unadjusted ones. (27RT/7640-7641.)

4. Andrew Slaman, respondents' CPA and then appellants', specializing in auto dealerships

    - All of his clients make adjustments at the end of the year. (23RT/6458.)

- The adjustments here were "usual and customary for automobile dealerships," and none violated tax law. (23RT/6459.)
- It is common for net earnings on financial statements before adjustments to be higher than net earnings on tax returns because dealership owners want to pay as little income tax as the law allows. (23RT/6467.)
- He is not aware of any significant differences in the accounting practices and methods of appellants and respondents. (23RT/6468.)
- He prepared similar adjustment reports for both appellants and respondents. (23RT/6470.)

5. Stephen Zubieta, co-owner of Encino Motorcars, LLC

- The financial statements were accurate. (23RT/6330.)
- The statements complied with APA section 7.6. (23RT/6403.)
- Mercedes-Benz USA and Mercedes-Benz Finance never raised concerns about the financial statements. (23RT/6381.)
- That a dealership makes adjustments for a tax return does not mean that the financial statement is inaccurate. (23RT/6360, 6387.)

6. Timothy Devine, appellant Trophy Automotive Group's Chief Financial Officer
    - The 2014 financial statement "looks like it does" fully and fairly represent the financial condition and results of operations of the dealership.[3] (28RT/7945.)

Appellants' lone expert witness on the financial statements' accuracy, Mr. Sompels, had previously done substantial work for Mr. Watar's company. (24RT/6722-6725.) He admitted that that materiality is judged from the perspective of the intended user of the financial statements (24RT/6769-6773) and that it is well known in the industry that dealers make post-closing year-end adjustments (24RT/6726). But he nevertheless testified that the financial statements were not accurately and fairly stated because they did not reflect year-end adjustments. (24RT/6702, 6721, 6752-6755.)

2. Other evidence.

Respondents also presented evidence, summarized above, that (a) appellants were not actually satisfied with the due diligence when they provided the certificate of satisfaction

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[3] Mr. Devine made this concession during his deposition, which was read at trial. When he did, appellants' counsel asked for a break and upon returning noted that Mr. Devine wanted to correct his testimony. (28RT/7945.) Mr. Devine then said that the financial statement "would be overstated somewhat based on these adjustments." (28RT/7945-7946.) Mr. Devine admitted that he spent the break talking to counsel. (28RT/7946.)

(pp. 21-22, *ante*) and (b) they did not rely on respondents' representations about the dealership's financial condition and instead made an immediate lump sum offer that never changed, even after conducting due diligence and seeing the different net income figures on the financial statements and tax returns (pp. 16, 20-21, *ante*). In fact, appellants' own expert admitted that one could see the difference right away by comparing respondents' financial statements and tax returns. (24RT/6736.) Even Mr. Watar admitted that he knew before closing that the net income stated in the financial statements differed from the net income stated in the tax returns. (29RT/8120.)

3. The verdict.

a. The verdict form.

The special verdict form asked these five questions:

1. Did defendants fail to comply with their obligations under section 7.6 or 7.22 of the Asset Purchase Agreement?
2. Did plaintiffs do all, or substantially all, of the significant things that the Asset Purchase Agreement required them to do?
3. Did plaintiffs rely on the warranties made by defendants in sections 7.6 or 7.22 of the Asset Purchase Agreement regarding the dealer financial statements?

4. Was defendants' failure to comply with their obligations under section 7.6 or 7.22 of the Asset Purchase Agreement a substantial factor in causing any harm to plaintiffs?
5. What are plaintiffs' damages?

(32CT/8271-8272, boldface and instructions omitted.) As we demonstrate below (§ I.A.1.a., *post*), it was clear to everyone that Question 1 concerned whether respondents' financial statements were inaccurate.

The verdict form instructed the jury: "If your answer to question 1 is yes, answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form." (32CT/8271.)

b. The jury finds that the financial statements were accurate.

By an 11-1 vote, the jury answered Question 1 "No," thus finding that the financial statements were accurate. (32RT/9021-9022.) Having answered "No" to Question 1, the jury followed the instruction not to answer any of the other questions and rendered a verdict for respondents. (See 32CT/8271.)

The trial court entered judgment for respondents on November 20, 2019. (33CT/8454.)

4. Attorney's fees.

The trial court granted respondents' motion for attorney's fees as the prevailing party under the APA. (6SuppCT/1310-1325.)[4]

J. The Appeals.

On December 16, 2019, appellants filed a timely notice of appeal from the November 20 judgment. (33CT/8466.) On May 20, 2020, appellants filed a timely notice of appeal from the April 8 attorney's fees order. (6SuppCT/1372.) This Court consolidated the appeals.

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[4] "SuppCT" refers to the Supplemental Clerk's Transcript filed with this Court on Sept. 11, 2020.

STANDARD OF REVIEW

This Court reviews de novo whether a challenged jury instruction correctly states the law. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 298.) However, a court cannot reverse a judgment based on instructional error "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; see *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107-1108.) This means that a court can reverse only "where it seems probable that the error prejudicially affected the verdict." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983 (*Rutherford*).)

ARGUMENT

I. The Purported Instructional Errors Were Not And Could Not Have Been Prejudicial, Because The Jury Never Reached The Issues That Those Instructions Addressed.

A. Because The Jury Found That Respondents' Financial Statements Were Accurate, It Did Not Reach—And Was Instructed Not To Reach—The Issues About Which Appellants Complain.

Appellants' arguments must fail because of a fact they never confront: The impact of the jury's finding that respondents' financial statements were accurate. That case-dispositive finding renders the claimed instructional errors irrelevant and therefore necessarily non-prejudicial. Accordingly, this Court must affirm.

1. The jury found that respondents' financial statements were accurate.

a. Verdict form Question 1 asked only whether respondents provided inaccurate financial statements, and the jury said "No."

Question 1 addressed breach. It asked: "Did defendants fail to comply with their obligations under section 7.6 or 7.22 of the Asset Purchase Agreement?" The only claimed breach was the purported inaccuracy of respondents' financial statements. (See AOB 10 ["At trial, the only cause of action at issue was

Appellants' claim that Respondents breached their express warranties in the APA by providing false financial statements"].) Accordingly, Question 1 asked only whether respondents supplied inaccurate financial statements—nothing more or less.

That is how appellants handled the issue at trial. In closing argument, their counsel told the jury that the answer to Question 1 was "yes, they did fail to comply. And that's the breach that brought us here." (31RT/8731.) He went on to say that the warranties refer to the financial statements, and the jury will take the financial statements back into the jury room. (31RT/8731-8732.) He concluded, "So we have our answer to No. 1, which is essentially the opinion that Mr. Sompels gave, that the financial statements do not comply. And therefore, defendants' [*sic*] failed to comply with the warranties in 7.6 and 7.22." (31RT/8740.)

In sum, the jury understood its simple task in answering Question 1: Assess the competing testimony on appellants' claim that respondents' financial statements were accurate. The jury did so, and by answering "No," delivered its finding that the statements were accurate.

b. Appellants have forfeited any evidence-based challenge to the jury's finding that the financial statements are accurate.

When an opening brief only discusses the evidence favorable to the appellant, without addressing the evidence favorable to the respondent, the appellant forfeits the argument that the verdict is not supported by substantial evidence. (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.)

Notwithstanding this foundational rule of appellate practice, appellants' opening brief contains no discussion of the evidence supporting the verdict. The statement of facts cites Mr. Sompels' testimony that respondents' financial statements were inaccurate (AOB 24-25), but it says nothing about the extensive competing evidence. A reader of the opening brief would have no idea that six witnesses—including appellant Trophy Automotive Group's own CFO—gave testimony supporting the financial statements' accuracy. (See Statement of the Case § I.1.)

Appellants' failure to address the evidence supporting the verdict forfeits any evidence-based challenge to the jury's finding that respondents' financial statements were accurate.

2. The challenged instructions have nothing to do with whether respondents' financial statements were accurate—in fact, they assume a finding that the financial statements were *not* accurate.

The Court need not even reach the merits of any challenged instruction, because the jury's finding on Question 1 makes all of them irrelevant.

a. Courts have repeatedly held that an erroneous instruction concerning an issue that the jury never reached cannot be prejudicial.

"[I]t is common for appellate courts to conclude an erroneous instruction was harmless where the jury does not reach the question addressed by the erroneous instruction." (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 633 (*Harb*), citing *Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 273 [erroneous instruction about the plaintiff-bicyclist's conduct was harmless because the jury found that the defendant-motorist was not negligent, and the jury did not reach the question of the plaintiff's negligence in causing a collision]; *Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 179 [the erroneous refusal to give an instruction on damages was harmless because the jury found that the defendant was not liable, so the jury did not reach the issue of damages]; *Thompson v. Keckler* (1964) 228 Cal.App.2d 199, 214 [allegedly erroneous instructions about damages were harmless because the jury never reached the question of damages].) The same conclusion—no prejudice—must apply here, where the jury never reached the issues about which appellants complain.

Question 1—the only question the jury answered—is about the content of *respondents'* financial statements, and therefore concerns only *respondents'* conduct. (See 32CT/8271 ["Did defendants fail to comply with their obligations under sections 7.6 or 7.22 of the Asset Purchase Agreement?"].) Those instructions cannot have affected the verdict, because the jury never reached the questions about appellants' own conduct—Questions 2 and 3:

- The instructions on condition precedent, substantial performance, and good faith related to Question 2—"Did *plaintiffs* do all, or substantially all, of the significant things that the Asset Purchase Agreement required them to do?" (32CT/8271, italics added.)
- The instructions on reliance and imputed knowledge related to Question 3—"Did *plaintiffs* rely on the warranties made by defendants in sections 7.6 or 7.22 of the Asset Purchase Agreement regarding the dealer financial statements?" (32CT/8272, italics added.)

In short, the jury could not have answered "No" to Question 1, which asked solely about *respondents*' financial statements, based on something that *appellants* did or didn't do. So even if any of the challenged instructions were incorrect, appellants cannot show—any more than the *Spriesterbach*, *Vahey* or *Thompson* appellants could—that any such instruction influenced the jury's exoneration of the *defendant's* conduct.

b. *Harb* provides no basis for appellants to connect the challenged instructions to the jury's unrelated finding.

Notwithstanding the authority holding that an erroneous instruction related to an issue that the jury never reached cannot be prejudicial, appellants insist that when incorrect instructions divert the jury's attention from the "actual issues," an inference of prejudice is raised regardless of what boxes are checked on the special verdict form. (AOB 83.) But the sole decision they cite—*Harb*, *supra*, 233 Cal.App.4th 606—is easily distinguishable, and in any event is not controlling (see *Jessen v. Mentor Corp*. (2008) 158 Cal.App.4th 1480, 1489, fn. 10 [there is no horizontal stare decisis in the Court of Appeal]).

In *Harb*, *supra*, 233 Cal.App.4th 606, the plaintiff physician suffered a stroke while driving home from a 12-hour shift, and he sued the first responders for allegedly delaying treatment and worsening the consequences of his stroke. (*Id*. at pp. 609-610 [police handcuffed him, believing that his slurred speech and disorientation indicated he was drunk, and the first ambulance to arrive departed without him].) Surgery did not occur for four hours after the 911 call, leaving the plaintiff unable to care for himself or perform most basic life functions. (*Id.* at p. 614.)

At trial, defense counsel argued that the plaintiff was contributorily negligent for failing to take his blood pressure medication, and the jury was instructed on contributory negligence. (*Id.* at p. 615.) The special verdict form asked whether the defendants were negligent and instructed the jury that if the answer was "No," the jury should not answer any other questions, one of which asked whether plaintiff was contributorily negligent. The jury answered "No," and did not reach the question about plaintiff's conduct. (*Id.* at pp. 615, 633.)

The Court of Appeal framed the issue before it as "whether an accident victim's preaccident negligence qualifies as comparative negligence that first responders can assert to reduce their liability for damages caused by their tortious acts or omissions"—and finding no precedent on *that* issue, reasoned at length to hold that the answer is no. (*Id.* at pp. 625-633.) Thus the court agreed with Dr. Harb that the jury should not have been instructed on comparative negligence and that the defendants should not have been allowed to argue that his neglect of his high blood pressure was comparative negligence that rendered him responsible for all the harm he suffered. (*Id.* at pp. 610, 633.)

The court then held that although the jury did not reach the question of contributory negligence, erroneously allowing the issue of contributory negligence to permeate the trial prejudicially influenced the no-fault defense verdict. (*Id.* at pp. 636-637.) Having relied in part on "the familiar principle of tort law that a 'tortfeasor takes the plaintiff as he finds him'" (*id.* at p. 626; see also *id.* at pp. 632-633), the court explained that the arguments of counsel and the evidence could have improperly focused the jury's attention on the plaintiff's conduct, distracting the jury from the key question of whether the defendants were negligent. (*Id.* at p. 637.)

In contrast, here there was no such risk of distracting or confusing the jury. The question of whether respondents' financial statements were accurate only involved assessing the documents themselves and the testimony of witnesses knowledgeable about such documents. Unlike in *Harb*, where the jury heard all about the plaintiff's claimed contribution to his own harm, there is nothing appellants here could have done to impact whether the financial statements were accurate. After all, respondents prepared the financial statements for Mercedes-Benz long before negotiations for the sale of the dealership began. (20RT/5538.) Appellants even concede in their opening brief that their conduct was "not relevant to whether the Financial Statements were accurate." (AOB 29.)

Appellants' only explicit argument that the instructions about Questions 2 and 3 might somehow have influenced the answer to Question 1 appears at pages 82-83 of their opening brief. There, they say that the jury could have been misled "to conclude that Respondents did not breach the APA if

Appellants breached any of their due-diligence obligations" or "to believe that Respondents breached their express warranty obligations only if they acted in 'bad faith.'" (AOB 82-83.) This is pure speculation. And since appellants' opening brief ignores all the *evidence* supporting the verdict, this Court need not evaluate the entire record on appellants' behalf to decide whether assertedly erroneous instructions made that verdict *even more* likely than it would have been anyway. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 ["[I]t is counsel's duty to point out portions of the record that support the position taken on appeal"]; see Statement of the Case § I.1. and Argument § I.A.1.a., *ante*.)

Because Question 1 presented a simple on-off switch based solely on respondents' conduct, the jury could not possibly have based its answer to that question on appellants' conduct. Appellants cannot connect the purportedly erroneous—and unrelated—instructions to the jury's finding on Question 1.

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Appellants have not identified a single case in which a court found prejudicial error in circumstances like those here. That should come as no surprise: Common sense tells us that when a jury resolves a dispositive issue with extensive evidentiary support without reaching any secondary issues, errors concerning those other issues could not have been prejudicial.

But, as we next demonstrate, even if the court engages in a full-fledged analysis of the *Soule*/*Rutherford* prejudice factors, that will only confirm the absence of any possible prejudice.

B. The Application of the ***Soule/Rutherford*** Prejudice Factors Confirms The Absence Of Any Possible Prejudice From Any Error In The Jury Instructions.

A court can only reverse "where it seems probable that the error prejudicially affected the verdict." (*Rutherford*, *supra*, 16 Cal.4th at p. 983.) Our Supreme Court has explained that a prejudice analysis should "tak[e] into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.'" (*Rutherford*, *supra*, 16 Cal.4th at p. 983, quoting *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580-581 (*Soule*).) None of the factors weighs in favor of finding prejudice here.

1. The overwhelming evidence that respondents' financial statements were accurate negates any possible prejudice from the claimed errors.

a. Appellants forfeited any claim of prejudice by failing to discuss the evidence supporting the verdict.

Appellants have the burden of showing that any instructional error was prejudicial. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) Such a showing necessarily requires a discussion of the evidence. (See, e.g., Cal. Const., art. VI, § 13 [no reversal "unless, after an examination of the *entire cause, including the evidence*, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," italics added].) Indeed, our Supreme Court has listed "the state of the evidence" as the first factor in a prejudice analysis. (*Rutherford*, *supra*, 16 Cal.4th at p. 983.)

Yet the opening brief contains no discussion of the evidence supporting the jury's verdict—*none*. The statement of facts cites testimony that respondents' financial statements were inaccurate (AOB 24-25), but it says nothing about the extensive competing evidence. The same is true of appellants' prejudice argument. (AOB 78-84.) These omissions should forfeit any claim of prejudice.

But if the Court wishes to consider the matter further, we now summarize how the evidence strongly supports the jury's verdict, with no indication that the jury was misled by any instructions or arguments of counsel.

b. There was extensive evidence from which the jury could find that respondents' financial statements were accurate.

Appellants' expert witness, Ronald Sompels, opined that respondents' financial statements were not accurate because they did not reflect year-end adjustments. (24RT/6702, 6721, 6752-6755.) But there was plenty of contrary evidence, well over the substantial evidence threshold. As detailed above, several witnesses explained that the financial statements were originally prepared for Mercedes-Benz, and they were not rendered inaccurate or misleading just because adjustments were later made that were reflected in tax returns or other financial statements. (Statement of the Case § I.1., *ante*.)

Dr. Mark Schmitz (Ph.D. in economics) testified that the financial statements complied with APA section 7.6 (28RT/7907), and the adjustments here were not misrepresentations (28RT/7853). Robert Davis (accountant for auto dealers) also testified that the financial statements met the requirements of section 7.6 (29RT/8133), and the adjustments did not cause the financial statements to not fully and fairly reflect the results of operations (29RT/8166). Others said the same. (See, e.g., 28RT/7939 [testimony from Jeffrey Canizaro, Senior Manager of Dealer Credit at Mercedes-Benz Financial Services USA, LLC, that the financial statements reflected the real results of the operation of the dealership].)

Not only that, but Timothy Devine, CFO of appellant Trophy Automotive Group, admitted that the 2014 financial statement "looks like it does" fully and fairly represent the financial condition and results of operations of the dealership. (28RT/7945.) Only after talking to counsel during a break in his deposition did Mr. Devine change his testimony to say that the financial statement "would be overstated somewhat based on these adjustments." (28RT/7945-7946.) The jury was under no obligation to accept his changed testimony.

Given the extensive testimony that respondents' financial statements were accurate, the jury's "No" answer to Question 1 was easily supported by the evidence. In fact, it wasn't even close—the vote was 11-1. (32RT/9021-9022; see *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 305-306 [verdict of 11-1 not close "and thus not helpful in assessing the impact of the instructional error"].)

2. The jury gave no indication that it was misled.

Another factor in the prejudice analysis is whether the jury gave any indication that it was misled. (*Rutherford*, *supra*, 16 Cal.4th at p. 983.) There was no such indication here. In fact, just the opposite: The jury's only note asked if they could see

Mr. Sompels' "report or testimony that says which tax adjustments should have been operating expenses." (32RT/9001.) This shows that the jury was focused on the correct issue for Question 1: Were respondents' financial statements inaccurate? Thus, this factor, too—which appellants also ignore—weighs against a finding of prejudice.

3. None of counsel's arguments about unrelated issues could have distracted the jury from answering the straightforward question of whether respondents' financial statements were inaccurate.

Let's recap what we know: (1) Appellants agreed to verdict form Question 1, which has the meaning that both sides attributed to it: Were respondents' financial statements inaccurate?; (2) a wealth of evidence supported the jury's "No" answer; and (3) the jury had no reason to answer the other questions. Given that much, no argument on unrelated issues involving appellants' conduct could have distracted the jury from the on-off switch that Question 1 represents.

Still, appellants posit that "the jury was to led to believe that the primary issue was *Appellants'* honesty rather than the accuracy of *Respondents'* Financial Statements." (AOB 81, original italics.) That's wrong. In opening statement, respondents' counsel began his discussion of "the liability picture" by saying that "the issue really is, simply put, whether or not financial statements that were to be provided under that particular part of the contract fully and fairly represent the financial condition and results of operations of the business in material respects." (20RT/5476.)

Appellants also dwell on respondents' efforts to challenge Mr. Watar's credibility. (AOB 29-30, 33.) But litigants are given wide latitude to cross-examine witnesses to test credibility. (See *Payette v. Sterle* (1962) 202 Cal.App.2d 372, 375.) And there were other issues in the case beyond the financial statements' accuracy—particularly causation, which implicated appellants' due diligence and Mr. Watar's alleged reliance on the representations. So respondents had every right to offer and argue about evidence on those issues.

Contrary to appellants' claim (AOB 81), although respondents' counsel did discuss those other issues during closing argument, he did not put them first. In fact, he began by agreeing with appellants' counsel that "this case is about one thing and one thing only. Were we supposed to write on schedule 7.6 adjusting entries." (31RT/8770.) Thus, respondents' counsel actually focused the jury on the financial statements' accuracy. To the extent he then discussed issues involving appellants' conduct before summarizing the extensive evidence that the financial statements were accurate (31RT/8801-8810), he did not suggest that those issues had any impact on the content of the financial statements. Thus, he could not have confused the jury into believing that its answer to Question 1 should have anything to do with appellants' conduct.

Appellants are also wrong to claim that the jury instruction on the implied duty of good faith and fair dealing "misled the jury to believe that Respondents breached their express warranty obligations only if they acted in 'bad faith.'" (AOB 83.) As discussed, counsel for both parties repeatedly told the jury that its sole task in answering Question 1 was to decide whether the financial statements were accurate. (§ I.A.1.a., *ante*.) Neither party mentioned good faith in connection with that issue. Properly so: The financial statements were prepared well before there was any conduct between the parties that could have involved bad faith.

Further, reviewing courts "assume that the jury understood the instructions and correctly applied them to the facts." (*Solgaard v. Guy T. Atkinson Co.* (1971) 6 Cal.3d 361, 371.) The jury was instructed that "in every contract or agreement there is an implied promise of good faith and fair dealing." (31RT/8724.) That instruction conveys that parties to a contract must act in good faith regardless of whatever else they've promised. Contrary to appellants' claim, the instruction does not come close to suggesting that respondents could only have breached their express warranty obligations if they acted in bad faith.

Nor is it at all reasonable to argue that there wasn't a question about the accuracy of the financials, so the jury must have been influenced by other matters. (See AOB 30, 62.) The evidence summarized above shows a clear dispute about the financial statements' accuracy.

None of the challenged jury instructions had anything to do with the jury's well-supported answer to Question 1, so the instructions could not have been prejudicial. Because appellants cannot demonstrate prejudice, this Court can stop reading here and affirm the judgment.

But even if the Court reads on, it will see that the jury instructions were not erroneous.[5]

[5] Without developing the argument, appellants claim that they were "denied a fair trial because they had to spend most of their trial time defending themselves against Respondents' improper accusations that Appellants had breached the contract and effectively committed fraud." (AOB 37.) It is unclear whether appellants intended this "fair trial" argument to be a standalone claim of reversible error, but they did not set it out separately or attempt make a specific showing of prejudice, so this Court should ignore it. (*Dinslage v. City & County of San Francisco* (2016) 5 Cal.App.5th 368, 377, fn. 3 ["although we address the issues raised in the headings, we do not consider all of the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument," internal quotation marks omitted].) But even if the Court were to consider the argument, it must fail. Respondents had every right to put on evidence that appellants failed to perform their obligations under the APA; as discussed in § II.B., *post*, that issue was relevant to appellants' breach of contract claim.

II. There Was No Error In The Challenged Jury Instructions, And In Any Event Appellants Failed To Preserve Most Of The Errors They Claim.

A. Governing Law.

A party is entitled to jury instructions on "every theory of the case advanced by him which is supported by substantial evidence." (*Soule*, *supra*, 8 Cal.4th at p. 572.) The instructions must also correctly state the law. (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 526.)

It is the appellant's burden to demonstrate error on an adequate record. (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678; see *Faulk v. Soberanes* (1961) 56 Cal.2d 466, 471 (*Faulk*) [the appellant must present a record "sufficiently complete to establish that the claimed errors were not invited by her"].) The invited error doctrine applies with "particular force" in the area of jury instructions, and "numerous cases have held that a party who requests, or acquiesces in, a particular jury instruction cannot appeal the giving of that instruction." (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000 (*Transport*).) So strong is this principle that "where the record does not disclose which party requested an allegedly erroneous instruction, 'the reviewing court *must presume that the appellant requested the instruction* and therefore cannot complain of error.'" (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 593, original italics.)

As we demonstrate below, appellants agreed to several of the instructions they now challenge, and even when they "objected" their position was often unclear. Thus, they have waived or forfeited many of their claims of error.

B. The Challenged Jury Instructions Were Supported By Substantial Evidence, They Correctly Stated the Law, And Appellants Agreed To Some Of Them.

1. Condition precedent.

Appellants first challenge a standard breach of contract instruction that said appellants could not recover if they did not do "all, or substantially all, of the significant things that the contract required." (33CT/8367; 31RT/8723.)

The instruction's wording, which came directly from CACI No. 303 (breach of contract elements), correctly conveyed the law that to succeed on a breach of contract claim, a plaintiff must prove that all conditions precedent occurred. This includes "[doing] all, or substantially all, of the significant things that the contract required [the plaintiff] to do." (CACI No. 303 (2016); see *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380.)

The instruction was also supported by the evidence. Under the APA, a "Condition Precedent to Obligations of the Seller" was appellants' truthful certification of satisfaction with due diligence. (35CT/8990, 9004, 9017-9018.) Respondents put on extensive evidence that appellants were *dissatisfied* with their due diligence—meaning that the certificate of satisfaction was untruthful, and the condition precedent of a truthful certification therefore did not occur. (Statement of the Case § F, *ante*.)

The trial court properly decided that this standard condition precedent instruction was necessary to give effect to appellants' warranty that their certificate of satisfaction was truthful. (See 29RT/8315.) If the trial court did not treat the completion of a truthful certificate as a condition precedent—as the APA expressly did—appellants would have been able to recover even after failing to comply with a crucial part of the deal. Although appellants refuse to accept that they would "forfeit" "bargained-for rights" by failing to provide a truthful certificate of satisfaction (AOB 40), that's what the contract dictated. They had no right to avoid instructions that mirrored the contract's requirements.

Respondents had demanded a truthful certificate of satisfaction in hopes of avoiding the very dispute that appellants dragged respondents into. Indeed, Mr. Peterson testified that if Mr. Watar had *expressed* his dissatisfaction with due diligence, Mr. Peterson would not have proceeded with the sale. (30RT/8472, 8474.) Mr. Zubieta said the same. (23RT/6406-6407.) And Mr. Watar conceded that he understood that his certificate of satisfaction with due diligence was the "point of no return" (22RT/6046)—that is, it compelled respondents to proceed to close the deal.

Appellants argue that the condition precedent instruction did not apply because their signing of a certificate of satisfaction was never intended to precede respondents' obligation to provide accurate financial statements. (AOB 38, 41-42.) But the premise is wrong: Appellants' obligation to provide a truthful certificate was a condition precedent to respondents' obligations to perform *at closing*. (35CT/9017 ["The obligations of the Seller to perform this Agreement at Closing are subject to the following conditions precedent which shall be fully satisfied *at or before the Closing*, unless waived in writing by the Seller," italics added].) And, as a practical matter, it was only *at closing* that respondents' representations and warranties had to be truthful. (35CT/9014 ["All of the representations and warranties of the Seller herein contained shall be true and correct in all material respects *on and as of the Closing Date as if made on and as of the Closing Date* . . . ," italics added].)

Not only that, but appellants ignore that a condition precedent is not just an act that must be performed before the other party must act. It is also an act that must be performed before "the contractual right accrues." (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1147, fn. 13.) Here, that is the contractual right to recover for breach. (See *Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1192 ["Generally, a party's failure to perform a condition precedent will preclude an action for breach of contract"].)

Finally, appellants claim that the instruction was unwarranted because "there was no dispute that Appellants *did* provide a due-diligence certification prior to Closing, and therefore *did* perform all or substantially all their obligations under the APA." (AOB 45.) This argument is easily dismissed as ignoring the contract language requiring appellants' certificate to be *truthful*. (35CT/9004, 9017.)

Because the jury instruction properly conveyed what the APA dictated—appellants could not recover if they did not do the significant things that the contract required, like providing a truthful certificate of satisfaction—appellants cannot show error.

2. Substantial performance doctrine.

Appellants also curiously challenge a related jury instruction that *favored* them. This instruction told the jury that appellants could overcome respondents' contention that they "did not perform all of the things that they were required to do under the contract" by showing that they "made a good faith effort to comply with the contract." (33CT/8370; 31RT/8724.) This language was based on CACI No. 312 (substantial performance). Contrary to appellants' argument (AOB 46, 47), the substantial performance doctrine is not limited to the construction context, and it does apply in the sales context. (See *Magic Carpet Ride LLC v. Rugger Investment Group, L.L.C.* (2019) 41 Cal.App.5th 357, 364 [applying the doctrine to the sale of an airplane].) This instruction was properly given because there was substantial evidence that appellants did not perform all their obligations under the APA: They did not provide a truthful certificate of satisfaction with due diligence.

a. The "good faith" language benefited appellants.

Appellants argue that this instruction improperly introduced a good faith requirement into the case. (AOB 47.) Not so: All contracts include an implied good faith duty. (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.)

Regardless, the "good faith" aspect of this instruction benefited *appellants*, not respondents. The instruction was a natural follow-on to the instruction about element two in CACI No. 303.[6] It allowed appellants to survive a failure to perform their obligations if they could prove that they made a good faith effort. In other words, it gave appellants an opportunity to recover even if they couldn't prove full performance.

Apparently unaware that they are challenging a favorable instruction, appellants assert that the instruction flipped the

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[6] Appellants never say this in so many words, but their objection to this instruction depends on their objection to the condition precedent instruction just discussed: The substantial performance instruction is entirely correct if the condition precedent instruction was properly given, and could only be objectionable if the prior instruction was objectionable.

burden of proof. (AOB 47.) Again, not so. In a breach of contract action, plaintiffs always have the burden of proving that they held up their end of the bargain. (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352.) If anything, this instruction effectively lowered appellants' burden of proof by allowing them to prove that they made a good faith effort to perform instead of requiring them to prove that they fully performed.

Appellants contend that if good faith were relevant at all, it would have been respondents' burden to prove that appellants breached their good faith obligations, not appellants' burden to prove that they acted in good faith. (AOB 47.) But the instruction was not about proving a breach of the implied covenant of good faith and fair dealing. It was about giving appellants an opportunity to save their breach of contract claim by proving a good faith effort to substantially comply, notwithstanding the evidence that they did not fully comply.

b. The removal of an element also benefited appellants—and since they apparently wanted it removed, the invited error doctrine bars their claim.

Appellants also claim that the trial court erred in removing the second paragraph from CACI No. 312, which requires a plaintiff to prove "[t]hat [name of defendant] received essentially what the contract called for because [name of plaintiff]'s failures, if any, were so trivial or unimportant that they could have been easily fixed or paid for." (AOB 47-48.) But appellants apparently *wanted* that paragraph removed. (See 30RT/8538-8539 [appellants' counsel complaining that paragraph two "is basically directing a verdict"].) If they encouraged the paragraph's removal, they invited the purported error. Alternatively, if they wanted the paragraph to remain in, they haven't provided any record support to show that they did (it was respondents' proposed instruction, see 33CT/8370). Either way, their claim is barred. Courts have long recognized that "[i]n the hurry of the trial many things may be, and are, overlooked which could readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them." (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29 (*North Coast*), quoting *Sommer v. Martin* (1921) 55 Cal.App. 603, 610, internal quotation marks omitted; see also *Faulk*, *supra*, 56 Cal.2d at p. 471; *Transport*, *supra*, 202 Cal.App.4th at p. 1000.)

Regardless, appellants' argument has no merit. They contend that removing paragraph two from the instruction "depriv[ed] [them] of the ability to show" that their failure to comply did not keep respondents from getting what they bargained for. (AOB 48.) But the paragraph's removal only *helped* appellants by eliminating an element that they otherwise would have had to prove. Because that element was removed, appellants did not have to show that respondents received essentially what the contract called for. Instead, appellants only had to "show that [they] made a good faith effort to comply with the contract." (33CT/8370; 31RT/8724.) It is nonsensical to suggest that appellants were harmed by the *lack* of the need to prove something.

c. The language regarding the quality of appellants' due diligence also benefited appellants.

Finally, appellants attack language that was added for their benefit *and that they agreed to*. The instruction stated that the "overall quality of the work performed in connection with the investigation and due diligence by [appellants], including their agents Steven Lee and KPMG, is not at issue in the case." (33CT/8370; 31RT/8724-8725.) As appellants acknowledge, this was intended to focus the jury on appellants' subjective state of mind rather than the objective question of what might have been uncovered through better due diligence. (AOB 49-50.)

When the parties and the trial court were finalizing this part of the instruction, appellants' counsel said, "Okay. We'll take it." (30RT/8548.) Thus, the invited error doctrine bars their claim. (See *Transport*, *supra*, 202 Cal.App.4th at p. 1000.) If counsel intended to convey that his clients objected to the instruction but reluctantly agreed to its proposed form, he never said so. Error cannot be predicated on the trial court's failure to read counsel's mind. Without a clear record of appellants' position on the instruction in the trial court, appellants have not satisfied their burden of showing that they did not invite the claimed error. (See *Faulk*, *supra*, 56 Cal.2d at p. 471; *North Coast*, *supra*, 17 Cal.App.4th at pp. 28-29.)

Regardless, appellants now make the backwards claim that instructing the jury *not* to focus on the objective question somehow put undue focus on it. (AOB 49-50.) But that can't be right. If it were, every time a trial court instructs a jury to disregard a witness's testimony, it would err for having drawn attention to the testimony.

In sum, there was no error in the substantial performance instruction.

3. Implied covenant of good faith and fair dealing.

The trial court gave the jury a modified version of CACI No. 325, which principally says that "[i]n every contract or agreement there is an implied promise of good faith and fair dealing." (31RT/8724.) The instruction also explains that the duty of good faith and fair dealing means "that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract." (*Ibid.*)

The Court need not reach appellants' substantive arguments, because they waived any objection to this instruction. Although appellants objected to an earlier proposed version of the instruction, which listed the elements necessary to prove a breach of the implied covenant of good faith and fair dealing (30RT/8530-8531), they did not object to the instruction given, which simply defined good faith, and they did not offer any qualifying language (30RT/8531-8532). And they conceded during trial that the instruction correctly stated the law. (30RT/8530.) This conduct constitutes a waiver. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 949 [when an instruction correctly states the law, the appellant waives any objection by failing to offer the trial court any qualifying language], disapproved on another ground in *White v. Ultramar* (1999) 21 Cal.4th 563, 574, fn. 4.)

But even if the Court considers appellants' arguments, it will see that they lack merit.

1. Appellants argue that CACI No. 325 is only appropriate when a party has brought a separate cause of action for breach of the implied covenant of good faith and fair dealing. (AOB 51.) That may be true, but it's irrelevant: The trial court did not give CACI No. 325. It simply borrowed the definition of "good faith" from CACI No. 325 to explain the substantial performance concept, and it never suggested to the jury that respondents were claiming a breach of the duty of good faith and fair dealing.

2. Pointing to the APA language stating that appellants had "sole discretion" to decide if they were "satisfied with the results of such due diligence review" (35CT/9016), appellants take aim at respondents' purported "theory that Appellants had

an implied obligation to certify the due diligence in good faith." (AOB 52.) There are two problems with this argument.

First, respondents' actual theory—based on the express terms of the APA—was that appellants had to provide a *truthful* certificate of satisfaction. Appellants did not need to rely on the implied covenant of good faith and fair dealing to show that appellants failed to perform that condition precedent. The APA expressly required appellants' certificate to be truthful (35CT/9004, 9017), and there was substantial evidence that the certificate was not truthful, among other things because appellants repeatedly expressed their dissatisfaction to KPMG (see pp. 21-22, *ante*.) The notion that this instruction read into the APA a good-faith limitation on appellants' discretion is a red herring.

Second, appellants miss the point. They *did* have sole discretion to determine their own satisfaction—and therefore to pull the plug on the deal if they were dissatisfied for any reason or for no reason. What appellants could *not* do was (1) certify that they were satisfied—thus inducing respondents to close this huge and complex transaction—when in fact they were dissatisfied, and then (2) play "gotcha" by suing over that very dissatisfaction. Putting it bluntly, appellants did not have "sole discretion" to lie.

3. Appellants argue that even if they were required to exercise their discretion in good faith, it was error to instruct the jury on the implied covenant in the absence of any evidence that

their alleged "abuse of discretion" denied respondents a benefit under the contract. (AOB 58.) This is wrong because there was plenty of evidence that appellants' failure to truthfully (or in good faith) certify their satisfaction with due diligence *did* deny respondents a benefit under the contract.

Respondents bargained for appellants' promise that if they signed the certificate, they were in fact satisfied with due diligence and thus would stand by their representation—not drag respondents into litigation over it. That was the purpose of the certificate of satisfaction. (See, e.g., 22RT/6046; 27RT/7580; 30RT/8460.) Appellants are right that "due diligence was a process conducted for the benefit of the *buyer*" (AOB 59, original italics), but the requirement that they deliver a truthful certificate of satisfaction was for the benefit of the *seller*.

Appellants further contend that they could have done no due diligence and still closed on the deal without breaching the APA, and that by instructing the jury on good faith, the trial court "transformed Respondents' warranty that they gave accurate financial statements into a conditional warranty simply because Appellants chose to complete due diligence for their own benefit." (AOB 60.) Yet again, not so: As explained above, the APA already expressly required appellants to provide a truthful certificate as a condition precedent to respondents' obligations. A jury instruction on the meaning of good faith did not "transform" anything.

4. Finally, appellants claim that the instruction was "vague and misleading." (AOB 61.) But contrary to appellants' argument, nothing in the instruction suggests that respondents could get away with providing inaccurate financial statements on the basis of a good-faith belief that the statements were accurate. The instruction says that the duty of good faith and fair dealing means "that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract." (31RT/8724.) If the jurors believed that the financial statements were inaccurate, this instruction would not have led them to answer "No" to Question 1.

———♦———

For all these reasons, the instruction defining "good faith" provides no basis to disturb the judgment.

4. Reliance.

Appellants challenge yet another instruction after having agreed that its subject matter was relevant.

The trial court instructed the jury: "Even if you find the defendants breached the contract by providing dealer financial statements that did not comply with Section 7.6 or 7.22 of the Asset Purchase Agreement, you cannot award damages to plaintiffs unless you first find that plaintiffs relied on defendants' warranties in those sections." (31RT/8726-8727.)

The instruction was entirely proper, and in any event appellants waived any claim of error.

a. Appellants admitted that reliance was relevant and conceded that it did not matter if the court gave the instruction—waiving any claim of error.

Although appellants argue on appeal that the reliance instruction is contrary to law because defendants should be "strictly liable for breaching their warranties" (AOB 64), that wasn't their position at trial. Just the opposite: Their counsel said that appellants "don't contend" that an error or omission in a financial statement leads to strict liability. (22RT/6013.) Counsel was clear: "[T]he jury is entitled to make a factual determination as to whether or not the buyer—whether or not the buyer relied upon the representations and warranties in the contract in deciding to go forward and close this transaction." (18RT/4828-4829.)

Additionally, trial counsel repeatedly conceded that appellants' knowledge about the accuracy of the financial statements was relevant:

- "[B]oth sides I think are entitled to present evidence that goes to knowledge. Did the buyer know at the time of certification that the financial statements were inaccurate, which means to [respondents' counsel's] point, that it was a farce or fraud when they certified.

We're not suggesting that that would not be relevant." (2SuppRT/29.)[7]

- "It is relevant what they knew, yes." (2SuppRT/9.)
- "The question of knowledge is a relevant question." (2SuppRT/10.)

Appellants' position on the specific reliance instruction was far from clear. At one point, counsel said, "We don't have a problem adding the *Kazerouni* reliance standard as long as we use actual knowledge."[8] (29RT/8195.) Counsel then went on to make a tepid objection, tempered by the concession that whether the court gave the instruction or not, "I don't think it matters." (29RT/8196-8197.)

To the extent appellants are deemed to have agreed to the reliance instruction, that bars their challenge. (See *Transport*, *supra*, 202 Cal.App.4th at p. 1000.) And their concession that the instruction didn't matter torpedoes any claim of prejudice.

Regardless, their challenge fails on the merits. Appellants contend that the reliance instruction was erroneous because a "typical" cause of action for breach of contract does not include the element of reliance. (AOB 63.) But this isn't a typical breach

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[7] "SuppRT" refers to the 6-volume reporter's transcript apparently filed with this Court on Sept. 11, 2020.

[8] We discuss *Kazerouni v. De Satnick* (1991) 228 Cal.App.3d 871 (*Kazerouni*), which requires proof of reliance as part of a breach of warranty claim, in § II.B.4.b., *post*.

of contract claim. It involves an alleged breach of warranty where, as we next show, the plaintiff must prove reliance on the defendant's representation. That is because a plaintiff cannot show that a breach of warranty caused any damages if the buyer did not rely on the seller's representation.

b. California law requires proof of reliance in a breach of warranty claim about the sale of a business.

During trial, appellants' counsel acknowledged that although some jurisdictions have held that a plaintiff bringing a breach of warranty claim need not prove reliance on the defendant's representation, California requires that proof. (29RT/8193-8197.)

In *Kazerouni*, *supra*, 228 Cal.App.3d 871, the Court of Appeal affirmed the trial court's rejection of a buyer's breach of warranty claim based on the seller's overstated financials. The trial court found that the buyer did not rely on the misstatements because before escrow closed, the buyer received accurate financial records from the seller, including tax returns and financial statements, and personally observed the operation of the business for two weeks. (*Id.* at pp. 872-873.) The buyer did not dispute the trial court's finding that the buyer had not relied on the misstatement but argued that no reliance is required for a breach of warranty claim under the California Uniform Commercial Code (UCC). (*Id.* at p. 873.)

The appellate court reasoned that the UCC did not apply because the warranty was about a business's financial condition, which does not involve goods. (*Id.* at p. 873.) The court also explained, "Under the law relating generally to express warranties a plaintiff must show reliance on the defendant's representation." (*Id.*, fn. 3, citing *Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 440, and *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115.)

Appellants make several arguments about why *Kazerouni* does not control, none of which has merit. First, they argue that the Court of Appeal could not have intended to "announce" a "sweeping rule" in a footnote. (AOB 73.) But *Kazerouni* did not purport to *announce* anything. It reiterated the longstanding rule that reliance is required for breach of warranty claims in non-UCC cases.

Relatedly, appellants contend that *Kazerouni* could not have intended to announce a rule in the non-UCC context without citing any cases outside the UCC. (AOB 73-74.) But again, *Kazerouni* did not announce a rule, and it *did* cite cases recognizing the reliance element in the non-UCC context. (*Kazerouni*, *supra*, 228 Cal.App.3d at p. 874, fn. 6.) For example, it cited *Gagne v. Bertran* (1954) 43 Cal.2d 481, 486, which held: "For historical reasons warranties have become identified primarily with transactions involving the sale or furnishing of tangible chattels [citations omitted], but they are not confined to such transactions. Strict liability has also been imposed for innocent misrepresentations of facts that the maker purported to know, *that the recipient relied on in matters affecting his economic interests*, and that the maker positively affirmed under circumstances that justify the conclusion that he assumed responsibility for their accuracy." (Italics added.)

Appellants also argue that *Kazerouni*'s discussion of the reliance requirement was dicta. (AOB 74-75.) It was not. The appellant in *Kazerouni* had argued that, as a matter of law, reliance was not required—but wrongly relied on the UCC in a non-UCC case. (228 Cal.App.3d at p. 873.) Necessary to the decision about whether reliance was required was a ruling on whether reliance is required in the non-UCC context. To dispose of this argument, the court had to determine whether non-UCC claims for breach of warranty require proof of reliance.

Kazerouni cannot be materially distinguished on the facts. It does not matter that the contract here spelled out the warranties in more detail than in *Kazerouni*. The key point from *Kazerouni* is that when the alleged breach is the failure to accurately represent the financial condition of a business, the buyer has no claim when, as here, he is on notice of the lower income figures reported in the business's tax returns. (See *Kazerouni*, *supra*, 228 Cal.App.3d at pp. 872-873.)

Contrary to appellants' claim (AOB 76), *Kazerouni* did *not* turn on whether a buyer can assert a warranty claim based on information that the seller never warranted was accurate. The court treated the listing agreement as having warranted that the financial information was accurate. And the court did not say, as appellants claim, that reliance was only a necessary element because nothing in the parties' contract indicated that they negotiated any "actual warranties." (AOB 76.) If the basis for the court's decision had been that the listing agreement was not a "warranty," the court would not have needed to address the question of whether reliance is a necessary element to a breach of warranty action.

c. Even if this Court decides that reliance is not an element of a breach of warranty claim, it should still hold that a buyer's knowledge of the falsity of a warranty precludes recovery.

California is not alone in requiring reliance as an element of a breach of warranty claim. (See, e.g., *Hendricks v. Callahan* (8th Cir. 1992) 972 F.2d 190, 192-194 [Minnesota law]; *Land v. Roper Corp.* (10th Cir. 1976) 531 F.2d 445, 448-449 [Kansas law]; *Professional Service Industries, Inc. v. Kimbrell* (D.Kan. 1993) 834 F.Supp. 1305, 1311 [Kansas law].)

To the extent other jurisdictions do not require proof of reliance, this Court should not follow them. Without a reliance element, plaintiffs could recover for having overpaid for a business, even though the seller's representations did not cause the overbid. That would improperly allow recovery for breach of contract without proof of causation—a necessary element in every contract case.

This case demonstrates the point. The allegedly overstated net income in the financial statements—versus what was reported in tax returns—could not have *caused* the claimed overpayment, because appellants knew about the difference in income figures before they closed the deal. A buyer does not rely on—damages are not *caused* by—a seller's "misrepresentation" of financial condition when the buyer is on notice that the net income reported in the tax returns was lower than that contained in the financial statements. That is especially true where, as here, the seller disclosed the very information that the buyer claims not to have known, and the buyer hired KPMG—one of the largest auditing and advisory services companies in the world—to review and compare the very documents at issue.

Appellants' own theory of the case was that the allegedly inflated net earnings caused them to overpay. (See, e.g., 20RT/5423.) But this could not be possible without their reliance on the allegedly inflated net earnings. Thus, reliance was the linchpin of this causation analysis. Without reliance, there could be no causation, and without causation, there can be no claim.

Apart from causation, some courts recognize a waiver defense when a buyer knows a warranty is false. For example, although New York law does not require a plaintiff-buyer to prove that it believed the warranted information (*CBS Inc. v. Ziff–Davis Pub. Co.* (N.Y. 1990) 553 N.E.2d 997, 1000-1001), there is still a waiver defense to a breach of express warranty claim where the "buyer closes on a contract in the full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty under the terms of the contract," unless the buyer expressly preserves his rights under the warranties. (*Galli v. Metz* (2d Cir. 1992) 973 F.2d 145, 151.) Under that framework, although reliance on the seller's representation is not an *element* of the breach of warranty cause of action, the plaintiff-buyer's knowledge of the falsity of the representation still bars recovery.

Some other courts analyzing the reliance issue have rejected the reliance-as-an-element approach but have not conclusively determined whether the law in their state would allow the sort of defense contemplated by New York law. In those cases, the purchase agreements included language that the seller's warranties would continue to operate even if the buyer learned that they were false, so those provisions would have overridden any sort of "New York defense." (See *Giuffrida v. American Family Brands, Inc.* (E.D.Pa. Apr. 23, 1998, No. CIV. A. 96-7062) 1998 WL 196402, at *4 [Pennsylvania law]; *Pegasus Management Co., Inc. v. Lyssa, Inc.* (D.Mass. 1998) 995 F.Supp. 29, 36-37 [Connecticut law].)

Here, there was no such language in the APA. The contract said that the warranties would survive the closing of the transaction for two years (35CT/9019-9020), but it did not say that the seller's warranties would continue to operate even if the buyer learned that they were false.

In the end, the jury properly found that respondents' financial statements were accurate. But even accepting appellants' position that the financial statements were inaccurate because adjustments were later made, appellants' claim would be barred because they knew of the "falsity" and accordingly did not rely on the representations. Mr. Watar himself acknowledged seeing that the net income figures on the financial statements were different from the tax returns. The jury instruction on reliance thus properly conveyed the fundamental causation concept that appellants could not recover if they did not rely on the representations in the financial statements.

5. Knowledge imputed to plaintiffs.

Special Instruction No. 3, given as Instruction No. 52, stated: "PLAINTIFFS are charged with knowledge of any facts or information learned by their agents, including KPMG and Stephen Lee, during their investigation and due diligence processes." (33CT/8371; 31RT/8725.)

Appellants *agreed* to this instruction:

The Court: Is there any objection to that as framed?
Mr. Jacoby: No. This is good.

(29RT/8300.) Appellants' agreement bars any challenge to the instruction. (*Transport*, *supra*, 202 Cal.App.4th at p. 1000.)

Regardless, appellants muster only a one-paragraph argument about this instruction, and they do not claim that it misstated the law. (AOB 77-78.) Instead, they argue that the instruction emphasized issues that were "irrelevant to whether or not Respondents breached their warranties." (AOB 78.) But there was nothing wrong with instructing the jury about appellants' knowledge. The accuracy of respondents' financial statements was not the only issue at trial. As noted above, appellants' own counsel repeatedly stated that the buyers' knowledge was relevant. (2SuppRT/9-10, 29.)

Because appellants conceded that their knowledge was relevant, this Court cannot find error.

III. The Judgment Awarding Attorney's Fees Should Be Affirmed.

The trial court properly determined that respondents were the prevailing party under the APA and thus entitled to attorney's fees. (See 6CTSupp/1310-1325.) Appellants claim no error in the award, apart from their contention that it must be vacated if the judgment is reversed. (AOB 85.) Because this Court should affirm the judgment on the jury verdict, it should also affirm the fee award.

CONCLUSION

Appellants' jury instruction arguments have nothing to do with the jury's dispositive and well-supported finding that respondents' financial statements were accurate. The challenged instructions, several of which appellants agreed to and none of which was erroneous, could not have caused prejudice.

The Court should affirm.

DATED: September 9, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENT'S BRIEF** contains **12,778** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: September 9, 2021

/s/ *Robin Meadow*

Robin Meadow

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036, my email address is pherndon@gmsr.com.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ *Pauletta L. Herndon*
Pauletta L. Herndon

First Motor Group Of Encino v. Encino Motorcars, Inc.
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Court of Appeal Case No. B303094

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