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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FIRST MOTOR GROUP OF ENCINO, LLC et al., Plaintiffs and Appellants, v. ENCINO MOTORCARS, LLC et al., Defendants and Respondents.	B303094 (Los Angeles County Super. Ct. No. LC106723)

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Virginia Keeny, Judge. Affirmed.

Quinn Emanuel Urquhart & Sullivan, Daniel C. Posner, Zachary Schenkkan; Arent Fox, Aaron H. Jacoby, Victor P. Danhi, Karen Van Essen, and Franjo M. Dolenac for Plaintiffs and Appellants.

Murphy Rosen, David E. Rosen; Greines, Martin, Stein & Richland, Robin Meadow and Laurie J. Hepler for Defendants and Respondents.

This consolidated appeal arises from the sale of an automotive dealership by defendants and respondents, Encino Motorcars, LLC, David L. Peterson, and Stephen Zubieta (sellers), to plaintiffs and appellants, First Motor Group of Encino LLC and Trophy Automotive Dealer Group LLC (buyers). After the transaction had been completed, buyers sued sellers alleging, among other things, that sellers breached the parties' asset purchase agreement (APA) by providing inaccurate financial statements.

The case proceeded to trial on buyers' singular breach of contract claim and the jury rendered a verdict in favor of sellers. The trial court granted sellers their attorney's fees. Buyers now appeal the judgment and attorney's fees order, primarily alleging errors pertaining to the jury instructions. Upon examination of the entire cause, we conclude that buyers have failed to demonstrate a reasonable probability that the allegedly erroneous instructions misled the jury. Therefore, any instructional error was not prejudicial. In light of that conclusion, we find no error with respect to the attorney's fees order. Accordingly, we affirm the judgment and order.

FACTUAL AND PROCEDURAL BACKGROUND[1]

I. The parties and their negotiations

Buyer's principal, Nasser Watar, attended business school in the United Arab Emirates. He had worked in the automobile industry since approximately 1985, owning or operating businesses around the world involving finance and automobiles. Watar aspired to own hundreds of auto dealerships in the United

[1] We derive the following facts from the evidence admitted at trial, unless otherwise indicated.

States. Around 2012 or 2013, Watar was put in touch with two brokers to assist him in buying a dealership. Watar told them that he and his business partner could afford large stores and were eager to move quickly in anticipation of positive industry trends. The brokers proposed several sellers. However, because Watar lacked credibility in the U.S. market having never owned a dealership, no deals came together until the brokers found sellers' dealership, Mercedes-Benz of Encino.

Mercedes-Benz is one of the most coveted luxury brands, and Southern California is a major market. Encino was within the top 10 in sales among the country's Mercedes-Benz dealerships, located near affluent buyers and having been recently remodeled. Watar was interested, and soon came to view the Encino dealership as a "trophy" store—not just a "golden opportunity," but a "diamond" one. He believed that, following the purchase, he could immediately grow the business by 20 percent, as well as possess the credibility to get other deals.

The brokers told Watar that Peterson (the dealership's majority owner) was a willing but not motivated seller who wanted $50 million for the goodwill of the dealership. Watar and Peterson first spoke on a videoconference in April or May 2013. Peterson said that he would take $100 million for the dealership without specifying whether the number was divided into separate portions for real estate and goodwill.

After visiting the dealership in May or June 2013, Watar told the brokers he was interested, so sellers provided him the dealership's 2011 and 2012 financial statements (the financial statements). Mercedes-Benz USA, the supplier of Mercedes-Benz automobiles, required dealers to submit monthly and yearly financial statements to compare their performance and watch for red flags. The company's credit arm, Mercedes-Benz Financial Services USA, LLC, required the submission of financial statements to assess whether the dealerships have sufficient cash flow to repay loans. Sellers' financial statements were prepared "in accordance with the Mercedes-Benz USA reporting requirements and d[id] not strictly follow . . . generally accepted accounting . . . princip[les]." Sellers sometimes adjusted their financials after closing their year-end books—a common practice. The financial statements were important to Watar because he expected they would be accurate, given that they were prepared for Mercedes-Benz well before he entered the picture. Buyers thus used the financial statements to determine the offer price for the dealership's goodwill.

The day after receiving the financial statements, Watar and Peterson met in person, and in less than 15 minutes, Watar offered $40 million for the dealership's goodwill. Watar did not tell Peterson how he arrived at that lump sum figure, and did not say it was based on a multiple of earnings. At the time, Watar's internal audit team had not done a formal analysis. To Peterson, it sounded like a firm offer.

II. The APA

The parties executed the APA to govern the completion of the sale, with the buyers agreeing to, among other things, pay sellers $40 million for goodwill.

Articles 6 and 7 of the APA contained the parties' warranties. Under sections 6.4 and 7.22, each party warranted that none of their statements or warranties 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." As regarding the accuracy of sellers' financial statements, section 7.6 stated that: "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." Schedule 7.6, on which seller could have identified any exceptions to this warranty, stated: "None."

Articles 8 and 9 of the APA defined the "conditions precedent" to be "fully satisfied at or before the Closing" before buyer and seller were required "to perform this Agreement at Closing."

Section 8.1 required that sellers provide a certificate at closing stating that "[a]ll of the representations and warranties of the Seller . . . [are] true and correct in all material respects on and as of the Closing Date as if made on and as of the Closing Date." Section 8.15 defined the buyers' ability to conduct due diligence: "The Buyer and its representatives shall have thirty (30) days from the delivery of all Schedules to be delivered by Seller, except Schedules 2.2(d), 3.1, 3.2, and 6.2, to conduct further due diligence review of the Seller, the Assets, the Assumed Liabilities or the Business (including, without limitation, any investigation into the Corner Lot (as such term is defined in the Property Purchase Agreement) or any environmental issues relating to the Real Property), and in the sole discretion of Buyer, the Buyer shall be satisfied with the results of such due diligence review." If buyers were not satisfied with the due diligence, they could elect to terminate the APA.

In section 9.1, buyers agreed to provide a certification at closing verifying that "[a]ll of the representations and warranties of the Buyer . . . [are] true and correct in all material respects on and as of the Closing Date as if made on and as of the Closing Date." Section 9.11 required buyers to send sellers "written notice of the Buyer's satisfaction with the Buyer's due diligence review." Consistent with these provisions, the APA's preamble stated that the deal was "specifically conditioned upon and subject to the Buyer's written satisfaction of its due diligence review"

In section 10.5, sellers agreed that the warranties would survive the closing of the transaction for two years, and that sellers would indemnify buyers for any damages buyers suffered "arising out of or based upon the breach or failure of any representation or warranty." According to section 10.14, sellers' obligation to indemnify buyers from losses resulting from sellers' breach of a representation or warranty survives the closing as to any breaches that are uncured as of the closing.

III. Buyers' due diligence and the deal's closing

As Peterson testified, and Watar's broker corroborated, buyers' certification of their completion of due diligence was the "fulcrum" of the contract to sellers because sellers wanted to know that the deal was done at closing and that buyers would honor their commitments, given the negative ramifications of the deal falling through for a dealership of this stature. Watar understood certification as the deal's "point of no return."

To perform due diligence, buyers hired audit firm KPMG, and relied on several lawyers from the law firm of Winston & Strawn, as well as their own in-house team, including Stephen Lee, head of its mergers and acquisitions and internal audit team. KPMG expended more than 400 billable hours on the project, reviewing the financial statements and speaking to Zubieta (the dealership's general manager and co-owner) about them, as well as the dealership's accounting. After KPMG noted that some of the dealership's reported net income was not being transferred to its equity accounts, it confirmed with Zubieta that the discrepancy was attributable to distributions to the owners of the dealership, accounting for the difference between reported and net income. KPMG did not compare the dealership's tax returns with its financial statements, as that was atypical for an asset purchase and not within the scope of their agreement here.

Watar asked Lee to review the financials. During due diligence, KPMG informed buyers that sellers' financial statements were prepared "in accordance with the Mercedes-Benz USA reporting requirements and do[] not strictly follow US GAAP." KPMG's financial due diligence team manager understood that this meant sellers made post-closing adjustments to their financials—which, he said, is "not unusual. Most of the companies do that."

Watar attested that he knew "at the time of closing that the net income on the financial statements was different than the net income on the tax returns." Nonetheless, Watar never attempted to renegotiate the purchase price. Upon receipt of KPMG's updated report in February 2014, Lee reported to Watar there were "[n]o red flags."

The same day, buyers provided written satisfaction with the due diligence. However, Watar was not satisfied with KPMG's work. Written correspondence from three days before buyers signed their certificate of satisfaction reflected that, after receiving KPMG's first draft report—which Lee called "the worst due diligence report" he had seen in 15 years—buyers intended to "terminate the whole engagement." In the same email, Lee stated to KPMG that Watar was "not satisfied with how the [due diligence] proceeded." In an email one day later, Lee said that "the financial due diligence was totally mismanaged," and he wanted KPMG's internal committee to review the work. Lee told KPMG that buyers "reserve[] our legal rights against your firm, including non-completion 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&A transaction relating to [the dealership]."

Nonetheless, in April 2014, the parties closed on the transaction.

IV. Post-closing operations

After taking over the dealership, buyers maintained similar operating and accounting practices. For example, the dealership's financial controller continued their prior practice of, at the start of a new year, adjusting a prior year's financials by moving some performance bonus income from December to January to reflect when that income was actually earned. The adjustment was necessary because of how Mercedes-Benz reported performance bonuses to its dealers, reflecting the sale in December when it was actually January. Doing so was consistent with Mercedes-Benz's requirements.

The controller approached Watar in January 2015 about this practice and received his approval to continue it, doing so for two years without complaints. Nonetheless, Watar believed that sellers' financial statements were inaccurate—in that the prior year's revenues were overstated by approximately $260,000—and that he had overpaid for the dealership.

After Watar was approached with this information, he also discovered that sellers had been booking operating expenses as an asset on the financial statements, thereby inflating yearly net profit. Comparing the statements to sellers' tax returns (where sellers had correctly reported their income net of operating expenses), it appeared that the financial statements overstated revenues by approximately $1.6 million in 2011 and $1.3 million for 2012 and again in 2013. However, he did not have his lawyers present these claims to sellers until April 2016. In January 2018, Watar instructed the controller to stop making the performance bonus adjustment, without explanation.

V. The instant action

The same month, buyers sued sellers for breach of contract, negligent misrepresentation, concealment, and intentional misrepresentation. They alleged that sellers breached their warranties in the APA's sections 7.6 and 7.22 by providing inaccurate financial statements, causing buyers to overpay. Sellers cross-claimed for declaratory relief, rescission, negligent misrepresentation, and intentional misrepresentation, contending in part that buyers' certification of their satisfaction with the due diligence was materially false and caused harm to sellers. Sellers later dismissed all but their declaratory relief claim and stipulated to withdraw their affirmative defense of rescission.

The case proceeded to a jury trial on buyers' breach of contract claim after their other claims were dismissed on statute of limitations grounds. Buyers moved in limine to bar sellers from introducing evidence and argument concerning buyers' satisfaction with the due-diligence process, arguing that it was not relevant to their remaining claim and therefore misleading, and, in any event, there was no dispute that buyers satisfied the APA's due-diligence certification requirement by providing a written certification before closing. The court denied the motion.

VI. Opening statements

In their opening statement, sellers stated that "liability" is the issue to "start with", hinging upon "whether or not financial statements that were to be provided under [the APA] fully and fairly represent[ed] the financial condition and results of operations of the business in material respects" for all relevant periods. Sellers further emphasized that buyers' due diligence, which in this case involved "very sophisticated" parties, was a "very critical" issue. They accused buyers of breaching the contract by certifying their satisfaction with due diligence despite actually being dissatisfied. They also alleged that Watar acted dishonestly and in bad faith.

VII. Testimony regarding compliance with the APA

Several witnesses testified about whether the financial statements met the requirements of APA section 7.6, i.e., whether they "fully and fairly represent[ed] the financial condition and results of operations of the [dealership] in all material respects."

Buyers' expert, CPA Ronald Sompels, testified that the financial statements were not accurately and fairly stated because they did not reflect year-end adjustments. Sompels acknowledged that materiality is judged from the perspective of the intended user of the financial statements, which he presumed was the buyers. Sompels further conceded that post-closing year-end adjustments are a well-known industry practice and that comparing the dealership's financial statements to its tax returns enabled one to see the differences right away.

Sellers' accounting expert, CPA Robert Davis, concluded that 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 buyers. Thus, the dealership's adjustments, which were ultimately reported in a financial statement, did not cause the financial statements to be inaccurate or otherwise not fully and fairly to reflect the results of operations. Davis disagreed with several of Sompels' other opinions, disputing that there were no consequences to submitting an inaccurate financial statement to Mercedes-Benz, and that adjusting entries was necessarily attributable to erroneous reporting.

Jeffrey Canizaro, Senior Manager of Dealer Credit at Mercedes-Benz Financial Services USA, LLC, testified that the financial statements reflected the real results of the operation of the dealership. Year-end adjustments for tax purposes were "not uncommon"—if not "obvious"—industry practices which do not render a dealership's financial statements invalid or misleading. He therefore never had any material concerns about the way sellers maintained their financial statements; no one at Mercedes-Benz determined that they were misleading or inconsistent with the company's expectations or standards.

Dr. Mark Schmitz, Ph.D. in economics, attested that the financial statements complied with APA section 7.6. He had never seen a dealership that did not make year-end adjustments. Adjusted financials were not any better of an indicator of profitability than unadjusted financials. Schmitz did seek clarification as to whether certain adjustments might be "misrepresentations", but upon receiving further documentation determined they were not.

Andrew Slaman, a CPA for both sellers and buyers who specialized in auto dealerships, testified that all of his clients make year-end adjustments. The adjustments in this case were "usual and customary for automobile dealerships," and none violated tax law. In order to minimize tax liability, net earnings on financial statements before adjustments are commonly higher than net earnings on tax returns. Slaman prepared similar adjustment reports for both buyers and sellers. He was not aware of any significant differences between buyers and sellers' accounting practices and methods.

Zubieta, also a CPA, testified that the financial statements were accurate when presented, and therefore complied with APA section 7.6. Mercedes-Benz never raised concerns about the financial statements. According to Zubieta, a dealership's adjustment for tax purposes does not render the financial statement inaccurate.

Timothy Devine, Trophy Automotive Group's chief financial officer, agreed initially that the 2014 financial statement appeared to fully and fairly represent the financial condition and results of operations of the dealership. However, after buyers' counsel asked for a break, and then spoke with Devine, Devine revised his testimony to state that the financial statement "would be overstated somewhat based on these adjustments."

VIII. The instructions and verdict form

The court gave several jury instructions over buyers' objections. The court gave a modified version of CACI No. 303 ("Breach of Contract – Essential Factual Elements") instructing the jury that, to recover damages on their breach of contract claim, buyers must prove that defendants breached the contract by delivering buyers financial statements that did not comply with APA sections 7.6 and 7.22. The court also included the optional element that buyers must prove they "did all, or substantially all, of the significant things that the contract required them to do."

The court also gave a modified version of CACI No. 312 ("Substantial Performance"), stating that sellers "contend that [buyers] did not perform all of the things that they were required to do under the contract, and therefore [sellers] did not have to perform their obligations under the contract," and that, to "overcome this contention," buyers "must show [they] made a good faith effort to comply with the contract." The court added to the instruction that the "overall quality of the work performed in connection with the investigation and due diligence by [buyers] . . . is not an issue in this case" and that the jury's verdict should not be based upon its "opinion of the quality of work performed by them during the investigation and due diligence process."[2]

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[2] The court omitted the second element of substantial performance from the instruction: "2. That [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." (CACI No. 312.)

The court also gave a modified version of CACI No. 325 (“Breach of Implied Covenant of Good Faith and Fair Dealing – Essential Factual Elements”), instructing the jury that every contract includes an “implied promise of good faith and fair dealing,” which means a party cannot “do anything to unfairly interfere with the right of any other party to receive the benefits of the contract.”

A special instruction (No. 2) stated that “[e]ven if you find that [sellers] breached the contract by providing dealer financial statements that did not comply with sections 7.6 or 7.22 of the [APA], you cannot award damages to [buyers] unless you first find that [buyers] relied on [sellers’] warranties in those sections.” Another special instruction (No. 3) stated that plaintiffs were “charged with knowledge of any facts or information learned by their agents,” including KPMG, during due diligence and investigation.

The special verdict form posed five questions to the jury. Question 1 asked “Did [sellers] fail to comply with their obligations under sections 7.6 or 7.22 of the Asset Purchase Agreement?” The form then instructed: “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.” Question 2 then asked whether buyers “d[id] all, or substantially all, of the significant things” required by the APA, question 3 asked whether buyers “rel[ied] on the warranties” in sections 7.6 and 7.22, question 4 asked whether sellers’ failure to comply with their obligations was “a substantial factor in causing any harm to [buyers],” and question 5 asked what buyers’ damages were.

Regarding the verdict form, the court instructed the jury to "follow my instructions and the form carefully" and to "consider each question separately" and "answer the questions on the verdict form in the order they appear." The court further told the jury that: "After you answer a question, the form tells you what to do next. [¶] Unless the verdict form tells all 12 jurors to stop and answer no further questions, every juror must deliberate and vote on all of the remaining questions."

IX. Closing arguments, deliberations, and verdict

In closing, buyers argued that question 1 on the verdict form could be resolved by reference to APA sections 7.6 and 7.22 and buyers' experts testimony, among other evidence, that the sellers' financial statements were inaccurate.

Sellers began their closing by arguing that they agreed with buyers that "this case is about one thing and one thing only. Were we supposed to write on Schedule 7.6 adjusting entries." Sellers then argued that the question of whether buyers relied on seller's warranties was the "meat of the case", a "critical" prerequisite to "award[ing] damages," which buyers could not satisfy because, as sellers' counsel emphasized in several ways, Watar knew that the financial statements were incomplete. Sellers again suggested that buyers breached the APA by lying when they certified their satisfaction with the due diligence, despite actually being dissatisfied.

The jury deliberated over an unspecified number of minutes in the afternoon following closing argument, and then the next morning until it rendered a verdict at approximately 11:45 a.m. During deliberations, the jury sent out one note requesting "[buyers' expert's] report or testimony that says which tax adjustments should have been operating expenses." By an

11-to-1 vote, the jury returned a verdict in sellers' favor by answering question 1—whether sellers had breached sections 7.6 and 7.22 of the APA—"No." Having answered "No" to question 1, the jury did not answer the verdict form's remaining questions.

After judgment was entered in sellers' favor, they were awarded attorney's fees consistent with the APA. Buyers timely appealed from the judgment and the attorney's fees order and we consolidated the appeals.

DISCUSSION

The sole basis for buyers' appeal from the underlying judgment is a handful of allegedly erroneous jury instructions. Specifically, buyers contend that the court erred in instructing the jury that buyers had to satisfy a condition precedent to prevail on their breach of contract claim (modified CACI No. 303), that buyers had to show they made a good faith effort to comply with the contract (modified CACI No. 312), that the contract had an implied covenant of good faith and fair dealing (modified CACI No. 325), that buyers were required to prove reliance on sellers' warranties (Special Instruction No. 2), and that buyers were charged with knowledge of any facts or information learned by their agents during due diligence (Special Instruction No. 3). According to buyers, these instructions, whether considered singly or together, caused the jury to improperly focus on buyers' performance of their contractual obligations and whether they relied on sellers' warranties, causing them prejudice and depriving them of a fair trial. By extension, awarding sellers attorney's fees was improper because they should not have been the " 'prevailing party' " at trial.

We reject buyers' arguments. Considering all relevant factors, any instructional error did not prejudice buyers. Most fundamentally, the jury did not reach the questions implicated by the alleged instructional errors, concluding only that sellers did not breach their obligations under the APA. Buyers' contrary arguments lack merit.

A. Standard of review and applicable law

We review the propriety of jury instructions de novo. (*Cristler v. Express Messenger Systems, Inc*. (2009) 171 Cal.App.4th 72, 82.) We will not reverse the judgment for instructional error unless appellant demonstrates that the error results in a miscarriage of justice (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 574 (*Soule*)), i.e., where it is reasonably probable the error actually misled the jury. (*Harry v. Ring the Alarm, LLC* (2019) 34 Cal.App.5th 749, 762; see *Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 617 (*Harb*) [appellant bears burden of satisfying prejudice standard].)

"[I]t is common for appellate courts to conclude an erroneous instruction" does not meet that standard "where the jury does not reach the question addressed by the erroneous instruction." (*Harb*, *supra*, 233 Cal.App.4th at p. 633.) But that conclusion is "not automatic because California courts are required to conduct 'an examination of the entire cause.' " (*Ibid*.) In doing so, the court must assess "(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." (*Soule*, *supra*, 8 Cal.4th at pp. 580–581.)[3]

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[3] Our Supreme Court has also articulated the relevant factors as follows: "(1) the degree of conflict in the evidence on critical issues [citations]; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading

Reviewing a claim of instructional error, we "view[ ] the evidence in the light most favorable to the appellant." (*Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1333.) " '[W]e must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party.' " (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.) That said, "[i]t is not enough that there may have been a 'mere possibility' of prejudice." (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1156.)

B. Buyers have not demonstrated prejudice from any instructional errors

Buyers contend that the five allegedly erroneous jury instructions sufficiently prejudiced them because the instructions, combined with the special verdict form and sellers' counsel's arguments, "misled the jury to conclude that [sellers] did not breach the APA if [buyers] breached any of their due-diligence obligations." Further, the allegedly erroneous instruction pertaining to the implied covenant of good faith and fair dealing "misled the jury to believe that [sellers] breached their express warranty obligations only if they acted in 'bad faith' " because the instruction did not refer to any particular implied obligation. We disagree.

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effect [citation]; (3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; (4) the closeness of the jury's verdict [citation]; and (5) the effect of other instructions in remedying the error [citations]." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876 (*LeMons*).)

Here, the jury answered "no" to question 1: "Did [sellers] fail to comply with their obligations under sections 7.6 or 7.22 of the Asset Purchase Agreement?" The jurors were instructed both orally and in the special verdict form's text that, upon answering "no" to question 1, they should stop their deliberations. Accordingly, the jury did not answer question 2 (which pertained to condition precedent), question 3 (which pertained to reliance), or any of the other remaining questions, including question 5 (which pertained to damages).

APA section 7.6 required that sellers deliver, among other things, two years of financial statements that fully and fairly represented the financial condition and results of their business operations in all material ways. Under section 7.22, sellers warranted that their representations, warranties, and statements did not contain any untrue statements and did not omit any material facts.

None of the allegedly erroneous instructions stated, or remotely implied, that they were related to the jury's analysis of breach (i.e., question 1). For instance, the instruction setting forth the elements for breach of contract (modified CACI No. 303) made clear that the only question the jury was to assess with respect to sellers' alleged *breach* was whether they delivered financial statements in violation of APA sections 7.6 and 7.22. The element in contention—whether buyers have proven that they "did all, or substantially all, of the significant things that the contract required them to do"—was set forth separately, entirely unassociated with the question of sellers' breach. The jury was instructed that the condition precedent finding was a prerequisite to *awarding damages* (i.e., question 5 of the verdict form) but in no sense did the instructions suggest that it was a prerequisite to the question of *breach* (i.e., question 1). Consistent with this reading, the language tracking this instruction was set forth at question 2 of the verdict form, and the jury did not need to answer that question.

Similarly, the substantial performance instruction (modified CACI No. 312) stated in relevant part that sellers "contend that [buyers] did not perform all of the things that they were required to do under the contract, and therefore [sellers] did not have to perform their obligations under the contract," and that, to "overcome this contention," buyers "must show [they] made a good faith effort to comply with the contract." This wording merely suggests that sellers' performance was excused if the jury concluded that buyers failed to fulfill their obligations, and did so in bad faith—in essence, the focus of question 2. The omission of the second element in CACI No. 312, which buyers acknowledge at most shifted the focus to their good faith rather than rendered it a prerequisite to the question of breach, does not persuade us otherwise.

The implied covenant of good faith and fair dealing instruction (modified CACI No. 325)—which explained a common principle of contract law and informed the jury that it applied to every contract, without focusing on one side's obligations at the exclusion of the other's—likewise did not suggest the question of buyers' good faith was necessary to consider with respect to question 1. We reject buyers' speculative argument that the instruction required a finding of either party's good or bad faith prior to the question of breach because the instruction did not refer to any particular implied obligation.

Our view of the special instructions (Nos. 2 and 3) is no different. The reliance instruction (No. 2) specifically carved out the question of breach from the reliance question, stating: "[e]ven if you find that [sellers] breached the contract by providing dealer financial statements that did not comply with sections 7.6 or 7.22 of the [APA], you cannot *award damages* to [buyers] unless you first find that [buyers] relied on [sellers'] warranties in those sections." (Italics added.) Like the condition precedent instruction, the reliance instruction clearly stated that reliance was a prerequisite to a finding of *damages* (question 5), not a finding of *breach* (question 1). Accordingly, it was also set out as a separate question (question 3) on the verdict form, such that the jury did not need to reach the question once it answered "no" to question 1.

Further, as buyers' arguments suggest, the imputed knowledge instruction (No. 3)—which told the jury it could impute the knowledge acquired by buyers' agents during due diligence to buyers—can only plausibly be read as relating to the condition precedent and reliance questions (questions 2 and 3). The instruction did not remotely reference the question of breach (question 1). Because we have already concluded that the condition precedent and reliance instructions could not have been conflated with the question of breach, we likewise discern no way that the special instruction might have misled the jury.

Thus, the special verdict form and the trial court's instructions to the jury made clear that the jury was to decide the questions of the breach of sellers' warranties separately from the questions as to which the allegedly erroneous instructions pertain. Taken together, the only "reasonable inference to be drawn" from the verdict form and the court's instructions was that the instructions had no bearing on the jury's conclusions, which only involved rendering a conclusion regarding the financial statement's accuracy. (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 274.)

Moreover, there was ample evidence to support the conclusions that sellers provided materially accurate financial statements, and a dearth of evidence suggesting otherwise.[4] The jury heard testimony from several witnesses to the effect that the financial statements furnished to buyers reflected the real results of the dealership's operations, and therefore complied with sellers' warranties.

Even buyers' expert—despite his ultimate conclusion that the financial statements were inaccurate—admitted that materiality is judged by the intended user of the financial statements, and that the adjustments at issue here were common industry practices that were self-apparent to anyone reviewing the dealership's tax returns. Despite his unelaborated assumption that the intended user was the buyers, all other evidence suggested that the end user was Mercedes-Benz, and Mercedes-Benz did not consider the alleged inaccuracies to be material.[5] Buyers' own chief financial officer, too, initially

[4] Buyers suggest, without supporting authority, that the evidence supporting the verdict is irrelevant to our analysis. However, our Supreme Court has made clear that we must assess "the state of the evidence" in ascertaining prejudice. (*Soule*, *supra*, 8 Cal.4th at pp. 576, 580–581.)

[5] Even were buyers the intended users of the financial statements, the evidence strongly suggested that buyers too did not consider any disparities as material, given that they certified satisfaction with their extensive due diligence and proceeded with the transaction despite knowledge of those disparities.

acknowledged the accuracy of the financial statements before conferring with counsel and qualifying his testimony.

Therefore, this was not a case where, for example, sellers chose not to comply with their warranty obligations by delivering no financials because buyers failed to perform. Rather, there was ample, minimally controverted evidence from which a properly instructed jury could draw a conclusion that sellers provided accurate financial statements in all material ways and therefore met their obligations under the APA. (*LeMons*, *supra*, 21 Cal.3d at p. 876.) Even viewing these facts and circumstances in a light most favorable to buyers (*Henderson v. Harnischfeger Corp.*, *supra*, 12 Cal.3d at p. 674), it is not reasonably probable that the instructions at issue affected the jury's findings.[6]

Next, the parties point to no other instructions which might have alleviated the prejudice from or exacerbated the harm of the allegedly erroneous instructions (*LeMons*, *supra*, 21 Cal.3d at p. 876), which we acknowledge "may weigh in favor of a finding that prejudice occurred in this case. However, [the remaining] factors

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[6] In this regard, buyers' citation to *Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 704—a "close" case where evidence conflicted on the issue implicated by the erroneous instruction that shifted the burden of proof—is unpersuasive. Even if we agreed that the substantial performance and implied covenant instructions shifted the burden of proof as buyers suggest, we do not view the evidence regarding the financial statements' accuracy as "close." (*Ibid.*) To be sure, buyers' compliance with *their* obligations was a hotly contested issue at trial, but, in light of our review of other relevant factors and the "entire cause," we decline to draw the conclusion that the jury was misled. (*Soule*, *supra*, 8 Cal.4th at pp. 580–581.)

show there is no reasonable probability the jury was misled or the verdict affected." (*Soule*, *supra*, 8 Cal.4th at pp. 581–582.)[7]

Most prominently, we glean no prejudice from the parties' trial arguments. Notably, sellers' opening statement and closing argument segmented off—and in several ways foregrounded—the question of whether they breached the APA, and that it only involved the question of the financial statements' accuracy. Buyers, too, argued that question 1 could be answered by sole reference to APA sections 7.6 and 7.22 and the evidence that the sellers' financial statements were inaccurate. Thus, neither party appeared to interpret the instructions and verdict form as buyers now do on appeal. While sellers did emphasize other elements of their defense elsewhere in their argument, including buyers' due diligence, alleged breach of their contractual responsibilities, their lack of reliance, and Watar's lack of credibility, sellers did not contend that these matters had any bearing on the answer to question 1 or otherwise conflate the relevant legal principles. Thus, the parties' arguments, if anything, militate against a conclusion that the alleged instructional errors were prejudicial. (*LeMons*, *supra*, 21 Cal.3d at p. 876; see, e.g., *Soule*, *supra*, 8 Cal.4th at p. 582 [finding no prejudice partially because counsel's "argument uniformly

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[7] We reiterate that the jury was specifically instructed to adhere to the instructions on the verdict form and to answer the questions in the order that they appear. The jury's declining to answer questions after their "no" answer to question 1 strongly suggests that they heeded the court's instructions regarding the method of deliberations and did not in fact deliberate on several of the issues relevant to buyers' claims of instructional error presented later on the verdict form.

supported the reasonable inference that the general causation instruction allowed"].)

Finally, the jury did not indicate that any of the allegedly erroneous instructions misled them. Instead, the one note that was sent out over the course of the few hours of deliberations suggested that the jury focused only on question 1, and specifically whether the financial statements were inaccurate. The request—seeking testimony from buyers' expert or others regarding which tax adjustments should have been operating expenses—appeared to interpret question 1 consistently with the parties' closing arguments, the court's instructions, and the only natural reading of the verdict form. Had the jury interpreted question 1 with the complexity that buyers now do on appeal, its deliberations may well have been more protracted, if not including clarifying requests focusing on subjects beyond the accuracy of the financial statements. Instead, the jury returned a quick 11-to-1 verdict, answering the single question in sellers' favor. (See *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 306 [11-to-1 verdict not supportive of prejudice].) Accordingly, this factor also weighs against a finding of prejudice. (See *LeMons*, *supra*, 21 Cal.3d at p. 876 [verdict that was not close and not preceded by reread requests relevant to the instructional issue counsel against prejudice finding].)

Buyers' invocation of *Harb*, *supra*, 233 Cal.App.4th 606 does not alter our conclusions. There, plaintiff suffered a stroke and crashed his car. (*Id.* at p. 609.) Plaintiff sued first responders, alleging that he suffered brain damage as a result of their delay in treating him. (*Ibid.*) At trial, the jury was given a comparative negligence instruction based on evidence that the plaintiff had failed to take medication to control his high blood pressure. (*Id.* at pp. 609–610, 614–615.) The jury found that defendants were not negligent and did not answer any other questions, including the question asking whether plaintiff was contributorily negligent. (*Id.* at pp. 615, 633.) Plaintiff appealed, alleging that the comparative negligence instruction was erroneous, and defendants countered that there was no prejudice from the erroneous instruction because the jury never reached the question of plaintiff's own negligence.

The Court of Appeal reversed, concluding the instruction was erroneous because a " 'tortfeasor takes the plaintiff as he finds him' " and plaintiff's allegedly negligent conduct occurred before the first responders arrived. (*Harb*, *supra*, 233 Cal.App.4th at p. 633.) Citing the testimony of several witnesses regarding plaintiff's failure to take his blood pressure medication and defense counsel's argument that Harb " 'own[ed] all of the responsibility here as to what happened' " (*id.* at pp. 636–637), the court rejected defendants' prejudice argument, reasoning that "allowing the issue of Harb's comparative negligence in failing to take his blood pressure medication may have affected the findings that defendants were not at fault by improperly focusing the jury's attention on [Harb's] conduct." (*Id.* at p. 637.)

Here, by contrast, there was no similar risk of confusing the issues. As noted, while the parties presented ample evidence of buyers' alleged malfeasance, there was also thorough exploration of the issue of whether the financial statements were accurate. Neither the court nor counsel suggested that question 1 implicated any of the allegedly erroneous instructions. To the contrary, all evidence suggests that the jury's "focus[]" had not been "improperly" diverted to issues that they were thoroughly advised were separate and distinct, and which were not ultimately necessary to reach. (*Harb*, *supra*, 233 Cal.App.4th at p. 637.)

Therefore, considering all relevant factors as they apply to these circumstances, it is not reasonably probable that the alleged instructional errors misled the jury. (*Harry v. Ring the Alarm, LLC*, *supra*, 34 Cal.App.5th at p. 762.) We therefore perceive no basis for disturbing the judgment based upon the purportedly erroneous jury instructions. (*Soule*, *supra*, 8 Cal.4th at pp. 574, 582–583.)[8]

C. Attorney's fees

The only issue that buyers raise in their appeal from the attorney's fees order is that a reversal based upon instructional error would render sellers no longer the " 'prevailing party' " under the APA, requiring that we vacate the attorney's fees award. Thus, because we have concluded that the alleged instructional errors do not constitute a basis for reversal, there is no basis for reversal of the attorney's fees order, either.

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[8] Buyers briefly suggest that they were denied a fair trial because they had to unnecessarily defend against seller's allegations that buyers breached the contract and committed fraud. Because buyers have not otherwise developed the claim, we decline to separately address it. (*Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 377, fn. 3 [declining to consider arguments unsupported by separate legal argument].)

DISPOSITION

The judgment and order are affirmed. Encino Motorcars, LLC, David L. Peterson, and Stephen Zubieta are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BENKE, J.*

We concur:

EDMON, P.J.

EGERTON, J.

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* Retired Justice of the Court of Appeal, Fourth District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.