Filed 11/25/19 Callahan v. Ami Adini & Associates CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

R. SCOTT CALLAHAN, as Personal Representative, etc., Plaintiff, Cross-defendant, and Respondent, v. AMI ADINI & ASSOCIATES, INC., Defendant, Cross-complainant, and Appellant; AMIRAM ADINI et. al., Defendants and Appellants.	D074007 (Super. Ct. No. 37-2014-00038522-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Reversed and remanded for further proceedings.

Gordon & Rees, Brian Mark Ledger, Don Willenburg and Kara Persson for Defendants, Cross-complainant and Appellants.

Kessler & Seecof, Daniel J. Kessler, Benjamin R. Seecof and Albert W. Lee for Plaintiff, Cross-defendant and Respondent.

Richard Callahan[1] employed Ami Adini & Associates, Inc. (AAA) to remediate underground tank pollution on his property and obtain reimbursement for AAA's work from California's Underground Storage Tank Cleanup Fund (the Fund). The trial court concluded that AAA and its agents Amiram Adini and Elie Balas (collectively with AAA, defendants) defrauded Callahan and awarded him compensatory damages of $677,695.51, $640,000 in punitive damages and his costs. The trial court also enjoined Adini and Balas from stating professional degrees or qualifications unless they are true and not misleading.

Defendants appeal, contending: (1) the trial court erred by granting Callahan's motion for judgment on the pleadings on their cross-complaint; (2) the statement of decision contains errors of fact and law that require reversal and retrial; (3) the trial court made erroneous liability determinations; and (4) the damages awards were excessive and not supported by substantial evidence.

We conclude that the trial court erred in granting Callahan's motion for judgment on the pleadings on AAA's cross-complaint for breach of contract. We also conclude that substantial evidence does not support the following findings: (1) alter ego liability

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1 Richard Callahan died shortly after judgment. R. Scott Callahan, as personal representative of his father's estate, has substituted in his place. All references to Callahan are to decedent Richard Callahan.

against Adini and Balas; (2) Balas's personal liability on any of the causes of action; and (3) Adini's personal liability for breach of contract, constructive fraud, and implied contractual indemnity. We otherwise reject defendants' arguments and remand the matter for further proceedings on defendants' cross-complaint.[2]

GENERAL BACKGROUND

The Legislature enacted the Barry Keene Underground Storage Tank (UST) Cleanup Trust Fund Act of 1989 (Health & Saf. Code, § 25299.10 et seq., the Act) "to help ensure an efficient petroleum [UST] cleanup program that adequately protects public health and safety and the environment and provides for the rapid distribution of cleanup funds . . . ." (Health & Saf. Code, § 25299.10(b)(1).) The Legislature found that "owners or operators of [UST's] have been unable to obtain affordable environmental impairment liability insurance coverage to pay for corrective action or the obtainable coverage has been outside their financial means." (Health & Saf. Code, § 25299.10, subd. (b)(4).) The Act created the Fund to pay for claims of reimbursement by UST owners who take

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[2] Callahan moved to strike portions of the appellants' appendix because it contains over 800 pages of trial exhibits that were not admitted into evidence. He also seeks to strike those portions of the opening briefing citing these documents. Defendants admit that the appellants' appendix contains portions of trial exhibits that the trial court did not admit into evidence, but claim that they either did not cite to the extraneous documents, or that other materials properly in the record supported any arguments that mistakenly cited this erroneous material. Defendants suggest that rather than striking portions of the appellants' appendix and those portions of the opening brief that reference the improper material, that we disregard this material. All exhibits, whether or not admitted into evidence, are "deemed" part of the record. (Cal. Rules of Court, rule 8.124(b)(4).) We deny the motion to strike as unnecessary and disregard any exhibits not relevant to the issues on appeal. (See *San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416, 438, fn. 10.)

" 'corrective action.' " (*Caldo Oil Co. v. State Water Res. Control Bd.* (1996) 44 Cal.App.4th 1821, 1825; Health & Saf. Code, § 25299.50, subd. (a).)

The San Diego County Environmental Health Department directed Callahan to remediate petroleum contamination from soil and groundwater under real property (the property) that he owned which previously had UST's. Callahan hired a company to remediate the contamination, which included a large amount of gasoline in the soil and groundwater beneath the property that spread beneath streets and adjacent properties. This company, however, stopped work because it could not handle the property or the reimbursement process. When this company stopped work, approximately $1.35 million remained available in Callahan's Fund account to cover future cleanup costs. Defendants' expert witness testified that he has worked on hundreds of leaking UST sites, but that Callahan's property had the largest "free product plume[]" he had ever come across "by an order of magnitude."[3]

Callahan contacted AAA after receiving several mailings from the company. One mailing advertised cleaning a site "in six months or less" and stated that their "newly employed remediation technology can achieve complete and final cleanup in as little as 90 days from the time we begin the actual remediation treatment." The mailing indicated "expert services" including "[a]nalysis of different remediation methods to determine the

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[3] A "plume" is a contaminant floating on or within groundwater that is not dissolved in the groundwater. "Free product" is gasoline or diesel fuel that is generally floating on the surface and not mixed into the groundwater or dissolved in the groundwater.

most suitable one, tailored for your site (based on contaminants, time, cost and future use of space)." (Italics deleted.)

Callahan contacted AAA and spoke to both Balas and Adini. They represented that AAA could clean the property "fast" from 90 days to six months. In December 2006, Callahan signed a proposal (the 2006 contract) guaranteeing that at least 90 percent of their cleanup charges would be reimbursed and that he would be personally responsible for paying a maximum of 10 percent of the cleanup costs, or $150,000. When he entered into the contract defendants told him they could fully perform their obligations under the contract within the $1.5 million reimbursement limits. Callahan designated AAA as his agent for preparing and seeking reimbursement from the Fund.

Balas admitted that AAA performed no evaluation to determine the amount of money required to clean the property before contracting with Callahan. Adini admitted that before contracting with Callahan, AAA did not review any environmental reports concerning the property, or discuss the extent of the contamination with Callahan. Additionally, AAA had cleaned only one site in six months or less.

AAA submitted "task orders" to Callahan outlining the work and providing a cost estimate. Callahan signed the task orders and returned them to AAA. AAA then sought reimbursement from the Fund as Callahan's agent. When Callahan received payment from the Fund, he would pay defendants' invoices. Callahan reviewed the invoices and saw that Adini billed himself as the "principal engineer." Callahan believed that to be true. Callahan also believed that Balas was licensed as an engineer and a geologist as reported on the AAA invoices.

From 2006 to 2011, Callahan believed that defendants were working on his property and they assured him that "everything's just fine." In January 2011, Callahan received a letter from Adini informing him that he had almost exhausted the $1.5 million in his Fund and it would cost him an additional $500,000 to $620,000 to remediate the property. In July 2011, defendants proposed that if Callahan personally paid them $250,000 above his remaining Fund money, they would "unconditionally guarantee" case closure. Because he did not have $250,000 in cash and believing that he had no other option, Callahan agreed and signed defendants' proposed "Promissory Note Secured by Deed of Trust and Agreement on Financing the Cost of Environmental Closure" (the 2011 note), returned the signed promissory note with an executed trust deed to the Property.

For the next three years, Callahan believed that defendants were still working on the property. Defendants, however, had stopped work on the property in July 2011. Balas admitted that he never informed Callahan that AAA had stopped working on the property. In October 2012, California seized most of AAA's business records.

On July 17, 2014, Callahan received a notice from the County of San Diego that a required corrective action plan for cleanup of the property was past due.

On July 21, 2014, Adini sent Callahan an e-mail that included copies of the 2006 proposal and the 2011 promissory note, which Adini referred to as "our agreements." The e-mail stated: "Due to extreme financial difficulties AAA does not anymore possess the means or personnel critically needed to carry on with the project."

In 2014, Callahan was served as a Doe defendant in a qui tam lawsuit against defendants.[4] That action was consolidated with another lawsuit filed by the State of California. According to the State, in 2008, defendants overbilled the Fund $50,270 for Callahan's project. Defendants refused to defend Callahan, who ultimately settled the consolidated qui tam action for $5,000 after incurring $32,695.51 in legal fees. Eventually, defendants stipulated to judgment in the qui tam action on the State's cause of action for professional negligence. Callahan filed this action in November 2014.

DISCUSSION

I. *MOTION FOR JUDGMENT ON THE PLEADINGS*

A. *Additional Background*

AAA filed a cross-complaint against Callahan for breaching the 2006 contract based on Callahan's alleged failure to pay all invoices submitted by AAA to him within the time specified by the 2006 contract. AAA incorporated into the cross-complaint a bill of particulars[5] stating that AAA sought to recover from Callahan for the reimbursement

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[4] A qui tam action is one brought under a statute that allows a private person to sue as a private attorney general to recover damages or penalties, all or part of which will be paid to the government. (*People ex rel. Allstate Ins. Co. v. Weitzman* (2003) 107 Cal.App.4th 534, 538.)

[5] A demand for bill of particulars may be served on the plaintiff in an action on "an account" and requires the plaintiff to "deliver to the adverse party . . . a copy of the account, or be precluded from giving evidence thereof." (Code Civ. Proc., § 454.) A bill of particulars is regarded as an amplification of the complaint. (*Kurokawa v. Saroyan* (1928) 95 Cal.App. 772, 775.) Its purpose "is to limit the evidence which the plaintiff may offer in support of his claim, ..." (*Weiner v. Davies* (1967) 248 Cal.App.2d 387, 391.)

requests that AAA had submitted for Callahan to the Fund in the amount of $153,351, plus interest, costs, and attorney fees.

Callahan moved for judgment on the pleadings, arguing that the stipulated judgment entered in the consolidated qui tam action (the stipulated judgment) provided that defendants would no longer have any right to any money or benefit from its work on Fund sites. Callahan argued that the stipulated judgment barred AAA from any further payment based upon any reimbursement request submitted to the Fund and that collateral estoppel (more accurately referred to as "issue preclusion")[6] prevented AAA from pursuing its cross-claim for breach of the 2006 contract against him.

AAA opposed the motion, arguing that the stipulated judgment did not apply to a claim for breach of contract for payment of invoices that they had submitted to the Fund for Callahan, "whether Callahan was reimbursed . . . or not." The trial court concluded that the stipulated judgment qualified as a final judgment on the merits and that it barred AAA from receiving financial benefit from Callahan under the 2006 contract.

B. *Analysis*

We review the trial court's grant of judgment on the pleadings under the same standard of review as for a judgment of dismissal following the sustaining of a general demurrer. (*Pardee Construction Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, 1361, fn. 25.) "[W]e are not bound by the determination of the trial court, but are required to render our independent judgment on whether a cause of action has been

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6 *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*).

stated." (*Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 189.) We accept as true all material facts alleged in the cross-complaint, consider matters that may be judicially noticed, and determine de novo and as a matter of law whether the complaint states a cause of action. (*Pardee*, at p. 1361, fn. 25; *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 602.) " 'We are not concerned with a plaintiff's possible inability to prove the claims made in the complaint, the allegations of which are accepted as true and liberally construed with a view toward attaining substantial justice.' " (*Ludgate*, at p. 602.)

"[I]ssue preclusion applies: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 825.) "[A] stipulated judgment may properly be given [issue preclusion] effect, at least when the parties manifest an intent to be collaterally bound by its terms." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664; *Avery v. Avery* (1970) 10 Cal.App.3d 525, 529 [a judgment entered on stipulation has the same effect as if the action were tried on its merits].)

Defendants contend that the trial court erred in granting judgment on the pleadings because the elements of issue preclusion were not satisfied. Specifically, they argue that the stipulated judgment: (1) was not a final judgment on the merits; and (2) did not qualify as final judgment because it did not resolve the negligent misrepresentation claim alleged against them in the qui tam action. We note that defendants did not raise these issues in the trial court. (*Professional Collection Consultants v. Lauron* (2017) 8

Cal.App.5th 958, 972 [" ' "[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court." ' "].) Further, defendants make these arguments without citation to authority. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655-656 [appellant is required to present legal authority in support of each issue raised, along with citations to the record, otherwise the issue may be deemed forfeited].) Accordingly, we deem these arguments forfeited.

The remaining question is whether the stipulated judgment decided an issue identical to the issue raised in the cross-complaint. (*DKN Holdings, supra*, 61 Cal.4th at p. 825.) We conclude that it did not.

In their cross-complaint, defendants alleged that AAA agreed to implement environmental remedial actions on Callahan's property and assist him in seeking reimbursement of the expenses from the Fund, including filing all needed reimbursement requests for corrective action taken at the property with the Fund. AAA claimed that Callahan breached the 2006 contract because he failed to pay all invoices submitted by AAA within the time specified by the 2006 contract.

In its bill of particulars, AAA stated that it submitted invoices detailing the work it performed on the property, that Callahan approved all invoices and "[a]ll monies reimbursed to [Callahan] from the Fund on account of the [Callahan]-approved invoices were to be paid by [Callahan] to [AAA]." The bill of particulars included a balance sheet that set forth the amount of reimbursement that Callahan received from the Fund and the sums allegedly owed to AAA under the 2006 contract. Further, AAA's bill of particulars

conceded that Callahan was a Fund claimant through the statement that "[a]ll monies reimbursed to [Callahan] from the Fund on account of the [Callahan]-approved invoices were to be paid by [Callahan] to [AAA]."

Together, the bill of particulars and cross-complaint show that AAA alleged breach of the 2006 contract based on Callahan's failure to pay it *after* Callahan had obtained reimbursement from the Fund. Accordingly, we review the stipulated judgment to determine whether it necessarily decided AAA's right to recover these funds.

In the stipulated judgment, the State Water Resources Control Board (State Water Board) agreed to pay defendants $325,000 in costs that it found to be reasonable and necessary to *claimants* from the Fund for whom defendants performed corrective action. As detailed *ante*, Callahan was a Fund claimant for whom defendants performed corrective work. Apart from this settlement payment, the stipulated judgment provided that defendants were "not entitled to any further payment based upon any reimbursement request submitted to the . . . Fund, whether submitted and not yet processed by the State Water Board, submitted but pending on appeal or petition before the State Water Board, or for work completed but not yet submitted, or appeals or petitions not yet submitted." As defendants note, this language resolved all pending and future reimbursement requests by AAA.

The stipulated judgment further provided that defendants "agreed not to receive financial benefit, or other benefit that may be monetized, from any entity and/or person that *seeks payment* from the State Water Board, including, but not limited to, any entity that may be considered for reimbursement from the . . . Fund . . . except as set forth in

this Order." (Italics added.) This language addresses future reimbursement requests. The stipulated judgment also bars recovery for future reimbursement requests, stating: "[T]he Court finds that any and all costs for work performed, supervised by and/or directed by Defendants *that have not been reimbursed* from the . . . Fund as of November 21, 2016 are not reasonable and necessary and, therefore, not subject to reimbursement from the . . . Fund." (Italics added.) Finally, the stipulated judgment states that it is a "full, final, and binding resolution *between the State Water Board and [d]efendants* of all claims, known or unknown, arising out of reimbursement requests submitted to the . . . Fund."

The clear language of the stipulated judgment does not bar AAA from pursuing sums allegedly owed to it based on reimbursement claims already processed by the Fund. Accordingly, issue preclusion does not apply and the trial court erred in granting Callahan's motion for judgment on the pleadings.

II. *SUFFICIENCY OF THE EVIDENCE*

A. *Introduction*

Defendants challenge certain factual findings by the trial court; namely whether substantial evidence supported the findings that: (1) Balas and Adini misrepresented their qualifications; (2) defendants improperly billed Callahan; and (3) Balas and Adini are the alter egos of AAA. Defendants also challenge whether substantial evidence supported the trial court's liability determinations on various causes of action. Specifically, they argue that the evidence does not support the trial court's liability determinations on the following causes of action: (1) breach of contract; (2) breach of

the implied covenant of good faith and fair dealing; (3) constructive fraud; (4) fraud/concealment; and (5) implied contractual indemnity. Finally, defendants challenge the damages and punitive damages awarded by the trial court.

We address each challenged cause of action. As part of this discussion, and as relevant, we address defendants' challenges to specific findings. We focus our discussion on the allegations of the operative complaint. (*Rainer v. Community Memorial Hosp.* (1971) 18 Cal.App.3d 240, 253 ([" 'One of the functions of pleadings is to limit the issues and narrow the proofs. . . . Evidence which is not pertinent to the issues raised by the pleadings is immaterial . . . .' "].)

B. *Standard of Review*

On appeal, we apply the substantial evidence standard of review to a trial court's findings, "regardless of the burden of proof at trial." (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 604.) Under this standard we review the entire record to determine whether there is substantial evidence supporting the trial court's factual determinations (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874), viewing the evidence and resolving all evidentiary conflicts in favor of the prevailing party, and indulging all reasonable inferences to uphold the judgment. (*Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1254-1255.) The issue is not whether there is other evidence in the record to support a different finding, but whether there is some evidence that, if believed, would support the findings of the trial court. (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429-430, fn. 5.)

Credibility is an issue of fact for the trial court to resolve (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622) and the testimony of a single witness, even that of a party, is sufficient to provide substantial evidence to support a trial court's finding. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) " 'In viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. [Citation.] Where the trial court has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable.' [Citation.] 'If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence.' " (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 47.) We must presume that the trial court's judgment is correct (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564) and that the record contains sufficient evidence to support the judgment, with the appellant bearing the burden of showing how the evidence does not sustain the challenged finding. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

C. *Breach of Contract and Breach of Implied Covenant*

1. Breach of Contract

"The elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Callahan alleged that defendants breached the 2006 contract

"by failing to provide services as appropriate or promised and by causing Callahan to be subject to litigation and potential liability for alleged misconduct by defendants towards the Fund, thereby depriving Callahan of the full benefit of his bargain."

The trial court found that defendants breached the contract with Callahan by (1) failing to meet the standard of care in conducting remediation efforts, (2) in depleting the UST funds available to the contract, (3) by submitting false and misleading invoices to the fund, and (4) by using a method of remediation they knew was largely ineffective and not at all cost effective. In a separate paragraph, the court also found that defendants breached the contract with Callahan by: (1) representing to Plaintiff that they would be able to remediate his property for less than the $1.4 million in the Fund without having any grounds for making such statement, (2) their pattern and practice of overbilling with false and misleading invoices submitted to the Fund, (3) defendants' failure to delineate and characterize the site and formulate a Corrective Action Plan, (4) defendants' false and misleading representation to Callahan that they were licensed engineers and geologists, (5) defendants' continued use of their HVDPE[7] machines on the property from approximately 2007 to 2011, even though this technology was not effective in remediating site conditions, and (6) defendants' failure to act as fiduciaries in the best interests of Callahan.

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7 HVDPE (high vacuum duel-phase extraction) is a remediation method used to extract subterranean water and vapor.

Defendants assert that substantial evidence does not support the trial court's findings regarding the conduct that breached the contract. Defendants then separately challenge *some* of the court's findings, necessarily focusing on the weakest findings. We take an alternate approach for this cause of action and the remaining causes of action, focusing on those factual findings that are supported by the evidence and that support the trial court's liability determinations.[8]

Before turning to the evidence, we address defendants' legal argument that the trial court erred in finding Adini and Balas liable for breach of contract because these individual defendants were not parties to the contract.[9] We agree.

Contract formation requires mutual assent among the parties. (Civ. Code, §§ 1550, 1565.) "Mutual assent usually is manifested by an offer communicated to the offeree and an acceptance communicated to the offeror." (*Donovan v. Rrl Corp.* (2001)

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8 Although not discussed by the parties, we note that the trial court adopted Callahan's tentative statement of decision without changes and declined to rule on defendants' lengthy objections to the tentative statement of decision. Absent any indication to the contrary, we presume that the trial court regularly performed its official duty and reviewed all the evidence and legal arguments prior to signing the statement of decision. (Evid. Code, § 664; *J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 984 [trial court's adoption of statement of decision prepared by one of the parties "creates no inference that it has failed to engage in a thoughtful weighing of the evidence . . . ."].) Nonetheless, even where a proposed statement of decision is legally sufficient it is ill advised for a trial court to adopt a statement of decision written by one of the parties without any changes. This course of action led to numerous and unnecessary "red herrings" on appeal. Accordingly, we do not address those arguments that are unnecessary to the resolution of this appeal.

9 Callahan does not address this argument in his respondent's brief.

26 Cal.4th 261, 270-271.) Here, the 2006 contract identifies the contracting parties as AAA (executed by Adini as AAA's president) and Callahan. Callahan has not cited, and we have not located, any evidence in the record suggesting that Adini and Balas agreed to be individually bound by the 2006 contract. Accordingly, the trial court erred in holding Adini and Balas liable for breach of contract. (*United States Liability Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595 ["Directors and officers are not personally liable on contracts . . . unless they purport to bind themselves individually."].)

Turning to the evidence, the general terms of the 2006 contract included that AAA would "diligently proceed" with the work outlined in the scope of work, complete the work in accordance with the contract and "according to standard practices." The 2006 contract warrantied that AAA's services would be "performed using that degree of care and skill ordinarily exercised by reputable consultants practicing under similar conditions in this, or similar localities at the time our services are rendered" and that its services would "CONFORM TO GENERALLY ACCEPTED PROFESSIONAL STANDARDS AS DESCRIBED ABOVE."

The 2006 contract listed the contract objective as "[p]rocess[ing] all needed corrective action at the subject site to a timely regulatory closure." The scope of work included: formulating all site assessment workplans that will be required by the regulatory agencies in charge; carrying out site assessment actions required and as approved by the regulatory agencies in charge; formulating emergency interim and final remedial action plans required by the regulatory agencies in charge; carrying out interim and final remedial actions that will be required and as approved by the regulatory

agencies in charge; and formulating all other actions as may be needed to carry forward the corrective actions at the site.

After hearing all the testimony, the trial court found that AAA breached the 2006 contract by, among other things, "fail[ing] to delineate and characterize the site and formulate a Corrective Action Plan." Substantial evidence supported this finding.

Namely, Callahan's expert, a hydrogeologist and engineering geologist, who evaluated the remediation work done on the property testified that he formed some opinions after reviewing numerous documents and examining the property. He stated that a corrective action plan evaluates site conditions, groundwater, soil, soil vapor conditions, depending on what the impacted media is, and then evaluates different remedial alternatives. He explained that it is important to delineate the site prior to commencing corrective action because one needs to know the amount of contamination, how bad it is, and how far it spreads.

Callahan's expert stated that AAA did not conduct its work pursuant to a corrective action plan and AAA never properly characterized or delineated the site prior to commencing corrective action. He criticized AAA for initiating corrective action before the contamination on the property had been fully delineated. He further opined that AAA should have prepared a corrective action plan before October 2008, and that AAA should not have initiated remedial actions without a corrective action plan in place. A defense expert conceded that Balas and Adini never obtained approval of a final corrective action plan for the property.

Based on this evidence, the trial court properly found AAA liable for breaching the 2006 contract.[10]

2. Breach of Implied Covenant of Good Faith and Fair Dealing

Defendants also challenge the court's liability finding for breach of implied covenant of good faith and fair dealing (breach of implied covenant), arguing that the court's findings on this cause of action were not supported by substantial evidence.[11]

This implied covenant is read into contracts and functions as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct, which frustrates the other party's rights to the benefits of the contract while not technically violating the express covenants. (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032.) "If the allegations do not

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10 Callahan argues that the 2011 note should also be considered in examining his breach of contract claim. Defendants dispute this argument noting, among other things, that although Callahan moved to amend his complaint to conform to proof, the trial court failed to rule on the request. We need not address whether the 2011 note was part of the breach of contract claim because the evidence is sufficient to show that AAA breached the 2006 contract.

11 The court concluded that defendants breached the implied covenant by: (1) submitting inflated false invoices for labor to the Fund; (2) exhausting the amount of funds available to remediate contamination; and (3) falsely representing their credentials, education and experience in the field of contaminant remediation. The court further concluded that defendants took unfair advantage of Callahan, an elderly retired gentleman who had relocated to another state and who was an absentee owner with no experience in the area of toxic chemical cleanup, and attempted to take additional $250,000.00 from Callahan by making a false representation of fact or making a representation of fact in reckless disregard for the truth, that they could complete remediation for that amount of money.

go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.)

Here, Callahan alleged that defendants breached the agreement and the implied covenant "by failing to provide services as appropriate or promised and by causing Callahan to be subject to litigation and potential liability for alleged misconduct by defendants towards the Fund, thereby depriving Callahan of the full benefit of his bargain." The implied covenant claim further alleged that "defendants shall provide their services in a diligent, responsible and timely manner in accordance with standard practices." Although the trial court made specific findings on the breach of implied covenant cause of action, which defendants challenge, it awarded no separate damages for this cause of action.

Accordingly, Callahan's breach of implied covenant claim is duplicative of his breach of contract claim. (See *Bionghi v. Metro. Water Dist.* (1999) 70 Cal.App.4th 1358, 1370 [where "claim of breach of the implied covenant relies on the same acts, and seeks the same damages, as its claim for breach of contract," summary adjudication affirmed on the ground "the cause of action for breach of the implied covenant is duplicative of the cause of action for breach of contract, and may be disregarded."].) Moreover, because the trial court did not award damages on this cause of action, defendants have not shown how they were prejudiced by the trial court's allegedly

erroneous findings. (*Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853-854 ["Prejudice from error is never presumed but must be affirmatively demonstrated by the appellant."].)

D. *Constructive Fraud*

1. Legal Principles

Constructive fraud consists of: (1) any breach of a duty which, "without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him"; or (2) "any act or omission as the law specially declares to be fraudulent, without respect to actual fraud." (Civ. Code, § 1573.) " 'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' " (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562 (*Salahutdin*).)

"[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 221, superseded on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.) " 'An agent "is anyone who undertakes to transact some business, or manage some affair, for another, by authority of and on account of the latter, and to render an account of such transactions." ' " (*Violette v. Shoup* (1993) 16 Cal.App.4th 611, 620; Civ. Code, § 2295 ["An agent is one who represents another, called the principal, in dealings with third persons."].) "An agency relationship is a

fiduciary one, obliging the agent to act in the interest of the principal." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 ["An agent *is* a fiduciary."].) Additionally, " 'a confidential relationship may exist whenever a person with justification places trust and confidence in the integrity of another.' [Citation.] ' "A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation may exist although there is no fiduciary relation . . . ." ' " (*Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 549.)

" ' "[C]onstructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence, and resulting in damages to another. [Citations.] Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated—that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud." ' " (*Estate of Gump* (1991) 1 Cal.App.4th 582, 601 (*Gump*).) When a fraud claim is based upon a misrepresentation or nondisclosure by a fiduciary or where a confidential relationship exists, "the reliance element is relaxed . . . to the extent we may presume reasonable reliance . . . absent direct evidence of a lack of reliance." (*Ibid.*; *Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1302 (*Edmunds*) ["a representation in the context of a trust or fiduciary relationship creates a rebuttable presumption of reasonable reliance subject to being overcome by substantial evidence to the contrary."].) Whether conduct constitutes constructive fraud depends on the facts and

circumstances of each case. (*Assilzadeh v. Cal. Fed. Bank* (2000) 82 Cal.App.4th 399, 415.)

2. Analysis

Callahan's constructive fraud claim alleged that defendants owed fiduciary, contractual, legal, ethical, professional and statutory duties to him and that defendants abused his trust and confidence by requesting and obtaining payment for work that was not actually performed, or was only partially performed, and by covering up the fact that agreed upon work was not in fact performed. Callahan also alleged that defendants fraudulently concealed the fact that: (1) they did not intend to substantially perform the written contract; and (2) their invoices and documentation would seek payment from him and the Fund for services that were either never performed or partially performed.

The trial court concluded that defendants' failure to demonstrate the utmost good faith toward Callahan establishes that their actions are presumed to be fraudulent. The court found that defendants' conduct breached fiduciary duties owed to Callahan and that this constituted constructive fraud that injured Callahan, who is now subject to increased regulatory oversight and must incur additional future costs to obtain regulatory closure for the property.

The court also concluded that defendants falsely represented that they were engineers and geologists, that they would clean Callahan's property in less than six months for a cost less than the available Fund reimbursement, and that they would obtain regulatory closure in regard to the cleanup of the Property. Defendants also concealed from Callahan that they used subcontractors who invoiced defendants at $40 per hour and

who defendants charged to Callahan at $120 per hour; in so doing, the court concluded that defendants intended to deceive Callahan and, derivatively, the Fund.

Defendants first contend that they did not have a fiduciary relationship with Callahan and that AAA's contractual relationship did not create a confidential relationship. Even assuming the 2006 contract created fiduciary obligations, defendants contend that the obligations ran to AAA, not Adini and Balas as individuals. Callahan claims that in the joint trial readiness report (the Joint Report) defendants stipulated that they "were plaintiff's agents." Because defendants were his agents, Callahan asserts that they were also his fiduciaries.

The Joint Report, under a heading for undisputed legal issues, stated that "Defendants were plaintiff's agents." The end of the Joint Report has unsigned signature blocks for counsel. The trial court subsequently issued an "Advance Trial Review Order" ordering the parties to meet in person at least three days before trial "for the purpose of arriving at stipulations and agreements resulting in the simplification of triable issues." Callahan does not argue that the parties thereafter stipulated that defendants were Callahan's agents, and we have located no such stipulation in the record.

A litigant who does not sign a stipulation is not a party to the stipulation. (*Turner Gas Co. v. Workmen's Comp. Appeals Bd.* (1975) 47 Cal.App.3d 286, 291-292.) We reject Callahan's contrary argument, made without citation to authority, that the unsigned Joint Report amounted to a stipulation which bound defendants. (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114 [issue raised without citation to authority requires no discussion].) Accordingly, we next address whether other evidence in the

record supports the trial court's conclusion that AAA and "Adini and Balas acted as Callahan's agents and his fiduciaries. . . ."

As to Adini and Balas, Callahan cited no authority that these individual defendants, who acted as agents of AAA, had an agency or confidential relationship with Callahan. Nor did Callahan cite any evidence suggesting the existence of an agency or confidential relationship between himself and the individual defendants. Rather, the 2006 contract expressly provided that "[AAA] or [AAA's] assigned agent" would prepare reimbursement requests on Callahan's behalf. The 2006 contract included a letter to the lead regulatory agency wherein Callahan designated AAA as his "environmental consultant representing and handling the subject case in all matters concerning compliance with the requirements of your agency." This evidence does not support the conclusion that Adini and Balas, as individuals, had a fiduciary or confidential relationship with Callahan. Thus, Adini and Balas cannot be liable for constructive fraud, and the court's judgment that Adini and Balas are liable for constructive fraud is reversed. We conclude, however, that based on the foregoing authority, the evidence supported the trial court's finding that AAA had a fiduciary relationship with Callahan.

We next address whether the evidence supports the court's finding that AAA's conduct breached fiduciary duties owed to Callahan. The trial court found defendants liable for breach of contract and fraud based on false and misleading invoices to the Fund and their false and misleading representations to Callahan that they were licensed engineers and geologists. Specifically, after reading the invoices submitted by AAA, Callahan believed that Adini was a licensed principal engineer and that Balas was a

licensed senior engineer/geologist. The trial court found that Adini was unlicensed, and Balas had no degree or licensure to act either as an engineer or geologist. Among other things, the trial court found AAA liable for constructive fraud based on its false representation that Adini and Balas were engineers and geologists.

The UST Cleanup Fund Cost Guidelines (the Guidelines) provide guidance regarding the reasonableness and necessity of remedial costs. Under the Guidelines, to be listed as a "project manager" Balas required "a degree in engineering/geology or a directly related field." To be listed as any type of engineer or geologist, an individual required an engineering or geology degree. The Fund required all claimants to follow applicable state laws and regulations and required that the practice of geology or engineering be performed by professional geologists or engineers within meaning of the Business and Professions Code sections 7800 et seq. (geologists) and 6700 et seq. (engineers). Only geologists registered under Business and Professions Code section 7800 et seq. can use the title "professional geologist." (Bus. & Prof. Code, § 7804.) Additionally, it is unlawful for anyone other than a professional engineer, licensed under Business and Professions Code section 6700 et seq., to represent they are an engineer. (Bus. & Prof. Code, § 6732.)

Defendants charged Callahan for Balas's services as a "senior engineer/geologist" (at $105 per hour), a "project manager" (at $120 per hour), and an "Executive Director" (at $145 per hour). Balas admitted, however, that he is not an engineer or a geologist. He also had no expertise in site remediation. Callahan believed that Balas was an engineer and geologist and relied on defendants' invoices to be accurate. Adini admitted

that clients expected invoices to be accurate. Balas claimed that Adini "probably" made the erroneous invoice entry. Adini testified that an AAA employee created the invoice entries that mistakenly listed Balas as a "senior engineer/geologist" and that Balas should have been listed as a project manager. Under the Guidelines, however, a project manager must possess "a degree in engineering/geology or a directly related field." Balas possessed no such degree. Because Balas did not meet the Fund requirements for an engineer or a geologist it was unlawful for AAA to claim that Balas was either an engineer or geologist. (Bus. & Prof. Code, §§ 6732, 7804.)

Balas testified that he never told Callahan that he was "an engineer or a geologist" and claims he told Callahan that he was not an engineer or a geologist. On review, however, we cannot reweigh the trial court's credibility determinations or its evaluation of conflicting evidence. (*Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc.* (2009) 177 Cal.App.4th 624, 643.)

Defendants assert that Adini's claim to be an engineer was not false or fraudulent because Adini had a bachelor of science degree in mechanical engineering. Adini also stated that he was licensed as a mechanical engineer by the Israeli Ministry of Labor and testified that he worked as a mechanical engineer in the United States. He became involved in the environmental field in about 1983 and founded AAA in 1987.

Invoices submitted to Callahan and the Fund for reimbursement listed Adini as the principal engineer/geologist. Under the Guidelines, to be listed as a "principal" Adini required "a valid professional registration (i.e. PE, CE, RG, CEG, CHG), an engineering or geologic science degree and at least 10 years experience in conducting corrective

actions for UST's." Defendants claim that the invoice entries were not inaccurate because the Guidelines utilize this title and the "slash between the two entries meant "or" such that they should be read as principal engineer or geologist."

Adini believed that he met the pertinent Guidelines definition of a "principal" and that he properly characterized himself as a principal engineer under the Guidelines. A payment section manager for the Fund, however, was unsure whether someone with Adini's qualifications could be properly billed as a "principal" within the meaning of the Guidelines. Adini testified that he is not a professional geologist or engineer and that he does not possess a professional engineering license issued by the State of California or licenses in civil engineering or mechanical engineering. Accordingly, Adini unlawfully claimed to be an engineer because he did not meet the Fund requirements for an engineer.[12] (Bus. & Prof. Code, § 6732.)

Among other things, "[t]he failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud." (*Salahutdin, supra,* 24 Cal.App.4th at p. 562.) Here, the trial court could have reasonably concluded that the misrepresentations constituted constructive fraud because they enabled AAA to bill Callahan for Adini's and Balas's work at a higher hourly rate. Adini's

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12 Defendants argue that e-mails sent to Callahan by Adini in 2016, after defendants had ceased work on Callahan's property, describing Adini as a mechanical engineer could not have been relied on by Callahan. While we agree with this assessment, it is of no relevance based on the other evidence before the trial court.

argument that he believed that he qualified to be labeled as an engineer is irrelevant because " 'a careless misstatement may constitute constructive fraud *even though there is no fraudulent intent*.' " (*Ibid.*) Additionally, where a fraud claim is based upon a misrepresentation or nondisclosure by a fiduciary, "the reliance element is relaxed . . . to the extent we may presume reasonable reliance . . . absent direct evidence of a lack of reliance." (*Gump, supra*, 1 Cal.App.4th at p. 601; *Edmunds, supra*, 16 Cal.App.4th at p. 1302 ["a representation in the context of a trust or fiduciary relationship creates a rebuttable presumption of reasonable reliance subject to being overcome by substantial evidence to the contrary."].) Defendants' briefing is devoid of any discussion regarding the existence of substantial evidence rebutting the presumption of reasonable reliance. Accordingly, we reject defendants' argument that insufficient evidence supported the liability finding against AAA for constructive fraud.

E. *Intentional Misrepresentation and Concealment*

The complaint contained causes of action for intentional misrepresentation and concealment. The court's statement of decision contained a heading labeled "Fraud/Concealment." Under this heading the court made findings regarding facts that defendants misrepresented or concealed.

Deceit includes "[t]he suppression of a fact, by one who is bound to disclose it, . . . " (Civ. Code, § 1710, subd. (3).) To prove a fraud based on concealment, a plaintiff must demonstrate: (1) the defendant concealed or suppressed a material fact, (2) the defendant had a duty to disclose the fact to the plaintiff, (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff,

(4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 131.) "A fraud claim based upon the suppression or concealment of a material fact must involve a defendant who had a legal duty to disclose the fact." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1186.) The requisite duty can arise when the plaintiff and defendant have a fiduciary relationship, or "some other relationship . . . in which a duty to disclose can arise." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.)

The elements of a cause of action for intentional misrepresentation are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) actual and justifiable reliance, and (5) resulting damage. (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.) Proof of one material fraudulent concealment or misrepresentation of fact is sufficient to prove either claim. (*Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231, 261.)

Among other things, the trial court concluded that defendants knowingly made statements of material fact to Callahan and the Fund falsely representing the qualifications and employment status of the persons performing the invoiced services. The court concluded that defendants also concealed their use of a subcontractor who invoiced at $40 per hour and who defendants charged to Callahan at $120 per hour. The court found that Callahan reasonably relied on the accuracy of the invoices when he submitted them to the Fund and that the invoices created by AAA harmed Callahan

economically and resulted in Callahan being named in the consolidated qui tam action. The court found that Callahan relied on these false representations of material fact in agreeing to use and continuing to use defendants' services, which resulted in the complete exhaustion of Callahan's available reimbursement from the Fund while the property remains contaminated with estimated future cleanup costs of $640,000.

Defendants assert that there is no substantial evidence showing that they engaged in a pattern and practice of issuing false and inflated invoices that resulted in secret and undeserved profits. We disagree.

Under the Guidelines, work done by subcontractors could be marked up 15 percent before November 2011, and 10 percent after this date. A Fund representative testified that if a subcontractor invoiced a contractor at $40 an hour that the Guidelines did not permit the contractor to retype the subcontractor's invoice descriptions of his labor and time into the contractor's own invoices as personnel costs at $120 an hour because this made it appear that the person is now an employee of the primary contractor. The representative also stated that when a contractor submits a claim for work done by a subcontractor, the reimbursement request must include the subcontractor's bills so that the Fund can determine whether the contractor applied a reasonable and necessary markup.

The evidence at trial revealed that Dinesh Rao worked for AAA and billed AAA for his work on Callahan's property at $40 per hour. Specifically, Rao issued invoices to AAA that included Rao's address and an invoice number. Defendants then rewrote Rao's descriptions of his services onto their own invoices, billing Rao at $120 per hour, and

gave those invoices to Callahan for submission to the Fund. The reimbursement requests submitted to the Fund did not include Rao's invoices to AAA, thus implying that Rao was an AAA employee. Callahan believed that Rao was an AAA employee.

Balas testified that Rao was both an AAA employee and a subcontractor, but he could not recall when Rao switched from being a subcontractor to an employee. Balas testified that if AAA billed Rao as a "project manager and not an independent contractor" that Rao should be an employee, but he did not know in what capacity Rao worked. Balas claimed that Rao worked "mostly as an employee, but that's kind of hard to define." Adini similarly testified that Rao first worked as an independent contractor, but switched to an employee at some unknown time. Adini did not believe that AAA improperly listed Rao as an employee, or that it was illegal to markup Rao's rate above the 15 percent listed in the Guidelines because he had concluded that Rao was not a subcontractor.

Additionally, AAA charged Callahan and the Fund $105 per hour for Balas's time as an engineer/geologist although Balas did not have the qualifications under the Guidelines to claim either of these titles or to be reimbursed by the Fund for his work in either of these capacities. AAA similarly billed the Fund $145 per hour for Adini as a "principal engineer" or "principal engineer/geologist" despite Adini not having the requisite qualifications to be reimbursed at that rate under the Guidelines.

Based on this evidence, the trial court could have reasonably concluded that Rao was a subcontractor and that AAA misrepresented Rao's employment status with the intent to defraud Callahan. The court could have also reasonably concluded that AAA misrepresented Balas's and Adini's qualifications in the invoices that AAA submitted to

Callahan and the Fund to increase their profits and deplete the Fund monies available to remediate Callahan's property.

The remaining question is whether the trial court properly found Balas and Adini individually liable for misrepresenting either Rao's employment status or their respective qualifications. "Directors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct." (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 785 (*Wyatt*).) "All persons who are shown to have participated in an intentional tort are liable for the full amount of the damages suffered. [Citations.] This rule applies to intentional torts committed by . . . those acting in their official capacities as officers or directors of a corporation, even though the corporation is also liable." (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1381-1382.) The type of liability imposed on corporate officers through their personal conduct is distinct from that imposed under the alter ego doctrine. (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 504; *Wyatt*, at p. 785.) Accordingly, the question before us is whether there is sufficient evidence showing that Balas and Adini directly ordered, authorized or participated in the fraudulent conduct.

Callahan argues that Balas knew that he was not an engineer or a geologist and that invoices Callahan received from AAA and the invoices AAA submitted to the Fund for reimbursement fraudulently misrepresented Balas. Callahan testified that he believed Balas was licensed as an engineer and a geologist as reported on the AAA invoices. Other than the invoices, however, Callahan does not cite to anything else in the record

showing that Balas directly ordered, authorized or participated in the fraudulent conduct. Rather, Balas denied telling Callahan that he was an engineer or a geologist, stating "In fact, I told [Callahan] that I wasn't." Balas testified that Rao submitted his invoices to Adini and that Adini made the decision to bill Rao at $120 per hour. Balas testified that he has never done any billing, including for his own time, stating that he submitted everything to Adini. Before the filing of this action, Balas was unaware that AAA's invoices identified him as an engineer or a geologist. Balas's testimony that he and Adini ran AAA together and made joint decisions, standing alone, is insufficient to show that Balas directly ordered, authorized or participated in the fraudulent conduct regarding his qualifications or Rao's billing. On this record, the trial court erred in holding Balas personally liable for AAA's fraud.

Callahan argues that Adini fraudulently mispresented himself. The evidence supports this conclusion. Adini admitted that he was not a professional geologist or professional engineer, did not have a professional engineering license issued by the State of California, and was not licensed in either civil or mechanical engineering. Callahan believed that Adini was an engineer based on the invoices he reviewed.

Adini testified that an AAA employee prepared the invoices. Adini, however, admitted that he approved the invoices created for Callahan's property. Accordingly, the trial court could have reasonably concluded that Adini saw and approved the fraudulent billing for Balas, Rao, and himself. The trial court could have also rejected Adini's testimony that he properly billed himself as an engineer. This is sufficient to show that

Adini either directly ordered, authorized or participated in the fraudulent conduct and hold him personally liable for AAA's fraud.

F. *Statute of Limitation Defense*

Defendants asserted the statute of limitations as an affirmative defense to all claims. Defendants objected to the court's failure to consider their statute of limitations defense in the tentative statement of decision. They claim that the trial court erred by not addressing this defense in the statement of decision and assert the error was not harmless because the fraud claims against them were untimely. Callahan responds that defendants forfeited this defense by failing to argue it at trial. We agree with Callahan.

The failure to timely assert a right generally results in forfeiture. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264.) The forfeiture doctrine "is designed to advance efficiency and deter gamesmanship." (*Ibid.*) Accordingly, theories not raised in the trial court generally cannot be asserted for the first time on appeal unless they present a question of law applied to undisputed facts. (*Nippon Credit Bank v. 1333 N. Cal. Blvd.* (2001) 86 Cal.App.4th 486, 500.)

Here, although defendants properly pleaded the statute of limitations defense in their answer, the Joint Report filed by the parties did not identify this defense as a controverted issue for trial. Moreover, defendants fail to cite anywhere in the trial record where they mentioned the statute of limitations defense. Rather, they raised the defense for the first time in their written closing argument for the second, punitive damages, phase of the trial. Defendants then objected to the tentative statement of decision on the ground the court failed to consider their statute of limitations defense. On this record, we

deem defendants' request for us to review their statute of limitations defense forfeited by their failure to raise it before the trial court. (See *RRLH, Inc. v. Saddleback Valley Unified Sch. Dist.* (1990) 222 Cal.App.3d 1602, 1605-1606, fn. 2 [statute of limitations defense asserted in answer but not at trial is waived].)

G. *Implied Contractual Indemnity*

Callahan's complaint included a cause of action for "contractual indemnity." Callahan alleged that defendants breached the 2006 contract by failing to provide services as appropriate or promised, and by causing him to be subjected to litigation and potential liability for alleged misconduct by defendants towards the Fund, thereby depriving him of the full benefit of his bargain and unnecessarily causing him to incur attorney fees and expense to defend himself.

In its statement of decision, the trial court analyzed this cause of action as one for "implied" contractual indemnity. The trial court found that, as direct consequence of the defendants' breach of contract and their practice of involving him in submitting false and misleading information to the Fund for payment, Callahan suffered damages in the form of the settlement he paid and the attorney fees and costs he incurred in the qui tam consolidated action. As part of the damages award for defendants' failure to perform their contractual duties, the court awarded Callahan: (1) $32,695.51 (incurred to pay for Callahan's defense in the consolidated qui tam action); and (2) $5,000 (incurred to settle the consolidated qui tam action.) The court also listed these two damage awards under a separate "Damages" heading, stating that "[b]ased on the foregoing, the Court awards damages and restitution to Callahan as follows: . . ."

"Implied contractual indemnity is a form of equitable indemnity, arising from equitable considerations either by contractual language not specifically dealing with indemnification or by the equities of the specific matter. [Citations.] 'The right to implied contractual indemnity is predicated [on] the indemnitor's breach of contract. . . .' " (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp.* (2003) 111 Cal.App.4th 1328, 1350 (*Sehulster Tunnels*).) " 'Implied contractual indemnity is applied to contract parties and is designed to apportion loss among contract parties based on the concept that one who enters a contract agrees to perform the work carefully and to discharge foreseeable damages resulting from that breach.' " (*Ibid.*)

Defendants first argue that the trial court erred in finding Adini and Balas liable on this claim because they were not parties to the 2006 contract. Defendants are correct that the existence of a contract is a prerequisite to stating an implied contractual indemnity claim. (*Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.* (2007) 148 Cal.App.4th 937, 968 ["Implied contractual indemnity is a type of equitable indemnity . . . , predicated on the indemnitor's breach of contract with the indemnitee."].) Here, Adini and Balas are not parties to either the 2006 contract or the 2011 note.

Defendants next argue that this cause of action fails because they did not admit liability when they settled the qui tam action. Defendants' liability in the qui tam action is irrelevant because implied contractual indemnity turns on the existence of a contract between the indemnitee (Callahan) and the indemnitor (AAA). As discussed *ante*, the trial court properly found AAA liable for breach of the 2006 contract. (*Ante*, pt. II.C.)

Finally, defendants contend that Callahan cannot recover his attorney fees against AAA under an implied contractual indemnity claim unless he met the requirements of Code of Civil Procedure[13] section 1021.6.[14] Specifically, defendants contend that there was no evidence showing Callahan lacked fault in the qui tam action, which is required for an award of attorney fees under section 1021.6. Defendants make their argument regarding the applicability of section 1021.6 without citation to authority or any analysis and we deem it forfeited. (*Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1509.)

In any event, we note that "section 1021.6 does not on its face create a right to indemnity. It merely 'permits an indemnitee to recover . . . attorney fees in an implied indemnity action under specified circumstances.' [Citation.] As such, section 1021.6 is simply a fee-shifting statute which codifies an exception [to] the so-called 'American Rule' (§ 1021), under which each party must bear his or her own attorney fees unless

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13 Undesignated statutory references are to the Code of Civil Procedure.

14 Section 1021.6 states: "Upon motion, a court after reviewing the evidence in the principal case may award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds (a) that the indemnitee through the tort of the indemnitor has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person and (b) if that indemnitor was properly notified of the demand to bring the action or provide the defense and did not avail itself of the opportunity to do so, and (c) that the trier of fact determined that the indemnitee was without fault in the principal case which is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict."

otherwise provided by statute or contract." (*John Hancock Mutual Life Ins. Co. v. Setser* (1996) 42 Cal.App.4th 1524, 1531.)

Callahan did not file a motion for attorney fees under section 1021.6. Rather, Callahan requested that defendants defend him in the qui tam act, but defendants refused. Callahan ultimately settled the consolidated qui tam action for $5,000 after incurring $32,695.51 in legal fees. Callahan sought to recover these attorney fees as an element of damages in this action relying on the tort of another doctrine. The trial court awarded the attorney fees as an element of Callahan's damages after expressly finding that defendants' actions caused Callahan to be named in the qui tam action.

Under these circumstances, "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice v. North American Title Guaranty Corp.* (1963) 59 Cal.2d 618, 620.) "The tort of another doctrine applies to economic damages (i.e., attorney fees incurred in litigation with third parties) suffered as a result of an alleged tort." (*Mega RV Corp. v. HWH Corp.* (2014) 225 Cal.App.4th 1318, 1339.) "The tort of another doctrine is not really an exception to the American rule [that a party generally must pay for its own attorney fees unless a contract or statute provides otherwise], but simply 'an application of the usual measure of tort damages.' " (*Id.* at p. 1337.)

Here, Callahan properly pleaded and proved his claim for attorney fees under the tort of another doctrine. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 869, fn. 4 ["Unless the

parties stipulate otherwise, a claim for attorney fees under the 'tort of another' doctrine may not be asserted by post-trial motion but rather must be pleaded and proved to the trier of fact."].) Accordingly, we need not address any differences between application of section 1061.5 and the tort of another doctrine.

H. *Alter Ego Liability*

1. Legal Principles

A corporation is ordinarily regarded as a legal entity, separate and distinct from its shareholders, officers, and directors. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 (*Sonora*).) Nonetheless, a corporate identity may be disregarded "where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation." (*Ibid.*) Alter ego liability affords relief when "some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form." (*Id.* at p. 539.) Two conditions must be met to find alter ego liability: (1) "there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist" and (2) "there must be an inequitable result if the acts in question are treated as those of the corporation alone." (*Id.* at p. 538.)

The determination of alter ego liability is a factual question for the trial court and will not be disturbed if supported by substantial evidence. (*Jack Farenbaugh & Son v. Belmont Constr.* (1987) 194 Cal.App.3d 1023, 1032.) Factors to be considered in determining whether to apply the alter ego doctrine include the commingling of funds or

other assets of the corporation and the individual, the individual's treatment of corporate assets as his or her own, the individual's representation of personal liability for corporate debts, failure to maintain adequate corporate minutes or records, sole ownership of the corporation's stock, domination and control of the corporation, use of the same address for the individual and the corporation, undercapitalization of the corporation, disregard of formalities and the individual's failure to maintain arm's length transactions with the corporation. (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1213, fn. 3.) No factor or factors should be considered in isolation; rather, the totality of the circumstances should be examined in making the determination. (*Id.* at p. 1213.) Moreover, "[t]here is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.)

2. Analysis

The trial court found that during the pendency of this action, Balas and Adini attempted to make AAA judgment proof by disposing of its equipment and " 'let [it] basically expire.' " At the same time, the court found that Balas and Adini moved AAA's identity to a new corporation, [Ami Adini Environmental Services, Inc. (AAES)], to perform the same services, utilizing the same address, website, e-mail and telephone number. The court concluded that "[t]his conduct is contrary to the legitimate business interests and corporate identity of [AAA], and defendants' conduct and assertions that [AAA] was out of business and did not possess the means to work were an artifice to avoid performance of defendants' contractual and fiduciary responsibilities to Callahan.

From the way in which [AAA] was conducted as the personal arm of Ami Adini and Elie Balas the court finds that this business was operated as the alter ego of these defendants who therefore bear personal liability for the judgment in this case."

Defendants argue that the trial court's ruling holding Adini and Balas individually liable as the alter egos of AAA must be reversed because substantial evidence does not exist showing that Adini or Balas disregarded the corporate form, or that injustice would result if AAA's acts were not attributed to the individuals.

We agree that the evidence does not demonstrate such a unity of interest and ownership between Adini and Balas, on the one hand, and AAA, on the other hand, that the corporate and individual personalities merged. (*Sonora*, *supra*, 83 Cal.App.4th at p. 538.) Because this prong of the alter ego analysis is not satisfied there is no need for us to discuss whether an inequitable result would occur if the acts in question were treated as those of the corporation alone.[15]

It was undisputed that AAA is a closely held corporation. Adini founded AAA and was a co-owner, director, and its principal shareholder. Balas was AAA's co-owner, an officer, and director of AAA. He was also a signatory on AAA's bank account, and made all decisions jointly with Adini. Callahan cited no authority to support the proposition that these facts, standing alone, will support alter ego liability. Rather, to

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15 Defendants' opening brief challenged both prongs of the alter ego analysis. Callahan, however, focused exclusively on the inequitable result prong and failed to respond to defendants' argument regarding the insufficiency of the evidence showing a unity of interest.

show a unity of interest there must be additional evidence, such as: commingling of personal and corporate funds or assets; treatment by an individual of the assets of the corporation as his or her own; the failure to obtain authority to issue stock or to subscribe to or issue the same; the holding out by an individual that he or she is personally liable for the debts of the corporation; the failure to maintain minutes or adequate corporate records; the failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors; or the use of a corporation as a subterfuge of illegal transactions. (See *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811-812.)

Callahan cites no evidence in the record supporting any of these factors and our review of the record does not disclose substantial evidence showing the existence of any of these factors. Accordingly, we reverse the trial court's finding that Adini and Balas are personally liable to Callahan as AAA's alter egos.

III. *DAMAGES AWARDS*

A. *Future Damages*

The amount of damages presents a fact question that will not be disturbed if it is supported by substantial evidence. (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 691.) "The evidence is insufficient to support a damage award only when no reasonable interpretation of the record supports the figure." (*Ibid.*) Although proof of the precise amount of damages is not required, some reasonable basis of computation must be used. (*Scheenstra v. California Dairies, Inc.* (2013) 213 Cal.App.4th 370, 402.) We make " '[a]ll presumptions favor the trial court's ruling, which is entitled to great deference because the trial judge, having been present at trial, necessarily is more familiar with the evidence and is bound by the more demanding test of weighing conflicting evidence rather than our standard of review under the substantial evidence rule. . . . [W]e do not reassess the credibility of witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor.' " (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 452.)

The trial court ruled that Callahan was entitled to compensatory damages for all detriment caused by defendants' misconduct. Referring to exhibit 573, the court awarded Callahan $640,000 in future damages, stating this sum was the "minimum estimated cost to complete cleanup of the Property based on [defendants'] breach of contract, breach of fiduciary duties, and fraud." Exhibit 573 is a cost estimate prepared by Adini in January 2011.

Defendants raise several challenges to the court's damages award. They first assert that the court erred because there was no evidence showing that, by the time of trial in July 2017, the 2011 cost estimate remained a current and accurate prediction of the cost to remediate the property. We disagree.

The 2011 cost estimate listed seven required steps to secure case closure, including: "1. Complete delineation of the extent of the plume of the free product. [¶] 2. Complete delineation of the extent of the plume of the dissolved product. [¶] 3. Extraction of free product on both sides of and under the street. [¶] 4. Application for and going through the case closure process. [¶] 5. Conduct four to six groundwater monitoring episodes. [¶] 6. Conduct post Remedial Action Verification Monitoring. [¶] 7. Removal (abandonment) of all the wells by over-drilling and plugging." Adini estimated that the cost to complete these steps was $500,000 to $620,000. Although Adini prepared this estimate in January 2011, AAA stopped working on the property a mere six months later.

At trial, Callahan's expert reviewed the seven steps listed in the cost estimate and opined that the anticipated completion cost of $500,000 to $620,000 appeared "low." Moreover, Adini testified that as of the date of trial no money remained in the Fund to assist Callahan with future remediation costs.

Additionally, a trial exhibit prepared by the State Water Board listed the items that, as of 2016, needed to be completed to achieve site closure. Callahan's expert opined that the items listed on this exhibit needed to be done at Callahan's additional expense to obtain site closure. The items listed paralleled those on the 2011 cost estimate, including

decreasing the pollution on the property to a certain level, conducting verification monitoring, and closing the wells. Defendant's expert concurred that the wells needed to be closed and estimated the minimum cost to do so at $65,000 and up to $80,000.[16] Adding this expense to the costs listed on the 2011 cost estimate adequately supports the court's future damages award.

Defendants also argue that the trial court's reliance on AAA's 2011 cost estimate to determine future remediation costs contradicts its finding that AAA's remediation methods were ineffective.

" 'While it is true that plaintiffs must show with reasonable certainty that they have been damaged because of the wrongful conduct of the defendant, "once the cause and existence of damages has been so established, recovery will not be denied because the damages are difficult of ascertainment." [Citation.] Liability cannot be evaded because damages cannot be measured with exactness.' " (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921.) "Where the *fact* of damages is certain, as here, the *amount* of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable

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16 We reject defendants' argument that the $80,000 cost estimate from their own expert was not supported by substantial evidence. The defense expert based his estimate on his "experience from other sites." The trial court was entitled to determine the weight to give this testimony. (*ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 294 ["questions regarding *the degree* of an expert's knowledge go more to the weight of the evidence presented than to its admissibility"].)

approximation." (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398, fns. omitted.)

Here, Callahan's expert did not do the work required to form an opinion to a reasonable degree of scientific probability as to the costs required to achieve regulatory closure. Defendants' expert similarly did not conduct an analysis that enabled him to opine as to the future costs of environmental work necessary to reach regulatory closure. On this record, the trial court did not act unreasonably when it based the future damages award on defendants' 2011 cost estimate. Moreover, even assuming the court's reliance on the cost estimate to determine future remediation costs contradicted its finding that AAA's remediation methods were ineffective, defendants have not shown how this prejudiced them as no evidence suggested that alternative remediation methods would have been less costly. Viewing the record in the light most favorable to the judgment, as we must, we conclude that the evidence supports the court's future damages award.

Defendants next assert that awarding Callahan his future cleanup costs put him in a better position than if the 2006 contract had been fully performed on both sides. They claim that finding AAA contractually responsible for 100 percent of Callahan's future cleanup costs conflicted with the contract provision allowing AAA to stop work for nonpayment. They assert that Callahan's actual losses, if any, were the amounts by which the monies in the Fund were diminished by their purportedly wrongful conduct.

We disagree with these arguments as they ignore that the trial court awarded Callahan his future cleanup costs not only for AAA's breach of contract, but also for the fraud perpetrated against him by AAA and Adini. The trial court acted reasonably in

awarding these damages. (Civ. Code, § 3333 [The measure of damages for "breach of an obligation not arising from contract . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."].) The trial court expressly stated that it intended the future damage award to "compensate [Callahan] for all detriment caused by Defendants' misconduct."

Finally, defendants contend that the trial court erroneously precluded Adini from testifying about the 2011 cost estimate's inaccuracy at the time of trial. Specifically, during recross-examination, defense counsel asked Adini if the 2011 cost estimate "would still be accurate today." The court sustained Callahan's "no foundation" objection. Defendants claim that Adini would have responded "no" and that this omitted evidence would have shown that the 2001 cost estimate did not reflect Callahan's future remediation costs to a reasonable certainty.

We disagree with this argument because it fails to consider Adini's prior testimony that he lacked knowledge of the current extent of the free product and dissolved product contamination. This testimony shows that the trial court properly sustained the no foundation objection based on Adini's lack of personal knowledge of the current extent of the contamination. (Evid. Code, § 702, subd. (a).)

Accordingly, we cannot conclude that the trial court erred in making its future damages award.

B. *Punitive Damages*

1. Legal Principles

In a civil case not arising from the breach of a contractual obligation, the jury may award punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) " 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (*Id.*, subd. (c)(3).) Constructive fraud is an appropriate basis for an award of punitive damages. (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1160.)

In reviewing a challenge to an award of punitive damages, courts traditionally "determine whether the award is excessive as a matter of law or raises a presumption that it is the product of passion or prejudice." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109-110.) To make this determination, courts consider three factors: (1) the degree of reprehensibility of the defendant's conduct; (2) the amount of compensatory damages awarded; and (3) the defendant's financial condition or wealth. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) "We review the trial court's award of punitive damages for substantial evidence." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679.)

"When the defendant is a corporation, '[a]n award of punitive damages against a corporation . . . must rest on the malice of the corporation's employees. [¶] But the law does not impute every employee's malice to the corporation.' [Citation.] Instead, the

oppression, fraud, or malice must be perpetrated, authorized, or knowingly ratified by an officer, director, or managing agent of the corporation. (Civ. Code, § 3294, subd. (b).) ' "[M]anaging agent" . . . include[s] only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy.' " (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 164 (*Wilson*).)

2. Analysis

The trial court found during phase one of the trial that all defendants acted with fraud, malice, and oppression in their dealings with Callahan. After considering the reprehensible nature of defendants' conduct, the injury suffered by Callahan, and the respective wealth of defendants, the court awarded Callahan punitive damages in the amount of $640,000, jointly and severally against all defendants.

Defendants contend that the punitive damages award must be reversed because it is not supported by clear and convincing evidence of malice, fraud or oppression. They argue no substantial evidence shows that Balas or Adini committed any of the alleged acts, or that they committed the acts with a mental state of anything other than carelessness.

We agree that the punitive damage award against Balas must be reversed because there is no liability finding against Balas to support an award of punitive damages. (*Ante*, pts. II.C-G.) There is sufficient evidence, however, to support the punitive damages award against Adini based on intentional misrepresentation. (*Ante*, pt. II.E.) Additionally, Adini's status as the founder, co-owner, and director of AAA qualified him

as a managing agent of AAA; thus, making AAA jointly and severally liable for the punitive damages award. (*Wilson, supra*, 234 Cal.App.4th at p. 164.)

Adini and AAA argue that the low degree of reprehensibility of their conduct rendered the punitive damages award constitutionally excessive.[17] We disagree.

Callahan was an elderly man who lived out-of-state. He knew nothing about site remediation and relied entirely on AAA, as his agent, to protect his interests by completing the work and submitting accurate invoices to the Fund. As discussed *ante*, AAA breached fiduciary duties owed to Callahan by misrepresenting Adini's and Balas's qualifications and overbilling him for their work on the property. (*Ante*, pt. II.D.) AAA and Adini, AAA's managing agent, also intentionally misrepresented Rao's employment status and Adini's and Balas's qualifications, to increase their profits and to deplete Fund monies available to remediate Callahan's property. (*Ante*, pt. II.E.) AAA's and Adini's fraudulent conduct caused him to be sued in the qui tam action.

Even accepting defendants' argument that AAA's and Adini's fraudulent conduct displayed low reprehensibility, we cannot conclude that the punitive damages award was excessive because it was approximately equal to the compensatory damage award. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 718 [" 'When compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages,* can reach the outermost limit of the due process guarantee.' "].) On this record, we cannot say that

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17 Adini and AAA do not challenge the remaining two prongs (the amount of compensatory damages or actual harm suffered by the plaintiff and their financial condition), and we do not discuss them.

the trial court's decision to award $640,000 in punitive damages exceeded constitutional restraints. We therefore affirm the punitive damages award as against AAA and Adini.

DISPOSITION

The judgment is reversed. The matter is remanded with directions to conduct further proceedings on AAA's cross-complaint. After conclusion of those proceedings: (1) the alter ego liability finding against Adini and Balas is to be reversed; (2) the award of damages against Balas is reversed and judgment is to be entered for Balas on all causes of action; (3) judgment is to be entered for Adini on Callahan's causes of action for breach of contract, breach of implied covenant, constructive fraud, and implied contractual indemnity. Except as specified, the judgment is affirmed. The parties shall bear their own costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

GUERRERO, J.