Filed 2/16/11 Alcoser v. Thomas CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

EDWARD ALCOSER et al., Plaintiffs and Respondents, v. RICHARD E. THOMAS et al. Defendants and Appellants.	A124848, A125994 & A126464 (Alameda County Super. Ct. No. RG03-112134)

In these consolidated appeals, Richard E. Thomas, individually, and doing business as Environmental and Land Management (ELM), a California corporation (collectively, Thomas) appeals from the judgment and from certain postjudgment orders entered against him after jury trial in this class action lawsuit.[1] We remand this case to the trial court to recalculate the award of prejudgment interest. In all other respects, we affirm.

PROCEDURAL HISTORY

On August 15, 2003, Edward Alcoser, Stiliani Antonakis, Sue Jacky, and Suzanee Kronisch, on behalf of themselves and as class representatives (hereafter, plaintiffs), filed a complaint against Thomas, alleging he had engaged in various practices "designed to deprive tenants of their security deposits to which they are lawfully entitled, and to deter tenants from claiming the deposits and asserting their rights." The complaint states

[1] Thomas previously appealed the trial court's order denying his special motion to strike (Code Civ. Proc., § 425.16) the initial complaint filed by plaintiffs. (*Alcoser v. Thomas* (June 15, 2005, A105615) [nonpub. opn.].)

three causes of action: (1) wrongful withholding of rent deposits in violation of Civil Code section 1950.5 (section 1950.5), (2) unfair business practices in violation of Business and Professions Code section 17200 et seq., and (3) fraud.

On April 5, 2006, plaintiffs filed their first amended complaint (FAC). The FAC alleges the same three causes of action as the original complaint. During the initial hearings before the trial court, the parties agreed that, with respect to the Business and Professions Code section 17200 claim, the court would hear the same evidence as presented to the jury on the Civil Code section 1950.5 and fraud claims.

On August 23, 2007, the trial court granted plaintiffs' motion for class certification. The proposed class consists of approximately 200 persons defined as "All former tenants who moved out of rental units owned by [Thomas] in Alameda County between August 15, 1999 and August 23, 2007 and who did not receive a refund of all or any part of their security deposit."[2]

On May 27, 2008, Thomas filed a motion to decertify and/or modify the class, and a motion for leave to file a cross-complaint against class members.

On July 14, 2008, the trial court granted Thomas's motion to file a cross-complaint and denied his motion to decertify the class.[3]

On September 3, 2008, the trial court denied a motion for summary judgment filed by Thomas.

The matter proceeded to jury trial, with opening statements given on October 7, 2008. The trial continued for 12 days until November 3, 2008.[4]

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[2] The class definition was subsequently modified as follows: "Those former tenants of [Thomas] named in a written lease who moved out of a rental unit owned by [Thomas] in Alameda County between August 15, 1999 and August 23, 2007 and who did not receive a refund of all or any part of a security deposit paid by them as to whom [Thomas's] records do not reflect claims for unpaid rent or late fees that exceed the amount of the security deposit paid by or on behalf of the former tenant."

[3] Thomas did not file a cross-complaint.

[4] During trial, on October 28, 2008, the trial court allowed plaintiffs to file a second amended complaint (SAC). The SAC does not differ materially from the FAC.

On November 4, 2008, the jury returned verdicts in plaintiffs' favor on the claims for violation of section 1950.5 and fraud. It fixed class damages at $183,018.87, and found that Thomas had acted in bad faith with respect to the statutory claim, as well as with malice, oppression, or fraud in defrauding the class.

On November 5, 2008, the jury awarded $5,490,566.10 in punitive damages against Thomas.

On December 29, 2008, the trial court filed a statement of decision and judgment in which it awarded the class $99,522.69 in prejudgment interest and $220,248.50 in statutory penalties, and granted injunctive relief on the Business and Professions Code section 17200 claim.

On January 13, 2009, Thomas filed a motion for a new trial.

On March 2, 2009, the trial court granted, in part, the motion for a new trial.

On March 3, 2009, the trial court entered its order on the motion for new trial, reducing compensatory damages to $130,819.31. The court also reduced prejudgment interest to $63,679, and reduced the punitive damages award to $1 million. It required plaintiffs to elect between punitive damages and statutory damages.

On April 10, 2009, the trial court entered an amended judgment consistent with the new trial order, awarding plaintiffs punitive damages but not statutory penalties.

On June 30, 2009, the trial court granted in part plaintiffs' motion for attorney fees and costs made pursuant to Code of Civil Procedure section 1021.5. The court awarded plaintiffs a total of $1,664,777.48 in attorney fees and costs.

On July 6, 2009, the trial court entered an order establishing a plan of class distribution. These consolidated appeals followed.

FACTUAL BACKGROUND

I. Thomas's Security Deposit Procedures

Thomas owns about 150 residential rental units in Alameda County. The units are managed by ELM. When new tenants move in, Thomas has the vast majority of them enter into leases. The leases contain provisions regarding security deposits. A typical such provision provides: "The security deposit will secure the performance of Tenant's

obligations. Owner may, but will not be obligated to, apply all portions of said deposit on account of Tenant's obligations. Any balance remaining will be returned to the Tenant, together with an accounting of any disbursements, no later than three weeks after termination or earlier if required by law. Tenant will not have the right to apply the security deposit in payment of the last month's rent. No interest will be paid to Tenant on account of the security deposit."

Thomas generally requires his tenants in Alameda County to pay a security deposit equal to 1.25 multiplied by one month's rent. During the time pertinent to this lawsuit, he also had a practice of conducting, or having his assistant conduct, a move-in inspection of the rental units at the beginning of each tenancy. The inspection included the filling out of a form in which a tenant could list any deficiencies with the unit.

At the close of a tenancy, Thomas generated a tenant's "cleaning encouragement letter." The letter provided, in part: "It is our mutual interest to see that the maximum portion of your Security Deposit is available for your return. Your detailed cleaning of your unit, restoring it to its thoroughly clean and original move-in condition, with respect to cleanliness, will insure this." The tasks tenants were directed to undertake included (1) reporting any tenant-caused damage, including any unauthorized painting or defacing of the interior, (2) washing both the inside and outside of all windows and replacing any broken, damaged or stolen window and door screens, (3) wiping down all the walls and ceilings, and professionally filling and priming any holes or depressions, (4) cleaning all cabinetry, drawer faces and drawers to remove grease and soap scum, (5) cleaning all kitchen appliances and adjacent surfaces, including beneath and behind the stove and refrigerator, (6) bringing in a wood flooring contractor to determine required treatment, (7) cleaning and waxing (by hand) the kitchen and bathroom floors, (8) cleaning window coverings, including professionally cleaning any draperies, (9) cleaning light fixtures and replacing any inoperable bulbs, and (10) placing operable batteries in the smoke detectors.

After a tenant moved out, Thomas's practice was to write a letter detailing any deductions he intended to take from the security deposit. He also took photographs of a

vacated unit if he had any claim of tenant-caused damage. Two binders of such claim letters were admitted into evidence. In the case of named plaintiff Alcoser, the letter reflects Thomas deducted a total of $2,189.50 for such things as replacing soot-stained carpeting, cleaning and stain-locking soot-stained walls, repairing paint chips in the porcelain tub and ceramic soap dish, and removing mold, residue and two red flower-shaped skid stickers from the bathtub. The document also reserved Thomas's right to claim over $1,000 for "consequential damage," including $50 per day for loss of 21 days' worth of rent during repairs.

Thomas uses a computer program called YARDI that is designed for property management businesses. The YARDI files contain a record of all the money Thomas spends on his properties by unit. The program generates a Unit Maintenance Report (UMR) that can list the expenditures for each unit and whether the expenses were for labor or materials. The reports do not distinguish the amount spent on tenant-caused damage only, though they could have been designed to do so. At trial, UMR's dating from January 2002 through August 2007 were admitted as evidence.

Robert Miller, an expert witness in the field of property management, testified that Thomas's policies regarding many of the charges applied to security deposits were not within the standards of the industry. For example, property managers do not normally charge a tenant for replacing light bulbs, refinishing discolored bathtubs, removing mold and mildew, removing clothes hangers and toilet plungers, changing furnace filters, and treating roach infestations in multi-unit buildings. Thomas's letters listing deficiencies upon move-out were sometimes 20 pages long with up to 80 items of claimed damage. Additionally, the letters sometimes stated that if a broken part to an appliance could not be found the entire appliance would be replaced at the tenant's expense. In Miller's opinion, these practices were aggressive and intimidating.

II. Evidence of Specific Tenancies

Some of Thomas's former tenants testified at trial. We summarize the evidence regarding their tenancies.

A. Edward Alcoser

Alcoser testified he moved into his unit in June 2000. He read the lease when he signed it, including the provision regarding the security deposit. He paid $1,868.75 as the security deposit. When he made that payment, he expected he and his roommate would receive the deposit back after cleaning the apartment and leaving it in good condition. About two weeks after he moved in, he filled out a move in checklist stating the condition of items in the apartment. A week after that, he submitted a handwritten note to the property manager, detailing seven problems with the unit. The problems reported by Alcoser included a leaky shower, a broken refrigerator door, and that the carpet in the living room smelled of animal urine. About a year after he moved in there was a fire on the ground floor of the building. The fire shot up the side of the building, and smoke and soot came into his apartment because the windows were open at the time. The soot stained the living and dining room area walls. He paid his last month's rent and moved out in February 2002.

When Alcoser moved in, the carpeting had stains and smells. The tub was chipped and the flower skid stickers were already present. Neither he nor his roommate did any damage to the carpeting or walls during their tenancy. When they moved out, they thoroughly cleaned the apartment, except for the oven, which they forgot to clean. After he received a claim letter from Thomas, he attempted several times to meet with him to look at the photographs of the apartment. His calls were not returned. When he filed an action in small claims court, Thomas countersued. Because his claim was small, Alcoser could not find a lawyer to represent him and he dropped his suit.

The YARDI report for Alcoser's unit indicates that less than $400 dollars was spent on cleaning and repairing the unit immediately after Alcoser moved out. Approximately a year later, the carpet was replaced at a cost of $1,400. The apartment was not rented out for three years. After Alcoser filed an action against him in small claims court, Thomas filed a claim against both Alcoser and his roommate in superior court as a limited jurisdiction case. At trial, Thomas was unable to say whether Alcoser was ever given a record of disbursements actually made. Thomas also took the position

that he was not required to complete stated repairs within 21 days after a tenant moves out.

B. Arek Nathanson

Another of Thomas's former tenants, Arek Nathanson, testified that he read the lease before he signed it, and that he and his roommates paid a $4,245 security deposit when they moved in. They expected they would get all or most of their deposit when they moved out of the house. Apart from some indentations to the hardwood floor caused by the rotation of a heavy television cart, they did not cause any damage to their unit during their tenancy. They received only $622.50 of their deposit back. $1,687.50 of the deposit was retained for floor work. The actual work was not done until over two years after Nathanson moved out.

C. Paul Paz Y Mino

Paul Paz Y Mino rented one of Thomas's apartments from the beginning of 2000 until August 2003. He paid a $1,150 security deposit. He read his lease when he signed it and expected to get all of his deposit back when he moved out. Before he left, he sent a letter to Thomas reminding him of deficiencies that he had previously asked to have corrected, which he believed should be attended to before renting out the unit. These problems included a missing tile in the shower, a worn curtain string in the living room, an eroded cable line, and mold on the wall inside the closet. When Thomas's employee did a move-out inspection, she broke the door and falsely accused Paz Y Mino of having changed the lock to the apartment. After he moved out, he received a letter from Thomas estimating total restoration costs to be $3,927.60, including a claim for a month's rent needed to keep the unit vacant during repairs. The charges included fixing the broken door. The letter also included charges for mold abatement. Paz Y Mino was "flabbergasted" when he received the letter.

D. Sue Jacky

Sue Jacky rented an apartment from Thomas. About seven months later she moved to another unit in the same building. When she signed the leases, she read everything that was handwritten, but did not read all of the "fine print." The leases for

both apartments reflect that she paid an additional $300 pet deposit. After she moved to the second unit, she received a letter from Thomas accusing her of not having properly cleaned the first apartment. The building manager told her not to worry about the letter. She completed a move-in inspection sheet for the second apartment, specifically listing various deficiencies, including cigarette burns, paint chippings, holes in the kitchen flooring, a cracked window, and leaky faucets. When she moved out, she hired a cleaning service to thoroughly clean the apartment. Later, she met with one of Thomas's employees to do a move-out inspection. By the time the employee arrived, the light was fading and, as Jacky had already transferred electrical service to her new apartment, there was no lighting available. After the walk-through, the employee told her that everything looked fine. Subsequently, she receive a "flurry" of letters from Thomas along with a check for $252 as a security deposit return. One of the letters accused her of having had an unauthorized pet, causing holes in the kitchen floor, leaving carpet stains, and failing to clean the unit. Many of the damages complained of were listed in her move-in report, thus they predated her tenancy. When she demanded the rest of her security deposit, Thomas told her the check she received had been sent by mistake and that she actually owed him $909.87. She never received an accounting of the work done in the unit.

E. Nathanael Silin

Nathanael Silin and his family moved into one of Thomas's apartments in August 2006. The lease was for six months and he paid a $1,300 security deposit. A few weeks to a month after he moved in, he began noticing cockroaches. The roaches got into all of the tenants' belongings, including their books, clothes, and electronic devices. Thomas told Silin that the roach problem was being caused by the tenant downstairs who was not keeping her apartment clean. He said she was being evicted and that the problem would be resolved. Silin gave notice on March 21, 2007, that he was moving out. He and some of his employees cleaned the unit, including cleaning some crayon marks left by his sons on the walls. During the cleaning process, some of Silin's employees left sunflower seeds in the hallway, and Thomas wrote him a letter forbidding Silin and his employees from entering the building. At that point, Silin had not finished cleaning the unit. Silin's

deposit was not returned and he received a letter stating that he owed Thomas $1,898.73. When Silin sued Thomas in small claims court, Thomas countersued him for almost $8,000 which removed the case from small claims jurisdiction.

F. Other Tenancies

In another instance, Thomas spent $1,070 to clean and repair a unit in which the tenants had paid a $1,300 security deposit. The claim letter had forecasted $3,000 for the work. After the work was done, Thomas did not refund any money to the tenants. In another case, Thomas wrote a letter to a tenant stating that he had spent $452 on correcting a unit, yet the YARDI report did not record such an expenditure.

III. Evidence of Expenditures on Repairs

A comparison of the costs estimated in letters sent to 157 tenants, as against actual amounts spent as shown by the YARDI reports, revealed that while $502,461.37 was claimed as damages only $215,057.72 was actually spent on repairing the affected units. Further, the amount attributable to tenant-caused damages was unknown as the YARDI reports do not segregate tenant-caused expenditures from expenditures for routine maintenance.

Thomas presented evidence supporting his charges and testified as to various proper grounds for deducting from tenants' security deposits. For example, he testified that in one case, plaintiffs had claimed he only spent $1,785.61 on repairing a unit when in fact he had spent $20,708.69. He also noted instances in which tenants had recovered a vast majority of their deposits, and others when tenants had failed to give 30 days' notice, made unauthorized changes to their units, and/or had left their units in extremely poor condition. In 60 percent of the relevant tenancies, security deposits were applied to cover nonpayment of the last month's rent. Claims for unpaid rent were not included in damages claimed in move-out letters.

Sallyann Andrews, the general manager of ELM, testified that some fixtures are bought in bulk, such as ceiling fans and sinks. When those items are subsequently placed in a unit, the cost is not entered into the YARDI reports.

DISCUSSION

On appeal, defendants raise the following challenges: (1) That the finding of reliance as an element of the fraud claim is not supported by substantial evidence, (2) that the trial court gave erroneous jury instructions on damages, (3) that the punitive damages award is excessive, (4) that the court erred in certifying a class action on the fraud claim, (5) that the court erred in awarding 10 percent in prejudgment interest, (6) that the attorney fee award is flawed, (7) that the court erred in handling Thomas's undertaking on appeal, and (8) that the distribution plan is flawed.

I. The Element of Reliance is Supported by Substantial Evidence

Thomas claims there is no substantial evidence that the class relied on his false promise to make only lawful deductions from their security deposits. He faults plaintiffs for not proving that *all* the prevailing members of the class read the security deposit provision in the lease and relied on it.

A. Standard of Review

"The function of the appellate court is not to reweigh the evidence but merely to determine whether the verdict reached by the jury is supported by substantial evidence in the record. It is well established that with respect to the sufficiency of the evidence the power of the appellate court is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, that will support the verdict. [Citation.] The appellate court may reverse the decision only if there is no evidence to support the verdict." (*Zhadan v. Downtown Los Angeles Motor Distributors, Inc.* (1979) 100 Cal.App.3d 821, 833.) "In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Ibid*.)

B. Substantial Evidence Supports the Jury's Finding

We note at the outset that Thomas does not contest the jury's conclusions with respect to the finding of liability under section 1950.5, including the finding that he acted in bad faith in withholding security deposits.[5] Nor does he claim that the plaintiffs failed to establish the other elements of their fraud cause of action, apart from the element of reliance.

Reliance is an essential element of fraud causes of action. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239; *Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 402.) "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. [Citations.] 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.' [Citations.]" (*Alliance Mortgage*, *supra*, at p. 1239.)

The record does reveal substantial direct evidence of reliance. As noted above, Alcoser, Nathanson, and Paz Y Mino all testified that they read their leases, which included provisions regarding security deposits.[6] They further testified that they gave Thomas their security deposits with the understanding they would receive the money back, less any justified deductions. Some of the tenants also testified they were experienced renters who had given landlords security deposits in the past, and had received all or most of their money back.

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[5] The statutory landlord-tenant law provides that within three weeks after the termination of tenancy a landlord must return the security deposit paid by a former tenant and provide a written accounting of any portion retained as compensation for unpaid rent, repairs, and cleaning. (§ 1950.5, subd. (g).)

[6] Thomas claims that only one witness testified he had read the security deposit provision. Our review of the record, summarized above, indicates that several witnesses testified to having read their leases, which would include the security deposit provisions.

While Thomas points out plaintiffs did not bring all the class members into court to testify that they read and relied upon the provision in the lease regarding security deposits, he does not provide legal authority for the proposition that such proof is required. Code of Civil Procedure section 382 authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." It thus would defeat the purpose of class action, in which certain plaintiffs are chosen to represent a class, if every single member of the class were individually required to appear in court to prove every element of the class action claims.

Thomas also notes that Jacky testified she did not read the fine print of the lease. From this testimony, he claims it necessarily follows that she could not have relied on the security deposit provision. Citing to cases involving complex insurance contracts, he also argues, without any citation to the record, that "because people, especially tenants renting residential property, simply do not regularly read their entire leases, it is improper to presume or infer that any class members, particularly those who did not testify, read their security deposit provision." This contention is based on pure speculation. Even with respect to Jacky, Thomas does not argue that she had no understanding of the concept of security deposits. Nor does he allege that she lacked an expectation that her deposit would be returned to her if she left her apartment in an appropriate condition. In our view, it is reasonable, if not common knowledge that tenants, regardless of whether they read the fine print on their lease, expect to receive the bulk of their security deposit back when they move out if they are current on the rent and leave their apartments clean and undamaged.

This case is thus distinguishable from *Mirkin v. Wassserman* (1993) 5 Cal.4th 1082 (*Mirkin*), upon which Thomas relies for the proposition that reliance cannot be based on representations that a plaintiff has neither heard nor read. In *Mirkin,* the plaintiffs alleged the defendants had made numerous misrepresentations about a company's prospects and financial status in its prospectuses, in documents filed with the Securities Exchange Commission, and in other public communications. These

misrepresentations allegedly inflated the price of the company's securities, thus allowing them to sell for more than their true value. (*Id.* at pp. 1087–1088.) However, as the plaintiffs could not allege that they had actually read any of the misrepresentations, the Supreme Court concluded the element of reliance could not be established. (*Id.* at p. 1095.)

While a more demanding and individualized focus on reliance is appropriate in a fraud theory like that presented in *Mirkin's* facts, our law has assessed evidence of reliance in the consumer "fraud" arena like landlord-tenant somewhat differently. The evidence discloses the plaintiffs each were given leases that contained common terminology about security deposits and their return. Defendant's practice took place over a considerable period of time and representations on the deposits were relatively standard, almost generic. "[I]ndividualized reliance on specific misrepresentations [are not required] where . . . those misrepresentations and false statements were part of an extensive . . . campaign." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 328.) It is also true that representations made to certain members of a class as is demonstrated in this record can be inferred as representations made to the others in the class. (*Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605.) Arguably, tenants in the same buildings owned by defendant shared details of their individual lease including recovery of deposits. (Rest.2d Torts, § 533.) The fact that members of this class engaged in conduct designed to recover the deposits like cleaning and improving the unit demonstrates their motive—reliance—to obtain a refund of deposit fees, creating a *presumption* of reliance by the class. (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 426.)

In the present case, all of Thomas's tenants were given leases that contained the false promise regarding security deposits. The tenants also were made aware of the security deposit provision when they paid their security deposits as a condition of their tenancies. This constitutes substantial circumstantial evidence of reliance, rendering this case distinguishable from cases such as *Mirkin,* in which the Supreme Court found the

plaintiffs could not successfully plead that the alleged misrepresentations ever came to their attention.

In sum, substantial evidence supports the finding that the tenants in the class relied on Thomas's promise that he would not make unauthorized deductions from the security deposits they entrusted to him. It does not stand to reason that these tenants would have surrendered their security deposits to Thomas had they known he had no intent to comply with the law governing the treatment of such deposits. We further note the jury was fully instructed on the reliance requirement.

II. Jury Instructions

A. The Instructions on Damages are Not Erroneous

"The propriety of jury instructions is a question of law that we review de novo." (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.) On appeal, Thomas claims the jury instructions on damages were improper because they directed the jury to award plaintiffs their entire security deposits, with no allowance for deductions for valid repair expenditures or unpaid rent.

The first contested jury instruction, on the bad faith deduction under section 1950.5,[7] provides, in part: "A landlord who fails to return a tenant's security deposit for reasons that are not among the reasons set forth in my preceding instruction loses his right to retain the security deposit and must return the entire deposit to tenants." The second instruction, on damages for fraud, provides, in part: "To determine the amount of damages, you must: [¶] 1. Determine the amount of the security deposits that the class gave to [Thomas] . . . ; and [¶] 2. Subtract the amount of deposits that the named plaintiffs and the class did receive in return. The resulting amount is the class' damages."

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[7] Section 1950.5, subdivision (*l*), provides in part: "The bad faith claim or retention by a landlord . . . of the security or any portion thereof in violation of this section . . . may subject the landlord . . . to statutory damages of up to twice the amount of the security, in addition to actual damages. The court may award damages for bad faith whenever the facts warrant that award, regardless of whether the injured party has specifically requested relief. In any action under this section, the landlord . . . shall have the burden of proof as to the reasonableness of the amounts claimed . . . ."

Thomas argues unpersuasively that the jury instruction on section 1950.5 was incomplete as it improperly included the entire security deposit as part of the compensatory damages, with no allowance for valid deductions. He also contends the Supreme Court's opinion in *Grandberry v. Islay Investments* (1995) 9 Cal.4th 738 (*Grandberry*) supports his claim of error. Contrary to Thomas's arguments, however, *Grandberry* established that when a landlord violates section 1950.5, "the right to retain all or part of the security deposit . . . has not been perfected, and he must return *the entire deposit* to the tenant." (9 Cal.4th 738, 745, italics added.) As noted above, Thomas does not contest the jury's finding that he violated this provision, nor does he contest the finding that he acted in bad faith. Furthermore, the holding of *Grandberry* was that a *good faith* failure to return a tenant's security deposit does not bar a landlord from pursuing a setoff at trial for unpaid rent, repairs, and cleaning. (*Id.* at pp. 741–742.) The court explicitly limited its holding to cases involving good faith failures only. (*Id.* at p. 750, fn. 6)

We also note that section 1950.5, subdivision (*l*), states that "[i]n any action under this section, *the landlord . . . shall have the burden of proof as to the reasonableness of the amounts claimed . . . .*" (Italics added.)[8] Thomas does not cite to any portion of the record demonstrating that he presented anything more than anecdotal evidence concerning the amounts of any such deductions, or that he made an offer of proof. Some evidence of a substantial character is needed to justify giving a jury instruction. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

We further note that, prior to trial, the trial court granted Thomas's request to file a cross-complaint. The court observed that such a complaint can be used to "set-off any damages that might be owed to the absent class members on the class claims." The court also stated: "any cross-claim and/or cross-demand for payment under C.C.P. 431.70

[8] While Thomas claims "it is not the rule that a landlord who makes an improper deduction of $1 from the deposit thereby forfeits all rights to keep the proper deductions," the evidence shows his improper deductions were far from de minimis.

would be considered in the second phase of the case where the trier of fact considered the individual claims of the absent class members." Thomas never filed a cross-complaint or made a cross-demand. On appeal, he repeatedly complains that the trial ended without a "second phase" concerning set-offs. Yet he does not provide any citation to the record showing that he objected to this outcome or offered any evidence during trial that would have triggered this second phase.[9] Accordingly, we conclude the jury instruction given here properly stated the law as applied to this case.[10]

B. The Issue Has Been Waived

Even if the jury instructions could be deemed flawed, we agree with plaintiffs that this argument has been forfeited. When the trial court gives an instruction "which is an incorrect statement of law, the party harmed by that instruction need not have objected to the instruction or proposed a correct instruction of his own in order to preserve the right to complain of the erroneous instruction on appeal." (*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9.) However, "When a trial court gives a jury instruction which is correct as far as it goes but which is too general or is incomplete for the state of the evidence, a failure to request an additional or a qualifying instruction will waive a party's right to later complain on appeal about the instruction which was given." (*Ibid.*)

Additionally, "Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error. [Citations.] But the doctrine does not apply when a party, while making the appropriate objections, acquiesces in a judicial determination. [Citation.] As this court has explained: ' "An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible." '

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[9] Thomas also suggests that his trial counsel was negligent in failing to note the trial was conducted in one phase only.

[10] We also conclude the trial court did not err in its instruction on damages for fraud.

[Citations.]" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212–213.) Absent these circumstances, where a party *affirmatively accepts* the opposition's jury instruction, this constitutes invited error. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1192, fn. 12.)

While it is true that plaintiffs proposed all the jury instructions used at trial, Thomas agreed to these instructions and never proposed any modifications. When the trial court noted that Thomas had not submitted any jury instructions, his counsel said: "We agree on—to the extent that we've gone over the jury instructions that they had, I agree on those instructions. I just don't agree with there being a jury. But to the extent that we have these jury instructions listed, *we agree with those jury instructions that they've provided*." (Emphasis added.) Thomas did not request any additional instructions or any modifications to the instructions proposed by plaintiffs. We therefore conclude any claim of error with respect to the instructions has been waived. (See *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520–521.)

On appeal, Thomas claims he acquiesced to the jury instructions only after the trial court cited *Grandberry* favorably for plaintiffs in its September 3, 2008 order denying his motion for summary judgment. He contends it would have been fruitless for him to object to the instructions in light of the court's ruling. With respect to *Grandberry*, the court's order states: "If Plaintiffs prove that [Thomas] had such an unlawful business policy or practice, then it might be equitable to deprive [him] of the statutory deduct and retain procedure. *Grandberry*, [*supra*,] 9 Cal.4th 738, 750, fn. 6."[11] There is nothing in this passage to suggest the court had already determined plaintiffs had proved Thomas had "an unlawful business policy or practice," or that it had already decided to deprive him of the deduct-and-retain procedure. Thus, the court had not foreclosed the opportunity for Thomas to object to plaintiffs' proposed instructions or to offer

[11] The footnote cited to by the trial court here provides: "Because the jury did not find that defendants here acted in bad faith, we do not consider and therefore express no opinion regarding the rights of landlords who have acted in bad faith." (*Grandberry, supra,* 9 Cal.4th 738, 750, fn. 6.)

modifications to them. Accordingly, he has not demonstrated that he made appropriate objections or motions prior to agreeing to plaintiffs' proposed jury instructions.

III. The Punitive Damages Award is Not Constitutionally Excessive

As noted above, the jury initially awarded $5,490,566.10 in punitive damages. The trial court reduced the award to $1 million, which is approximately eight times the revised compensatory damages award of $130,819.31, or five times the compensatory damages award plus interest awarded by the court ($196,279.67). Thomas claims that the $1 million punitive damage award violates constitutional limitations on such awards. He claims the ratio of those damages to the compensatory damages should not exceed one to one, and, in any event should not exceed the $220,248.50 penalty that would have been awardable under section 1950.5, subdivision (*l*).

"[T]he United States Supreme Court has determined that the due process clause of the Fourteenth Amendment to the United States Constitution places limits on state courts' awards of punitive damages, limits appellate courts are required to enforce in their review of jury awards. [Citations.] The imposition of 'grossly excessive or arbitrary' awards is constitutionally prohibited, for due process entitles a tortfeasor to ' "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." ' [Citations.] [¶] Eschewing both rigid numerical limits and a subjective inquiry into the jury's motives, the high court eventually expounded in *BMW* [*of North America, Inc. v. Gore* (1996) 517 U.S. 559 (*BMW*)] and *State Farm* [*Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408 (*State Farm*)] a three-factor weighing analysis looking to the nature and effects of the defendant's tortious conduct and the state's treatment of comparable conduct in other contexts. As articulated in *State Farm,* the constitutional 'guideposts' for reviewing courts are: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' [Citations.]" (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171–1172 (*Simon*).)

We review the jury's award of punitive damages de novo, making an independent assessment of each of these factors. (*Simon, supra,* 35 Cal.4th 1159, 1172.)

A. Reprehensibility

The degree of reprehensibility is the most important indicator of the reasonableness of a punitive damages award. (*State Farm, supra,* 538 U.S. 408, 419.) In analyzing the degree of reprehensibility, we consider five subfactors: (1) whether the harm was economic or physical; (2) whether the tortious conduct demonstrated disregard for the health or safety of others; (3) whether the plaintiff was financially vulnerable; (4) whether the conduct involved repeated actions or an isolated incident; and (5) whether the harm was the result of accident or intentional malice, trickery or deceit. (*Ibid.*; see *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 21.)

Here, the harm to plaintiffs was primarily economic. While reasonable tenants might endure some distress at Thomas's conduct, the conduct affected their financial situation far more than their physical health. Similarly, even if his conduct caused plaintiffs distress, it cannot be said to demonstrate disregard for the health and safety of others. These two subfactors are therefore of minimal applicability.

Many of the plaintiffs were financially vulnerable, as Thomas acknowledged at trial. This factor supports a finding of a high degree of reprehensibility. Further, his conduct was regular and ongoing, repeated multiple times over a substantial period of time. This demonstrated a pattern of unlawful conduct towards his many tenants. This subfactor also supports a high assessment of reprehensibility.

Further, when reviewing the evidence in light of the jury's findings, we agree with the trial court that concluded Thomas systematically committed intentional fraud in a way "calculated to deter former tenants from pursuing their legal remedies," supporting a finding of *intentional* malice, trickery or deceit. The jury's determinations here virtually compel a conclusion that this deliberative subfactor weighs strongly in favor of a finding of reprehensibility.

In sum, our analysis of all five subfactors leads to the conclusion that, on balance, Thomas's conduct evidenced a relatively high degree of reprehensibility.

B. Ratio of Punitive Damages to Actual Harm

While there is no bright-line test for determining whether a punitive damages award is excessive, courts have disapproved damages that are grossly disproportionate to the amount of actual damages awarded. For example, in *BMW*, the United States Supreme Court disapproved the "breathtaking 500 to 1" ratio in the case before it. (*BMW, supra,* 517 U.S. 559, 583.) In *State Farm*, a case involving a punitive damage ratio of 145 to 1, the court described cases approving a ratio of 3 or 4 to 1 as "instructive," and held that few awards "exceeding a single-digit ratio between punitive and compensatory damages" can survive a due process challenge. (*State Farm, supra*, 538 U.S. 408, 425.)

In *Simon,* the California Supreme Court interpreted these statements as establishing a type of presumption: "[R]atios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause." (*Simon, supra,* 35 Cal.4th 1159, 1182.) At the same time, "[m]ultipliers less than nine or 10 are not . . . presumptively valid under *State Farm*. Especially when the compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee.' [Citation.]" (*Ibid.,* italics omitted.) The court, however, refused to adopt a test establishing a ratio of four to one as the outer constitutional limit. (*Id.* at pp. 1182–1183.)

In arguing that a one-to-one ratio is required here, Thomas relies on *Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471 [171 L.Ed.2d 570, 591, 128 S.Ct. 2605]. That case concerns maritime law only, and is therefore inapposite. (See *id.* 171 L.Ed.2d 570, 591, 128 S.Ct. 2605, 2626.) Even the court in *Exxon* noted that single digit ratios other than one to one are permissible: "Although 'we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula,' [citation], we have determined that 'few awards exceeding a single-digit ratio between punitive and

compensatory damages, to a significant degree, will satisfy due process,' [citation]; '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee,' [citation]." (*Ibid.*)

The case before us does not involve a ratio of breathtaking proportions. Setting aside the issue of whether prejudgment interest should be included in the calculation of compensatory damages, under the facts of this case even a ratio of eight to one falls within the due process norms. (*Simon, supra,* 35 Cal.4th 1159, 1182). We conclude the ratio of the award does not violate due process and cannot be deemed excessive.

C. Comparable Civil Penalties

In determining the reasonableness of a punitive damages award, courts also "[c]ompar[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct . . . ." (*BMW, supra,* 517 U.S. 559, 583.)

Thomas points out that the statutory damages awarded under section 1950.5 in this case are $220,248.50, and, essentially, argues that punitive damages must necessarily be capped at the same level as statutory penalties.[12] But that is not the law. While a comparable civil penalty is a factor to be considered, it is not determinative in and of itself. It is simply one factor to be considered with all the others in determining whether a jury's award of punitive damages violates due process. (See, e.g., *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 222–223.) This weighing process varies from case to case.

Punitive damages are designed to punish wrongdoers and deter the commission of wrongful acts. (*Bardis v. Oates, supra,* 119 Cal.App.4th 1, 26.) Limiting an award to an arbitrary ratio of no more than the actual damage would serve neither function. Rather, such a proposal "would flatten out the variability of punitive damage awards by deemphasizing two important factors used to determine such damages: the extent of the

[12] Thomas's request for judicial notice (filed Sept. 24, 2010) of certain documents reflecting the legislative history of section 1950.5 is granted.

defendant's misconduct and its wealth. As such, the worse the defendant's misconduct, and the greater its wealth, the more it stands to benefit from [such a] damages limitation." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 418 (conc. opn. of Mosk, J.).)

D. Defendant's Financial Condition

Finally, we note Thomas does not contend the award is disparate relative to his financial condition. At trial, his net assets were stipulated to be between $25 and $35 million. The $1 million awarded to plaintiffs is consistent with the state's interest in punishing reprehensible conduct and deterring its repetition. (See *Simon, supra*, 35 Cal.4th 1159, 1187.)

IV. Class Certification

Thomas claims the trial court erred by certifying a class action on the fraud claim. He asserts plaintiffs could not satisfy the typicality and commonality requirements due to the variation in facts among the class members concerning the elements of fraud. "An appellate court will 'not disturb a trial court ruling on class certification which is supported by substantial evidence unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation].' [Citations.]" (*McAdams v. Monier, Inc.* (2010) 182 Cal.App.4th 174, 180.)

Thomas's arguments here are similar to the arguments he makes concerning the element of reliance, namely, that "there is no evidence whether any of the class members who did not testify understood, or even read, the representation." We have already concluded that the element of reliance with respect to the class's claim for fraud was properly established at trial. Accordingly, Thomas's argument fails.

V. Award of Prejudgment Interest

After the jury returned its verdict, plaintiffs moved for prejudgment interest under Civil Code section 3287, subdivisions (a) *and* (b),[13] asserting that the applicable interest

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[13] Civil Code section 3287, subdivision (a), provides in part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." Subdivision (b) provides in part: "Every person who is entitled under any

rate was 10 percent pursuant to the rate of interest set for contracts by Civil Code section 3289, subdivision (b).[14] In its statement of decision, the trial court disagreed, in part, finding that section 3287, subdivision (b), "has no application to this case because no claim for breach of contract was pleaded or tried." Thomas, however, did not challenge plaintiffs' calculation of interest as set forth in a declaration filed with their motion. Instead, he argued that the award of prejudgment interest was erroneous because the procedures of section 3288 were not followed.[15] The trial court ruled against Thomas, noting the award was not being made pursuant to section 3288. The court accepted plaintiffs' calculation of $99,522.69 in awarding interest on the Civil Code section 1950.5 claim. When the court later entered its amended judgment, it noted that Thomas did not challenge the revised calculation of $63,679 in prejudgment interest.[16] On appeal, Thomas claims that the interest rate should have been 7 percent because plaintiffs' claims were for statutory violations and for fraud, and not breach of contract.

Thomas's argument has merit: "Whether the proper interest rate was applied is a question of law. [Citation.] There is no legislative act specifying the rate of prejudgment interest for a fraud claim, and therefore the constitutional rate of 7 percent applies to the [award of] tort damages." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585.)[17]

Plaintiffs claim the 10 percent interest rate is proper because the jury's finding in favor of the class on the fraud cause of action necessarily included a finding that Thomas

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judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix . . . ."

[14] Civil Code section 3289, subdivision (b), provides: "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach."

[15] Civil Code section 3288 provides: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

[16] While Thomas's conduct could be deemed acquiescence (see *Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, 1145), we exercise our discretion to review this issue.

[17] See California Constitution, article XV, section 1.

had also breached his rental contracts with the class members. They further argue Civil Code section 3289, subdivision (b), applies "without regard to whether an action is brought under a contract theory or some other theory, and without regard to whether contract damages are awarded." They do not cite to any authority for this proposition.

We note the trial court clearly stated that plaintiffs' lawsuit was not based on breach of contract. Accordingly, the matter will be remanded to the trial court to recalculate prejudgment interest at a rate of 7 percent.

VI. Attorney Fee Award

As noted above, the trial court awarded plaintiffs a total of $1,664,777.48 in attorney fees and costs. Thomas claims the attorney fee award was excessive and should be reversed.

Thomas does not contest plaintiffs' right to attorney fees, only the amount awarded. Under specified circumstances, plaintiffs' counsel in a class action may recover Code of Civil Procedure section 1021.5 private attorney general fees. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578; see *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 38.) Those fees can be subject to a lodestar calculation and potential enhancement. (*Graham, supra,* at pp. 578–579; *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 902–903.) "Because the sole issue before us . . . is the amount of fees awarded, our review is deferential. ' "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong'—meaning that it abused its discretion." ' [Citations.]" (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 832–833.)

Thomas first agues that the trial court abused its discretion by failing to account for plaintiffs' attorneys' duplicative and unsuccessful efforts. The trial court reviewed the contemporaneous time records submitted by plaintiffs, the consolidated time record created by Thomas, and the task-based summary attached as an exhibit to plaintiffs' fee memorandum. Thomas claims the court "abandoned" an earlier "admonishment" to plaintiffs that they "eliminate billing for duplicative and unnecessary work." To the

contrary, the court found plaintiffs' task-based summary "particularly helpful since when the hours were broken down by task, no category of time spent appeared to be excessive despite the number of attorneys involved." We see no abuse of discretion.

Next, Thomas claims the trial court's selection of a multiplier was an abuse of discretion. "Some factors the court may consider in adjusting the lodestar include: '(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award. [Citation.]' [Citation.]" (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1216.)

The trial court here applied a multiplier of 1.4, adjusted down from the 2.0 multiplier sought by plaintiffs. This multiplier was chosen based primarily on the risk plaintiffs and their counsel took in pursuing this action, knowing that Thomas was a "highly litigious landlord who used his great wealth to intimidate tenants into not seeking return of their security deposits." In deciding on the multiplier, the court also observed this risk was "exacerbated by [Thomas's] scorched earth manner of defending this case." The record on appeal provides ample support for the court's conclusions. Accordingly, we find no abuse of discretion with respect to the chosen multiplier.

Finally, Thomas contends plaintiffs' counsel Barry Willdorf is barred from recovering attorney fees because the trial court accepted his declarations as an expert witness concerning the value of real property pledged by Victoria Thomas for the undertaking on appeal. In making this argument, Thomas claims Willdorf violated his ethical duties to the plaintiffs he represented by agreeing to provide expert testimony on a contingency fee basis. Even if Thomas has properly characterized Willdorf's conduct (a point plaintiffs vigorously contest) he does not provide a citation to the record indicating that he raised this argument in the trial court. The record shows that he objected to Willdorf's declaration solely on the basis that he was not qualified as an expert on property values. Thomas's subsequent opposition to plaintiffs' motion for attorney fees contains no mention of Willdorf's declaration. His failure to raise this argument below waives it on appeal. (*California State Auto. Assn. Inter-Ins. Bureau v. Antonelli* (1979)

94 Cal.App.3d 113, 122.) In sum, we conclude the attorney fee award does not constitute an abuse of discretion.

VII. The Undertaking

Thomas claims the trial court committed prejudicial error in handling his undertaking. Specifically, he challenges the court's application of judicial estoppel to bar him from using two of the properties as security. Plaintiffs counter that the orders Thomas challenges are moot. We agree.

Thomas appeals from orders filed on May 4, 2009, (granting plaintiffs' motion on appeal bond), May 19 (granting application for order compelling insufficiency of undertaking), and June 26, 2009 (denial of motion for reconsideration). In the May 4 order, the trial court found that Thomas had initiated unlawful detainer proceedings against residents of two properties owned by Thomas's wife as her separate property, including stating in court filings that he is the owner of these properties. The court found he was judicially stopped from asserting that the properties were his wife's separate property. Following that finding, the court concluded the undertaking insufficient, and held that "[Thomas] must file a replacement bond or undertaking on or before May 5, 2009." No replacement undertaking was filed.

On December 29, 2009, the parties entered into a stipulation resolving plaintiffs' objection to the undertaking.

On January 13, 2010, the trial court entered an order permitting recordation of the revised undertaking.

The December 29, 2009 stipulation states that the parties "hereby stipulate that the parties have resolved all issues raised by plaintiffs' pending Objection to Undertaking on Appeal, except that plaintiffs maintain their request for an order requiring the county recorders of Marin and San Francisco to record the undertaking declarations submitted in this case by defendants." The January 13, 2010 order permits recordation of two supplementary declarations of personal surety, filed on November 18, 2009, and December 31, 2009. Thomas has not appealed from this order.

"An appellate court will not review or determine questions which have become moot, since the decision will serve no useful or beneficial purpose." (*Farney v. Stockton Port Dist.* (1939) 12 Cal.2d 653, 656.)

Thomas claims the May 4 order is not moot because it allowed plaintiffs to record it, regardless of whether or not they have done so. The relevant portion of the order provides: "Defendants must file a replacement bond or undertaking on or before May 5, 2009. C.C.P. § 996.010(c). If defendants file an undertaking by a personal surety under C.C.P. § 995.510, then the undertaking is an 'Instrument' under Gov't Code § 27279, and Plaintiffs can record the undertaking to preserve an interest granted by the undertaking in the real property indentified in the undertaking. To the extent required, the Court orders that the recorder accept the undertaking to be recorded. Gov't Code § 27201." As no replacement bond or undertaking was filed pursuant to this order, there is nothing to be recorded. We thus agree with plaintiffs that the appeal from the May 4 order is moot.

The May 19 order again found an insufficiency in the security and directed defendant to post an amended undertaking not later than May 22, 2009. There is nothing in the record showing that Thomas filed an amended undertaking. Thus, this order is also moot.

The June 26, 2009 order denied Thomas's motion for reconsideration of the May 4, 2009 order, noting that the May 19, 2009 order "effectively superceded the May 4, 2009 order." As both the May 4 and May 19 orders are moot, it follows that the June 26 order is also moot. Accordingly, we need not consider this issue any further.[18]

VIII. Plan of Distribution

Thomas challenges the plan of distribution claiming that it takes money from the class members who prevailed at trial and gives it to class members "who lost at trial for lack of evidence." Thomas claims he will be prejudiced by the plan because he will be required "to pay for class counsel to unethically redistribute money attributed to the

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[18] Thomas's request for judicial notice (filed Sept. 24, 2010) of the recorded grant deed transferring certain real property to his wife is denied.

prevailing class members to those who did not prevail." He notes that the trial court reduced the amount of the judgment rendered by the jury, claiming this was done because plaintiffs "could not account for certain, unidentified class members" who will now be "entitled to share in the prevailing class members' award" if they come forward.

This argument is poorly presented. Plaintiffs, as representatives of the class, prevailed at trial. The final judgment does not distinguish class members who "prevailed" from those who "lost." Every argument presented by an appellant must be supported by both coherent argument and pertinent legal authority. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007.) If either is not provided, the appellate court may treat the issue as waived. (*Ibid*.) We deem this argument waived as lacking in coherency.

In any event, our independent review of the plan of distribution does not suggest to us that the funds are likely to be distributed improvidently. We also note the following language appears in the plan, language Thomas does not now contest: "Defendants shall have no interest whatsoever in [the funds recovered pursuant to the judgment] and shall have no right to intervene in any proceedings concerning the disposition of such funds." Further, while the plan allows plaintiffs' counsel to seek reasonable attorney fees from Thomas in connection with the administration of the distribution plan, no such order appears in the record. Thus, the matter is not ripe for review. Thomas will have the opportunity to contest the award of such fees at such time as plaintiffs apply for them with the trial court.

DISPOSITION

The matter is remanded to the trial court with directions to recalculate the prejudgment interest at the rate of 7 percent. In all other respects, the judgment and posttrial orders are affirmed. Plaintiffs to receive their costs on appeal.

_____
Dondero, J.

We concur:

_____
Margulies, Acting P. J.

_____
Banke, J.