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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

STREETSCENES et al., Plaintiffs and Respondents, v. ITC ENTERTAINMENT GROUP, INC. et al., Defendants and Appellants.	B151505 (Super. Ct. No. BC176134)

APPEAL from a judgment of the Superior Court of Los Angeles County. Fumiko H. Wasserman, Judge. Reversed in part, affirmed in part and remanded for further proceedings.

Munger, Tolles & Olson, Glenn D. Pomerantz, Mark H. Epstein and Allison B. Stein; Glickfeld & Fields and Craig M. Fields for Defendants and Appellants.

Fox & Spillane, Gerard P. Fox and Monica Balderrama for Plaintiffs and Respondents.

A movie production company hires an executive to look for projects with the movie production company having the right of "first refusal" as to any projects the

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II and III.

executive found. The producer is housed in the movie production offices and has all of the trappings of an executive producer of the company. When the producer finds investors for a movie, he promises millions in profits and then proceeds to fraudulently convert over a million dollars from those investors.

At trial, the movie production company disavows the executive producer's actions and claims he was an independent producer. The jury finds he was an agent and awards damages in moneys invested and lost in addition to lost profits and punitive damages. On this appeal the fraud of the producer is not disputed, but agency and lost profits are.

We reverse that portion of the judgment awarding damages for lost profits and remand for a new hearing on the issue of the amount of punitive damages.

FACTS

The appellants in this action are ITC Entertainment Group Inc., ITC Entertainment Group Ltd. and ITC Distribution, Inc. (ITC). Respondents are StreetScenes L.L.C. and CrewCast L.L.C. (respondents).[1] The principals of StreetScenes and CrewCast are Martin Chernoff (Chernoff), Neil Feinstein (Feinstein) and Ron Hunt (Hunt). The other party to this action was L. Travis Clark (Clark). A default judgment was obtained as to Clark. In May 1995, Clark was hired by ITC to share, create ideas and develop projects. Clark was brought aboard at ITC by ITC's president Jules Haimovitz who had previously worked with Clark at Spelling Entertainment.

Hunt, Feinstein and Chernoff had been business partners for over 20 years. Feinstein had financed a low budget film in the past, but in that case he had been a passive investor. Hunt had written a screenplay entitled "Wrong Decision" which was based upon his experiences as a manager and then owner of a nightclub. Hunt recalled having met Clark and recalled Clark was somehow involved in the movie industry. Hunt decided to submit his script to Clark whom Hunt knew was now at ITC. After Clark read

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[1] Respondent's motion to strike portions of appellant's reply brief is denied.

the script, Hunt and Clark talked. Clark then told Hunt the script had serious potential and that ITC was interested in making a movie for distribution.

Clark represented himself to be an Executive Producer at ITC and stated that ITC would produce and distribute the movie. Clark also faxed to respondents, on ITC's fax machine, with an ITC cover sheet, his resume and biographical information. The resume specified Clark had completed a motion picture and was an executive producer at ITC/Polygram Film Entertainment.

In July 1995, Clark flew to Washington D.C. at Hunt's expense to meet with Hunt and Keith Rosenburg (Rosenburg), who was respondent's transactional attorney. At the meeting in Rosenburg's office, Clark claimed he was an Executive Producer for ITC and, through his position at ITC, he was to produce the film which ITC would distribute.

Clark represented the film would focus on the African-American market and should do very well in video and cable. Clark also told others, at a lunch meeting, that he was an "executive producer with a very large Hollywood Company called ITC" and that ITC had deep seated connections in the distribution of movies, especially in the inner cities. He further explained that with ITC's extensive distribution systems and a sound track with ITC/Polygram recording artists, the low budget movie should make a profit of $10 to $12 million.

In a letter, on ITC Distribution letterhead, dated July 21, 1995, Clark "confirmed ITC's agreement for guaranteed distribution for the intended film presently entitled Wrong Decision." Clark also wrote "ITC and I are looking forward to distributing this project." ITC, through Clark, then guaranteed two additional projects for plaintiffs following the completion of "Wrong Decision."

On or about July 26, 1995, Clark sent Rosenburg a letter on ITC Distribution letterhead along with ITC's detailed financial projections for the movie. The projections were also on ITC Distribution letterhead and were sent from ITC's fax machine. The projections were in part based upon industry publications and from ITC people.

Projections of this type were normally provided by ITC's Chief Operating Officer, Mike Novelly.[2]

The projections were detailed and included home video revenues of between $250,000 to $500,000, pay-per-view of between $150,000 to $300,000, cable revenue of between $125,000 to $700,000 and basic cable of between $100,000 to $300,000. Syndication was estimated at being between $250,000 to $400,000 and foreign theatrical revenue was estimated at between $150,000 to $300,000.

Clark further represented the film would be a theatrical release and ITC's calculated theater revenue of between $10 to $15 million. Clark further promised he would complete the film for approximately $550,000.

ITC provided Clark with all of the accoutrements of an ITC executive. He was housed in an executive office on the same floor as ITC's President, Vice President, General Counsel and other senior executives. Additionally, ITC provided Clark with ITC letterhead, fax cover sheets, use of ITC's telephone, fax machines, mail room and other resources for the purpose of completing projects for ITC. Also, Clark was provided embossed business cards with the ITC logo identifying him as an executive producer for ITC. These were displayed prominently on Clark's desk. One visiting Clark at the ITC offices would come away with the impression that Clark was a very heavy hitter at ITC.

There were other independent production companies, such as American Zoetrope, located in the ITC suites. These companies had separate signage and their own telephone numbers. Separate signage typically distinguished independent film producers. There was no separate signage indicating Clark was any different than any other ITC executive or that he was an independent producer.

Clark's written promises of ITC production and distribution combined with the detailed and very promising ITC revenue projections convinced respondents to enter into

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2 At trial, ITC's expert testified the projections were not our of line.

a production agreement. Clark also promised, on ITC's behalf, a soundtrack with ITC/Polygram recording artists such as Stevie Wonder and George Clinton.

A meeting was held in Clark's office, where Clark suggested Feinstein, Hunt and Chernoff should form a production company to handle film financing. As a result, StreetScenes to handle the production, and CrewCast to handle the payments to the crew, were formed. Respondents then started putting money into the project. Clark was in control of the money and was to be paid a producers' fee. Clark represented this was standard practice for ITC films.

In April 1996 pre-production, which lasted several weeks, commenced at the ITC offices. Clark hired the director and music director and told them both that he was doing the film for ITC which was also to be the distributor. Clark also hired the film's accountant who prepared credit applications for equipment rental and other forms using ITC's name and address.

Casting and rehearsals took place in ITC's conference room. A great deal of activity was occurring in the ITC offices, in full view of other ITC executives and there was a "buzz" at ITC about the film. During this same period of time Clark and others began to rewrite the script.

Once the film production started, costs began to spiral out of control and the budget was never finalized. What had been a $550,000 production soon escalated to $1 million. Clark deposited some of the money into his own personal banking account and even forged the name of the music director. At one point, while the film was being shot in Washington D.C., Clark left for about four or five days while he went to Vancouver, Canada to work on another ITC project. This had the effect of leaving the film production floundering. During this same period of time Clark kept asking respondents for more money referring back to the ITC projections, if respondents balked. He also provided bogus updates on the sound track that was in development by Stevie Wonder or other big names.

When respondents began to want explanations for the cost overruns, they asked to see the "dailies." Clark would not oblige. When they were finally allowed to see the movie, it was of such poor quality that they became concerned this whole thing was a scam. Clark, however, continued to emphasize the film's potential revenue and his belief the film could be saved. Respondents began to investigate the circumstances surrounding the making of the film and soon discovered numerous bills had not been paid. In fact they were sued by various vendors that, supposedly had been, but in actuality had not been, paid by Clark. As a result, respondents had to hire counsel to defend those lawsuits and in some cases pay out money. They also spent a great deal of time and money attempting to resurrect the movie. Finally it was determined the film was unsalvageable.

When attorney Rosenburg approached ITC with evidence of Clark's fraud, ITC declined responsibility and insisted Clark was an independent producer.

Following a five week jury trial, ITC was found liable for Clark's conduct. The jury returned a special verdict finding ITC liable for Clark's fraud and also negligent in hiring and supervising Clark. Among other things the jury awarded ITC damages for the lost profits the film would have made. At a second phase, respondents were awarded $8 million in punitive damages. The court subsequently entered judgment against ITC in the sum of $8,999,239.36 in actual damages with prejudgment interest in the sum of $1,545,706 plus $8 million in punitive damages for a total of $18,544,945.36.

The appeal is from the judgment.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDINGS THAT TRAVIS CLARK WAS ITC'S AGENT

A. The Special Verdict Form Covered Both Actual Agency and Ostensible Agency

ITC bases several of its arguments upon the premise that the evidence was insufficient to support a finding Travis was the ostensible agent of ITC. This in turn

leads ITC to conclude that Clark's conduct could not be imputed to ITC and therefore the jury's awarding of punitive damages was also defective.

In relevant part, the jury was asked and answered in the affirmative the following question: Did ITC, by statements or conduct, either *intentionally* or negligently, *cause or allow* the *Plaintiffs reasonably to believe* that Travis Clark was its agent and had the authority to act on its behalf with respect to this film project?" (Emphasis added.)

In this state there are two types of agents, actual or ostensible. (Civ. Code, § 2298.) An actual agent is one who is employed by the principal (Civ. Code, § 2299), whereas an ostensible agent is not employed by the principal, but the principal intentionally, or by want of ordinary care, causes a third person to believe that the person is the principal's agent. (Civ. Code, § 2300.)

The jury was instructed on both actual and ostensible agency[3] theories. In arguments to the jury, counsel for respondents argued Clark was an actual agent of ITC , whereas counsel for ITC argued Clark was not an agent at all. The Special Verdict Form, which was 16 pages long, had its own special section on agency which consisted of four separate questions. However, there was no question asking the jury to make a determination as to whether Clark was an actual or ostensible agent. In each of the separate categories addressing the fraud allegations of the specific torts, the question were phrased as "Did Travis Clark, while acting as an agent on behalf of ITC, makes one or more representations. . . ."

A fair reading of the question indicates that the jury could have found on either theory. For whatever reason, the questions put to the jury did not differentiate between the two agency theories. If ITC intentionally caused respondents to believe Clark was its agent, it could have been because Clark was in fact its agent. Thus, if this court finds

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[3] The Trial Court instructed the jury using the standard BAJI instructions on agency supplemented by special instructions submitted by the parties. ITC has not indicated there were objections to these instructions.

there was substantial evidence to support a finding of actual agency it need not examine whether there was sufficient evidence to support a theory of ostensible agency. (*Luce v. Sutton* (1953) 115 Cal.App.2d 428, 432.)

B. As a Reviewing Court We Must Accept the Evidence Supporting the Verdict.

Without acknowledging it as such, appellants reargue the evidence and ask this court to reweigh the evidence and reach a different result than the jury. However, agency is a question of fact for the jury to determine. (*Gulf Ins. Co. v. TIG Ins. Co*. (2001) 86 Cal.App.4th 422, 439.) As a reviewing court we must state the facts in the manner most favorable to the judgment. "When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co*. (1995) 11 Cal.4th 454, 465.) All conflicts must be resolved in favor of the judgment and all legitimate and reasonable inferences are indulged in order to uphold the judgment, if possible. When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or un-contradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court determines those facts in the manner most likely to uphold the judgment. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571*; Crawford v. Southern Pacific Co*. (1935) 3 Cal.2d 427, 429.) When the facts are stated in this manner, the statement of facts rarely makes pleasant reading for the losing party. (*Toole v. Richardson-Merrell Inc.* (1966) 251 Cal.App.2d 689, 719 [opinion in denial of rehearing].)

C. Substantial Evidence Supports the Finding that Clark was ITC's Agent

The evidence reveals ITC brought Clark to ITC to develop projects for ITC. Clark was given unlimited use of ITC's name and logo, including ITC Distribution and ITC

Entertainment Group letterhead, ITC fax cover sheets and ITC business cards with Clark's name and title of Executive Producer. Clark and his assistant were given offices in the same suites as the ITC President, Vice-President, General Counsel and other senior ITC executives. ITC also provided Clark the use of ITC telephones, fax machines, mail room and other resources. When calls were placed to Clark, the calls went through ITC's main switchboard and were answered "ITC." When Clark wrote to respondents, the letters were sent on ITC letterhead paper.

Although there were other independent companies, such as American Zoetrope, located in ITC's suites, those companies had separate signages and separate telephone numbers. There was no such separate designation for Clark.

The evidence also supported the inference that Clark also believed he was an agent of ITC. On July 21, 1995, shortly after joining ITC, Clark wrote a letter on ITC Distribution stationery to Ron Hunt, one of respondents' principals, stating "[T]his is to confirm ITC's agreement for guaranteed distribution for the intended film presently called "Wrong Decision." In the same letter, Clark further wrote "ITC *understands* that the film is to be shot in Washington D.C. starting September of 1995." (Emphasis added.) Clark further wrote "Pursuant to ITC distribution agreement dated May 1, 1995 with LTC Entertainment, ITC has accepted this project for distribution under that overall deal agreement." This letter and the assertions in it are compelling evidence that ITC had led Clark to believe he was ITC's agent, notwithstanding that both Clark and ITC denied it. (*See Lee v. Helmco Inc*. (1962) 199 Cal.App.2d 820, 834.)

The evidence also discloses that on July 26, 1995, Clark sent a fax from ITC's offices on ITC Entertainment Group letterhead to respondent's legal representative enclosing revenue projections for low budget films such as "Wrong Decision." The projections contained a detailed financial analysis of the projections for "Wrong Decision." Clark testified he did not come up with these projections entirely on his own. ITC attempts to deny these projections which came from ITC. The evidence discloses:

(1) Clark was under contract with ITC; (2) Clark's offices were in the same suite of offices as top management of ITC; (3) Clark was incapable on his own of formulating the projections and thus must have obtained the help of others; (4) the fax containing the projections came from the ITC office; and (5) these types of projections would normally have come from ITC's chief operating officer. From that evidence, the jury could have determined that ITC must have provided Clark with the necessary information to calculate the projections which were sent to respondent. Even ITC's own expert testified the projections were of the type and within the range of those he would expect to be provided by ITC.

Clark also joined other ITC executives for weekly meetings where all projects in development were discussed. If Clark could not make the meetings, he would send his assistant. Clark testified respondents' project was subject to ITC's right of first refusal and that he was contractually obligated to tell ITC of the prospective movie. If ITC did not want a Clark project, it was contractually obligated to notify Clark. There was no evidence that ITC ever rejected the project.

The evidence further revealed several weeks of pre-production work for the movie "M.O.B./Wrong Decision"[4] took place at ITC's offices. ITC also allowed auditions for parts to take place in ITC's conference room. ITC's president walked by Clark's office during the period of time when the pre-production work was taking place.

During this period of time the crew had use of the ITC offices, fax machines, telephones and everything needed to complete the production. At any given time there would be between 10 to 20 different members of the cast and crew at the ITC offices. These pre-production activities required the cast and crew to use ITC's offices during the day, after hours and even on weekends. No limitations were placed on Clark's access to the ITC suites.

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[4] During this period of time Clark changed the name of the movie from "Wrong Decision" to "M.O.B." (Mostly Over Bullshit").

There was a great deal of activity happening in the ITC offices in front of the ITC executives. While this was going on, Clark and others were beginning to rewrite the film. There was also a "buzz" at ITC about the film.

Even though ITC denied it, the evidence also disclosed Clark introduced people involved in the production to Jules Haimovitz, the president of ITC. The music director and the director of the film were both introduced by Clark to Mr. Haimovitz and the music director went into Haimovitz's office, where the two talked. There was also evidence, from ITC's office manager, that no one entered Haimovitz's office unless Haimovitz wanted them there.

"The question of whether there exists an agency relationship is one of fact [citations], and for the jury to decide unless the evidence is susceptible of but a single inference." (*Dorsic v. Kurtin* (1971) 19 Cal.App.3d 226, 237-238.) Here there was a factual issue for the jury to determine. Because the jury, based upon substantial evidence, made the determination of agency we are bound by that determination.

II. The Lost Profits Issue

A. The expert was qualified to render an opinion

At trial, respondents' expert witness, Diane Kirman (Kirman), was called to testify, among other things, as to the probable profits respondents would have received had defendants produced the quality film they had been promised. Prior to trial, ITC filed a motion to preclude her testimony as to lost profits. Both sides briefed the issue and the court allowed extensive voir dire on the issue.

The evidence presented to the court established Kirman was an independent producer of low budget films. She had been involved in many aspects of the film business from casting to costuming of films to location casting. Married to a writer-director, she testified, she lived, slept and breathed the business. She had over 10 years in the movie business and had experience in the area of securing film financing. She had worked on the sale of a film to 20th Century Fox Studios for domestic rights and Rank Films for foreign rights.

Kirman had produced feature films such as "The New Swiss Family Robinson" and "Tammy and The Teenage T-Rex." Tammy and The Teenage T-Rex had been produced for just under a million dollars. Additionally, Kirman had secured the funding, director and producer for a film called "Lost in Africa."

As a producer Kirman had to understand the sorts of fees distributors and sales agents would pay so that she could explain to her investors how they were to get their profit. Thus, Kirman was required to make revenue projections for investors on the films she produced. As she stated, "You can't be a producer without understanding the return on the investment."

At the conclusion of the voir dire the court overruled the objection and Kirman was allowed to testify as to her opinions. The trial court properly determined Kirman had sufficient knowledge of the subject matter to entitle her opinion to go to the jury. (Evid. Code, §§ 720, 801.) As this court stated in *Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432 1442, "The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so his testimony would be likely to assist the jury in the search for the truth." Here the trial court, which was in the best position to evaluate the witness, found her to be credible, reliable and qualified to testify. (*See Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 737-739.) We find no reason to question that determination.

B. The expert's sources were reliable

ITC next contends that, even if Kirman was qualified, her opinion did not rise to the level of substantial evidence. Specifically, ITC argues that Kirman's opinion was like a house built on sand. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 926.)

The evidence discloses that Kirman relied on the Internet Movie Database to arrive at her loss of profits calculation. This source was valuable because it has a listing of all sorts of films, the budgets of those films, the credits, and the profits of those films. Additionally, Kirman consulted the trade newspapers such as The Hollywood Reporter

and The Variety. She also relied upon her knowledge as to what had been going on in the 90's, when there had been a resurgence of films for the Black audience. Kirman further compared and contrasted four other films directed primarily to Black audiences that had been made during the period in question. Finally, she also relied on the projections sent on ITC stationery indicating what the expected profits would be for this particular movie. Even ITC's expert admitted the ITC projections were within a reasonable range and "in the ball park." Thus, Kirman's sources were reliable.

C. The Lost profits were too speculative to be the subject of an award

ITC next argues that lost profits were improperly awarded as damages because the very nature of film making is so risky that no one is ever guaranteed a profit. In fact, even Kirman had to admit, the movie business is inherently risky and investors can lose a lot of money. Accordingly, ITC further argues, courts, in unmade entertainment products cases, have often refused to allow lost profits as damages because they are too speculative. (See *J. B. Lippincott Co. v. Lasher* (S.D. N.Y. 1977) 430 F.Supp. 993, 995 [lost profits disallowed on unpublished book because lost profits, if any, were too speculative].)

"The Supreme Court set forth the law concerning lost profits as damages in *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-693, as follows: '[W]here the operation of an *established business* is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales. [Citations.] On the other hand, where the operation of an *unestablished business* is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability.

[Citations.] All of these [cited] cases recognize and apply the general principle that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' (Italics added; accord*, e.g.*, *Shade Foods, Inc. v. Innovative Products Sales & Marketing*, *Inc.* (2000) 78 Cal.App.4th 847, 889-890*; Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697-1698*; Maggio, Inc. v. United Farm Workers* (1991) 227 Cal.App.3d 847, 869-870; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 221.)" (*Kids Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 882-883.)

In *Kids Universe,* the defendants had negligently caused a flood in the plaintiff's store. This flood, in turn, prevented plaintiffs from launching an internet site for the sale of toys. When plaintiff sued the defendants for lost profits, the defendants filed and won a motion for summary judgment. On appeal the court held that because the business was new no pattern of profits could be demonstrated with "reasonable certainty" making any loss of "net profits" speculative. (*Kids Universe v. In2Labs, supra*, 95 Cal.App.4th at pp. 886-887.)

However, there are exceptions to the rules concerning damages for lost profits in new businesses. In *S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, the court stated the rule on lost profits thusly "Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892.) It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. (*Kerner v. Hughes Tool Co*. (1976) 56 Cal.App.3d 924, 937; accord, *Maggio, Inc. v. United Farm Workers* (1991) 227 Cal.App.3d 847, 869-876.) The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits. (*Warner Constr. Corp. v. City of Los Angeles, supra*, 2 Cal.3d at p. 302; *Stott v. Johnston* (1951) 36 Cal.2d 864, 876.)" (Emphasis added.)

(*S. C. Anderson, Inc. v. Bank of America, supra*, 24 Cal.App.4th at p. 536.) In *Anderson,* plaintiff lost its ability to bid on construction projects because of an impairment of its bonding capacity. A nonsuit was granted and upheld on appeal because plaintiff had failed to show he would have earned a profit on any of the projects that he was prevented from bidding on because of the lack of a bond. In other words, he was unable to show actual damages.

In *Sanchez-Corea,* the company owned by plaintiffs (Cormac) had been forced into bankruptcy by defendants wrongful acts. Because it was in bankruptcy, Cormac could not obtain the necessary financing needed to secure contracts. Even though Cormac had been in business for a period of time, the business line alleged to have been damaged was new and there was no profits history upon which to base a prediction of future profits. Plaintiff, however, presented circumstantial evidence indicating the company would have earned a certain percentage of the market in the new product line. Upon the defendant's motion that the damages were too speculative, the trial court set aside the judgment. In reversing the trial court's setting aside of the verdict the Supreme Court stated, "[T]here was substantial evidence that Cormac's lack of financial resources resulted from the Bank's own wrongdoing. '[The] wrongdoer cannot complain if his own condition creates a situation in which the court must estimate rather than compute. [Citations.]" (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143.)" (*Sanchez-Corea v. Bank of America, supra,* 38 Cal.3d at p. 908.)

In *S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp*. (1976) 58 Cal.App.3d 173, 184-185, the court in answering a response to the contention that damages to an un-established business is speculative and too uncertain so as to provide a basis for loss of profits damages stated, "The rule is, however, 'not a hard and fast one.' (*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists,* 14 Cal.App.3d 209, 221.) The issue is, rather, whether the damages can be calculated with reasonable certainty. (*Grupe v. Glick,* 26 Cal.2d 680, 693.)"

"Uncertainty as to the fact of damage, that is, as to the nature, existence or cause of the damage, is fatal. But the same certainty as to the amount of the damage is not required. An innocent party damaged by the acts of a contract violator will not be denied recovery simply because precise proof of the amount of damage is not available. The law only requires that some reasonable basis of computation be used, and will allow damages so computed even if the result reached is only an approximation." [¶] "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created . . . ." (*Allen v. Gardner* (1954) 126 Cal.App.2d 335, 340; *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 46.)

The conclusion to be reached from the cases discussed, is that in cases involving new businesses or intellectual properties such as movies, the courts have used the "speculative" rubric in cases where it cannot be shown that there would actually have been a profit. In those cases, there may have been a wrong, but no one can say for sure there was any damage. This case falls into that category. Here, had this been a movie with established stars and director the result might be different. But under the facts of this case there were no legal damages for lost profits. The fact that ITC had obtained the money by fraud does not change the result. Had there been damages, given the uncontested fraud, ITC might have had to endure a reasonable approximation as far as the damages were concerned. (*Nelson v. Reisner* (1958) 51 Cal.2d 161, 171.) However, since loss profits were speculative it was error to allow the issue of lost profit damages to go to the jury.

III. The Judgment Needs To Be Corrected

At trial, the jury was given a special verdict consisting of 16 pages and containing 78 questions or findings for the jury to determine. The jury returned a special verdict in favor of plaintiffs as to each cause of action and the agency issues. Specifically, the jury found plaintiffs were entitled to damages of $1,065,087.79 for the misrepresentations cause of action, $1,184,878.35 for fraudulent concealment, $3,064,224.35 for unjust enrichment, $3,064,225.35 for conversion, and $3,064,224.35 for negligent hiring and

supervision. Additionally, the jury found Clark, while acting as an agent of ITC, had committed the misrepresentations, fraudulent concealments and conversions with fraud, oppression or malice and that ITC with knowledge of the fraud and oppression of Clark had ratified those actions. The next day, March 31, 2000, in the second phase of the trial, the jury awarded punitive damages of $8 million.

About seven months later, on November 15, 2000, after a lengthy hearing on what the judgment should be, the court took the matter under submission. On April 20, 2001, the court signed the judgment awarding plaintiffs the sum of $8,899.239.36 in damages plus $1,545,706.00 in prejudgment interest and $8 million in punitive damages. ITC contends that the court erred in awarding double and even triple damages and that the judgment needs to be corrected. In this contention ITC is correct.

The rule was stated in *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158-1159, "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. (*Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 291.) Double or duplicative recovery for the same items of damage amounts to over compensation and is therefore prohibited." (*Ibid*.)

Here, respondents were out of pocket the sum of $1,065,087.79 but suffered damages totaling $1,184,878.35. Although there were several torts committed, there was but one injury; the loss of the $1,065,087.79, and additional moneys spent in trying to save the lost project. Respondents rely on *Jones v. Los Angeles Community College Dist.* (1988) 198 Cal.App.3d 794, 808-809 and *Ventura County Employees' Retirement Association v. Pope* (1978) 87 Cal.App.3d 938, 953-954, for the proposition that where there are separate wrongs each may be separately compensated. However, those cases are inapposite. In *Jones v. Los Angeles Community College Dist.,* the plaintiff had been forced to endure racial harassment as well as retaliation for complaining about the harassment. Clearly these were and are two separate wrongs under the Fair Employment and Housing Act (FEHA). (Govt. Code, § 12940 et seq.) In *Ventura County Employees'*

Retirement Association, the court was discussing the one act having effects on two separate individuals.

Respondents also rely on cases such as *Smith v. Shasta Electric Co*. (1961) 190 Cal.App.2d 728, 733-34 [lost profits are recoverable in a negligence action] and *Myers v. Stephens* (1965) 233 Cal.App.2d 104, 120 [lost profits may sometimes be recoverable in a conversion action] for the proposition that different wrongs are involved. However, respondents are attempting to "have it both ways" when they differentiate between Clark's own peccadillos and those of ITC. The theory of the case, as argued to the jury and in the instructions, and even to this court on other issues, is that Clark was ITC. In fact, that is the basis for the punitive damages award.

In this case, respondents parted with $1,184,878.35 which ITC and Clark took and lost. No matter how many legal causes of action can come out of these facts, there was only one wrong, one loss and there can be only one recovery. (*Tavaglione v. Billings*, *supra*, 4 Cal.4th 1150.) The judgment should be modified to reflect so that there is only one loss which is not to include any lost profits for the reasons stated *infra*. In correcting the judgment the prejudgment interest will also have to be recalculated.[5]

IV. Punitive Damages Were Properly Awarded

A. Proceedings prior to the Punitive Damages Phase

Prior to the commencement of trial ITC made a motion to bifurcate the punitive damages issue should it arise. (Civ. Code, § 3295.) Thereafter, the issue was visited from time to time during the trial. On March 28, 2000, immediately following the swearing of the jury to retire and arrive at a verdict the following occurred:

"[DEFENSE COUNSEL]: I have been informed by Mr. Glickfield [sic] that my clients have the most recent consolidated financial report, and we

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[5] In light of this disposition the court does not need to examine alleged errors in instructing the jury as to damages.

will present that to the court immediately upon the jury returning, assuming we're going to have a second phase.

"(Off the record discussion.)

"[THE COURT]: I think how we will proceed is if we discover we are having a second phase, we will need to determine whether or not anyone is going to give an opening statement, or if you're just going to admit the report, you know, at the point in which defendant will then give it to the plaintiff, and then we'll admit the report and then just have argument . . . ."

Two days later, after the jury had returned a verdict finding ITC liable, and just before the second phase was to commence, counsel for respondents indicated he was waiting for ITC's report. Counsel for ITC then indicated there was no one in the United States that could authenticate the financial records he had brought. The court then excused the jury and placed on the record what had transpired during the trial. Counsel further indicated she had given ITC a chance to argue the issues and had made it very clear that it was to be done while the jury was deliberating.

At that point, and apparently for the first time, counsel indicated it was ITC's position that: (1) it did not have to prove its net worth; and (2) it did not have to authenticate documents. Counsel for plaintiffs then indicated plaintiffs had served notices to appear on each of the ITC defendants and asked for a comprehensive set of financial records. He further indicated his recollection of the facts was the same as the court's. Counsel for ITC then objected saying they were not properly authenticated, they were hearsay, and they lacked foundation.

Counsel for ITC then apparently handed the court and counsel a two-page unconsolidated income statement for the 12-month period ending 12-31-97. The court ordered the documents marked as next in order. Counsel for ITC then attempted to argue that some of the entities subpoenaed had never had an ownership interest in ITC or the documents requested.

"[THE COURT]: Excuse me. Counsel, I already indicated to you you had an opportunity throughout this month-long trial to have raised this. You had an opportunity from the time this jury went out to deliberation. [¶] And I specifically asked you on this issue more than one day, next day we want more time, and then I said you must either argue this or produce the documents.

"[COUNSEL]: Your Honor - -

"[THE COURT]: So at this time these are admitted."

ITC then called one witness who testified that ITC was now owned by different entities than those who had owned ITC when the acts occurred. Additionally, there had been a complete changeover in personnel at ITC in the intervening period.

The jury after hearing arguments returned a verdict awarding respondents $8 million in punitive damages.

B. The evidence was sufficient to establish ITC ratified or authorized Clark's wrongful conduct

"Ratification is a question of fact. The burden of proving ratification is upon the party asserting its existence. But ratification may be proved by circumstantial as well as direct evidence. Anything which convincingly shows the intention of the principal to adopt or approve the act in question is sufficient. (2 Cal.Jur.2d, Agency, § 102, pp. 768-769.) It may also be shown by implication. '". . . where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name, . . . else he will be bound by the act as having ratified it by implication."' (*Ralphs v. Hensler* (1893) 97 Cal. 296, 303 [32 P. 243].)" (*Hale v. Farmers Ins. Exch.* (1974) 42 Cal.App.3d 681, 691-692 disapproved on other grounds in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822, fn. 5.)

Here the evidence discloses that when ITC's General Counsel was asked if ITC would reimburse respondents or assist in the attempt to finish the project, ITC demurred and indicated it would not do either. However, ITC did not repudiate Clark's acts. That

in itself was evidence of ratification. (*Hartman v. Shell Oil Co*., *supra*, 68 Cal.App.3d 240, 250-251.) Also, ITC's explanations that Clark had a special relationship, unique to the movie industry, that enabled Clark to be an executive producer of ITC but allowed him space to do his own deals could also have been found to be evidence of ratification. A jury could determine that this relationship was created in order to give ITC deniability for Clarks actions: In other words, allowing Clark to practice low level fraud while allowing ITC to claim high level ignorance.

ITC further argues that, because no one at ITC admitted that ITC authorized Clark's wrongful conduct, there was no evidence of authorization. Or, as ITC states, merely because the jury disbelieves a witness when he states it is not raining does not mean that it is raining. However, as pointed out by respondents, the circumstantial evidence was that the ground was wet, it was cloudy and people were carrying umbrellas. Therefore, a trier of fact could conclude it was raining, or in this case that there was ratification. Here, the evidence also reveals from the time Clark first had contact with respondents, he attended weekly meetings with ITC executives where ongoing ITC projects were discussed. The evidence also discloses that Clark's contract with ITC was extended during the time that pre-production activities were taking place at the ITC offices. The fact that at trial, ITC took the see no evil, hear no evil and speak no evil defense[6] does not mean there was no evil. Respondents showed that activities were going on that had to be noticed at ITC. Additionally, the fact that the pre-production activities were taking place down the hall from the president's office and that some of the movie people even met with the president certainly lent credence to the conclusion that ITC had authorized and ratified Clark's actions during the entire production. (*Hartman v. Shell Oil Co., supra,* 68 Cal.App. 3d at p. 251.) The president's denial of these facts did not mean they were not true. It only meant, in light of the verdict, that the jury seriously disbelieved him or found him to be credibly handicapped.

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6 Named after the carvings of the three wise monkeys over the sacred stables at Nikko, Japan.

C. Respondent's Adequately Established ITC's Net Worth

ITC next contends the punitive damages should be reversed because there was no admissible evidence of net worth. (*Adams v. Murakami* (1991) 54 Cal.3d 105.) ITC argues that because *Adams* requires evidence of the defendants financial condition, the punitive damages portion of the judgment should be set aside. However, ITC is in no position to complain. As recently stated by Division Three of this court in *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 609, a court may order a defendant to produce evidence of his or her financial following a determination of liability for punitive damages even if the plaintiff has not attempted to obtain that information prior to trial. Here, of course, respondents did attempt to obtain the information. In fact, when the jury retired to commence its deliberations, counsel for ITC informed the court that his clients had the most recent consolidated report and would present it to the court immediately after the jury returned should a second phase be required.

When that second phase was ready to begin, ITC suddenly reversed its direction arguing: (1) it was not ITC's burden to prove its net worth or; (2) to authenticate the documents. As to the first reason, it may not be a defendant's burden to prove its net worth, but if it is ordered to produce that evidence it is under an obligation to do so. (Civ. Code, § 3295, subd. (c).) Once the court makes the order there is no justification for not specifically following that order. (See *People v. Glass* (1972) 44 Cal.App.3d 772, 781-782.) If counsel has problems with the court's orders, he or she may seek a pretrial writ or argue the validity of that ruling on appeal. (*Mike Davidov Co. v. Issod, supra,* 78 Cal.App.4th 597, 609.) Here, there was no error in ordering ITC to bring evidence of its financial condition to court.

The second point, the lack of authentication, has no merit. ITC presented the information to the court after being ordered to do so and after informing the court it would present the information at the proper time. The documents were from ITC and were presented to the court by ITC's counsel as per the statement of two days before. This is all the authentication that is required. (Evid. Code, §§ 1414, 1420, 1421.) Once

authenticated, the two page unaudited consolidating income statements for the 13-month period ending 12/31/97 was an admission which was admissible against ITC. ITC's contention that the balance sheets were not audited is of no moment since there is no requirement that the unaudited balance sheets would themselves have been admissible at the trial. (See 1 Witkin, Calif. Evidence (4th ed. 2000) Hearsay § 95 pp. 797-798.)

Once counsel for ITC presented the unaudited balance sheets in accordance with his prior representation, the balance sheets were authenticated, and were properly admitted and used against ITC. Therefore, there was evidence of ITC's financial condition for the jury to consider. (*Adams v. Murakami, supra,* 54 Cal.3d at pp. 115-116; *Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1151.)

D. Should The Punitive Damages Award Be Reduced

Finally, ITC argues that since the judgment will have to be reduced, the punitive damages must also be reversed. (See *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 284.) However, in *Liodas,* the court reversed the entire judgment because of errors in the damage instructions. Here, however, ITC does not contest the fraud allegations. This case has already consumed an inordinate amount of trial court time. The trial itself took over five weeks to try and the reporter's transcript on appeal consists of 18 volumes. The clerk's transcript consists of 31 volumes and is in excess of 5,300 pages. The only issue left for a retrial would be to reassess punitive damages.

A jury has already heard all of the evidence concerning the fraud and has determined by clear and convincing evidence that Clark, while acting as the agent of ITC had committed his acts with fraud, oppression and malice. The jury further found ITC with knowledge of Clark's unfitness, or with a conscious disregard for the rights of others, employed Clark or authorized the conduct of Clark that was found to be fraudulent, oppressive or malicious. The only purpose of a remand would be to kill more trees and consume even more jury and court resources on a question that has already been answered: ITC and Clark were guilty of fraud, oppression and malice.

As an appellate court, this court has the duty to review and examine punitive damage awards and in appropriate cases modify the award to insure that justice is done. (*Gerard v. Ross* (1988) 204 Cal.App.3d 968, 980; *Burnett v. National Enquirer*, *Inc*. (1983) 144 Cal.App.3d 991, 1010-1011.) An argument can also be made for the proposition that an appellate court has the inherent authority to decide punitive damages on appeal if the amount is due to bias and prejudice. (See discussion in *Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1606.)

However, the trial court is in a much better position than this court to rule on the damages. "'The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court [citation]. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' (See *Schroeder v. Auto Driveaway Co*. (1974) 11 Cal.3d 908, 919; see also *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64.)" (*Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 727-728.)

In *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798 the Supreme Court announced a new standard for determining when the statute of limitations commences under a continuing violation under FEHA. Because the standard was new, the trial court had used the wrong test in ruling upon a motion for new trial. The Supreme Court determined the proper procedure was to remand the matter to the trial court to rule upon the motion for new trial using the new standard just announced. (*Id.* at pp. 824-825.) In *Teitel v. First Los Angeles Bank, supra*, 231 Cal.App.3d 1593, 1606, the trial court used the wrong procedure in reducing the amount of punitive damages. The Court of Appeal

felt the most appropriate remedy was a remand to the trial court to reconsider the motion for new trial applying the correct procedure.

Here, this court is faced with a situation where a portion of the verdict is being reversed. A jury having heard all of the evidence arrived at several verdicts in the millions of dollars, but they did not know what the effect of those numbers would be because the jury was merely answering questions. Having arrived at the verdict on various causes of action the jury then evaluated the conduct of defendant ITC and awarded punitive damages in the sum of $8 million. Now having reversed a portion of the judgment, the person in the best position to determine what the appropriate punitive damages would appear to be, in the first instance, the trial judge. Accordingly, we will employ the vehicle used by the court in *Richards v. CH2M Hill, Inc.* and *Teitle v. First Los Angeles Bank.*

After having corrected the judgment to eliminate the loss of profits from the judgment, the trial court is to reconsider ITC's motion for new trial as it relates to punitive damages. If the court denies any reduction, then ITC may once again appeal. If respondents do no agree with any such reduction, the court may grant a new trial solely on the punitive damages issue. (*See Teitel v. First Los Angeles Bank, supra;* 231 Cal.App.3d 1593; *Krouse v. Graham* (1977) 19 Cal.3d 59, 81-83; *Tan Jay Internat., Ltd. v. Canadian Indemnity Co.* (1988) 198 Cal.App.3d 695, 709.) We do not decide what amount of punitive damages is appropriate. That is left up the trial judge who saw and heard the evidence. (*Teitel v. First Los Angeles Bank, supra,* 231 Cal.App.3d 1593.)

Should respondents reject the trial court's reassessment of the punitive damages award, any retrial shall be limited to the sole issue of the amount of punitive damages to

be awarded. ITC may not contest the issue of fraud or that Clark was its agent.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings not inconsistent with the views expressed herein. Each side to bear its own costs on appeal.

MUNOZ (AURELIO), J.*

We concur:

JOHNSON, Acting P.J.

WOODS, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.