EXHIBIT 11

187 F.3d 647, 1999 WL 451764 (C.A.9 (Cal.))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 187 F.3d 647, 1999 WL 451764 (C.A.9 (Cal.)))

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NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.
Forrest L. FLEMING, Plaintiff-counter-defendant-Appellee,
v.
PARAMETRIC TECHNOLOGY CORPORATION, a Massachusetts Corp., Defendant-counter-claimant-Appellant.
Forrest L. FLEMING, Plaintiff-counter-defendant-Appellee/Cross-Appellant,
v.
PARAMETRIC TECHNOLOGY CORPORATION, a Massachusetts corporation, Defendant-counter-claimant-Appellant/Cross-Appellee.
Nos. 97-56262, 97-56350.
D.C. Nos. CV-93-01464-RMT, CV-93-01464-RMT.

Argued and Submitted June 9, 1999.
Decided June 29, 1999.

Appeal from the United States District Court for the Central District of California, Robert M. Takasugi, District Judge, Presiding.

Before KOZINSKI and FERNANDEZ, Circuit Judges, and SHUBB,[FN2] District Judge.

FN2. The Honorable William B. Shubb, Chief United States District Judge for the Eastern District of California, sitting by designation.

MEMORANDUM [FN1]

FN1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

***1** (1) The jury verdict against Parametric was based upon a determination that under Massachusetts law [FN3] it had violated the covenant of good faith and fair dealing when it terminated Fleming so that he would not be able to exercise his incentive stock options, which he had been given for past services.[FN4] Those were timed for exercise on future dates, but would expire, even before they were exercisable, ten days after his termination.

FN3. The parties agree that Massachusetts law applies to this case.

FN4. The parties agree that the stock option agreements were earned as compensation for past services.

Parametric asserts that Massachusetts law does not permit recovery under those conditions. We disagree because we are satisfied that, under the law of Massachusetts, where an employee has earned a right to a benefit which is contingent upon his being employed at some later date, the employer cannot terminate him for the very purpose of depriving him of that benefit, even if he is expected to render services in the meantime. *See Gram v. Liberty Mutual Insur, Co.*, 461 N.E.2d 796, 797 (Mass.1984); *Maddaloni v. Western Mass. Bus Lines, Inc.*, 438 N.E.2d 351, 355 (Mass.1982); *Gram v. Liberty Mutual Insur. Co.*, 429 N.E.2d 21, 29 (Mass.1981) (*Gram* I); *Fortune v. National Cash Register Co .*, 364 N.E.2d 1251, 1257 (Mass.1977); *Cataldo v. Zuckerman*, 482 N.E.2d 849, 855-56 (Mass.App.Ct.1985); *cf. McCone v. New England Tel. & Tel. Co.*, 471 N.E.2d 47, 50 (Mass.1984); *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908, 911 (Mass.1982).

Parametric's added argument that the evidence does not support the verdict rests on its opinion that the jurors should have believed its version of the facts rather than Fleming's. We understand its position, but, in general, weighing the evidence and its credibility is committed to the jury, rather than to the parties or us. *See Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1128-29 (9th Cir.1997); *Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1452 (9th Cir.1995). Here, there was substantial evidence to support the verdict.

(2) Parametric raises a host of issues regarding the instructions. We have reviewed each of them, and determine that some of them are a rehash of its disagreement with the district court's view of Massachusetts law in this area, some are waived for failure to preserve them in the district court, and others are not at all well taken. Essentially, the district court neither misstated the law nor abused its discretion in formulating the instructions. *See Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir.1998). For example, the damages instruction, which allowed the jury to measure the loss to Fleming rather than merely consider the gain to Parametric, was a perfectly proper measure of damages arising out of Parametric's breach of contract. *See Gram I*, 429 N.E.2d at 29; *Fortune*, 364 N.E.2d at 1257; *see also Scarfo v. Cabletron Syst., Inc.*, 54 F.3d 931, 956 (1st Cir.1995); *Miller v. Dixon Indus, Corp.*, 513 A.2d 597, 602 (R.I.1986). Similarly, although Parametric now questions using the value of the stock at the time of trial in determining damages, it did not object to that measure at trial and, therefore, cannot object here. *See Kopczynski v. The Jacqueline*, 742 F.2d 555, 560 (9th Cir.1984).

***2** (3) We see no abuse of discretion in the district court's admission of evidence of the value of Fleming's options at his new place of employment, or in its admission of Fleming's evidence regarding the quality of his services to Parametric, the latter being relevant to the question of the true reason for his termination-his good work *is* evidence of Parametric's bad faith. *See Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371, 1378 (9th Cir.1997); *EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir.1997).

(4) The district court did not abuse its discretion when it denied sanctions against Fleming for failure to admit that he was an at-will employee when he responded to a Federal Rule of Civil Procedure 36 request. *See Washington State Dep't of Trans. v. Washington Nat. Gas Co.*, 59 F.3d 793, 805 (9th Cir.1995); *cf. Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 936 (9th Cir.1994).

(5) The district court did not err when it denied Fleming prejudgment interest on his recovery from Parametric on the jury's general verdict in his favor. Although prejudgment interest is normally allowed on Massachusetts contract judgments, that is not universally so when interest has already been taken account of in the jury verdict. *See Computer Sys. Eng'g, Inc. v. Qantel Corp .*, 740 F.2d 59, 71 (1st Cir.1984). Here it is quite possible that the time value of money was effectively taken into account because the verdict Fleming obtained may well have been based upon the value of the stock at the time of trial, rather than at some earlier date. It is difficult to be precise because Fleming objected to a special verdict, but we will not question the district court's insight under the circumstances. We need not consider the issue of compounding the interest because zero compounded is still zero. At any rate, that issue is left to the discretion of the trial judge. *See Chokel v. First Nat'l Supermarkets, Inc.*, 660 N.E.2d 644, 651-52 (Mass.1996).

AFFIRMED.[FN5] Fleming shall recover his costs on appeal.

FN5. Microsoft Corporation's motion to file an amicus brief is denied, and the amicus letters from National Venture Capital Association, American Electronics Association and Paul A. Gompers are rejected.

C.A.9 (Cal.),1999.

Fleming v. Parametric Technology Corp.
187 F.3d 647, 1999 WL 451764 (C.A.9 (Cal.))

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