EXHIBIT K

LEXSEE 1991 U.S. DIST. LEXIS 4398

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As of: Jan 22, 2008

FRANCIS S.L. WANG, Plaintiff, v. PAUL HSU; C.V. CHEN; KWAN TAO LI; LEE AND LI, a partnership, Defendants

No. C-87-2981-TEH (JSB)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1991 U.S. Dist. LEXIS 4398

March 1, 1991, Decided
March 1, 1991, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant partners sought judgment notwithstanding the verdict and a new trial or, in the alternative, remittitur after a jury returned a verdict for plaintiff partner and awarded him damages in an action for wrongful repudiation of the partnership agreement.

OVERVIEW: Plaintiff partner entered into an oral partnership with defendant partners to establish an office for the Taiwan-based partnership in San Francisco. A dispute arose among the parties and, after plaintiff requested and accounting and announced his intention to dissolve the partnership, defendants denied the existence of a partnership agreement. Plaintiff sued for wrongful repudiation and a jury entered a verdict for plaintiff and awarded him both compensatory and punitive damages. Defendants filed motions for judgment notwithstanding the verdict (JNOV) and a new trial and, in the alternative, remittitur. The court denied the motions for JNOV and a new trial on the condition that plaintiff accept a remittitur. The court held that the weight of evidence substantially supported the finding that the parties entered into a partnership which was wrongfully repudiated by defendants and that plaintiff suffered damages from defendants' breach of contract, breach of fiduciary duty, and fraud. Because the damages awards on some issues were not supported by the evidence, the court conditioned its denial of the motions on plaintiff's acceptance of a remittitur.

OUTCOME: The court denied defendant partners' motions for judgment notwithstanding the verdict and a new trial on the condition that plaintiff partner accept a remittitur. Ample evidence supported the jury's findings of liability but did not support the damage awards on all the issues.

LexisNexis(R) Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > Judgments Notwithstanding Verdicts

[HN1] A motion for judgment notwithstanding the verdict (JNOV) must be granted when, viewing the evidence as a whole, there is no substantial evidence to support the verdict. The evidence must be viewed in the light most favorable to the party against whom the motion is made; the district court must then deny the motion if it determines that the jury had sufficient facts from which to find in that party's favor. "Substantial evidence" is more than a mere scintilla; it is evidence that a reasonable mind might accept as adequate to support a conclusion. In order to withstand a defendant's motion for JNOV, the plaintiff must have introduced sufficient evidence at trial to establish a prima facie case. Consequently, a motion for JNOV shall be granted when the jury's factual findings cannot support the legal conclusions that necessarily were drawn by the jury in reaching its verdict or when the jury verdict is internally inconsistent.

Civil Procedure > Trials > Judgment as Matter of Law > Judgments Notwithstanding Verdicts

[HN2] A motion for judgment notwithstanding the verdict should be cautiously and sparingly granted because there should be a minimum of interference with the jury. The district court is not free to consider the credibility of witnesses or weigh the evidence or reach a result it finds more reasonable if the jury's verdict is supported by substantial evidence. The district court must not substitute its choice for that of the jury's in deciding between conflicting elements of the evidence.

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials
Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

[HN3] A new trial may be granted for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. *Fed. R. Civ. P. Rule 59(a).*

Civil Procedure > Trials > Jury Trials > Jurors > Misconduct
Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials

[HN4] The motion for a new trial may invoke the discretion of the district court in so far as it is bottomed on the claim that the verdict is against the weight of evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury. A motion for a new trial may also be based on grounds of inadequacy or inconsistency of the verdict; denial of proper mode of trial; systematic exclusion of qualified jurors from the jury list; or misconduct of the jury or of court officials, counsel, parties, or witnesses.

Civil Procedure > Trials > Judgment as Matter of Law > Judgments Notwithstanding Verdicts
Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials
Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

[HN5] The standard for granting a motion for a new trial is less stringent than the standard for granting judgment notwithstanding the verdict (JNOV). By contrast with a motion for JNOV, the existence of substantial evidence does not prevent a district court from granting a motion for a new trial pursuant to *Fed. R. Civ. P. 59* if the verdict is against the clear weight of evidence, or if the damages are excessive or inadequate, or to prevent a miscarriage of justice.

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials
Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial
Evidence > Procedural Considerations > Weight & Sufficiency

[HN6] A motion for new trial may be granted on grounds of insufficiency of evidence only if the verdict is against the great weight of evidence or it is quite clear that the jury has reached a seriously erroneous result. Mere doubts about the correctness of the verdict, however, are insufficient grounds to grant a new trial; the district court must have a firm conviction that the jury has made a mistake. In ruling on a new trial motion, the district court may weigh all the evidence and consider the credibility of the witnesses, and need not view the evidence from the perspective most favorable to the prevailing party.

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials

[HN7] The burden of proof on a motion for a new trial is on the moving party, and the district court should not lightly disturb a plausible jury verdict.

Business & Corporate Law > General Partnerships > Dissolution & Winding Up > Dissolution > General Overview
Contracts Law > Remedies > General Overview
Governments > Legislation > Statutory Remedies & Rights

[HN8] An "at-will" partnership (one without any definite term or undertaking to be accomplished) can be dissolved by a partner at any time. Such election is neither wrongful nor triggers the statutory remedies for premature dissolution. This exercise of the right to dissolve an at-will partnership, however, must be exercised in good faith and consistently with the fiduciary duties among the partners. By contrast, a partner has no right to dissolve a partnership formed to continue for a definite term or a particular undertaking. Because the partners have agreed to enter into association with each other for a certain length of time, it is a breach of contract to act so as to end the association before the time has expired. A partner in this second kind of partnership who causes a premature dissolution in contravention of the partnership agreement can be held liable for damages.

Business & Corporate Law > General Partnerships > Dissolution & Winding Up > Dissolution > Breach of Agreement & Expulsion
Business & Corporate Law > General Partnerships > Dissolution & Winding Up > Winding Up > Accounting
[HN9] Partners are generally precluded from the adjudication of partnership claims other than in connection with a formal accounting. Thus, the rule in California, which has adopted the Uniform Partnership Act as *Cal. Corp. Code §15001 et seq.*, is that there can ordinarily be but one form of action between partners: an action for judicial dissolution and accounting under *Cal. Corp. Code § 15038*. A significant exception to this rule is that where one partner excludes the other, repudiates the very existence of the partnership, and converts all of the partnership assets, the victim may sue for damages without seeking a judicial dissolution and an accounting.

Business & Corporate Law > General Partnerships > Formation > General Overview
Business & Corporate Law > General Partnerships > Management Duties & Liabilities > General Overview
Contracts Law > Types of Contracts > Partnership Agreements
[HN10] Wrongful repudiation takes place when one partner denies the existence of the partnership agreement.

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > General Overview
[HN11] In determining whether a party can seek remedy under *Cal. Corp. Code § 15038(b)*, it is irrelevant whether the innocent party attempts to dissolve the partnership before or after the wrongful repudiation.

Business & Corporate Law > General Partnerships > Dissolution & Winding Up > General Overview
Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Causes of Action > General Overview
Contracts Law > Remedies > General Overview
[HN12] If a partner breaches the partnership agreement by wrongfully repudiating it, or denying that it ever existed, then whether the agreement was at will or not is irrelevant for purposes of the availability of the remedies of *Cal. Corp. Code § 15038(b)*.

Contracts Law > Remedies > General Overview
Contracts Law > Types of Contracts > Covenants
Torts > Business Torts > Bad Faith Breach of Contract > General Overview
[HN13] In California, the law implies in every contract a covenant of good faith and fair dealing. Broadly stated, that covenant requires that neither party do anything which will deprive the other of the benefits of the agreement. A party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial
Civil Procedure > Trials > Jury Trials > Verdicts > Special Verdicts
Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions
[HN14] *U.S. Const. amend. VII* demands that, if there is a view of the case which makes the jury's answers consistent, the district court must adopt that view. The test to be applied in reconciling apparent conflicts between the jury's answers is whether the answers may fairly be said to represent a logical and probable decision of the relevant issues as submitted. The right to a jury trial guaranteed by the *Seventh Amendment* requires that a district court validate the verdict by reconciling the jury's special verdict responses on any reasonable theory consistent with the evidence. If there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. If, on the other hand, after careful consideration, the answers cannot be reconciled, a new trial must be ordered.

Business & Corporate Law > General Partnerships > Dissolution & Winding Up > Dissolution > General Overview
Business & Corporate Law > General Partnerships > Dissolution & Winding Up > Winding Up > Accounting
Governments > Fiduciary Responsibilities
[HN15] In the absence of wrongful dissolution, a breach of fiduciary duty by a partner ordinarily gives rise to the remedy of accounting. *Cal. Corp. Code § 15038*.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Torts > Business Torts > Fraud & Misrepresentation > Actual Fraud > General Overview
[HN16] Fraud is either actual or constructive. *Cal. Civ. Code § 1571*.

Contracts Law > Breach > General Overview

Contracts Law > Defenses > Fraud & Misrepresentation > Constructive Fraud
Torts > Business Torts > Fraud & Misrepresentation > Constructive Fraud > General Overview
[HN17] Constructive fraud consists of any breach of duty which, without actually fraudulent intent, gains an advantage for the person in fault by misleading another person to his or her prejudice, and it also exists where conduct, though not actually fraudulent, ought to be treated as such because it has all the actual consequences and all the legal effects of actual fraud. *Cal. Civ. Code § 1573*. To constitute positive or actual fraud there must be an intentional deception. Constructive fraud, on the other hand, is presumed from the relation of the parties to a transaction, or the circumstances under which it takes place. Constructive fraud thus arises when the parties to a contract have a special, confidential, or fiduciary relation, and one of the parties breaches a duty arising from the confidential relationship, inducing justifiable reliance by the other to his prejudice.

Business & Corporate Law > Agency Relationships > Agents Distinguished > Fiduciary Relationships > General Overview
Estate, Gift & Trust Law > Trusts > Trustees > General Overview
Governments > Fiduciary Responsibilities
[HN18] "Confidential relationship" embraces both fiduciary relations and other, more informal, relations that exist whenever one person trusts in and relies on another. Although "fiduciary" and "confidential" are used interchangeably, "fiduciary relationship" technically refers to a specific kind of recognized legal relationship such as those between guardian and ward, trustee and beneficiary, principal and agent, and attorney and client, whereas "confidential relationship" may be founded on moral, social, domestic, or merely personal relationships as well as on legal relationships. In other words, all fiduciary relationships are confidential relationships, but confidential relationships encompass more that fiduciary relationships. Constructive fraud requires the existence of a confidential relationship, but not necessarily a fiduciary relationship.

Business & Corporate Law > General Partnerships > Formation > General Overview
Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Fiduciary Responsibilities > General Overview
Governments > Fiduciary Responsibilities
[HN19] A partnership is an association of two or more persons to carry on as co-owners a business for profit. *Cal. Corp. Code 15006*. Partners are trustees, and therefore fiduciaries, of each other. Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. *Cal. Corp. Code. § 15021.*

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Causes of Action > Breach of Fiduciary Duty
Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Fiduciary Responsibilities > Duty of Good Faith & Loyalty
Governments > Fiduciary Responsibilities
[HN20] One partner cannot, directly or indirectly, use partnership assets for his own benefit; he cannot in conducting the business of the partnership, take any profit clandestinely for himself; he cannot carry on the business of the partnership for his private advantage; he cannot carry on another business in competition or rivalry with that of the firm. Partners are trustees for each other, and in all proceedings connected with the conduct of the partnership, every partner is bound to act in the highest good faith to each copartner and may not obtain any advantage over any copartner in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. A partner has no right to deal with the partnership property other than for the sole benefit of the partnership. The fiduciary duty of partners thus encompasses significantly more than the duty to disclose.

Torts > Intentional Torts > Defamation > Defenses > Truth
Trademark Law > Infringement Actions > General Overview
Trademark Law > Special Marks > Service Marks > General Overview
[HN21] Both libel and slander are defined as "false and unprivileged publications." *Cal. Civ. Code § 45 et seq.* Consequently, truth is a complete defense to a defamation claim.

Business & Corporate Law > General Partnerships > General Overview
Contracts Law > Breach > General Overview
Contracts Law > Remedies > General Overview
[HN22] A partner who has wrongfully caused a dissolution may be held liable to another partner for damages for breach of the partnership agreement. The innocent partner may (1) waive the tort or breach and sue to spe-

cifically enforce the partnership agreement, or submit to the repudiation and sue for damages for conversion, or (2) sue for breach of contract, or (3) sue in tort. A plaintiff may plead all these remedies. They may be cumulative but a party is not entitled to receive a double recovery for a single injury.

Civil Procedure > Judgments > Relief From Judgment > Additurs & Remittiturs > Remittiturs
Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Award Calculations > General Overview
[HN23] A jury's determination of damages is entitled to great deference by a district court. Damages must be upheld unless the amount is clearly not supported by the evidence, or is grossly excessive, monstrous, or shocking to the conscience.

Civil Procedure > Judgments > Relief From Judgment > Additurs & Remittiturs > Remittiturs
Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials
Torts > Damages > Punitive Damages > Award Calculations > General Overview
[HN24] When a district court, after viewing the evidence concerning damages in the light most favorable to the prevailing party, determines that the jury's award of damages is excessive, it has two alternatives: it may grant defendant's motion for a new trial, or deny the motion conditional upon the prevailing party accepting a remittitur, and the prevailing party is then given the option of either submitting to a new trial or accepting a reduced amount of damages which the district court considers justified. If, however, the verdict is the result of passion or prejudice, or where it appears that the jury erred on the issues of damages and liability, the district court is required to order a new trial. An oppressive verdict on the issue of punitive damages is a sound basis for granting a new trial, although in order to warrant the granting of a new trial on such a ground, the amount of the damages awarded must be such that it shocks the conscience of the district court.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine
Civil Procedure > Judgments > Relief From Judgment > Additurs & Remittiturs > Remittiturs
Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend
[HN25] In a diversity action where state law provides the basis of the decision, the propriety of an award of damages and the factors the jury may consider in determining the amount are questions of state law. Federal law, however will control on those issues involving the proper review of the jury award by a federal district court and court of appeals. Thus, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine by reference to federal standards under *Fed. R. Civ. P. 59*, whether a new trial or remittitur should be ordered.

Torts > Damages > General Overview
[HN26] The fact that a jury may have been outraged by the defendant's conduct to the point of awarding excessive damages does not prove that its decision on liability was flawed.

Torts > Damages > General Overview
[HN27] Even a total inadequacy of proof on isolated elements of damages claims submitted to a jury will not undermine a resulting aggregated verdict which is nevertheless reasonable in light of the totality of the evidence.

Governments > Fiduciary Responsibilities
Torts > Intentional Torts > Breach of Fiduciary Duty > Remedies
Torts > Intentional Torts > Defamation > Remedies > Damages
[HN28] A jury's evaluation of complex and conflicting evidence should not be supplanted when the jury's verdict finds substantial support in the record and lies within a range susceptible by proof; a district court should order remission or a new trial only if the damage would exceed the maximum amount sustainable by probative evidence.

Civil Procedure > Remedies > Damages > Special Damages
Torts > Intentional Torts > Defamation > Defamation Per Se
Torts > Intentional Torts > Defamation > Elements > Libel
[HN29] Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. *Cal. Civ. Code § 45*. A libel which is defamatory of the plaintiff without the necessity of explanatory matter is said to be a libel on its face. *Cal. Civ. Code § 45a*. In California, when the statement is libelous per se, it is actionable without proof of special damage. Conversely, defamatory language not libelous

on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. *Cal. Civ. Code § 45a.*

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Torts > Intentional Torts > Defamation > Defamation Per Se
Torts > Intentional Torts > Defamation > Elements > Libel
[HN30] The question whether a publication is libelous on its face is one of law. The test is whether in the mind of the average reader, the publication, considered as a whole, could reasonably be construed as defamatory. The court must determine as a matter of law whether the publication is libelous per se. If it is determined that the publication is susceptible of a defamatory meaning and also of an innocent and nondefamatory meaning it is for the jury to determine which meaning would be given to it by the average reader.

Civil Procedure > Remedies > Damages > Special Damages
Torts > Intentional Torts > Defamation > Elements > Libel
Torts > Intentional Torts > Defamation > Remedies > Damages
[HN31] *Cal. Civ. Code § 45a* requires that a plaintiff satisfy three requirements when making a claim for defamatory language not libelous on its face: 1) adequately allege special damages, 2) prove special damages, and 3) prove that such damages proximately resulted from the alleged defamation.

Torts > Intentional Torts > Defamation > General Overview
[HN32] An action for defamation must allege that the defamatory matter was "published" or communicated to a third person. Publication occurs when the statement is communicated to a third party who understands the defamatory meaning and its applicability to the plaintiff. There is no requirement, however, that the statement be disseminated widely; a slanderous statement heard by one person is no less a slander than that heard by a large group.

Torts > Intentional Torts > Defamation > Defamation Per Se
[HN33] Calling an attorney a "crook" is actionable as slander per se without proof of special damage. Imputing dishonesty or lack of ethics to an attorney is also actionable under *Cal. Civ. Code § 46* because of the probability of damage to professional reputation.

Torts > Damages > General Overview
Torts > Intentional Torts > Defamation > Defamation Per Se
Torts > Intentional Torts > Defamation > Remedies > Damages
[HN34] An award of nominal damages only may be appropriate when a plaintiff in a defamation per se action has suffered no actual damages.

Governments > Courts > Common Law
Torts > Damages > Punitive Damages > General Overview
[HN35] Although the basic principle of damages is compensation, the rule in California is that additional damages may be given in tort actions when the defendant's conduct has been outrageous, for the purpose of punishment and deterrence.

Civil Procedure > Remedies > Damages > Punitive Damages
Contracts Law > Remedies > Foreseeable Damages > General Overview
Contracts Law > Remedies > Punitive Damages
[HN36] See *Cal. Civ. Code § 3294(a).*

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN37] In order to award punitive damages, a jury must find despicable conduct (malice, oppression, or fraud).

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > General Overview
[HN38] A jury finding of fraud is considered a sufficient basis for awarding punitive damages.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Award Calculations > Factors
[HN39] Claims that punitive damages are excessive are analyzed in the light most favorable to the prevailing party. While there is no rigid formula for evaluating the

alleged excessiveness of an award of punitive damages, the district court should consider the ratio of compensatory damages to punitive damages, the reprehensibility of the defendants' conduct, and the wealth of defendants, in particular whether the award is in excess of the defendants' ability to pay. Regarding the first factor, there is no fixed ratio to determine the proper proportion between punitive and compensatory damages. The calculation of punitive damages involves, instead, a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendants, and in this regard juries have a wide discretion in determining what is proper.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > General Overview
[HN40] A defendant's net worth is generally considered the best measure of his wealth for the purpose of assessing exemplary damages. It is proper for the district court to compare the punitive damages award to net worth and income because an award of punitive damages should be large enough to punish and deter but not larger than necessary to serve this purpose.

Civil Procedure > Remedies > Damages > Punitive Damages
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor
Torts > Damages > Punitive Damages > General Overview
[HN41] If a defendant wishes to establish inability to pay a large penalty, he or she may meet the burden by introducing such evidence.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Award Calculations > General Overview
[HN42] It is the duty of the district court to intervene in instances where punitive damages are so palpably excessive or grossly disproportionate as to raise a presumption that they resulted from passion or prejudice.

Torts > Damages > General Overview
Torts > Intentional Torts > Defamation > Defamation Per Se
Torts > Intentional Torts > Defamation > Remedies > Damages
[HN43] In California punitive damages cannot be awarded unless actual damages were suffered, because punitive damages are meant to be awarded in addition to compensatory damages.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Award Calculations > General Overview
[HN44] Punitive damages should ordinarily be in some reasonable proportion to the actual damages suffered. This rule does not preclude a large award of punitive damages based upon substantial actual damages, if the amount of compensatory damages awarded was small because of the difficulty of ascertaining the extent of the actual damage.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment
Torts > Damages > Punitive Damages > Availability > Governmental Entities
[HN45] The Excessive Fines Clause of *U.S. Const. amend. VIII* does not apply to civil penalties in cases between private parties, but was intended to limit only those fines directly imposed by, and payable to, the government.

Contracts Law > Remedies > Equitable Relief > Unclean Hands Doctrine
Governments > Fiduciary Responsibilities
Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview
[HN46] The unclean hands rule is qualified by the requirement that the actions of the party alleged to have soiled hands must relate directly to the transaction concerning which the complaint is made.

Business & Corporate Law > General Partnerships > Formation > General Overview
Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Rights of Partners > General Overview
Torts > Damages
[HN47] Conduct amounting to a wrongful repudiation is inconsistent with an accounting, because wrongful repudiation denies the existence of the partnership agreement, while the purpose of an accounting is to seek an adjust-

ment of partnership interest predicated upon the partnership agreement.

JUDGES: [*1] Joan S. Brennan, United States Magistrate.

OPINION BY: BRENNAN

OPINION

OPINION AND ORDER RE DEFENDANTS' MOTION FOR JUDGMENT NOV; MOTION FOR NEW TRIAL; OR IN THE ALTERNATIVE, FOR REMITTITUR

The trial in this action concerned a dispute over the break-up of a business relationship between plaintiff Francis S.L. Wang, an American attorney, and defendants Paul Hsu, C.V. Chen, Kwan Tao Li, and the partnership of Lee and Li, a law firm based in Taipei, in the Republic of China (Taiwan, or R.O.C.). The United States District Court has jurisdiction pursuant to *28 U.S.C. section 1332(a)(2)*, and the parties consented to the jurisdiction of the magistrate, pursuant to *28 U.S.C. section 636(c)*. Prior to trial, the court determined that resolution of the joint venture or partnership issues would be governed by California, rather than Taiwanese, law. In May of 1990, the case was tried to a jury, the Honorable Joan S. Brennan, United States Magistrate-Judge, presiding. The jury found for the plaintiff and awarded him $ 19,880,000 in damages. Defendants now bring this motion for judgment notwithstanding the verdict and motion for new trial, or in the alternative, for remittitur. The court, having considered the arguments [*2] of counsel and the papers submitted, and for the reasons stated below, hereby DENIES the motion for JNOV, and DENIES the motion for new trial, conditional upon plaintiff's acceptance of a remittitur.

BACKGROUND

In 1979, plaintiff Francis Wang was a 32-year-old attorney, employed at the San Francisco office of the law firm of Morrison & Foerster. Francis Wang's family had business, family, and social ties to China and the R.O.C. His father, Kenneth Wang, had been a lawyer and judge in pre-1949 China, and plaintiff himself was born in Shanghai.

James Lee, the founder of the Taiwan-based Lee and Li law firm, began practicing law in Shanghai in the 1930s. He left Shanghai in 1949, and in 1953 formed a law firm in Taipei. In 1965 he was joined by C.N. Li, father of defendant Kwan Tao Li Defendants Paul Hsu and Kwan Tao Li joined the firm in 1969. James Lee died in 1970, and defendant C.V. Chen joined the firm in 1973. Each of the individual defendants was a full equity partner of Lee and Li in 1979 when the firm entered into its arrangement with Francis Wang. The firm's name and its Chinese counterpart were registered in the R.O.C. in 1982 by defendant C.V. Chen.

Lee and Li is the [*3] most prominent law firm in the R.O.C. With 260 legal professionals and staff members, it is the largest R.O.C. firm. The majority of its clients are foreign corporations doing business in R.O.C., although it also represents large Taiwanese corporations. Defendant C.V. Chen is legal advisor to the ruling party of the R.O.C., as well as to the ministries of defense and foreign affairs. He also enjoys some celebrity as a television commentator on legal affairs. The fathers of both defendants K.T. Li and Paul Hsu were high government officials.

Francis Wang was employed as an intern with Lee and Li in 1971. He developed a personal friendship with defendant Paul Hsu, whom Wang had met in the late sixties when Hsu was studying in the United States. Wang and Hsu shared an interest in developing a law firm to service the Pacific rim trade basin. For a number of years, Hsu discussed the possibility of Wang's joining Lee and Li. In 1977 Hsu proposed that Wang join the Taipei firm. Wang, however, was not interested in leaving Morrison & Foerster to become an associate at a firm based in the Far East.

In late December, 1978, the United States announced it would formally recognize the People's [*4] Republic of China (P.R.C.) and sever diplomatic relations with the R.O.C on January 1, 1979. Both Hsu and Wang were attending the American Bar Association meeting in New York at the time, and Hsu urged Wang to reconsider joining Lee and Li. Hsu suggested Wang could open a San Francisco office of the firm. In the ensuing months the partners of Lee and Li negotiated with Wang. They wanted to expand Lee and Li's practice, serve Asian clients making investments in the United States, and solidify their American corporate client base.

In the fall of 1979, Wang reached an agreement with Lee and Li. The agreement was not written. The defendants took the position that it was "the Chinese way" to avoid such formalities. Thus, one of the major areas of dispute in this litigation concerned the exact terms of the agreement -- whether the agreement was intended to create a partnership or a joint venture. Wang claimed that in September, 1979, he, Paul Hsu, C.V. Chen, K.T. Li, and Frank C.S. Wang entered into a partnership for the purpose of practicing law under the name of Lee and Li. [1] The partnership's headquarters would continue to be located in Taipei, and Wang would open a Lee and Li office [*5] in San Francisco. Both offices would conduct business within the partnership of Lee and Li. Under the terms of the partnership agreement, Wang would be an equity partner, initially with an interest equal to 90% of

the individual share of the other partners. [2] Wang was guaranteed $ 55,000 per year and profit sharing. Approximately two years after Wang was admitted as a partner, Frank C.S. Wang died, and the partners' percentage shares changed, Francis Wang receiving 22.5% and each of the Taipei partners 26%.

1 The partners of Li and Lee in 1979 were defendants Paul Hsu, Kwan Tao Li, and C.V. Chen, plus C.Y. Yin, who retired in January of 1980, and Frank C.S Wang, who died in March of 1982. This order refers to Hsu, Li, Chen, and Frank C.S. Wang (before his death) as the "Taipei partners."

2 Wang claimed that the agreement was that his partnership share would come from the share that C.Y. Yin would be giving up when he retired.

The defendants, on the other hand, claimed that one of the five Lee and Li partners, [*6] C.Y. Yin, never agreed to have Francis Wang as a partner and refused to participate in the formation of a San Francisco office. Defendants claimed that Paul Hsu, K.T. Li, C.V. Chen, and Frank C.S. Wang entered into a separate joint venture with Wang, whereby Wang agreed to manage a San Francisco branch office of Lee and Li. Under the terms of the purported agreement, Yin's share of the partnership would not be affected, and defendants would pay Wang an amount equal to 90% of a partner's share of Lee and Li's profits, with a $ 55,000 guaranteed minimum salary. Defendants claimed that the parties agreed that Wang would be considered as a candidate in the Taipei partnership after a trial period of two or three years if the partners were satisfied with the performance of Wang and the San Francisco office; they insisted, however, that an actual offer of partnership was never extended.

Wang proceeded to open the San Francisco office. For U.S. tax reporting purposes, the San Francisco office was treated as a sole proprietorship. No profit distributions were made by the San Francisco office to the partners, nor were any expected during the formative years of the office. During the trial, [*7] the parties offered conflicting evidence about whether the office was a business success and about the amount of profit it generated. They also disagreed about whether Wang had successfully managed the office and whether either Wang or the defendants had defrauded the others.

Wang claimed that the San Francisco office met or exceeded performance projections during the first two years of operations. He complained that the San Francisco office suffered a serious cash-flow problem because of the failure of the Taipei office to pay promotional expenses as promised. He also complained that when the San Francisco office did work for certain U.S. clients, the Taipei office billed those clients and then retained the fees. In 1983 a coordinated billing system was set up so that the San Francisco office would do the billing when both offices did work for a Lee and Li client. Wang claimed that he could not obtain adequate financial information from Taipei. During the first three years all he received was a handwritten statement regarding the calculation of annual partnership shares from Lee and Li's chief accountant. In 1984 he advised the Taipei office not to pay him any more money until he [*8] got an accounting.

Defendants, on the other hand, contended that Wang was never considered for partnership. They claimed that the Taipei partners never developed trust and confidence in Wang, that Wang's management style was not compatible with Lee and Li's, that Wang was abrasive with staff and clients, that Wang's style of legal practice was too aggressive for the Lee and Li image, and that the San Francisco office never made a profit.

Defendant C.V. Chen registered the "Lee and Li" service mark in Taiwan in 1982. Wang registered "Lee and Li" as a service mark with the United States Patent and Trademark Office in 1983, and with the California Secretary of State in 1986. Lee and Li later contended that it was the exclusive owner of the service mark, and Wang did not contest that he registered the name on behalf of Lee and Li, despite the designation of himself as the registrant. With the knowledge of the Taipei partners, Wang registered the "Lee and Li" service mark in Korea and the P.R.C., and attempted to register the "Lee and Li" service mark in Hong Kong and Japan.

In July, 1986, Wang traveled to Taipei for a meeting of the Lee and Li partners. At the meeting, he presented a detailed [*9] agenda describing the problems that had developed and setting forth potential alternative solutions, including dissolution and litigation. The Taipei partners were not receptive to Wang's suggestions. In September, 1986, Wang made a formal demand on Lee and Li "for a full accounting, by an independent Certified Public Accountant . . . of all books and records of Lee and Li, Taipei." Plaintiff's Exhibit 50. No accounting was forthcoming.

In April, 1987, Wang wrote C.V. Chen, Paul Hsu, and K.T. Li a letter entitled "Dissolution of Partnership," in which he stated that while he had been attempting to "repair the relationship between our respective offices, and to restructure it on a businesslike basis" . . . , he had discovered that the Taipei partners had "informed people that the partnership is dissolved, [had] taken my name and the name of this office off of the firm letterhead, and [had] otherwise represented to the world at large that there is no longer a relationship between us." He then stated his demand for dissolution of the partnership, re-

questing (1) "[a] full accounting of the partnership books and assets" -- in particular, "the Income Statements and Balance Sheets for the [*10] years 1984, 1985, and 1986" -- and (2) "[a] partition and distribution of the partnership profits, assets, and liabilities." Plaintiff's Trial Exhibit 357. Wang also mailed a "Bulletin" dated April 10, 1987 to selected clients announcing the dissolution.

In May of 1987 the Taipei partners responded as follows:

In reference to your letter of April 15, 1987, there seems to be a gross misunderstanding, deliberately or otherwise, of our past association. Back in 1979, we have indeed reached an oral agreement that we in Taipei would make cash contribution to support your effort to start a law office in San Francisco using the good name of Lee & Li to accommodate and enhance the future expansion of Lee & Li. All of us would enter into international partnership for the San Francisco practice with you as the resident partner in charge of the operation. We also verbally agreed that the above association must be tested in a duration of several years to the satisfaction of all parties concerned and then we may proceed to negotiate a partnership to include the practices in Taipei and other territories.

Plaintiff's Trial Exhibit 48. The letter also charged that the San Francisco office had [*11] achieved none of the objectives intended at the time of its creation, and that the Taipei partners "were never recognized or registered to share any assets of the San Francisco Office." The letter also claimed that the Taipei partners had "discovered recently that the name of Lee & Li was registered in the United States as the service mark under [Wang's] name without our consent, and without any information in this regard given to us prior to and after the registration." Plaintiff's Trial Exhibit 48.

Between April and November of 1987, the San Francisco office continued to use the Lee and Li name in the United States, adopting the name Lee and Li-USA in late July. Wang sent out letters advising clients and other interested parties that Lee and Li-USA was not affiliated with Lee and Li-Taipei. The Taipei partners continued to assure Wang that they could work out their differences. K.T. Li came to the United States three times, and Paul Hsu once that summer, to attempt to negotiate a settlement. Nonetheless, the Taipei partners still refused to give Wang an accounting, or to agree to a mutual inspection of the books. Wang filed this suit in June, 1987, although he did not serve the [*12] complaint upon the defendants until October.

On November 1, 1987, the Taipei partners wrote Wang that they understood by his letter of April 15, 1987, that Wang had caused his association with Lee and Li to be dissolved.

By your action we regard your association with Paul S.P. Hsu, Kwan-Tao Li, and C.V. Chen of this firm to have ended.

* * * * *

As of the moment of disassociation, your use of the firm name and any further actions conducted in the name of the firm constituted a breach of your fiduciary duty and tortious unfair competition. Any attempt to usurp the firm name and misrepresentations to third parties as to the identity of our offices and personnel shall not be tolerated.

We demand that you cease and desist from any use of the name "Lee and Li" [Chinese characters], or their similars in the future, and refrain from misleading clients and other third parties.

Plaintiff's Trial Exhibit 47.

On November 5, 1987, Wang traveled to Taipei for a judicial seminar attended by government officials, judges, corporate representatives, and attorneys concerned with enforcement of intellectual property rights in the R.O.C. Immediately after Wang's departure from the United States, the [*13] San Francisco office was served with papers noticing a motion for a temporary restraining order prohibiting the office from using the Lee and Li name, with a hearing set for the morning of November 9th. Michael Welch, a young associate in the San Francisco office, reached Wang in Taipei over the weekend and discussed the facts over the telephone so that Welch could file a declaration for Wang and points and authorities in opposition to the motion. At the hearing, the court ordered the parties to

come up with some agreement that will at least limit, until there's a further hearing by the court, plaintiff's use of the name, and that he may essentially use it for practice in San Francisco until there's a further order of the court and in connection with business that has already been generated.

Transcript of Proceedings Before the Honorable Marilyn Hall Patel, Judge, November 9, 1987, at 12. The attorneys for Wang and the Taipei partners conferred in the hallway and then entered into an oral stipulation that each office could use the name "Li and Lee" in its own country, and that Wang could use "Li and Lee -- USA" with a disclaimer. This agreement was subsequently reduced to writing, [*14] signed by Judge Patel, and filed with the court on November 13, 1987.

On November 10, the day the seminar was to begin, the Taipei partners caused a large color advertisement to be placed on the front page of every Taiwan daily news-

paper, claiming that Francis Wang had been misusing the "Lee and Li" service mark. According to the ads,

At present, American attorney [Wang] et al, are using, without authorization, service marks that are identical or similar to the above mentioned service marks. He also applied, in his own name, for registration of the trademark and service mark of "Lee and Li Law Firm" in Chinese and the English "LEE and LI," in other countries and regions (including Mainland China).

We attorneys, aside from taking various legal actions to protect the legal rights against those involved in this litigation, also make this announcement in case this matter has not been made public.

Plaintiff's Trial Exhibit 87. Wang and his father arranged a press conference at which Wang distributed copies of the complaint he had filed in San Francisco. His father explained the P.R.C. registration and Wang's demand for an accounting, and answered questions of the reporters present. [*15] Following the press conference, additional news stories and advertisements placed by both parties appeared in the Taiwan media.

Later, at a dinner party hosted by Lee and Li and attended by seminar participants, Paul Hsu said to one of the guests, "Isn't it ridiculous that Frank Wang is practicing law in our name? He's a crook. We're going to take care of him."

Wang's complaint alleged dissolution of partnership (accounting), breach of contract, fraudulent representation, fraudulent concealment, defamation, interference with prospective economic advantage, breach of the implied covenant of good faith and fair dealing, unfair competition, and breach of fiduciary duty. Defendants' counterclaim alleged service mark infringement, fraudulent registration, unfair competition, breach of contract, conversion, defamation, interference with contractual relations, breach of fiduciary duty, fraud and deceit, conspiracy, and claim for accounting.

The jury found that Wang and the defendants agreed in 1979 that Wang would be an equity partner in Lee and Li, and found further that defendants wrongfully repudiated the partnership agreement. The jury also found defendants liable for breach of contract, [*16] fraud and deceit, breach of fiduciary duty, and defamation, and found Wang liable for breach of contract, fraud and deceit, breach of fiduciary duty, service mark infringement, and defamation. The jury awarded Wang $ 7,100,000 in compensatory damages and $ 12,780,000 in punitive damages, and awarded defendants $ 325,000 in compensatory damages.

Defendants now bring this motion, claiming that the record before the court mandates granting of judgment notwithstanding the verdict or a new trial, or in the alternative, a remittitur.

STANDARD OF REVIEW

[HN1] A motion for judgment notwithstanding the verdict ("JNOV") must be granted when, viewing the evidence as a whole, there is no substantial evidence to support the verdict. *Bjaranson v. Botelho Shipping Corp., 873 F.2d 1204, 1207 (9th Cir. 1989)*, citing *Quichocho v. Kelvinator Corp., 546 F.2d 812, 813 (9th Cir. 1976)*. The evidence must be viewed in the light most favorable to the party against whom the motion is made; the court must then deny the motion if it determines that the jury had sufficient facts from which to find in that party's favor. *Id.*, citing *Naton v. Bank of California, 649 F.2d 691, 697 (9th Cir. 1981)*. [*17] "Substantial evidence" is more than a mere scintilla; it is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th Cir. 1979), cert. denied, 447 U.S. 924 (1980)*.

In order to withstand a defendant's motion for JNOV, the plaintiff must have introduced sufficient evidence at trial to establish a prima facie case. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 461 F.Supp. 410, 416 (N.D. Cal. 1978), withdrawn, 668 F.2d 1014, (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982)*. Consequently, a motion for JNOV shall be granted when the jury's factual findings cannot support the legal conclusions that necessarily were drawn by the jury in reaching its verdict, *Verdegaal Bros., Inc. v. Union Oil Co., 814 F.2d 628, 631 (Fed.Cir.), cert. denied, 484 U.S. 827 (1987)* or when the jury verdict is internally inconsistent, *see Pierce v. Southern Pacific Transp. Co., 823 F.2d 1366, 1369-70 (9th Cir. 1987)*

[HN2] A motion for JNOV should be cautiously and [*18] sparingly granted, however, since there should be a minimum of interference with the jury. *Walker v. KFC Corp., 515 F. Supp. 612, 616 (S.D. Cal. 1981), affd. in part and rev'd in part, 728 F.2d 1215 (9th Cir. 1984)*. The court is not free to consider the credibility of witnesses, *Kay v. Cessna Aircraft Co., 548 F.2d 1370, 1372 (9th Cir. 1977)*, or weigh the evidence or reach a result it finds more reasonable if the jury's verdict is supported by substantial evidence. *Garvin v. Greenbank, 856 F.2d 1392, 1396 (9th Cir. 1988)*, citing *Wilcox v. First Interstate Bank, N.A., 815 F.2d 522, 525 (9th Cir. 1987)*. The court must not substitute its choice for that of the jury's in deciding between conflicting elements of the evidence. *Verdegaal Bros., 814 F.2d at 631*.

Defendants argue that the court should grant JNOV in this case because Wang presented no substantial evidence of wrongful repudiation, because Wang presented

no substantial evidence of damages for either his tort or his contract claims, and because the special verdict is internally inconsistent.

[HN3] A new trial may be [*19] granted for "any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ." *Fed. R. Civ. P. Rule 59(a).*

[HN4] The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). A motion for a new trial may also be based on grounds of inadequacy or inconsistency of the verdict; denial of proper mode of trial; systematic exclusion of qualified jurors from the jury list; or misconduct of the jury or of court officials, counsel, parties, or witnesses. *See* 6A *Moore's Federal Practice* para. 59.08[1] (2nd ed. 1987), and cases cited therein.

[HN5] The standard for granting a motion for a new trial is less stringent than the standard for granting JNOV. *Anglo-American General Agents v. Jackson Nat. Life Ins. Co., 83 F.R.D. 41, 43 (N.D. Cal. 1979).* [*20] By contrast with a motion for JNOV, the existence of substantial evidence does not prevent a court from granting a motion for a new trial pursuant to *Fed. R. Civ. P. Rule 59* if the verdict is against the clear weight of evidence, *Landes Construction Co. v. Royal Bank of Canada, 833 F.2d 1365, 1371 (9th Cir. 1987),* or if the damages are excessive or inadequate, or to prevent a miscarriage of justice. *Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977); Fenner v. Dependable Trucking Co., 716 F.2d 598, 602 (9th Cir. 1983).*

[HN6] A motion for new trial may be granted on grounds of insufficiency of evidence only if the verdict is against the great weight of evidence or it is quite clear that the jury has reached a seriously erroneous result. *Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1347 (9th Cir. 1984), cert. denied, Data General Corp. v. Digidyne Corp., 473 U.S. 980 (1985).* Mere doubts about the correctness of the verdict, however, are insufficient grounds to grant a new trial; the court must have a firm conviction that [*21] the jury has made a mistake. *Landes, 833 F.2d at 1372; Venegas v. Wagner, 831 F.2d 1514, 1519 (9th Cir. 1987).* In ruling on a new trial motion, the trial court may weigh all the evidence and consider the credibility of the witnesses, and need not view the evidence from the perspective most favorable to the prevailing party. *Landes, 833 F.2d at 1371.*

"Nevertheless, [HN7] the burden of proof on a motion for a new trial is on the moving party, and the court should not lightly disturb a plausible jury verdict." *Anglo-American, 83 F.R.D. at 43.* The court should be guided by a common sense determination such as that suggested by Wright and Miller:

[The judge's] power to set aside the verdict is supported by clear precedent at common law and, and, far from being a denigration or usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his doubts [*22] in the matter. Probably all a judge can do is balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

11 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2806 at 48-49.

Defendants argue that a new trial is mandated in this case because the special verdict is the product of passion and prejudice, is against the clear weight of evidence, and is irreconcilably inconsistent; because plaintiff's damage award is excessive, and defendants' damage award is inadequate; and because of errors in instructions to the jury, errors in the admission and exclusion of evidence, and jury misconduct.

DEFENDANTS' MOTION FOR JNOV AND MOTION FOR NEW TRIAL

Defendants have presented the court with a Hydra of a motion, in which dozens of issues, both major and minuscule, appear, reappear, and overlap. In our endeavor to dispatch this unruly creature, we found that as one issue seemed resolved, it would spring up again in two different [*23] places. We have attempted to avoid repetition in our analysis of defendants' various arguments, but have not been entirely successful. Our summary of defendants' claims, which does not necessarily follow the sequence in which they were presented in defendants' supporting papers, is as follows:

1. Wang presented no substantial evidence of wrongful repudiation; the court should grant JNOV or a new trial.

(a) The weight of evidence was against a finding that Wang was an equity partner in the Taipei office;

(b) There was never a repudiation of the entire agreement, but only of a single term -- namely, how the assets of the partnership were to be distributed upon dissolution (which determination was based on whether Wang was an equity partner;

(c) The disagreement over that single term never manifested until after Wang unilaterally terminated the agreement; and

(d) The jury was not properly instructed as to wrongful repudiation, and the evidence did not show that repudiation by defendants caused dissolution and resulted in conversion of partnership assets.

2. The special verdict is inconsistent; the court should grant JNOV or a new trial.

3. Wang presented insufficient evidence [*24] to support his legal claims, and there was therefore no substantial evidence of damages for either the tort or the contract claims; the court should order a new trial.

a. The finding of fiduciary breach was against the weight of evidence;

b. The findings of breach of contract and fraud were against the weight of evidence;

c. The finding of defamation is unsupported by evidence.

4. The award of damages to Wang was excessive; the court should order remittitur or a new trial.

a. The jury's award of both compensatory and punitive damages was excessive;

b. Wang is precluded from recovering damages because the jury found that he committed breach of contract, breach of fiduciary duty, and fraud (unclean hands doctrine);

c. The damages were erroneously computed pre-tax and with work-in-progress (WIP).

5. The clear weight of evidence supported higher damages for defendants' counterclaims; the court should order a new trial.

6. Evidentiary errors during trial mandate a new trial.

7. The court's denial of an accounting remedy mandates a new trial.

8. Jury misconduct mandates a new trial.

1. WRONGFUL REPUDIATION

Defendants claim that Wang presented no substantial evidence [*25] of wrongful repudiation. They argue that (a) the weight of evidence was against a finding that Wang was an equity partner in the Lee and Li law firm; (b) there was never a repudiation of the entire agreement, but of a single term -- namely, how the assets of the partnership were to be distributed upon dissolution (which determination was based on whether Wang was an equity partner); (c) the disagreement over that single term never manifested until after Wang unilaterally terminated the agreement; and (d) the jury was not properly instructed as to wrongful repudiation, and furthermore, the evidence did not show that repudiation by defendants caused dissolution and resulted in conversion of partnership assets.

A. Evidence that Wang was an Equity Partner

Defendants first argue that the weight of evidence is against the jury's finding that Wang became an equity partner in the Lee and Li law firm in 1979, since Wang failed to prove by "clear and convincing evidence" [3] that the contract existed in 1979, and that all the partners of the then-existing partnership, including C.Y. Yin, consented in 1979. Defendants contend that Yin did not retire until March of 1980, that he legally remained [*26] a partner until that date, that he did not agree to accept Wang as a partner in 1979, and that Wang was not involved in approving the retirement agreement between Yin and Lee and Li. Thus, defendants claim that, as a matter of contract law, Wang was not a partner with Yin and thus not of Lee and Li at the time he made his arrangement with the Taipei partners in 1979.

3 Jury Instruction No. 28 read as follows:

A party alleging breach of contract based upon an oral contract has the burden of proving by clear and convincing evidence the following:

1. That the parties entered into a contract;

2. The terms of the contract.

The party alleging breach of contract based upon an oral contract must also prove by a preponderance of the evidence the following:

1. That he performed what he was required to do under the contract;

2. That the other party breached one or more of the terms of the contract;

3. That the other party's failure to perform as promised was a substantial factor in causing the party alleging breach of contract to suffer damages; and

4. The nature and extent of his damages.

[*27] Yin was not a party to the lawsuit, and whether he agreed to become a partner with Wang in the

Lee and Li firm was not a question the jury had to answer on the special verdict. What the jury had to decide was whether Paul Hsu, C.V. Chen, K.T. Li, and Frank C.S. Wang agreed in September, 1979, to admit Francis Wang as an equity partner in the Lee and Li law firm. Whether Wang became an equity partner of the Lee and Li partners, including Yin, in September, 1979 or became a partner upon Yin's retirement in January, 1980 (as plaintiff's expert Robert Vizas opined), had no effect on the matters in dispute. The evidence was unequivocal that Yin agreed not to oppose the arrangement made between the other partners and Wang so long as Yin's partnership share was not affected. It is therefore not true, as defendants claim, that an essential finding was that Yin was a necessary party to the contract.

The jury responded "Yes" to the special verdict question, "Do you find that plaintiff and defendants agreed in 1979 that plaintiff would be an equity partner in the Taipei law firm of Lee & Li?" Special Verdict, filed June 11, 1990, ("Special Verdict"), question 1. The jury responded "No" to the [*28] special verdict question, "Do you find that plaintiff and defendants agreed in 1979 to form a joint venture to open a San Francisco office?" Special Verdict, question 2. The finding that Wang and defendants entered into a partnership agreement was supported by substantial evidence, and that it was neither against the weight of evidence nor the product of confusion or mistake on the part of the jury.

The evidence showed that Francis Wang entered into an agreement in 1979 with the four Taipei partners with whom he intended to do business: Frank C.S. Wang and defendants Paul Hsu, K.T. Li, and C.V. Chen. C.Y. Yin was retiring from the firm as of January 1, 1980. Yin did not want to be involved in any partnership with Francis Wang. He did not participate in any discussions with Wang. He insisted that in any arrangement with Wang, his (Yin's) partnership share was not to be reduced. Accordingly, the four Taipei partners and Francis Wang agreed in 1979 that Francis Wang would become an equity partner in Lee and Li. They also agreed that Wang would be paid on a profit basis for the remaining months of 1979, and on the same basis as the other equity partners (except with 90% of a share) upon [*29] Yin's retirement on January 1, 1980. Thus, Yin's consent or lack thereof was irrelevant in this context.

Wang's claim that he was an equity partner was supported by substantial evidence. The Taipei partners held Wang out as a Lee and Li partner to their clients and billed his work at a partner's rate. Lee and Li identified Wang as a partner on the firm letterhead and brochure, as well as in legal directories such as Martindale-Hubbell. Wang attended meetings of the partners in Taipei where discussions concerned the overall operation of Lee and Li, not merely the San Francisco office. Furthermore, Lee and Li paid Wang as a partner. His partnership share was reduced in 1980 by C.Y. Yin's retirement payment. After the death of Frank C.S. Wang in 1982, Wang's profit share was reduced by payments to the widow Wang to amortize the deceased partner's share.

Robert Vizas, plaintiff's expert and a partner at Heller, Ehrman, White & McAuliffe, testified that based on indicia of equity partnership -- namely, capital, profit, liability, management, and voting -- Wang was an equity partner of Lee and Li. Vizas further testified that the absence of a hold harmless agreement was strong evidence [*30] of partnership. In Vizas' words, Wang would have been "crazy" to enter an arrangement with Lee and Li without a hold harmless agreement if he were not an equity partner, because the consequences of being held out as a partner would include liability for the actions of the other partners.

Accordingly, the court concludes that the weight of evidence substantially supports the finding that Wang and defendants agreed in 1979 that Wang would be an equity partner in Lee and Li.

B. Repudiation of Agreement

Defendants next argue that this case does not involve the denial of the existence of an agreement. Defendants claim that the dispute is over a single term in the agreement -- namely, whether Wang had an equity interest in the Taipei office -- which would affect the manner in which assets would be distributed upon dissolution of the partnership. Defendants claim that because the court instructed the jury in Jury Instruction No. 24 [4] that both parties conceded the existence of an agreement, the jury thus had no option but to find that the parties were simply arguing over the *terms* of that single agreement.

4 Jury Instruction No. 24 read as follows:

In this case, you have received evidence that plaintiff and defendants entered into either a joint venture or a partnership. Under the law, partnerships and joint ventures are virtually identical. Both are contractual relationships characterized by the following elements:

1. The members associate together as co-owners of a business enterprise; and

2. The members agree to share profits; and

3. The members possess the right to joint management and control of the business enterprise.

> 4. When there is an existing business enterprise, a person cannot become a member without the unanimous consent of all the members.
>
> In this case the plaintiff maintains that the 1979 Contract was a partnership agreement and the defendants contend that the 1979 Contract was a joint venture agreement. You may find it convenient to refer to the plaintiff's version of the 1979 Contract as a partnership agreement and the defendants' version of the 1979 Contract as a joint venture agreement. But you should understand that it does not matter whether you decide the 1979 Contract created a partnership or a joint venture because the rights and duties of the business associates of a partnership or a joint venture are in all important respects the same. What is important for you to decide is (1) who were the parties to the 1979 Contract, and (2) what were the terms of their agreement.

[*31] Certainly Jury Instruction No. 24 suggests that both parties agreed that some sort of contractual relationship existed between them, but it neither states nor reasonably implies that their dispute concerned a discrete disagreement over a single term rather than a fundamental disagreement over the formation and substance of the contract. In fact, Jury Instruction No. 24 refers specifically to "plaintiff's version of the 1979 contract" and "defendants' version of the 1979 contract," and instructs the jury that it must decide 1) who the parties to the contract were, and 2) what the terms were -- namely, which version of the contract was the operative one.

The theory that there was but one agreement and that the dispute between Wang and the defendants concerned a single term in that agreement was never articulated during the trial. [5] Indeed, defendants' audacity in asserting this theory is breathtaking in light of their position at the commencement of trial, as indicated by the following extracts from defendants' trial brief and from defendants' appendix to the joint pretrial statement:

> Defendants contend that they *never entered into a law partnership with Mr. Wang, but rather*, [*32] *that four of the five partners of the law firm of Lee and Li entered a separate joint venture agreement with Mr. Wang* whereby he agreed to manage a San Francisco branch office of Lee and Li and perform other responsibilities in exchange for compensation equal to 90 percent of the profit share received by a partner of Lee and Li.
>
> Defendants' Appendix (c) to Joint Pretrial Statement (emphasis added).

> Plaintiff finally revealed his intention to separate and demand a full partnership share by letter dated April 15, 1987, in which he announced that the partnership was dissolved. Defendants immediately responded to plaintiff's demands for a full accounting by indicating that *no such partnership arrangement with Taipei existed.*
>
> Defendants' Trial Brief ("Defs' Tr. Brief") at 21 (emphasis added).

> It was difficult for the defendants to understand . . . [plaintiff's] assertion of a full partnership interest.
>
> Defs' Tr. Brief at 22.

> The primary dispute in this case concerns plaintiff's assertion that he was a full participation, equity partner in the Lee and Li law firm. The parties do not dispute that a contractual business relationship was entered into in September, 1979, to [*33] start a San Francisco law practice. *The contested issues are the nature of the relationship (partnership v. joint venture) and the terms of participation (principally, equal sharing of profits and equity v. unequal sharing of profits only).*
>
> In September, 1979, when their business venture commenced, *plaintiff in fact entered into a joint venture with four of the five partners of Lee and Li.* At no time after the formation of this relationship was there any material change in the contractual terms or the character of the relationship. Plaintiff was to be considered for partnership in the future but . . . was *never invited to join the partnership.*
>
> Defs' Tr. Brief at 35-36 (emphasis added).

> *The 1979 Contract memorialized an agreement between only four of the five partners of Lee and Li.* The terms of the contract provide that plaintiff would manage the finances and personnel of the San Francisco office, including the training of Taipei associates in U.S. law, expand the client base of Lee and Li through aggressive marketing and account for and remit to Taipei his fellow joint venturers' share of the profits of the San Francisco office. For their part, *defendants* [*34] *promised to compensate plaintiff at the rate of 90% of an individual partner's annual profit* with the understanding that plaintiff's annual income would never fall below that paid by his former employer.
>
> Defs' Tr. Brief at 38 (emphasis added).

Defendants had an existing partnership in Taiwan with a written agreement. *The arrangement they made with plaintiff was to fund a joint venture in San Francisco.* He was given the security of payment derived from Taipei based upon nine-tenths of what a Taipei partner received.

* * * * *

No partnership agreement was ever entered into with plaintiff. The existing partnership continued in

Taipei until one of the partners (Yin) retired after the arrangement was made with plaintiff. . . . During the course of the succeeding years, . . . [plaintiff] did not participate in the affairs of running the Taipei operation, its financing, its employees and the kind of day-to-day activities and decisions which the partners in fact did reach.

Defs' Tr. Brief at 39-40 (emphasis added).

Plaintiff was never a partner in the Taipei office of Lee and Li. His relationship with defendants was that of joint venturer in the San Francisco office. Plaintiff [*35] was not entitled to a straight share of profits, but rather, was *compensated* in an amount equal to nine-tenths of what each of the defendants received.

Defs' Tr. Brief at 45 (emphasis in original).

5 After the trial, on June 25, 1990, defendants' attorney, Ronald Mallen, first raised this argument before the court in a letter that was essentially a precursor to this motion. Mallen stated, in part, "In the instruction prepared by the court, the jury was informed that both parties agreed there was only *one contract* and that the duties were substantially the same. (Jury Instruction No. 14.) The jury was instructed that the parties 'disagree on the *terms* of the 1979 contract.'" (Emphasis in original).

These extracts show clearly that defendants contemplated a resolution of a dispute concerning two competing versions of the business arrangement between Wang and Lee and Li, rather than a single agreement with one disputed term. This is the theory on which the case was tried. After hearing all the evidence, [*36] the jury rejected defendants' joint venture in San Francisco office version and accepted Wang's partnership in Lee and Li version.

Defendants' new claim that the dispute concerned the interpretation of a single term in a single contract is also refuted by the theory of the case as reflected in the jury instructions. For example, Jury Instruction No. 14 [6] states that "each party carries the burden of proving the terms of *the contract it claims to have been in force and the breach of that contract by the other party* (emphasis added). Jury Instruction No. 24 [7] refers to "plaintiff's version of the 1979 contract" and "defendants' version of the 1979 contract." Jury Instruction No. 26 [8] sets forth defendants' version of the contract, while Jury Instruction No. 25 [9] sets forth Wang's version. Defendants assert that because Jury Instruction No. 14, *see supra* note 6, refers to *"the* 1979 contract," the jury was therefore instructed that both parties agreed there was only one contract. What Jury Instruction No. 14 instructs the jury to do, however, is determine which version -- plaintiff's or defendants' -- was the operative contract, the contract that was agreed to by the parties [*37] in 1979. Nowhere in the jury instructions is there *any* reference to a single contract with one disputed term.

6 Jury Instruction No. 14 read as follows:

Both plaintiff Francis S.L. Wang and the individual defendants Paul Hsu, C.V. Chen and K.T. Li acknowledge that they entered into a contract with one another in late 1979 to establish and develop a law office of Lee and Li in San Francisco, California (the "1979 Contract"). Both parties assert the other party breached (failed to perform) some or all of the terms of the 1979 Contract. Additionally, defendants and plaintiff disagree on the terms of the 1979 Contract.

Francis Wang contends that in late 1979 he became a full participation, equity partner with the defendants Hsu, Chen, Li and one other partner (Frank C.S. Wang, now deceased) in the law firm of Lee and Li. Defendants, on the other hand, contend that plaintiff was a member of a joint venture to develop a San Francisco office with four of the five partners of Lee and Li and was never admitted as a member of the Taipei partnership. It is your duty to determine which agreement was entered into between plaintiff and defendants.

Each party carries the burden of proving the terms of the contract it claims to have been in force and the breach of that contract by the other party. It is your duty to decide whether any party has proved its version of the terms and conditions of the 1979 Contract and whether the opposite party breached those terms.

I will now instruct you in the rules of law that will guide you in making these determinations.

[*38]

7 *See supra* note 4.

8 Jury Instruction No. 26 read as follows:

Defendants contend that plaintiff and defendants entered into a Joint Venture. Under the terms of the joint venture agreement, defendants claim plaintiff agreed to:

1. Competently manage the finances and personnel of the San Francisco branch office of Lee and Li,

2. Undertake to expand the client base of Lee and Li,

3. Market the services of the Taipei office of Lee and Li to prospective clients in the United States,

4. Collect certain billings for services provided by the Taipei Office of Lee and Li,

5. Compile and remit to the Taipei office of Lee and Li records of the San Francisco offices billing for legal services and the monies collected, and

6. Comply with his fiduciary duties and to act in good faith to promote and maximize the mutual economic interests of the Taipei and San Francisco offices over his own personal economic interests.

For their part, defendants agree and promised to annually compensate Plaintiff with the higher of a sum equal to 90% of the profit share paid to a Taipei partner or a minimum guaranteed salary of $ 55,000 U.S. dollars per year.

9 Jury Instruction No. 25 read as follows:

Plaintiff contends that he and defendants entered into a partnership agreement. Under the terms of the partnership agreement, plaintiff claims defendants agreed to:

1. Accept Francis Wang as their full equity partner in the law firm of Lee and Li; and

2. Pay Francis Wang an equity interest equal to 90% of the interest of the other individual partners;

Plaintiff and defendants mutually agreed to:

1. Competently and timely perform legal services for clients;

2. Promote and market the San Francisco Office;

3. Establish and maintain a competent billing and timekeeping system;

4. Cooperate in the development and furtherance of partnership business;

5. Take no actions to compete with the partnership or its members;

6. Comply with their fiduciary duties and to act in good faith to promote and maximize the mutual economic interests of the Taipei and San Francisco offices over their own personal economic interests.

[*39] At the risk of belaboring the issue, we repeat that this case was tried on the theory that plaintiff and defendants alleged two distinct and inconsistent contracts, not that they merely disputed a single term of the same contract: defendants claimed a joint venture, involving Wang and some of the Lee and Li partners, to operate a law office in San Francisco, while Wang claimed a partnership agreement by which he became an equity partner of Lee and Li. The two versions of the contract were different -- each had different parties and different terms. The jury found that Wang's version was the contract agreed upon by the parties in 1979, and found further that defendants wrongfully denied its existence.

C. Timing of Repudiation

Defendants next claim that neither side realized there was disagreement about any term of the agreement until Wang terminated the relationship and demanded a share of the accounts receivable and goodwill. They contend that it was only then that defendants "repudiated," or denied that Wang was an equity partner. Defendants argue that the timing of the repudiation distinguishes [*40] this case from *Gherman v. Colburn, 72 Cal. App. 3d 544, 140 Cal. Rptr. 330 (1977)*, in which (1) "the act of repudiation 'not only terminates the partnership, *but wrongfully destroys it*,'" quoting *Laughlin v. Haberfelde, 72 Cal. App. 2d 780, 788, 165 P.2d 544, 548 (1946)*, and (2) there is also the contemporaneous conversion of "all of the partnership assets," quoting *Gherman, 72 Cal. App. 3d at 557, 140 Cal. Rptr. at 338*. By contrast, defendants claim, first Wang terminated the partnership, and *then* the parties "realized they were at odds over a material term of their agreement;" furthermore, defendants contend, they did not convert all the partnership assets.

The general rule under the provisions of the Uniform Partnership Act is that [HN8] an "at-will" partnership (one without any definite term or undertaking to be accomplished) can be dissolved by a partner at any time. "The significance of the partnership being one at will . . . is that any partner may freely elect to dissolve, and such election is neither wrongful nor triggers the statutory remedies for premature dissolution."

A. [*41] Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership ["Bromberg & Ribstein"]* (1988) § 7.20. This exercise of the right to dissolve an at-will partnership, however, "must be exercised in good faith and consistently with the fiduciary duties among the partners." *Id.* By contrast, a partner has no right to dissolve a partnership formed to continue for a definite term or a particular undertaking. Because the partners have agreed to enter into association with each other for a certain length of time, it is a breach of contract to act so as to end the association before the time has expired. *Id.* at

§ 7.03. A partner in this second kind of partnership who causes a premature dissolution "in contravention of the partnership agreement" can be held liable for damages. *Id.*

Although the U.P.A. does not explicitly so provide, courts in most states have determined that [HN9] partners are generally precluded from the adjudication of partnership claims other than in connection with a formal accounting. [10] Thus, the rule in California, which has adopted the Uniform Partnership Act as *California Corporations Code sections 15001 to 15045*, is that there can ordinarily be but one form [*42] of action between partners -- an action for judicial dissolution and accounting under *California Corporations Code section 15038*. [11] A significant exception to this rule is that

where one partner excludes the other, repudiates the very existence of the partnership and converts all of the partnership assets, the victim may sue for damages without seeking a judicial dissolution and an accounting. The reason for the exception is obvious: the guilty partner has breached (i.e., repudiated) the basic agreement which created the partnership. He denies the very existence of the partnership.

Gherman, 72 Cal. App. 3d at 557-58, 140 Cal. Rptr. at 338-39 (citations omitted).

10 In an accounting, the court conducts a comprehensive investigation of the transactions of the partners, adjudicates their respective rights, and divides up the assets of the partnership among them. *Bromberg & Ribstein* at § 6.08.

11 *California Corporations Code section 15038* (U.P.A. section 38) pertains to the rights of partners to the application of partnership property -- or, what happens to the partnership property upon the dissolution of the partnership. Subsection (a) provides, in essence, that an accounting is the appropriate remedy "when dissolution is caused in any way, except in contravention of the partnership agreement." Subsection (b) provides that "when dissolution is caused in contravention of the partnership agreement," a partner who has not caused dissolution wrongfully is entitled to the remedies set forth in subsection (a), and has, in addition, the right to damages for breach of the agreement. A partner who has caused the dissolution wrongfully has only the rights set forth in subsection (a).

[*43] In *Gherman,* plaintiffs and defendants entered into an oral agreement of joint venture with respect to the acquisition and sale of certain real property, with the proceeds of the sale, including the profits, to be distributed in a specified manner among plaintiffs and defendants. Plaintiffs brought suit, claiming that they had performed what was required of them by the terms of the agreement, or had been prevented from doing so by defendants, who had wrongfully repudiated the agreement and converted all the joint venture assets to themselves. Plaintiffs subsequently dismissed their cause of action for dissolution of the joint venture. On the first day of trial, defendants moved to file a cross-complaint seeking judicial dissolution and accounting, pursuant to *California Corporations Code section 15038. See supra* note 11. The court denied the motion. At trial, defendants denied the existence of the joint venture, but the jury found for the plaintiffs. The defendants appealed on the ground that *section 15038* provides that there can be but one form of action between partners.

The California Court [*44] of Appeal affirmed the judgment, rejecting defendants' contentions that there can be but one form of action between partners or joint venturers. The court held that while it is true that California cases have held that a partner may not file an action at law for breach of contract in the performance of a partnership agreement not amounting to a wrongful dissolution, such an action *is* maintainable between partners (as contracting parties, rather than as partners) when there has been "a *repudiation* of the basic concept -- a denial of the very existence of a partnership or joint venture relationship in any form or at any time and a conversion of the partnership assets." *Gherman, 72 Cal. App. 3d at 563-64, 140 Cal. Rptr. at 343*. Because "it is axiomatic that every contract contains an implied covenant of good faith, and implied within that covenant is a covenant that there will not be a denial of the existence of the contract," the court found that plaintiffs were entitled to maintain an action for damages "for what in ultimate effect [was] a repudiation of the agreement." *Id. at 564, 140 Cal. Rptr. at 343*.

[HN10] Wrongful [*45] repudiation under *Gherman* thus takes place when one partner denies the existence of the partnership agreement. Such conduct "not only terminates the partnership, but wrongfully destroys it." *Barlow v. Collins, 166 Cal. App. 2d 274, 278, 333 P.2d 64, 66 (1958)*. In the dispute between Wang and the Taipei partners, the jury found that Wang and the defendants agreed in 1979 that Wang would be an equity partner in the Taipei firm of Lee and Li. *See* Special Verdict, question 1. Jury Instruction No. 25, *see supra* note 9, sets forth the terms of the relevant partnership agreement. The jury then found that defendants had wrongfully repudiated the agreement that they had with Wang. *See* Special Verdict, question 3a. The jury was instructed that "wrongful repudiation is the denial of existence of the agreement despite the knowledge that said agreement did in fact exist." Jury Instruction No. 27. [12]

12 Instruction No. 27 read as follows: Jury

"Once you have determined the terms of the 1979 Agreement, you should consider whether either party wrongfully repudiated that agreement. Wrongful repudiation is the denial of existence of the agreement despite the knowledge that said agreement did in fact exist."

[*46] Defendants place a great deal of emphasis on their contention that Wang, and not defendants, dissolved the partnership. Wang dissolved the partnership after he received a copy of a letter dated March 20, 1987, written by Paul Hsu to Richard M. Brennan, stating that Wang was acting independently of Lee and Li. Plaintiff's Trial Exhibit 89. When he read the letter, Wang also noticed that Lee and Li had removed his name from the firm letterhead. Wang determined to dissolve the partnership *because of* defendants' wrongful conduct in denying his partnership in Lee and Li. Defendants' misconduct was the impetus behind the dissolution. *See Vangel v. Vangel, 116 Cal. App. 2d 615, 626, 254 P.2d 919, 926 (1953).* [13] Nonetheless, the question whether defendants' conduct prior to Wang's declaring dissolution amounts to an implied repudiation is mooted by defendants' subsequent express denial of the existence of the partnership agreement. Defendants' conduct establishes the causal link sufficient to trigger the remedies of *California Corporations Code § 15038(b)* as they pertain to wrongful repudiation.

13 Although the agreement at issue in *Vangel* related to a partnership for a fixed term, the court's observation is nevertheless relevant here: "In some cases where the breach is serious and unequivocal, [the court may decree the dissolution] as of the date of the breach. In such cases misconduct really dissolves the partnership, the court decree merely giving legal effect thereto." *116 Cal. App. 2d at 626, 254 P.2d at 926.*

[*47] When Wang wrote the letter dated April 15, 1987 to defendants to demand an accounting, defendants responded that there had never been any partnership contract to begin with. By comparison, in *Gherman,* the plaintiff had not sought any judicial relief whatsoever when the defendants denied the existence of the joint venture. The *Gherman* court ruled that in addition to the right to an accounting provided by Corporations Code *section 15038(b)*, the plaintiff had a right to sue for damages. This court can discern no legal significance in the timing of the actual words of repudiation. Whether defendants denied the existence of the partnership contract before or after Wang announced that he intended to seek dissolution and an accounting should not determine whether Wang can seek *section 15038(b)* remedies. By wrongfully repudiating, the wrongdoer "seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." *Foley v. Interactive Data Corp., 47 Cal. 3d 654, 688, 254 Cal. Rptr. 211, 231, 765 P.2d 373, 393*, quoting *Seaman's Direct Buying Service v. Standard Oil Co., 36 Cal. 3d 752, 769, 206 Cal. Rptr. 354, 363, 686 P.2d 1158, 1167 (1984).* [*48] Public policy strongly disfavors letting a wrongdoer profit from his wrongdoing. Thus, [HN11] it is irrelevant whether the innocent party attempts to dissolve before or after the wrongful repudiation. The court finds accordingly that Wang is entitled to the same remedies as the plaintiff in *Gherman.*

Defendants urge further that there is no evidence that defendants converted all the partnership assets or that defendants' actions caused the loss of Wang's entire partnership interests. The court does not agree. Apart from the fact that evidence presented at trial showed that defendants failed to pay Wang his fair share of firm income as an equity partner, failed to render a complete accounting of records of the partnership despite repeated requests, altered and destroyed books and records, and converted and secreted assets of the firm, inherent in defendants' denial of the existence of the partnership contract was a refusal to allocate to Wang his agreed-upon share of the partnership's assets. This wrongful withholding of partnership assets from a partner is certainly the constructive equivalent of conversion. Furthermore, whether defendants' actions caused Wang to lose only part and not [*49] all of his partnership interest is not determinative as to whether defendants wrongfully repudiated. Accordingly, the court finds that this portion of defendants' argument is entirely without merit.

D. Causal Relationship Between Repudiation and Dissolution

Finally, defendants assert that no evidence showed that repudiation by defendants caused dissolution and resulted in the conversion of the partnership assets. They also contend that Jury Instruction No. 27, which defined wrongful repudiation as "the denial of existence of the agreement despite the knowledge that said agreement did in fact exist," *see supra* note 12, did not correctly state the elements of wrongful repudiation. Defendants have instead devised a "tort" of wrongful repudiation containing the following elements:

1. Dissolution in "contravention of the partnership agreement" (Corp. Code *§ 15038*);

2. A link between the dissolution and wrongful conduct on the part of one or more of the partners. *(Barlow v. Collins, 166 Cal. App. 2d 274 (1958)* (tortious conduct destroying the partnership);

3. The wrongful dissolution must directly cause damage as in the conversion of the entire [*50] assets of the partnership. *(Gherman, 72 Cal. App. 2d at 563-64; Barlow, 166 Cal. App. 2d at 278.)*

See Memorandum of Points and Authorities in Support of Motion for Judgment NOV (As Specified); Motion for New Trial or, in the Alternative, for Remittitur ("Memo in Support"), filed September 14, 1990, at 10.

Although the court finds that defendants' objection to Jury Instruction No. 27 is untimely, [14] we nonetheless wish to emphasize that defendants' definition of wrongful repudiation is not the law. Therefore, we will address each argument defendants have raised in connection with their assertion of the elements necessary to the "tort" of wrongful repudiation. Defendants contend that the court should order a new trial because there is no evidence of dissolution in contravention of the partnership agreement (element (1)), and because the jury was not instructed (in Jury Instruction No. 27, or elsewhere) to find elements (2) and (3), and was consequently misled as to its duties and the law.

14 Defendants waived their objection to Jury Instruction No. 27 by not raising it at trial. *Fed. R. Civ. P. Rule 51* provides, in part, that "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Defendants did not object at trial on the ground that Jury Instruction No. 27 presented an improper test for wrongful repudiation; their only objection was that wrongful repudiation was "an unsupported condition precedent to the jury's consideration of defendants' contract and tort claims." Record of Objections to Court's Instructions and Special Verdict, filed June 7, 1990, at 2.

[*51] Regarding element (1), defendants claim that "contravention" under Corporations Code *section 15038(b), see supra* note 11, means more than "mere breach of the agreement." They contend that it does not apply to this case, but rather refers to a situation such as that in *Gherman,* which involved a complete exclusion of partners from a venture formed for a specific undertaking for a specific term -- in other words, the "denial of the very existence of the partnership or joint venture relationship in any form, at any time, and conversion of the assets." The court views this argument as little more than a re-hash of defendants' claim, already rejected by the court, that defendants did not deny the existence of the entire agreement, but rather disputed only Wang's interpretation of one term in the agreement.

Defendants urge further that because the relationship between Wang and defendants was at will, it did not fall within *section 15038(b).* Indeed, defendants claim that the fact that the parties had entered into an at-will relationship "draws into question either side's ability to establish wrongful repudiation." Memo in Support at 10. When no time is fixed for the duration or continuance [*52] of a partnership, such a partnership is "at will," and can be dissolved at any time. *Maryland Cas. Co. v. Little, 102 Cal. App. 205, 210, 282 P. 968, 970 (1929).* Because partners in an at-will partnership have no right to insist that the partnership proceed beyond a specific time, ordinarily no partner in such a partnership has a remedy arising from termination. *Rosenthal v. Gould, 273 Cal. App. 2d 239, 247, 78 Cal. Rptr. 244, 250 (1969)*

Defendants contend that the legal remedies provided under *section 15038(b)* are inapplicable to the at-will agreement between Wang and defendants, because the facts surrounding the dissolution of the partnership in this case do not meet the standard for "dissolution in contravention of the partnership agreement," set forth in *California Corporations Code section 15031(2).* [15] They claim that *section 15038* provides for an accounting remedy only, "unless the dissolution is 'wrongful,' that is, before the term or undertaking is completed." Defendants' Memorandum of Points and Authorities in Reply to Plaintiff's opposition to Motion for JNOV, New Trial, or Remittitur ("Defs' Reply"), filed [*53] October 18, 1990, at 11. Defendants argue that *sections 15031(2)* and *15038(b)* apply to wrongful dissolution only; and that although there may be wrongful *repudiation* in an at-will partnership, there can be no wrongful *dissolution,* because "at will" means that the partnership can be dissolved at any time by any partner without penalty.

15 *California Corporations Code section 15031* pertains to "causes of dissolution of partnerships." It specifies that partnerships may be dissolved either

(1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified in the agreement,

(c) By the express will of all the partners who have not assigned their interest or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) *In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provisions of this section, by the express will of any partner at any time;*

(3) By any event which makes the business of the partnership unlawful . .

(4) By the death of any partner, unless otherwise provided in an agreement in writing signed by all the partners . .

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 15032; [or]

(7) By withdrawal of a partner or admission of a partner, unless otherwise provided in an agreement in writing signed by all the partners

(emphasis added)

[*54] Defendants are playing with words. They are, in the words of the *Gherman* court, inviting this court "to join them in a quagmire of erudite, esoteric quicksand searching for the abstract philosophical theories . . . applicable to this action." *Gherman, 72 Cal. App. 3d at 556, 140 Cal. Rptr. at 337.* Defendants may have correctly interpreted *section 15038* insofar as it relates to the *Gherman* court's ruling, but the court does not agree with defendants' contention that their actions did not reach the level of "dissolution in contravention of the partnership agreement."

Although it is true that "in contravention of the partnership agreement" can refer to the premature dissolution of a partnership agreement formed to continue for a definite term or for a particular undertaking, the *Gherman* court found that wrongful repudiation -- denial of the existence of the contract -- was an analogous act, triggering the remedies of *section 15038(b).* When Wang sought a dissolution of the partnership and demanded an accounting, defendants' response was to deny that Wang had ever been a partner in Lee and Li. Indeed, defendants "denied the very existence of [*55] the partnership relationship in any form at any time." Such a repudiation was "wrongful" because it was a denial "despite the knowledge that said agreement did in fact exist." It was "in contravention of the partnership agreement" because an essential predicate to such an agreement is the knowledge that the agreement exists.

Thus, the court does not agree that the remedies of *section 15038(b)* apply to "premature" dissolutions only, and not to wrongful repudiation as accomplished by defendants. The "at-will" distinction is significant in determining whether a partner has the right to *dissolve* the partnership at any time. [HN12] If, on the other hand, a partner *breaches* the partnership agreement by wrongfully repudiating it, or denying that it ever existed, then whether the agreement was at will or not is irrelevant for purposes of the availability of the remedies of *section 15038(b).*

In the present case, the weight of evidence supports the jury's finding that defendants wrongfully repudiated, or denied the very existence of, the partnership agreement between Wang and defendants. This repudiation was clearly accomplished "in contravention of the agreement between the partners." To hold [*56] otherwise would be to allow a partner in an at-will partnership to freely repudiate the existence of the partnership agreement whenever one of his or her fellow partners decided to exercise the right to seek dissolution and an accounting. Public policy would be poorly served by allowing a defendant who had wrongly denied the existence of such an agreement to avoid tort or contract liability simply because he or she waited to repudiate until the plaintiff demanded dissolution as a matter of right. Consequently, the court finds that the remedies of *section 15038(b)* do apply in this case, as in *Gherman.*

As for element (2) of defendants' version of the "tort" of wrongful repudiation, defendants claim that there were no instructions or jury findings on the question of whether any partner caused the dissolution wrongfully. The court agrees with defendants that breach of contract in the performance of a partnership agreement may not be enough to amount to wrongful dissolution, *Gherman, 72 Cal. App. 3d at 563-64, 140 Cal. Rptr. at 342-43,* and that the breach must be so serious that it "destroys the partnership," *Barlow, 166 Cal. App. 3d at 268, 333 P.2d at 66.* [*57] Defendants are not correct, however, when they urge that "the facts of this case did not remotely reach the level of an implied dissolution by defendants before Wang himself declared a dissolution" and that "there was not a complete exclusion of plaintiff from the partnership coupled with complete conversion of assets nor did defendants completely refuse to perform the agreement." Memo in Support at 14. Defendants' suggestion that a distinction should be made between "dissolution" (the language of *section 15038*) and "repudiation" (the language of *Gherman)* is a thinly-disguised attempt to obfuscate the clear holding of *Gherman.*

The jury in this case was instructed to determine whether the defendants had denied the existence of the contract. The jury found that the defendants wrongfully repudiated the agreement by denying that Wang was an

equity partner. In so doing, defendants excluded Wang from the partnership and completely refused to perform the partnership agreement. In discussing the remedies for wrongful dissolution, the *Gherman* court analyzed the language of *section 15038* thus:

It is regrettable that the words "breach" and "repudiation" are sometimes used interchangeably, [*58] but there is a technical difference. According to Black's Law Dictionary (rev. 4th ed. 1968), a "breach of contract" is the "failure, without legal excuse, to perform any promise which forms the whole or part of a contract" whereas according to the same authority "repudiation" means the "rejection; disclaimer, renunciation; . . . of a duty or relation." When read in its entirety, Corporations Code *section 15038* in speaking of wrongful dissolution of the partnership and expulsion of a partner in "contravention of the agreement" creating the "right" to damages for "breach of the agreement" *we believe the Legislature was using the word "breach" in the sense of "repudiation." The word "breach" obviously relates back to the word "contravention" and we interpret the word contravention to include a repudiation.*

Gherman, 72 Cal. App. 3d at 564, 140 Cal. Rptr. at 343 (emphasis added). It was not necessary for this court to ask the jury whether defendants' denial of the existence of the contract caused the dissolution. The causal relationship was established by operation of law. *See Cal. Civ. Code § 15031(2)*, *supra* note 15. Accordingly, the [*59] court finds that defendants' argument regarding element (2) is without merit, because the jury was adequately instructed as to wrongful dissolution by Jury Instruction No. 27 ("Wrongful Repudiation").

As for element (3), defendants argue that the failure of the court to instruct the jury that the wrongful dissolution must cause damage has prejudiced defendants. *See* Memo in Support at 14-15; Defs' Reply at 13. The court is simply unable to follow defendants' argument here. The significant issue concerning causation is whether Wang is entitled only to damages directly caused by the repudiation, or whether he is entitled to damages flowing from any proven breach of the agreement. *Section 15038(b)* has no limiting language; it provides only that the partner not causing the wrongful dissolution has a right to damages for breach of the agreement. The jury was instructed to find who the parties to the contract were and what the terms were -- that is, which version of the contract had the parties agreed to in 1979. *See* Jury Instruction No. 24, *supra* note 4. The jury was then instructed that, once it had determined what the terms of the agreement were, and if it found that one or [*60] both of the parties breached the terms of that agreement, it should then determine whether that breach was "a substantial factor in causing any damage to the non-breaching party." Jury Instruction No. 29. [16] The jury was also instructed to find what the damages to the non-breaching party were. *See* Jury Instructions Nos. 31-34. Following these instructions, the jury found that the defendants had both breached and wrongfully repudiated the agreement with Wang, and also that Wang had suffered damages. Defendants were in no way prejudiced by the lack of an instruction that specifically directed the jury to find whether "wrongful dissolution caused damage."

16 Jury Instruction No. 29 read as follows:

> Once you have decided among yourselves the nature and terms of the agreement between plaintiff and defendants, you should consider whether either the plaintiff or the defendants, or both, breached one or more of the material terms of the agreement. If so, you should proceed to determine whether the breach or breaches were a substantial factor in causing any damage to the non-breaching partys.

[*61] For the foregoing reasons, the court concludes that Wang presented substantial evidence of wrongful repudiation, and that the jury's finding was not against the weight of evidence.

2. SPECIAL VERDICT IS INCONSISTENT

Defendants argue that the special verdict is inconsistent because the jury finding on wrongful repudiation is irreconcilable with the finding of no denial of liability in bad faith: The jury checked "yes" in response to special verdict question 3(a) ("Do you find that defendants wrongfully repudiated their agreement with plaintiff?") but checked "no" to special verdict question number 10 ("Do you find that defendants denied liability under the contract in bad faith?").

Defendants urge that in attempting to reconcile the special verdict findings, the court should look to the instructions. Defendants contend that "wrongful repudiation" and "bad faith denial" are identical because they were both defined in the jury instructions (Jury Instruction No. 27 and Jury Instruction No. 36(2)) as "denial of the existence of the [partnership] agreement." Because the jury found, however, that the defendants *did* wrongfully repudiate, but that they *did not* deny liability in bad [*62] faith, defendants conclude that the special verdict is irreconcilably inconsistent.

The two jury instructions are not identical. Jury Instruction No. 27, *see supra* note 12, simply defined wrongful repudiation as "the denial of the existence of the agreement despite the knowledge that said agreement did in fact exist." This instruction was drafted based on *Gherman. 72 Cal. App. 3d at 564, 140 Cal. Rptr. at 343.* By contrast, Jury Instruction No. 36 (bad faith denial)

instructed the jury that to recover for bad faith denial of contract, Wang had the burden, first, of proving by clear and convincing evidence that he had entered into an equity partnership agreement with defendants, and then, of proving by a preponderance of the evidence that defendants had denied the existence of that agreement in bad faith, and that the denial caused him damage. Jury Instruction No. 36 also instructed the jury that to establish that defendants' denial was in bad faith, Wang had to prove that defendants knew at the time of their denial that the equity partnership agreement did in fact exist. Defendants contend further that the definition of wrongful repudiation in Jury [*63] Instruction No. 27 is identical to the legal test and instruction given for bad faith denial of contractual liability in *Seaman's Direct Buying Service,* in which the California Supreme Court declared,

> It is well settled that, [HN13] in California, the law implies in *every* contract a covenant of good faith and fair dealing. Broadly stated, that covenant requires that neither party do anything which will deprive the other of the benefits of the agreement.
>
> * * * * *
>
> [A] party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists.

36 Cal. 3d at 768-69, 206 Cal. Rptr. at 362-63, 686 P.2d at 1166-67 (citations omitted) (emphasis in original). Defendants then argue that inconsistent responses to the special verdict provide a basis for both JNOV and a new trial. They claim that "reversal of judgment and new trial will occur where judgment is entered on a special verdict containing inconsistent answers," citing an Eleventh Circuit case, *Aquachem Co. v. Olin Corp., 699 F.2d 516, 521 (11th Cir. 1983).* [*64]

Aquachem also states, however, that [HN14] "the *Seventh Amendment* demands that, if there is a view of the case which makes the jury's answers consistent, [the] court must adopt that view." According to the Eleventh Circuit, the test to be applied in reconciling apparent conflicts between the jury's answers is "whether the answers may fairly be said to represent a logical and probable decision of the relevant issues as submitted." *Id.* The Ninth Circuit takes a similar position; it holds that the right to a jury trial guaranteed by the *Seventh Amendment* requires that a court validate the verdict by "reconciling the jury's special verdict responses on any reasonable theory consistent with the evidence." *Pierce v. Southern Pacific Transp. Co., 823 F.2d 1366, 1370 (9th Cir. 1987)*; *Ortiz v. Bank of America Nat. Trust & Sav. Ass'n, 852 F.2d 383, 388 (9th Cir. 1987).* "If 'there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.'" *Ward v. San Jose, 737 F. Supp. 1502, 1505 (N.D. Cal. 1990)*, quoting *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364,* [*65] *reh. denied, 369 U.S. 882 (1962).* If, on the other hand, "after careful consideration, the answers cannot be reconciled, a new trial must be ordered." *Bourque v. Diamond M. Drilling Co., 623 F.2d 351, 353 (5th Cir. 1980)*; *Tanno v. S.S. President Madison VES, 830 F.2d 991, 992 (9th Cir. 1987).*

Defendants have made the same error here as they did in their analysis of wrongful repudiation in section 1(D), *supra.* According to *Seaman's,* a party to a contract who denies, "in bad faith and without probable cause, that the contract exists," may incur tort liability. *36 Cal. 3d at 768-69, 206 Cal. Rptr. at 363, 686 P.2d at 1167*; *see also Foley, 47 Cal. 3d at 688, 254 Cal. Rptr. at 231, 765 P.2d at 393.* As explained above, Jury Instruction No. 36 set forth the elements of bad faith denial of contract in this case as (1) Wang and defendants entered into an equity partnership agreement; (2) defendants denied the existence of the equity partnership agreement; (3) defendants' denial was in bad faith; and (4) that denial caused damage to Wang. Wrongful [*66] repudiation, by contrast, is not in itself an independent tort. Rather, as Wang states in his opposition, "it is conduct which, if proved, allows a partner to circumvent the normally exclusive accounting remedy and sue the other partners in contract or in tort." Opposition to Motion for Judgment N.O.V. and New Trial or Remittitur ("Pltf's Opp."), filed October 11, 1990, at 45.

Reconciling the responses to special verdict questions 3(a) and 10 is a simple matter. In order to find bad faith denial of liability, the jury in this case was required to find all the elements listed in Jury Instruction No. 36, including that Wang had suffered damage because of defendants' bad faith denial. Since the jury found no damage (Special Verdict, question 11), there could be no finding of bad faith denial. The jury could have reasonably concluded that Wang suffered damages from defendants' breach of contract, breach of fiduciary duty, and fraud, without also necessarily finding additional damages from bad faith denial of liability. "'Inconsistent jury verdicts upon different counts or claims are not an anomaly in the law, which at times recognizes a jury's right to an idiosyncratic position, provided [*67] the challenged verdict is based upon the evidence and the law.'" *Ward, 737 F.Supp. at 1505*, quoting *Malm v. United States Lines Company, 269 F.Supp 731, 731-32 (S.D.N.Y.), aff'd, 378 F.2d 941 (2d Cir. 1967).* Thus, the court finds no inconsistency in the special verdict.

3. WANG'S LEGAL CLAIMS

Defendants argue that there is inadequate evidence to support Wang's legal claims, and concomitantly, that

there is no substantial evidence of damages for either the tort or contract claims. They contend (a) that the jury's finding of fiduciary breach is against the weight of evidence; (b) that the contract and fraud claim findings are against the weight of evidence; and (c) that the defamation award is unsupported by evidence.

A. Findings re Fiduciary Breach

Wang alleged that the defendants breached their fiduciary duty by (1) intentionally failing to fully disclose Lee and Li's financial records; (2) intentionally failing to fully pay Wang the amounts he was due under the parties' agreement; and (3) using partnership assets for personal and non-partnership business. *See* Jury Instruction No. 88. The jury was instructed that [*68] in order to prevail on his claim for breach of fiduciary duty, Wang had to establish by a preponderance of the evidence (1) that the defendants committed the acts alleged; (2) that these acts constituted a breach of duty of full disclosure, good faith, or loyalty; and (3) that Wang suffered injury as a result of the breach of duty. Jury Instruction No. 90. The jury was instructed further that "an injury is caused by a breach of fiduciary duty if the breach was a substantial factor in bringing that injury about." Jury Instruction No. 91. The jury found that the defendants breached their fiduciary duties to Wang, and determined that damages should be awarded. Special Verdict questions 22-25.

Defendants argue that the jury's finding of fiduciary breach as to the first two wrongs listed in the fiduciary breach instruction is against the weight of evidence. [17] They claim that the evidence was uncontradicted that Wang was given financial information on profit distributions.

17 Defendants discuss the first two "wrongs" listed in the fiduciary breach instruction together because they claim the two are duplicative, in that defendants' failure to disclose financial records could cause no damage to Wang other than causing him not to receive the amounts he was due as his profit share under the agreement.

[*69] The Taipei partners' breach of fiduciary duty lay at the heart of this case, since defendants wrongly denied that Wang had ever been a partner. The evidence showed that defendants refused to provide any accounting, refused to allow Wang access to the financial records of the Taipei office, refused to provide copies of tax returns showing the Taipei partners' income, refused to properly account for funds received from clients, failed to promptly bill clients for work performed by the San Francisco office, and failed to promptly remit to Wang money owed to him for promotional expenses, thereby creating a cash squeeze in the San Francisco office of Lee and Li. Evidence also showed that the defendants had altered books to move money received from clients during the period of the partnership to the period after Wang sent the dissolution letter, and had taken as tax deductions promotional expenses incurred by the San Francisco office for which Wang had never been reimbursed. Plaintiff's expert accountant, Karen Kluska, testified that substantial amounts of Lee and Li income may never be recovered; she based her opinion on missing debit notes, aging of accounts receivable, analysis of billing [*70] capacity, cessation of deposits to known foreign bank accounts, decline of reported income in 1986, and delay in recording partnership fees.

Defendants claim that the third allegation listed in the fiduciary breach instruction -- that defendants used partnership assets for personal and non-business purposes -- was unsupported by any evidence. The evidence showed, however, that defendants invested Lee and Li funds in certificates of deposit held in their individual names and kept the interest for themselves; that defendants received hundreds of thousands of dollars for the purchase of luxury automobiles for personal use; that defendants spent over $ 1.5 million U.S. on "business entertainment;" and that Lee and Li paid $ 1.5 million on rent to Wu Shyr Corporation, owned by some defendants, their relatives, and certain firm associates.

Defendants also renew their objection to the submission of the fiduciary duty claim to the jury. [18] They contend that breach of fiduciary duty is not an independent cause of action, but an element of, and "often a misnomer for," constructive fraud. [HN15] In the absence of wrongful dissolution, a breach of fiduciary duty by a partner ordinarily gives rise to [*71] the remedy of accounting. *California Corporations Code § 15038.* Defendants claim, however, that when breach of fiduciary duty results in wrongful dissolution, "the recognized tort remedy, which incorporates a fiduciary breach as an element, is constructive fraud." They insist that fiduciary breach "does not exist as a free floating, separate tort, but must be paired with another cause of action," Defs' Reply at 29, and that breach of fiduciary duty is but one of the five elements required to prove constructive fraud, citing *Younan v. Equifax, Inc., 111 Cal. App. 3d 498, 516 n.14, 169 Cal. Rptr. 478, 489 n.14 (1980).*

18 Defendants to a breach of objected submitting fiduciary duty claim to the jury in their Record of Objections to Court's Instructions, filed June 7, 1990, at 11.

[HN16] Fraud is either actual or constructive. *Cal. Civ. Code § 1571.* The jury in this case was instructed regarding actual fraud, both as to fraudulent representation and as to fraudulent concealment. *See* Jury [*72] Instructions Nos. 39-46. The jury was not instructed as to constructive fraud, since neither party alleged it. A brief

discussion of constructive fraud is necessary here, however, to explain why and how breach of fiduciary duty can be both an independent tort and an element of the cause of action for constructive fraud.

[HN17] Constructive fraud consists of "any breach of duty which, without actually fraudulent intent, gains an advantage for the person in fault . . . by misleading another [person] to his [or her] prejudice," and it also exists where conduct, though not actually fraudulent, ought to be treated as such because it has all the actual consequences and all the legal effects of actual fraud. *Cal. Civ. Code § 1573*; *Devers v. Greenwood, 139 Cal. App. 2d 345, 348, 293 P.2d 834, 837 (1956)*. "To constitute positive or actual fraud there must be . . . an intentional deception. Constructive fraud, on the other hand, is presumed from the relation of the parties to a transaction, or the circumstances under which it takes place." *Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal. 2d 501, 525, 86 P.2d 102, 114 (1939)*. Constructive [*73] fraud thus arises when the parties to a contract have a special confidential or fiduciary relation, and one of the parties breaches a duty arising from the confidential relationship, inducing justifiable reliance by the other to his prejudice. *Darrow v. Robert A. Klein & Co., 111 Cal. App. 310, 315-16, 295 P. 566, 568 (1931)*; *Guthrie v. Times-Mirror Co., 51 Cal. App. 3d 879, 889, 124 Cal. Rptr. 577, 584 (1975)*. This requirement that the duty arise from the confidential relationship distinguishes constructive fraud from other forms of fraud, including negligent misrepresentation, which may occur in any kind of relationship. *Byrum v. Brand, 219 Cal. App. 3d 926, 938-39, 268 Cal. Rptr. 609, 617 (1990)*.

[HN18] "Confidential relationship" embraces both fiduciary relations and other, more informal, relations that exist whenever one person trusts in and relies on another. *See Estate of Davison, 256 Cal. App. 2d 807, 813, 64 Cal. Rptr. 514, 517 (1967)*. Although "fiduciary" and "confidential" are used interchangeably, "fiduciary relationship" technically refers to a specific [*74] kind of recognized legal relationship such as those between guardian and ward, trustee and beneficiary, principal and agent, and attorney and client, whereas "confidential relationship" may be founded on moral, social, domestic, or merely personal relationships as well as on legal relationships. *Barbara A. v. John G., 145 Cal. App. 3d 369, 382-83, 193 Cal. Rptr. 422, 431 (1983)*; *see* 1 Witkin, *Summary of California Law,* Contracts 401 (9th ed. 1988). In other words, all fiduciary relationships are confidential relationships, but confidential relationships encompass more that fiduciary relationships. Constructive fraud requires the existence of a confidential relationship, but not necessarily a fiduciary relationship.

[HN19] A partnership is an association of two or more persons to carry on as co-owners a business for profit. *Cal. Corp. Code 15006*. Partners are trustees, and therefore fiduciaries, of each other. "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior." *Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 546 (1928)*.

[*75]

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

Cal. Corp. Code. § 15021. The United States Supreme Court elaborated on the principle set forth in U.P.A. section 21 (*Cal. Corp. Code § 15021*) in *Latta v. Kilbourn:*

[HN20] One partner cannot, directly or indirectly, use partnership assets for his own benefit; . . . he cannot in conducting the business of the partnership, take any profit clandestinely for himself; . . . he cannot carry on the business of the partnership for his private advantage; . he cannot carry on another business in competition or rivalry with that of the firm

150 U.S. 524, 541 (1893). And the California Supreme Court has held that

partners are trustees for each other, and in all proceedings connected with the conduct of the partnership, every partner is bound to act in the highest good faith to [each] copartner and may not obtain any advantage over [any copartner] in the partnership affairs by the slightest [*76] misrepresentation, concealment, threat, or adverse pressure of any kind. A partner has no right to deal with the partnership property other than for the sole benefit of the partnership.

Llewelyn v. Levi, 157 Cal. 31, 37, 106 P. 219, 221 (1909) (citations omitted). The fiduciary duty of partners thus encompasses significantly more than the duty to disclose.

A careful reading of *Younan* reveals that the court in that case did not say, as defendants urge, that breach of fiduciary duty is not a separate tort, but rather a single element of the tort of constructive fraud. The *Younan* court first explained that "unlike *actual fraud,* constructive fraud depends upon the existence of a fiduciary relationship of some kind." *Younan, 111 Cal. App. 3d at 516, 169 Cal. Rptr. at 489* (emphasis in original). The court then stated (in a footnote), without citation, "The elements of the cause of action for constructive fraud are (1) fiduciary relationship; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive; and (4) reliance and

resulting injury (causation). *Id.* at n.4. [19] Later in the opinion, however, [*77] the court added, "The fraud [in constructive fraud] consists of the breach of the *fiduciary duty* of disclosure of relevant matters arising from the relationship." *Id. at 517, 169 Cal. Rptr. at 489* (emphasis in original). The court described the "breach of fiduciary duty" element of constructive fraud as the breach of a particular kind of fiduciary duty -- that is, the "duty of disclosure of relevant matters arising from the relationship." Because constructive fraud requires the existence of a fiduciary duty of disclosure, it seems fair to interpret the *Younan* court's use of the term "breach of fiduciary duty" to refer to the limited breach of the general duty to disclose that applies to any confidential relationship. The fact that this particular variety of breach of fiduciary duty may be an element of the tort of constructive fraud does not therefore mean that there can be no separate tort of breach of fiduciary duty.

19 action for The same elements of the cause of constructive fraud are identified by Witkin. 5 Witkin *California Procedure,* Pleading § 666 (3d ed. 1987).

[*78] Indeed, the courts of California have long recognized breach of fiduciary duty as a common tort. For example, in *Prince v. Harting, 177 Cal. App. 2d 720, 2 Cal. Rptr. 545 (1960)*, an action by partners against a partner for fraudulent breach of the fiduciary duty owed by him to them, the court declared, "We think that such a fraudulent breach is a tort." *Id. at 729, 2 Cal. Rptr. at 550.* The elements of such a claim are 1) duty, 2) breach, 3) causation, and 4) resulting injury. *See, e.g., Moore v. Regents of the University of California, 51 Cal. 3d 120, 129-32, 271 Cal. Rptr. 146, 150-52, 793 P.2d 479, 483-85, reh. denied, 1990 Cal. LEXIS 3975 (1990); Bancroft-Whitney Co. v. Glen, 64 Cal. 2d 327, 347-53, 49 Cal. Rptr. 825, 838-44, 411 P.2d 921, 934-40 (1966).* Accordingly, the court finds that the jury was properly instructed regarding the claims of breach of fiduciary duty (Jury Instructions Nos. 88-90) and causation and damages (Jury Instruction No. 91).

B. Findings re Contract and Fraud Claims

The jury found [*79] that defendants breached their agreement with Wang, and that they also committed acts of fraud and deceit against him. Special Verdict, questions 6 and 14. Defendants claim that the contract and fraud claim findings are against the weight of evidence. Defendants reiterate that the only evidence presented by Wang concerned *post-dissolution* conduct of defendants, which defendants assert cannot support Wang's claims for either fraud or breach of contract. They repeat their argument that wrongful repudiation cannot apply to conduct after a relationship is terminated, and that a denial of Wang's equity status cannot therefore be the basis of a claim for damages. The court has already responded at length, *see* section 1, *supra*, to defendants' claim that there was no evidence supporting the finding of wrongful repudiation because Wang dissolved the partnership before defendants sent Wang the letter of repudiation. The same reasoning applies here.

Furthermore, the record is replete with evidence of defendants' fraud and breach of contract throughout the duration of the partnership, from 1979 through April, 1987. For example, evidence showed that defendants concealed partnership [*80] income from Wang and refused to properly account for funds received from clients, and also that defendants failed to cooperate with Wang in the furtherance and development of the partnership business. The court concludes therefore that the contract and fraud claim findings are not against the weight of evidence.

C. Findings re Defamation

Wang alleged that defendants committed the following two acts of defamation: 1) defendants caused the "infringement notices" to be published in the Taipei newspapers on November 10, 1987; and 2) defendant Paul Hsu stated to Joseph Bainton at a dinner party that Wang was a "crook" and that he had never been a partner of Lee and Li. The jury found that the defendants committed acts of defamation against Wang, and awarded him $ 1,065,000 in general damages, and $ 3,195,000 in punitive damages. Special Verdict, questions 48-51.

Defendants now argue that the defamation award is unsupported by evidence. Defendants claim 1) that the jury finding that Wang deliberately infringed and committed fraud and deceit establishes the defense of truth; 2) that because the infringement notices are not defamatory *per se,* Wang cannot recover since he failed to [*81] introduce evidence of special damages; 3) that the compensatory award for slander is unsupported by the evidence and is so excessive as to manifest jury confusion, passion, or prejudice; 4) that the punitive damages award for defamation cannot stand because it was the result of passion and prejudice, and cannot stand insofar as there was no evidence of compensatory damages. This order will address the defense of truth claim here, and will discuss the damages issues in section 4, "Wang's Damages."

The jury found that Wang committed acts of fraud and deceit against the defendants, [20] and awarded defendants general damages of $ 200,000. Special Verdict, questions 18-19. The jury also found that Wang deliberately infringed the Lee and Li service mark, [21] but awarded no damages. Special Verdict, questions 30-32. Defendants argue that the jury finding that Wang delib-

erately infringed and committed fraud and deceit establishes the defense of truth as to both the infringement notices and the "crook" statement.

20 In Jury Instruction No. 41 (Fraudulent Representation) the jury was instructed that defendants had sued for damages based on the following representations that defendants claimed were false and fraudulent: 1) Wang represented to defendants that he tendered to the Taipei office, pursuant to the 1979 contract, accurate records of the San Francisco office's expenses and billings, and 2) Wang represented that he was willing and able to devote his full attention and loyalty to the management and promotion of the San Francisco office for the benefit of Lee and Li. In Jury Instruction No. 44 (Fraudulent Concealment) the jury was instructed that defendants claimed that Wang had engaged in the following activities: 1) Wang wrongfully registered Lee and Li service marks in his own name in various jurisdictions around the world; 2) Wang failed to render to the Taipei office true accounts of the billings and other monies received by the San Francisco office; 3) Wang appropriated as his own certain San Francisco revenues, Taipei revenues, and other firm property in which the Taipei office was entitled to share; 4) Wang wrongfully diverted legal matters to other Taipei law firms; 5) Wang told clients the Taipei office was not competent to handle legal services for them; and 6) in preparing for his separation from Lee and Li and without advising defendants, Wang took affirmative steps to advance his own interests to the detriment of defendants' interests.

[*82]

21 registered the Lee and Li name in Defendant C.V. Chen Taiwan in 1982. Wang registered the name as a service mark with the United States Patent and Trademark Office in 1983, and with the California Secretary of State in 1986. Lee and Li contended that it was the exclusive owner of the service marks, and Wang did not contest that he registered the name on behalf of Lee and Li, despite the designation of himself as the registrant. *See* Jury Instruction No. 67. Wang contended, however, that the defendants consented to his use of the Lee and Li name. *See* Jury Instruction No. 73. In Jury Instruction No. 70 the jury was instructed as follows:

To establish liability for service mark infringement, defendant Lee and Li must prove by a preponderance of the evidence that :

1. Lee and Li had established its name as its exclusive service mark in Taiwan and California before or during the relevant period; and

2. Plaintiff used the Lee and Li name or similar name after April 15, 1987, in a manner which was likely to cause confusion among clients or prospective clients regarding the source of legal services.

[*83] [HN21] Both libel and slander are defined as "false and unprivileged publications." *Cal. Civ. Code §§ 45*-46. Consequently, truth is a complete defense to a defamation claim. [22] *Washer v. Bank of America, Nat. Trust & Sav. Ass'n, 87 Cal. App. 2d 501, 509, 197 P.2d 202, 207-08 (1948)*. The infringement notices stated that Wang was using the Lee and Li service mark "without authorization." The jury found that Wang had deliberately infringed on defendants' service mark. Special Verdict, questions 30 and 32. Defendants thus argue that these jury findings of deliberate infringement establish that the infringement notices were true.

22 *See* Jury Instruction No. 62.

The court finds, however, that these limited findings in favor of defendants do not establish the defense of truth. The jury was instructed that "[a] partner who joins a preexisting partnership operating under an established service mark, and thereafter withdraws from said partnership, may not establish a competing enterprise [*84] under the partnership's firm name without the actual or implied consent of the partnership." Jury Instruction No. 69. The jury was further instructed that to establish liability for service mark infringement, Lee and Li was required to prove that "it had established the name as its exclusive service mark in Taiwan and California before or during the relevant period" and that Wang had used the Lee and Li name after April 15, 1987 "in a manner which was likely to cause confusion among clients or prospective clients regarding the source of legal services." Jury Instruction No. 70. Following these instructions, the jury found that Wang had infringed defendants' service mark, since he had used the name "Lee and Li" after April 15, 1987, the date he notified the Taipei partners of his intention to seek a dissolution of the partnership. Special Verdict, question 30. But the jury also found that Wang did not continue to infringe upon the Lee and Li service mark after notice of defendants' objection to the infringement (the November 1, 1987 letter). Special Verdict, question 35. Consequently, it was not true on the date of the publication of the infringement notices that Wang was using the [*85] Lee and Li service mark without authorization. Moreover, the jury found (in Special Verdict, question 37) that defendants were barred from recovering for infringement (which necessarily occurred prior to the November 1st letter)

under the doctrines of laches and/or estoppel, since defendants either "unreasonably delayed in seeking to prevent him from using the Lee and Li service mark and . . . plaintiff detrimentally relied on such delay to his substantial prejudice [laches]," Jury Instruction No. 72, and/or gave Wang assurances "that he had defendants' consent to use the Lee and Li name [estoppel]," Jury Instruction No. 73.

In addition to stating that Wang was using the Lee and Li name "without authorization," the notices also stated that Wang had "applied, in his own name, for registration of the trademark and service mark of 'Lee & Li Law Firm' in Chinese and the English 'LEE AND LI' in other countries and regions (including Mainland China)." The jury found, however, that Wang had not fraudulently registered the Lee and Li name.

Special Verdict, question 47. Defendants argue that this jury finding is irrelevant to the issue of whether the statements in the infringement notices [*86] were true. They claim that

there is nothing the least bit defamatory about the statement that plaintiff had registered the name in other countries. The statement was completely true and made no accusation of wrongdoing, nor was there anything wrong with Wang, as an American, registering the name in the [People's Republic of China]. Rather the objective was defensive, intended to shield the Taipei attorneys from liability for violating ROC laws [prohibiting Taiwanese firms from doing business with the PRC].

Reply Memo at 26-27.

Nonetheless, the ads should be viewed in their totality, rather than as a collection of individual isolated sentences. The first sentence states that "At present, . . . Wang et al. are using without authorization, service marks that are identical or similar to [the Lee and Li mark]." The next sentence states that "he *also* applied, in his own name, for registration of [the Lee and Li mark] . . . in other countries." (Emphasis added). The final sentence states that the Lee and Li attorneys are "taking various legal actions to protect the legal rights against those involved in this litigation." The middle sentence, positioned as it is between the statement [*87] that Wang was using the mark "without authorization" and the statement that the Taipei attorneys were taking legal action to protect their rights, conveys the idea that Wang had no right to register the Lee and Li mark in his own name. But the jury found that Wang did not fraudulently register the Lee and Li mark; consequently, defendants have not established a truth defense as to the infringement notices.

Defendants also claim a truth defense as to the "crook" statement. Joseph Bainton testified that at a dinner he attended when he was in Taipei for the judicial conference, Paul Hsu said about Wang, in response to a comment by another guest about the infringement notices, "Isn't it ridiculous that he's practicing law in our name. He's a crook and we're going to take care of him" (or words to that effect.) Defendants assert that the jury findings that Wang had deliberately infringed the Lee and Li name, and the award of damages against Wang for fraud and breach of fiduciary duty established the truth of the "crook" statement.

As the California Supreme Court explained, in reference to the issue of whether the language in a certain newspaper article was libelous, "the publication should [*88] be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law and in the application of the rules of pleading, as by the question, 'What would be its natural and probable effect upon the mind of the average lay reader of the newspaper?'" *Stevens v. Snow, 191 Cal. 58, 63, 214 P. 968, 970 (1923). Webster's Third New International Dictionary* defines "crook" as "a person given to crooked or fraudulent practices: swindler, thief." The court is of the opinion that the average listener would interpret "crook," when used to refer to an attorney by his law partner, to indicate "criminal wrongdoing." Wang, however, was not on criminal trial in this case, and defendants lost the conversion claim they brought against him. Special Verdict, question 60. The court does not find that Wang's limited civil liability is a sufficient basis for a truth defense as to the issue of whether Wang was a "crook." As for the remainder of Paul Hsu's statement, since Wang was a partner in Lee and Li, it was not "ridiculous" that he was practicing under the Lee and Li name. Nor was Wang practicing law under the Lee and Li name without [*89] the consent of the other partners. Special Verdict, questions 35 and 37. Thus, defendants cannot claim a truth defense as to the statement that Wang was not entitled to practice law under the Lee and Li name.

4. WANG'S DAMAGES

The jury awarded Wang a total of $ 19,880,000 in damages, $ 7,100,000 compensatory and $ 12,780,000 punitive, as follows:

a. For breach of contract -- $ 2,840,000 compensatory;

b. For fraud and deceit -- $ 355,000 compensatory and $ 1,065,000 punitive;

c. For breach of fiduciary duty -- $ 2,840,000 compensatory and $ 8,520,000 punitive;

d. For defamation -- $ 1,065,000 compensatory and $ 3,195,000 punitive.

The jury awarded defendants $ 325,000 in compensatory damages, as follows:

a. For fraud and deceit -- $ 200,000 compensatory;

b. For breach of fiduciary duty -- $ 125,000 compensatory.

The court did not credit Wang with the jury's award of damages for breach of contract or for fraud and deceit because to do so would have been to allow a double recovery for a single injury. *Gherman* held that [HN22] a partner who has wrongfully caused a dissolution may be held liable to another partner for damages for breach of the partnership agreement. The innocent partner [*90] may 1) waive the tort or breach and sue to specifically enforce the partnership agreement, or submit to the repudiation and sue for damages for conversion, or 2) sue for breach of contract, or 3) sue in tort. *Gherman, 72 Cal. App. 3d at 564-65, 140 Cal. Rptr. at 343*. A plaintiff may plead all these remedies. They may be cumulative, *see id. at 564 n.12*, but a party is not entitled to receive a double recovery for a single injury. Wright & Miller, 18 *Federal Practice and Procedure* 775 (1981).

In its Memorandum re Judgment, filed August 30, 1990, the court explained that because Wang's claim for breach of contract was directly related to his claim for breach of fiduciary duty in that both stemmed from defendants' failure to perform duties under the partnership agreement, he could not recover for both breach of contract and breach of fiduciary duty. Similarly, Wang's claims of fraud and deceit based on false representations directly arose from his contract claims. Consequently, defendants' acts of fraud and deceit also constituted ordinary breaches of the partnership agreement, and Wang cannot recover on both causes of [*91] action.

Thus, the total amount of Wang's damages to be considered in this motion is $ 15,620,000, or $ 2,840,000 compensatory and $ 8,520,000 punitive for breach of fiduciary duty, and $ 1,065,000 compensatory and $ 3,195,000 punitive for defamation. In addition, the court will subtract as an offset the jury's award of $ 325,000 compensatory damages for Wang's acts of fraud and deceit and breach of fiduciary duty.

Defendants argue that the court should order a new trial, or if the court denies the motion for a new trial, defendants request that the denial be conditioned upon Wang's acceptance of a remittitur, because (a) the jury's award of damages is excessive; (b) Wang is precluded from recovering damages because the jury found him liable for breach of contract, breach of fiduciary duty, and fraud; and (c) the damages were erroneously computed pre-tax and including work in progress (WIP).

A. Jury's Award of Damages is Excessive

Defendants request remittitur or a new trial, arguing 1) that the compensatory damages are excessive and 2) that the punitive damage award is against the weight of evidence and is grossly excessive. [HN23] A jury's determination of damages is entitled to great [*92] deference by a trial court. Damages must be upheld unless the amount is clearly not supported by the evidence, or is grossly excessive, monstrous, or shocking to the conscience. *Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1044 (9th Cir. 1987), aff'd, Texaco, Inc. v. Hasbrouck, 110 S. Ct. 3142 (1990)*. [HN24] When a trial court, after viewing the evidence concerning damages in the light most favorable to the prevailing party, determines that the jury's award of damages is excessive, it has two alternatives: it may grant defendant's motion for a new trial, or deny the motion conditional upon the prevailing party accepting a remittitur, and the prevailing party is then given the option of either submitting to a new trial or accepting a reduced amount of damages which the court considers justified. *Fenner v. Dependable Trucking Co., 716 F.2d 598, 603 (9th Cir. 1983)*. If, however, the verdict is the result of passion or prejudice, or where it appears that the jury erred on the issues of damages and liability, the court is required to order a new trial. *Minnesota, St. Paul & Saute Ste Marie Ry. v. Moquin, 283 U.S. 520, 521-22 (1931)*. [*93] An oppressive verdict on the issue of punitive damages is a sound basis for granting a new trial, although in order to warrant the granting of a new trial on such a ground, the amount of the damages awarded must be such that it shocks the conscience of the court. *Consolidated Data Terminals v. Applied Digital Data Systems, Inc., 512 F.Supp 581, 590 (N.D. Cal. 1981), aff'd in part and rev'd in part, 708 F.2d 385 (9th Cir. 1983)*.

[HN25] In a diversity action where state law provides the basis of the decision, the propriety of an award of damages and the factors the jury may consider in determining the amount are questions of state law. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc., 109 S.Ct. 2909, 2922 (1989)*. "Federal law, however will control on those issues involving the proper review of the jury award by a federal district court and court of appeals." *Id.* Thus, "the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine by reference to federal standards under *Rule 59*, whether a new trial or remittitur should be ordered." *Id.*

1. Compensatory [*94] Damages

In their memorandum in support of their motion for a new trial, defendants claim that the compensatory damages are excessive because there was no evidence of either tort or contract damages. [23] They contend that "the special verdict is so obviously flawed and tainted both with respect to the liability and the damages that remitti-

tur is an inadequate remedy and a new trial must be granted." Memo in Support at 31. They further characterize the damages awarded as "ridiculously excessive without support in the evidence." *Id.* They assert that the only possible damage to Wang was for a failure to account for partnership profits, and that the proper remedy for failure to account is an accounting.

> 23 In their reply memo, defendants shift the focus of their argument, claiming that Wang (in his opposition to defendants' motion) "mistakes the gravamen of defendants' challenge to the compensatory award. Defendants' challenge is not to the size of the compensatory damages in the abstract, but the method of calculation employed." Nevertheless, because defendants in their memo in support contend that "compensatory damages are excessive," that "the record is devoid of evidence that plaintiff sustained damages either in contract or tort," and that "the only possible damage to plaintiff was for a failure to account for partnership profits," the court will address both the argument as to the size of the award and the argument as to the method of calculation.

[*95] "[HN26] The fact that a jury may have been outraged by the defendant's conduct to the point of awarding excessive damages does not prove that its decision on liability was flawed." *Seymour v. Summa Vista Cinema, Inc., 809 F.2d 1385, 1387, reh. denied, 817 F.2d 609 (9th Cir. 1987).* [HN27] "Even a total inadequacy of proof on isolated elements of damages claims submitted to a jury will not undermine a resulting aggregated verdict which is nevertheless reasonable in light of the totality of the evidence." *Los Angeles Memorial Coliseum Com'n v. National Football League, 791 F.2d 1356, 1366 (9th Cir. 1986), cert. denied, 484 U.S. 826 (1987).* [HN28] A jury's evaluation of complex and conflicting evidence should not be supplanted when the jury's verdict finds substantial support in the record and lies within a range susceptible by proof; a court should order remission or a new trial only if the damage would exceed the maximum amount sustainable by probative evidence. *Id.*

After reviewing the case in the light of the defendants' contentions, the court concludes that the jury's decision on liability for breach of fiduciary duty [*96] and defamation is supported by substantial evidence, and that the award of compensatory damages for breach of fiduciary duty is neither grossly excessive nor based upon mere speculation. The award of compensatory damages for defamation, however, is not so adequately supported by the evidence, and the court will condition its denial of a new trial on Wang's acceptance of a substantial remittitur.

a. Compensatory damages for breach of fiduciary duty

The jury awarded Wang compensatory damages in the amount of $ 2,840,000 for breach of contract, $ 355,000 for fraud and deceit, and $ 2,840,000 for breach of fiduciary duty. Despite the fact that the court did not credit Wang with the award for breach of contract and for fraud and deceit because to do so would have been to allow double recovery, the court nonetheless considers the jury's findings of defendants' liability for breach of contract and fraud and deceit to be significant indications of the jury's belief, based on having heard all the evidence, that defendants clearly breached their fiduciary duty to Wang.

The jury based its award of damages for breach of contract on a finding that defendants had breached their agreement to, *inter* [*97] *alia,* accept Wang as an equity partner, pay him an equity interest equal to 90% of the interest of the other individual partners, promote and market the San Francisco office, establish and maintain a competent billing and timekeeping system, cooperate with Wang in the development and furtherance of the partnership business, and act in good faith to promote and maximize the mutual economic interests of the Taipei and San Francisco offices over their personal economic interests. *See* Jury Instruction No. 25. The jury based its award of damages for fraud on a finding that defendants fraudulently represented to Wang that Paul Hsu, K.T. Li and C.V. Chen were licensed attorneys, and that they would fully perform all the terms of the partnership agreement, would competently perform services for clients, would cooperate with Wang in the development and furtherance of the partnership's reputation and business, and would institute a competent system for recording billable time. *See* Jury Instructions Nos. 40 and 42. The jury based its award of damages for breach of fiduciary duty on a finding that defendants intentionally failed to fully disclose Lee and Li's financial records to Wang, [*98] intentionally failed to fully pay Wang the amount he was due under the parties' agreement, and used partnership assets for personal and non-partnership business. Jury Instruction No. 88. The weight of evidence supported the jury's findings of liability as to each of these causes of action.

Defendants claim that the award of damages was based on hypothetical evidence that was improperly admitted. Wang's expert accountant, Karen Kluska, presented evidence to the jury that Wang was damaged in the amount of at least $ 7.1 million. Defendants argue that Kluska's testimony was purely hypothetical in nature and not founded on any real evidence, and that it led to mere "possibilities." They claim that "the methodologies and assumptions applied by Ms. Kluska, in conjunction with her hypothetical numbers regarding purported miss-

ing moneys, were speculative and unsubstantiated by facts." Memo in Support at 32. Thus, they argue, Kluska's opinions were not reasonably reliable, and should have been excluded under *FRE Rules 403*, *702*, and *703*, because the data underlying her opinions was not of a kind reasonably relied upon by accounting experts, nor otherwise trustworthy.

Kluska testified that Wang's [*99] share of partnership income, calculated on a modified cash basis, was $ 5.3 million including accounts receivable and work-in-progress (WIP), and $ 3.1 million without accounts receivable and WIP. She also testified that her final estimate of defendants' net income was close to the estimate of Les Hand, the neutral accountant, despite the fact that Hand had access to many more of the Taipei office records than Kluska did. She stated that she considered Hand's estimate to be fair to both parties. It is thus not necessary for the court to address defendants' complaints regarding Kluska's testimony, because substantial evidence was presented by the neutral accountant to support the jury's award of $ 2,840,000 for breach of fiduciary duty.

Hand testified that Wang's interest in the Lee and Li firm was 18.37% until the death of Frank C.S. Wang, and 22.5% thereafter, or roughly 20% overall. Both reports prepared by Hand -- the Report of the Court Appointed Expert Accountant, dated April 9, 1990, and the Supplemental Report, dated May 8, 1990 -- were admitted into evidence at the trial. Hand was subjected to extensive examination by counsel for both parties regarding his reports, and each [*100] party's expert accountant commented on the reports. In the Supplemental Report Executive Summary, Hand set forth his revised estimates of U.S. dollar gross income, business expenses, and business taxes (except for Lee and Li-USA business taxes), for the period September 15, 1979, through April 15, 1987, and estimated the net income [24] after taxes on a modified cash basis as

Lee and Li-Taiwan	$ 12,347,331
Lee and Li-USA	*649,966*
Total	$ 12,997,297

Applying Hand's shorthand 20% to that figure, we arrive at $ 2,599,459. Hand's calculation of net income did not include accounts receivable and WIP of NT$ 255,161,749, or approximately 1.5 million in U.S. dollars. This amount is offset, however, by the approximately $ 1.5 million that Hand calculated that Wang had already received from Taipei. The jury found that Wang left Lee and Li on a modified cash basis and awarded him $ 2,840,000. The court concludes that the jury's award is substantially supported by the evidence.

24 See section 4(A)(2)(a) *infra* for a discussion of Hand's testimony concerning the difficulty of calculating Lee and Li's income.

[*101] b. Compensatory damages for libel

Jury Instruction No. 52 instructed the jury that Wang claimed that defendants had defamed him by publishing the infringement notices in the Taiwanese newspapers, and that defendant Paul Hsu had defamed him by calling him a crook and stating that he had never been a partner of Lee and Li. The jury was also instructed that the infringement notices were not defamatory *per se*, Jury Instruction No. 53, [25] and that the "crook" statement was defamatory *per se*, Jury Instruction No. 53. The jury found defendants liable for defamation, and awarded Wang $ 1,065,000 in compensatory damages. Special Verdict, questions 48-49. The special verdict did not ask the jury to state whether its finding of liability and award of damages applied to one or both of the alleged acts.

25 Jury Instruction No. 53 instructed the jury that it was required to determine 1) whether the notices published in the Taiwanese newspapers were untrue and intentionally published by the defendants, 2) if so, whether the natural and probable effect on the average listener was to defame Francis Wang, 3) if so, whether the publication of those statements by the defendants was a proximate cause of *special damage* to Wang, and 4) if so, the nature, character, and extent of that damage. The jury was advised that Wang "may not recover any damages *without proof of special damages* proximately caused by the publication of said statements." (emphasis added)

[*102] [HN29] "Libel is a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." *Cal. Civ. Code § 45*. "A libel which is defamatory of the plaintiff with-

out the necessity of explanatory matter . . . is said to be a libel on its face." *Cal. Civ. Code § 45a.* In California, when the statement is libelous *per se,* it is actionable without proof of special damage. [26] Conversely, "defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." *Cal. Civ. Code § 45a.* [27] [HN30] The question whether a publication is libelous on its face is one of law.

The test is whether in the mind of the average reader, the publication, considered as a whole, could reasonably be construed as defamatory. The court must determine as a matter of law whether the publication is libelous per se. If it is determined that the publication is susceptible of a defamatory meaning and also of an innocent [*103] and nondefamatory meaning it is for the jury to determine which meaning would be given to it by the average reader.

Patton v. Royal Industries, Inc., 263 Cal. App. 2d 760, 765, 70 Cal Rptr. 44, 46-47 (1968).

26 In defamation actions, general damages are "damages for loss of reputation, shame, mortification and hurt feelings," and special damages are "all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as plaintiff alleges and proves he has expended as a result to the alleged libel." *Cal. Civ. Code § 48a (4)(a)* and *(b). See* Jury Instruction No. 59.

27 Other pleading requirements for defamation actions brought under California law are 1) publication to a third person, 2) indication of personal application of publication to plaintiff, 3) innuendo and inducement when the language is ambiguous. 5 Witkin, *California Procedure,* Pleading § 684 (3d ed. 1985). If the statement is innocent on its face but defamatory in light of extrinsic circumstances, the plaintiff must plead and prove that it was used with a particular meaning ("the innuendo") that makes it defamatory; if the language is ambiguous, the extrinsic circumstances that show that the reader or listener reasonably understood it in its defamatory sense must also be alleged ("the inducement"). 5 Witkin, *Summary of California Law,* Torts (9th ed. 1988) § 493.

[*104] Defendants now argue that any compensatory award for libel (the publication of the infringement notices) cannot stand because Wang failed to plead and prove special damages, and because general damages cannot be presumed when a writing is not defamatory on its face. Defendants contend that the infringement notices cannot be construed as defamatory *per se,* because they say nothing about any legal claims of civil or criminal infringement against Wang, but rather simply state that Wang was not authorized to use the Lee an Li service mark. Furthermore, defendants argue, because the court instructed the jury that it had made a finding that the infringement notices were not libelous *per se,* the notices cannot support an award of damages because Wang failed to introduce any evidence of special damages (lost profits or money lost or spent because of the defamation).

Wang claims, however, that the ads were defamatory *per se*, arguing that they had a natural tendency to injure his reputation with respect to his profession, and that the statements were reasonably susceptible to defamatory interpretation [*105] without knowledge of specific extrinsic facts not within the reader's common knowledge. Wang contends that the ads accuse him of "breaching his duties to his profession, violating the law, and defrauding foreign governments," and that these accusations "sufficiently impugn Wang's loyalty, honesty, and competence to render those advertisements defamatory *per se."* Pltf's Opp. at 31. Wang also argues that it was "well understood" in the R.O.C. that doing business with P.R.C. was a "treasonable offense," and that the average reader of the ads would understand that the infringement notices accused Wang of fraudulently registering the mark in violation of R.O.C. laws against doing business in the P.R.C.

Although it is true that a publication is defamatory if it has a natural tendency to injure a party's reputation either generally or with respect to his profession, *MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 546, 343 P.2d 36, 41 (1959)* and it is possible that the infringement notices might be interpreted as having a tendency to injure Wang in his profession, nonetheless the court did not, and does not now, find that the ads rise to the level of [*106] libel *per se.*

Wang did not introduce sufficient evidence at trial from which the jury could have concluded that an average Taiwanese newspaper reader would have understood the notices to accuse Wang of a crime. Nor did he present evidence concerning what elements, under Taiwanese law, constitute criminal trademark infringement, or which actions the average Taiwanese reader would understand as the commission of such a crime. Moreover, even if Wang had presented such evidence, it is not clear why if would be a "treasonable offense" for Wang, an American attorney, to conduct business with the P.R.C. The court finds therefore that there was inadequate evidence from which the jury could have concluded that the average Taiwanese newspaper reader would view the

publication of the notices as the equivalent of accusing Wang of a criminal offense.

[HN31] *California Civil Code section 45a* requires that a plaintiff satisfy three requirements when making a claim for defamatory language not libelous on its face: 1) adequately allege special damages, 2) prove special damages, and 3) prove that such damages proximately resulted from the alleged defamation. Wang's Second Amended Complaint alleges no [*107] special damages for defamation, and Wang offered no proof that the alleged defamations caused any business losses, nor presented any evidence of their nature or amount. Accordingly, because Wang failed either to plead innuendo and inducement or to plead and prove special damages, and because the case was tried and the jury was instructed on the theory that the ads, if defamatory, were not libelous *per se,* the court finds that general damages awarded on the defamation claim with respect to the infringement notices cannot stand.

c. Compensatory damages for slander

Defendants argue that the compensatory award for slander (the "crook" statement) is unsupported by the evidence and is so excessive as to manifest jury confusion, passion, or prejudice. Defendants claim further that because of the complete absence of evidence of damage, that statement supports only the award of nominal compensatory recovery. Defendants argue that Wang's recovery should be limited because the statement, if made, was heard by a small audience, there is no evidence of harm to reputation, there is no evidence of money damages, and there is no evidence of expenses attributable to mental distress.

[HN32] An action for [*108] defamation must allege that the defamatory matter was "published" or communicated to a third person. *Draper v. Hellman Commercial Trust & Sav. Bank, 203 Cal. 26, 39, 263 P. 240, 247 (1928).* Publication occurs when the statement is communicated to a third party who understands the defamatory meaning and its applicability to the plaintiff. *Neary v. Regents of the University of California, 185 Cal. App. 3d 1136, 1147, 230 Cal. Rptr. 281, 288 (1986).* There is no requirement, however, that the statement be disseminated widely; a slanderous statement heard by one person is no less a slander than that heard by a large group. *Cunningham v. Simpson, 1 Cal. 3d 301, 307, 81 Cal. Rptr. 855, 858, 461 P.2d 39, 42 (1969).*

The court finds that the statement qualifies as slander *per se,* and that general damages are therefore presumed.

Calling someone a "thief" was early held to be defamation *per se.* A fair construction of Civil Code *section 46* requires a holding that [HN33] calling an attorney a "crook" is equally actionable as slander *per se* without proof of special damage. Imputing [*109] dishonesty or lack of ethics to an attorney is also actionable under Civil Code *section 46* because of the probability of damage to professional reputation.

Albertini v. Schaefer, 97 Cal. App. 3d 822, 829-30, 159 Cal. Rptr. 98, 102 (1979) (citations omitted). Nevertheless, even though the statement does qualify as slander *per se,* [28] and Wang therefore was not required to prove special damages, the court finds that it would not be appropriate or just for the jury's entire compensatory award to stand.

28 Instruction No. the was instructed In Jury 54, jury that the court had determined that the "crook" statement, if proved, was defamatory on its face.

The jury was instructed that in determining the amount to be awarded as general damages, it should consider the extent of the publicity given to the defamatory statement; the good name, reputation, and the loss thereof to Wang; the shame, mortification, injured feelings and mental distress suffered by Wang; Wang's prominence in the community; [*110] and Wang's professional or business standing in the community. Jury Instruction No. 59. The court agrees with defendants that the audience for the "crook" statement was a small one, and that Wang presented no substantial evidence of money damages or of any harm to his reputation that translated into loss of income or business opportunity, caused by Hsu's statement. Nevertheless, evidence was presented from which the jury could have concluded that Wang suffered embarrassment, injured feelings, and mental distress, particularly given his professional standing in the intellectual property international legal community -- specifically, the participants in the November 1987 judicial seminar.

California courts have found that [HN34] an award of nominal damages only may be appropriate when a plaintiff in a defamation *per se* action has suffered no actual damages. *Triton Ins. Underwriters Inc. v. Nat'l Chiropractic Ins. Co., 232 Cal. App. 2d 829, 833, 43 Cal. Rptr. 504, 506-08 (1965).* In this case, the court finds that although Wang suffered some damages, those damages were not sufficiently severe or long-lasting to warrant a compensatory award of $ 1,065,000. [*111] Accordingly, the court denies defendants' motion for a new trial on the ground that the compensatory damages award for defamation is excessive, conditional upon Wang's acceptance of a remittitur to $ 10,000.

2. Punitive Damages

Defendants also contend that the punitive damages award is against the weight of evidence and is grossly

excessive. They term it "a classic case of unreasonable award rendered by a runaway jury," and insist that the amount of the award "ridicules the notion of justice." Memo in Support at 35. They argue that California law "does not favor punitive damages." *Id.* They also claim that the punitive damages award is violative of defendants' due process rights as guaranteed by the *Fourteenth Amendment to the United States Constitution*, as well as their right to be free of excessive fines as guaranteed by the *Eighth Amendment*.

[HN35] Although the basic principle of damages is compensation, the rule in California is that additional damages may be given in tort actions when the defendant's conduct has been outrageous, for the purpose of punishment and deterrence. *See* 6 Witkin, *Summary of California Law,* Torts § 1327 (9th ed. 1988) (and cases cited therein). This [*112] practice "is rooted in the English common law and is a settled principle of the common law of this country." *Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 807, 174 Cal. Rptr 348, 380 (1981). California Civil Code section 3294(a)* provides the statutory authority for the awarding of punitive damages in this state:

[HN36] In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

[HN37] In order to award punitive damages, a jury must find despicable conduct (malice, oppression, or fraud). "'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." *Cal. Civ. Code § 3294(c)(1).* "Evil motive . . . [is] the central essential factor in the malice which justifies an exemplary award." *G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 31, 122 Cal. Rptr. 218, 244 (1975).* [*113] "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." *Cal. Civ. Code § 3294(c)(2).* Evidence establishing conscious disregard of another's rights is evidence indicating that the defendant was aware of the probable consequences of his or her acts and wilfully and deliberately failed to avoid those consequences. *J.R. Norton Co. v. Gen'l Teamsters, Warehousemen & Helpers Union, Local 890, 208 Cal. App. 3d 430, 444, 256 Cal. Rptr. 246, 254 (1989).* "'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." *Cal. Civ. Code § 3294(c)(3).*

a. Punitive damages for breach of fiduciary duty

The jury awarded Wang $ 8,520,000 in punitive damages for breach of fiduciary duty. Defendants contest this award on the grounds that their conduct did not rise to the level of malice or oppression required to justify an award of punitive damages for breach of fiduciary duty, and that the amount of the [*114] award is grossly excessive.

Defendants insist that "devoid of its recriminatory detail, [the] 'crime' for which plaintiff ultimately seeks ruinous financial punishment objectively comes down to a failure to pay plaintiff his share." Defs' Reply at 21. They characterize an award of punitive damages in this case as "punishment for having one's day in court," and contend that such an award will "serve only to deter the public's trust in the system's capacity to reach just results." *Id.* Defendants describe the dispute between the parties in this case as a simple business disagreement, in which defendants merely differed as to whether Wang was an equity partner. According to defendants, their only wrong was that they made Wang sue for an accounting. They claim that Wang presented "no evidence of outrageous bad acts which caused any damage to him beyond what he would seek in an accounting," and that he "prospered substantially in his relationship with defendants." Memo in Support at 39-40.

As for defendants' claim that their conduct did not rise to the level of malice or oppression required to justify an award of punitive damages, [HN38] a jury finding of fraud is considered a sufficient basis [*115] for awarding punitive damages. *Pat Rose Associates v. Coombe, 225 Cal. App. 3d 9, 21, 275 Cal. Rptr 1, 8 (1990).* Defendants argue that there was no evidence that they intended to or did wilfully commit fraud, but the court finds the record substantially supports the jury's verdict on that point.

Defendants' claim that Wang showed no evidence of damage "beyond what he would seek in an accounting" can also be easily dismissed. By wrongfully repudiating the partnership agreement, defendants triggered the remedies of *California Corporations Code section 15038(b), see supra* note 11, which permits a partner who is the wronged party in a wrongful repudiation of a partnership agreement to sue for damages *and/or* an accounting. Thus, Wang had the right, among others, to sue in tort and to seek punitive damages. To limit his recovery to what he might recover in an accounting would extract all the teeth from *section 15038.* Such a result is patently absurd.

Defendants also contend that the jury's award is grossly disproportionate, both as to the compensatory damages and as to defendants' net worth. They urge that the size of the award, which they characterize [*116] as

"unconscionably excessive," provides an independent basis for either vacating the award and ordering a new trial on all issues, or drastically reducing the award by remittitur.

The law provides no mechanical formula to determine punitive damages. The amount is usually left to the discretion of the jury, subject to the court's power to reject the award if it is without support in the evidence. *Brewer v. Second Baptist Church, 32 Cal. 2d 791, 801, 197 P.2d 713, 719-20 (1948).* [HN39] Claims that punitive damages are excessive are analyzed in the light most favorable to the prevailing party. *See Moore v. American United Life Ins. Co., 150 Cal. App. 3d 610, 636, 197 Cal. Rptr. 878, 894 (1984).* While there is no rigid formula for evaluating the alleged excessiveness of an award of punitive damages, *Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc., 155 Cal. App. 3d 381, 391-96, 202 Cal. Rptr. 204, 211-213 (1984)*, the court should consider the ratio of compensatory damages to punitive damages, the reprehensibility of the defendants' conduct, and the wealth of defendants, in particular whether the award [*117] is in excess of the defendants' ability to pay. *See Wollersheim v. Church of Scientology, 212 Cal. App. 3d 872, 906-07, 260 Cal. Rptr. 331, 354 (1989); Walker v. Signal Company, 84 Cal. App. 2d 982, 997, 149 Cal. Rptr. 119, 126 (1978).*

Regarding the first factor,

There is no fixed ratio to determine the proper proportion between punitive and compensatory damages. The calculation of punitive damages involves, instead, a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendants, and in this regard juries have a wide discretion in determining what is proper.

Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., 189 Cal. App. 3d 1072, 1097, 234 Cal. Rptr. 835, 849 (1987), cert. denied, Ohio Cas. Ins. Co. v. Downey Say. & Loan Ass'n, 486 U.S. 1036 (1988) (citations and internal quotation omitted).

The jury awarded Wang $ 8,520,000 in punitive damages for breach of fiduciary duty. This amount is three times the $ 2,840,000 compensatory award. By itself, this ratio between punitive and compensatory [*118] damages is not excessive as a matter of law, because no specific ratio is used to determine the proper proportion between the two. *Ferraro v. Pacific Fin. Corp., 8 Cal. App. 3d 339, 353, 87 Cal. Rptr. 226, 235 (1970)* California courts have approved of much greater ratios between punitive and compensatory damages. *See, e.g., Finney v. Lockhart, 35 Cal. 2d 161, 164, 217 P.2d 19, 21 (1950)* (ratio of 2,000:1); *Neal, 21 Cal. 3d at 927-29, 148 Cal. Rptr. at 399-400, 582 P.2d at 990-91* (ratio of 78:1); *Chodos v. Insurance Co. of North America, 126 Cal. App. 3d 86, 103-04, 178 Cal. Rptr. 831, 841 (1981)* (ratio of 40:1); *Downey Savings, 189 Cal. App. 3d at 1099, 234 Cal. Rptr. at 850-51* (ratio of 32:1).

Regarding the second factor, "the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." *Neal, 21 Cal. 3d at 928, 148 Cal. Rptr. at 399, 582 P.2d at 990.* The conduct of the defendants in this case was highly reprehensible. At trial, Wang presented considerable evidence of [*119] "outrageous bad acts" from which the jury could have reasonably found that defendants acted maliciously, with an intent to oppress, and in conscious disregard of Wang's rights. The evidence showed that at the time the parties entered into their agreement, the defendants affirmatively represented to Wang that he was a full partner of the Lee and Li law firm. For eight years Wang invested his time, money, and effort to build Lee and Li into a prosperous international law firm. The reward for his faithful service was defendants' intentional failure to pay him his fair share of partnership assets during the course of the partnership. Defendants refused Wang's rightful demands for an accounting and access to the financial records of Lee and Li. They concealed income from him, and withheld funds necessary to pay expenses incurred by the San Francisco office. The jury expressly found that the defendants wrongfully repudiated their agreement with Wang, that they denied the existence of the 1979 equity partnership agreement despite the knowledge that the agreement did in fact exist among the parties. Following Wang's announcement in 1987 of his intention to seek dissolution of the partnership, [*120] defendants denied to the world that Wang was ever an equity partner in the Lee and Li law firm and treated him with contempt.

Finally, as for the third factor, "the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." *Bertero v. National General Corp., 13 Cal. 3d 43, 65, 118 Cal. Rptr. 184, 200, 529 P.2d 608, 624 (1974).* "The function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." *Neal, 21 Cal. 3d at 928, 148 Cal. Rptr. at 399, 582 P.2d at 990.* Thus, [HN40] "[a] defendant's net worth is generally considered the best measure of his wealth for the purpose of assessing exemplary damages." *Downey Savings, 189 Cal. App. 3d at 1100, 234 Cal. Rptr. at 851; see Walker, 84 Cal. App. 2d at 997-98, 149 Cal. Rptr. at 126-27.* It is proper for the court to compare the punitive damages award to net worth and income because "an award of punitive damages should be large enough to punish and deter but not larger than [*121] necessary to serve this purpose." *Moore, 150 Cal. App. 3d at 641, 197 Cal. Rptr. at 898.*

In *Downey Savings,* the defendant presented evidence that a punitive damages award represented 1.9 percent of its net wealth and 3.64 weeks' worth of its net annual income. The appellate court upheld the award. *189 Cal. App. 3d at 1099, 234 Cal. Rptr. at 850-51.* In *Moore,* the court approved a punitive damages award which represented 3.2 percent of the defendant's net assets and 3.4 weeks' worth of its net income for one specific year. *150 Cal. App. 3d at 641-42, 197 Cal. Rptr at 898-99.*

California courts generally disfavor awards exceeding ten percent of a defendant's net worth. *Seeley v. Seymour, 190 Cal. App.3d 844, 868, 237 Cal. Rptr. 282, 296 (1987).* Punitive damages awards of nearly one-third of the defendant's net worth, *Merlo v. Standard Life & Acc. Ins. Co., 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416, 425 (1976),* more than seven months of net income, *Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 824, 169 Cal. Rptr 691, 699, 620 P.2d 141, 149 (1979),* [*122] *cert. denied, Mutual of Omaha Ins. Co. v. Egan, 445 U.S. 912 (1980),* or fifty percent of defendant's net income, *Burnett v. National Enquirer Inc., 144 Cal. App. 3d 991, 1011-12, 193 Cal. Rptr. 206, 219 (1983), cert. denied, National Enquirer Inc. v. Burnett, 465 U.S. 1014 (1984),* have been set aside.

Defendants in this case assert that the ratio of punitive damages to defendants' assets is "light years beyond the upper range established by case law." Memo in Support at 42. Defendants also argue that Wang bore the burden of showing defendants' current net worth, citing *People ex rel Dept. of Transportation v. Grocers Wholesale Co., 214 Cal. App. 3d 498, 516, 262 Cal. Rptr. 689, 701 (1989).* They claim that Wang offered no such evidence, thereby entitling defendants to a new trial.

Although there is currently a split of authority among California courts as to whether evidence of a defendant's net worth is prerequisite to an award of punitive damages, [29] the long-standing majority rule seems to be that the plaintiff *may* offer such evidence, but need not. 6 Witkin, *Summary* [*123] *of California Law,* Torts § 1377 (9th ed. 1988 and 1990 Supp.). California courts have held that [HN41] if a defendant wishes to establish inability to pay a large penalty, he or she may meet the burden by introducing such evidence. In *Fenlon v. Brock, 216 Cal. App. 3d 1174, 1182, 265 Cal. Rptr. 324, 328 (1989)* the court observed that "the defendant always has the ability to introduce evidence of his financial condition to preserve a challenge to a punitive damages award on the ground that it is excessive as a percentage of his net worth, and the defendant also has the best access to such information." Similarly, the court in *Vossler v. Richards Mfg. Co., 143 Cal. App. 3d 952, 964, 192 Cal. Rptr. 219, 226 (1983),* stated that "the defendant is in the best position to provide the most accurate data concerning its financial condition." We agree with the appellate court in *Pat Rose, 225 Cal. App. 3d at 23, 275 Cal. Rptr. at 9,* which declared, "If the defendant does not avail itself of the opportunity to present such evidence, we see no reason in law or policy to give the defendant a second bite of [*124] the apple by permitting an appeal based on lack of evidence." Furthermore, even the cases, such as those relied upon by defendants, that hold that the plaintiff is required to introduce such evidence concern plaintiffs that *made no attempt* to obtain such evidence or to present it at trial. *See Dumas v. Stocker, 213 Cal. App. 3d 1262, 1267-69, 262 Cal. Rptr. 311, 315-16 (1989)* and cases cited therein.

29 California Supreme Court review The recently granted in *Adams v. Murakami, 219 Cal. App. 3d 647, 268 Cal. Rptr 467 (1990)* to resolve the issue whether a plaintiff or a defendant must prove the defendant's net worth to recover punitive damages. *Pat Rose, 225 Cal. App. 3d at 22 n.15, 275 Cal. Rptr. at 8 n.15.*

When California courts have set aside a punitive damages award as excessive, the courts have been able to ascertain the defendant's net worth and income, based on accurate accounting records of defendant's assets and [*125] yearly income. Here, by contrast, defendants did everything possible to frustrate Wang's attempt to learn the details of their net worth. *See Moore, 150 Cal. App. 3d at 641, 197 Cal. Rptr. at 898.* Nor can the court make a reasonable estimate, because it was evident at the trial that the Taiwan offices of Lee and Li ("Lee and Li-Taiwan") did not preserve important accounting records; that firm income, expenses, and tax records were manipulated to deprive Wang of his full partnership share; and that an accounting of the individual defendants' net worth was not available.

Defendants presented evidence that the Lee and Li law firm was the largest and most prestigious law firm in the R.O.C. and that Lee and Li served many significant international corporate clients. Defendants offered into evidence a videotape showing their lavish offices and sophisticated office equipment, housed in a modern office building.

Les Hand, the court-appointed neutral accountant, estimated that the gross income of Lee and Li-Taiwan was approximately fifty-two million U.S. dollars for the period September 15, 1979 through April 15, 1987 (the period Wang was a member of the firm); [*126] and that the net income of the office before taxes was approximately nineteen million U.S. dollars and after taxes approximately twelve million U.S. dollars, using a modified cash basis of accounting. [30] Hand testified that the firm's gross income noticeably increased after 1982. In 1986, the firm earned approximately ten million U.S.

dollars. For the first three and one-half months of 1987, the firm gross income was approximately five million U.S. dollars.

30 In *Moore*, the court found that net income should exclude taxes. *150 Cal. App. 3d at 642, 197 Cal. Rptr. at 898-99*. The court believes it appropriate to examine the firm's before taxes income because the jury found that the parties agreed to distribute profits on a pre-tax basis. The jury also found that the parties agreed that plaintiff entered the partnership on a cash-in basis and would leave on a modified cash basis, including accounts receivable and work in progress. A modified cash basis method of accounting includes all income collected and expenses paid.

[*127] Hand admitted to a significant degree of uncertainty in his calculations of Lee and Li's income because of the lack of adequate accounting records and the possibility that his data did not account for all of defendants' sources of income. Many records were not available because they had been destroyed. Catherine Chang, Lee and Li's chief accountant, testified that accounting records not required to be maintained by the tax authorities were regularly destroyed.

Lee and Li-Taiwan maintained two primary sets of financial records purporting to support income and expense of the firm. Financial analysis prepared for partner distributions was maintained separately from data accumulated for reporting income and expenses to the tax authorities. The financial analysis for partnership distribution was similar to an income statement and did not reflect individual transactions. Tax income and expense records ("TIE logs") reflected only income and expense items reported to the tax authorities. No audit trail existed to permit reconciliation of the financial analysis for partnership distribution and the TIE logs. Defendants prepared an after-the-fact reconciliation which the jury may have rejected [*128] as self-serving and inaccurate. The jury may likewise have reasonably inferred that the defendants deliberately destroyed accounting records. Supporting documentation for bank account activity (and there were more than twelve known Lee and Li-Taipei bank accounts), such as account statements, cancelled checks, and wire transfers, were lost, destroyed, or otherwise not available.

In determining the wealth of the defendants, the jury could have also considered evidence that defendants maintained bank accounts outside the Republic of China in which they deposited client fee payments, not reported as part of the firm's gross income, in order to avoid Taiwanese foreign exchange laws. Hand testified that Lee and Li-Taiwan kept no records of cash receipts from non-Taiwan based clients which were deposited into foreign bank accounts and not reflected as revenue received in TIE logs. Lee and Li-Taiwan recorded, in a journal or "memory book," non-Taiwan client fees paid in U.S. dollars, which were deposited in the Royal Bank of Canada in Hong Kong. Catherine Chang, Lee and Li's chief accountant, testified that the "memory book" was inadvertently destroyed. The Royal Bank of Canada statements [*129] were also destroyed.

Hand testified that the description of many entries in the accounting records was vague and ambiguous as to the nature of the transaction. Many supporting documents, including invoices and canceled checks, were unavailable. Consequently, Hand was not able to determine the nature of many expenses nor their proper connection to the practice of law. There was also documentary evidence that defendants manipulated their accounting records in 1987 (when it was apparent that plaintiff would leave the law firm), thereby artificially underreporting firm income.

Lee and Li-Taiwan paid the partners' personal income taxes. Hand testified that it was possible these expenses were not reimbursed by the partners. There was minimal evidence available to support the entertainment expenses paid to partners. The defendants also had personal use of thirty luxury automobiles paid for by Lee and Li-Taiwan during the relevant period. There was also evidence that the Taipei office's business expenses were extravagant and improperly inflated to deprive plaintiff of his fair partnership share. (Expenses were deducted from the partnership income prior to distribution.)

In sum, because of [*130] the incomplete and missing accounting records it is impossible to state with accuracy what the net income of the law firm was from 1979 through 1987. Wang's accounting expert Karen Kluska testified that she attempted to reconstruct the Taipei firm's assets from an analysis of cash receipts, financial statements, general ledgers, inventory records, and fixed assets. The jury may have concluded that Kluska's final estimate or some lesser amount was a reasonable conclusion. Given the evidence that the defendants intentionally under-reported firm income and improperly inflated firm expenses, the jury may have given greater weight to the estimate of the neutral accountant that a conservative figure for the *gross* income of the firm during the relevant period was fifty-two million dollars, than to his estimates of net income before and after taxes.

[HN42] It is the duty of the court to intervene "'in instances where punitive damages are so palpably excessive or grossly disproportionate as to raise a presumption that they resulted from passion or prejudice.'" *Seeley, 190 Cal. App. 3d at 866, 237 Cal. Rptr. at 294*, quoting *Burnett, 144 Cal. App. 3d at 1011, 193 Cal. Rptr. at 218*. [*131] Defendants have not shown that jury's award of

punitive damages was palpably excessive or grossly disproportionate to raise this presumption.

Nor is there other evidence that the award was the result of the jury's sympathy, passion, or prejudice. Plaintiff was not, for example, a disabled individual suing an insurance company, *see Egan, 24 Cal.3d at 809, 620 P.2d at 147-49*; *Little v. Stuyvesant Life Ins. Co., 67 Cal. App. 3d 451, 136 Cal Rptr. 653 (1977)*; or a homeowner victimized by a defrauding or defaulting building contractor, *see Rosener v. Sears, Roebuck & Co., 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (1980)*. Rather, both Wang and defendants presented credible evidence that they were competent, respected, and financially successful attorneys. There was no question of inequality in level of sophistication. The court can discern no evidence that the jury's award of punitive damages was motivated by sympathy for the economic plight of the plaintiff or feelings of animosity towards defendants.

The court believes that ample cause (malice, oppression, and fraud) exists for an [*132] award of punitive damages, but concedes that the jury appears to have applied a mechanical formula of three times the compensatory damages in its calculation of the amount of the award. Such a method of calculation is obviously arbitrary and improper, and the court must therefore review the amount awarded, taking into consideration the three factors discussed above. Therefore, having considered the reprehensibility of defendants' conduct, the ratio of compensatory damages to punitive damages, and defendants' wealth, together with the other evidence discussed above, the court has determined to deny defendants' request for a new trial on the ground that the punitive damage award for breach of fiduciary duty is excessive; this denial, however, is conditioned upon Wang's acceptance of a remittitur to $ 2,500,000.

The evidence we do have regarding defendants' wealth substantially justifies this award. It is an amount that will punish defendants but will not destroy them. "The function of punitive damages is not served by an award which, in light of the defendants' wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." *Neal, 21 Cal. 3d at 928, 148 Cal. Rptr. at 399, 582 P.2d at 990.* [*133] Indeed, "there can be no circumstances in which the necessity for punishment compels an award in excess of the defendant's ability to pay." *Kaye v. Mount La Jolla Homeowners Ass'n, 204 Cal. App. 3d 1476, 1494, 252 Cal. Rptr. 67, 78 (1988)*. In recalculating the award, we are considering the hard evidence presented at trial, such as the reports prepared by the neutral accountant.

b. Punitive damages for defamation

Wang presented evidence at trial that defendants published full-page color notices in several Taiwanese newspapers advising that Wang was not authorized to use the Lee and Li service mark. These notices appeared on the opening day of the intellectual property judicial enforcement seminar, and were read by all the Chinese-speaking attendees. Defendants argue that the punitive damages award for defamation cannot stand because Wang failed to prove damages from the infringement notices, and because the award was the result of passion and prejudice on the part of the jury.

[HN43] In California punitive damages cannot be awarded unless actual damages were suffered, because punitive damages are meant to be awarded in addition to compensatory damages. *See* [*134] 6 Witkin, *Summary of California Law,* Torts § 1369 (9th ed. 1988) and cases cited therein. Because the court found that the infringement notices were not libelous *per se,* and because Wang failed to plead and prove special damages, the court has determined that Wang can recover no compensatory damages based on a finding that the act of publishing the notices was defamatory. *See* section 4(A)(1)(b), *supra*. Accordingly, punitive damages should not be awarded for the publication of the notices.

As for the damages awarded for the "crook" statement, the jury could have reasonably found the requisite level of malice to justify an award of punitive damages. Defendant Paul Hsu told one of the guests at a dinner party hosted by Lee and Li that Wang was a crook and also stated that Wang had never been a partner in Lee and Li. Although the audience for the "crook" statement may have been very small, Paul Hsu's statement nonetheless partook of the very essence of malice as this court understands it.

As for the amount of the damages, [HN44] punitive damages should ordinarily be in some "reasonable" proportion to the actual damages suffered. *Gagnon v. Continental Cas. Co., 211 Cal. App. 3d 1598, 1602, 260 Cal. Rptr. 305, 307 (1989).* [*135] "'Even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small.'" *Id. at 1604, 260 Cal. Rptr. at 308*, quoting *Neal v. Farmers Ins. Exchange, 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389, 399, 582 P.2d 980, 990 (1978)*. This rule does not preclude a large award of punitive damages based upon substantial actual damages, if the amount of compensatory damages awarded was small because of the difficulty of ascertaining the extent of the actual damage. *Sterling Drug v. Benatar, 99 Cal. App. 2d 393, 402, 221 P.2d 965, 970 (1950)*. Thus, based both on the amount of damage suffered, and the reduction in the amount of the compensatory award, upon which the court is conditioning its denial of defendants' motion for new trial, *see* section 4(A)(1)(c), *supra*, the court finds that Wang's punitive damage award for defendants' defamatory acts cannot stand. Accordingly, the

court denies defendants' motion for a new trial on the ground that the punitive damages award for defamation is excessive, [*136] conditional upon Wang's acceptance of a remittitur to $ 30,000.

c. Whether punitive damage award violates the U.S. Constitution

Defendants complain that the punitive damages award is unconstitutional in that it violates the Excessive Fines Clause of the *Eighth Amendment to the United States Constitution*, and *Due Process Clause of the Fourteenth Amendment*. The United States Supreme Court recently rejected a similar *eighth amendment* argument in *Browning-Ferris Industries of Vermont, Inc. v. Kelko Disposal, Inc., 109 S. Ct. 2909 (1989)*. The Court held that [HN45] the Excessive Fines Clause does not apply to civil penalties in cases between private parties, but was intended to limit only those fines directly imposed by, and payable to, the government. *Id. at 2916*.

Defendants also contend that the statutory definitions of the acts that trigger punitive damages contained in *California Civil Code section 3294* -- "malice," "fraud," "oppression" -- are so vague as to deprive them of the fundamental fairness guaranteed by the *Due Process Clause of the Fourteenth Amendment*. This claim has been rejected, however, by a number of California courts. *See Bertero v. National General Corp., 13 Cal. 3d 43, 66 n.13, 118 Cal. Rptr. 184, 201 n. 13, 529 P.2d 608, 625 n. 13 (1974)*; [*137] *Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 811, 174 Cal. Rptr. 348, 383 (1981)*; and cases cited therein.

Although the Supreme Court in *Browning-Ferris* specifically left open the issue of whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limits, *109 S. Ct. at 2921*, California courts have considered and rejected similar due process arguments. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., 198 Cal. App. 3d 1072, 1101, 234 Cal. Rptr. 835, 851-52 (1987)*; *Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 716-17, 60 Cal. Rptr. 398, 417-18 (1967)*; *see also George v. ISKCON of California, 213 Cal. App. 3d 729, 798, 962 Cal. Rptr. 217, 257 (1989)*; *Grocers Wholesale, 214 Cal. App. 3d at 514, 262 Cal. Rptr. at 699*.

The jury in this case was properly instructed to consider the offensiveness of the wrongful conduct, the wrongdoer's financial condition, and the relationship between the actual damage and the amount of the [*138] punitive award. Jury Instruction No. 100. An instruction of this kind places limits on the jury's discretion and serves as an adequate procedural safeguard; civil rules of procedure apply in civil cases, and the *Fourteenth Amendment* does not require that an award of punitive damages be accompanied by the same sorts of safeguards essential to a criminal proceeding. *Downey, 198 Cal. App. 3d at 1101, 234 Cal. Rptr. at 851*. Moreover, this court believes, as does the California Court of Appeal, *see ISKCON, 213 Cal. App. 3d at 798, 262 Cal. Rptr. at 257*, that a "thoughtful consideration of the motion for new trial" combined with a significant reduction in the punitive damages award can provide defendants with meaningful procedural safeguards sufficient to insure the protection of their *fourteenth amendment* rights.

B. Wang is Precluded From Recovering Damages

Defendants argue that Wang is precluded from recovering damages because the jury found that he committed breach of contract, breach of fiduciary duty, and fraud, or, alternatively, because defendants' proposed jury instruction regarding excuse of performance by another's [*139] breach was erroneously denied.

Defendants first contend that because the unclean hands doctrine applies to suits at law and equity in California, citing *Pond v. Insurance Co. of N. America, 151 Cal. App. 3d 280, 289-90, 198 Cal. Rptr. 517, 522 (1984)*, it would be fundamentally inconsistent to allow Wang to recover damages arising from breach of the agreement when the jury found that, in the same relationship and agreement, he committed fraud and breached his fiduciary obligations. Defendants claim that analysis of the jury instructions and the special verdict demonstrate that the breaches arose out of precisely the same episode -- the contractual relationship -- and concerned identical issues. Defendants point out that the jury instructions for fiduciary breach are identical, and that the same specific conduct is asserted by both sides: the intentional failure to disclose financial records, the intentional failure to pay amounts owed, and the use of partnership assets for non-partnership business. [31]

31 *See* Jury Instructions Nos. 88 and 89.

[*140] [HN46] The unclean hands rule is qualified by the requirement that "the actions of the party alleged to have soiled hands must relate 'directly to the transaction concerning which the complaint is made.'" *Id.*, quoting *Fibreboard Papers Products Corp. v. East Bay Union of Machinists, 227 Cal. App. 2d 675, 728, 39 Cal. Rptr. 64, 97 (1964)*. The wrongs done to defendants by Wang are independent of the transaction arising from defendants' breach of contract, fraud, and breach of fiduciary duty. Thus, Wang's minor breaches do not preclude him from recovering substantial damages from defendants for their malicious treatment of him. His breaches do not concern "the same issue," nor did they arise "during one episode" of the contractual relationship. *Los Angeles Memorial Coliseum Comm. v. National Football*

League, 791 F.2d 1356, 1362-63 (9th Cir. 1986), cert. denied, 484 U.S. 826 (1987).

Whether the jury instructions for fiduciary breach are identical is irrelevant here. The jury found that the Taipei partners breached their fiduciary duty to Wang by wrongly denying that he had ever been a partner in Lee and Li. There was [*141] no corresponding offsetting breach by Wang. Similarly, the Taipei partners failed to honestly disclose the partnership's financial records to Wang, and failed to pay him money due him under the partnership agreement, and there was no evidence of corresponding breaches by Wang. The only breach of fiduciary duty that the jury could have found on Wang's part was that he "used partnership assets for personal and nonpartnership business," but these instances cannot be categorized as "the same issue" occurring during "one episode" of the 8-year-long contractual relationship between Wang and the defendants.

Defendants argue, alternatively, that the court's refusal to instruct regarding excuse of performance was prejudicial error, requiring a new trial. Defendants proposed a jury instruction stating that "a breach of a material form of an agreement by one party which occurs before the non-breaching party has completed his performance excuses the non-breaching party of further performance." Memo in Support at 17 n.11. Defendants cannot claim that they were prejudiced by the court's refusal to so instruct the jury, however, because it was the jury's finding that defendants had wrongfully repudiated [*142] the partnership agreement that triggered the remedies of *section 15038(b)*. An excuse of performance argument is irrelevant in this context.

C. Tax Credit Issue

Defendants claim 1) that the damages were erroneously computed pre-tax and with WIP; 2) that the only evidence presented at trial regarding calculation of partnership shares concerned common tax practice in the United States; 3) that defendants are severely prejudiced because they have already paid taxes in Taiwan on the income in question and cannot get a tax refund, while Wang gets double recovery because he can claim a foreign tax credit on Lee and Li income reported to the IRS; and 4) that Kluska was not an expert in R.O.C. tax law, and was therefore not competent to testify concerning R.O.C. tax consequences.

Regarding the first claim, the jury determined that Wang should receive his share pre-tax and with WIP after listening to testimony from the accounting and partnership expert witnesses, as well as the Lee and Li principals. The jury also considered documentation provided by defendants.

Kluska testified that Yin's retirement share and the death share paid to the widow of Frank C.S. Wang included a proportionate [*143] share of accounts receivable. Wang testified that his partner's share in the early years included fees paid by clients for work done prior to his joining the firm. There was evidence that, following Wang's letter of dissolution, defendants delayed recording receipt of client fees in order to reduce Lee and Li income subject to an accounting to determine Wang's share. Inclusion of unbilled work in the award may have been the jury's way of ensuring that Wang received his fair share of income from work done while he was a partner.

The claim that the only evidence presented at trial concerned common practice in the United States is untrue. The neutral accountant testified that the U.S. practice is to determine partnership share pretax, but that in the R.O.C. there is no common practice -- it is done both ways. Certainly defendants had the opportunity to offer additional evidence that the R.O.C. practice differed.

Regarding the claim that defendants are prejudiced because they have already paid taxes and cannot get a refund, while Wang gets a double recovery because he can claim a foreign tax credit, Kluska testified that it was unfair to compute Wang's partnership share post-tax because [*144] Lee and Li had paid the R.O.C. taxes for the Taipei partners, thus reducing Lee and Li's net income and Wang's proportionate share by that amount. Wang will have to pay income taxes on his partnership share of income. Moreover, defendants' failure to provide Wang with any tax documentation which would have permitted him to seek foreign tax credit may have been understood by the jury as indicative of defendants' intent that Wang receive his partnership share pretax.

Kluska, who was familiar with tax issues because of her background, testified that defendants could, in fact, claim a tax credit. She based her opinion on the fact that defendants had deducted from their amended 1986 tax returns, income in the form of bonuses booked for defendants Hsu and Li, and had deducted those booked but unpaid bonuses from from C.V. Chen's personal tax return, filed for Chen as sole proprietor on behalf of Lee and Li. [32]

32 For income tax purposes, Lee and Li-Taipei was considered the equivalent of what is known in the U.S. as a sole proprietorship, with C.V. Chen as the sole proprietor. Paul Hsu and K.T. Li were treated as employees of Lee and Li for tax reporting purposes. Thus, salary expense in C.V. Chen's tax return included the salary expense of Hsu and Li as reflected on Taiwan tax forms that are the equivalent to U.S. income and tax withholding forms ("W-2s"). Hand found, however,

that the amounts recorded on these "W-2s" for Hsu and Li were not necessarily the amounts paid.

[*145] Regarding the claim that Kluska was not an expert on R.O.C. tax law, Kluska testified that she relied on R.O.C. tax information from the neutral accountant's firm, KPMG Peat Marwick (Peat Marwick). It was reasonable for Kluska to rely on Peat Marwick for this kind of information in forming her opinion, per *FRE Rule 703*. Hand's personal qualifications as a public accountant were impressive, and he testified that Peat Marwick has 55,000 employees, and that the firm maintains offices worldwide, including an office in Taipei. Peat Marwick spent 3000 person-hours on its preparation of the neutral accountant's reports, including 700-800 hours of effort by personnel in its Taipei office. This entire Peat Marwick effort was of course conducted under Hand's direction.

5. DAMAGES FOR COUNTERCLAIMS

Defendants contend that the weight of evidence supports a finding in favor of the counterclaimants, and that a new trial on the counterclaims is mandated. The jury found Wang liable for breach of contract, breach of fiduciary duty, fraud, service mark infringement, and defamation; nevertheless, they returned damage awards of zero dollars for the breach of contract, infringement, and defamation [*146] claims; $ 200,000 for the fraud claim; and $ 125,000 for the breach of fiduciary duty claim. Defendants argue that substantial and largely uncontroverted evidence was submitted in support of an award of damages far higher than was awarded. They also argue that any jury that would return answers to special interrogatories finding liability while refusing to assign damages must be acting out of caprice or confusion -- and the only remedy for this is a new trial.

The jury's award of damages was supported by the weight of the evidence. Furthermore, it is entirely conceivable to the court, which heard the evidence, that the jury could have found that Wang breached some portion of his agreement with defendants, infringed defendants' service mark, and committed acts of defamation, and that defendants suffered no damage thereby. For example, defendants were unable to prove that the loss of a single client was caused by any conduct on Wang's part. The court does not consider that the jury was acting out of caprice or confusion when it made its findings on the counterclaims.

6. EVIDENTIARY ERRORS DURING TRIAL

Defendants claim that the record reflects errors in evidentiary rulings by the [*147] court that prejudiced defendants' case and mandate a new trial. Defendants identify two errors that they term "prejudicial": a) the admission of the testimony of Wang's expert, Robert Vizas and b) the failure to admit impeachment evidence concerning the S.P. Yang divorce.

A. Admission of Vizas' Testimony

Defendants claim that Wang's expert Robert Vizas was improperly permitted to testify whether Wang was a full equity partner of Lee and Li. They argue that Vizas' testimony "invaded the precise province of the jury," and that allowing him to become an "expert" did nothing more than "place an 'expert's' imprimatur on plaintiff's version of disputed facts." They contend that this testimony was contrary to *FRE 701-703* and that it resulted in prejudice to defendants.

Vizas was well qualified as an expert on partnership on the basis of his knowledge, skill, experience, training, and education. Vizas is a partner in a major San Francisco law firm and serves on that firm's management committee, which has reviewed the structure of alternative forms of partnership. He has studied the structure of his own and other law firms, including firms with foreign offices. He counsels clients on partnerships, [*148] including the dissolution of law partnerships. He was familiar with literature on the subject brought to his attention by defendants' counsel.

The jury was properly instructed that "expert testimony should be judged just as any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case." Jury Instruction No. 7. There was no error in permitting Vizas to testify as an expert.

B. Impeachment Evidence re S.P. Yang Divorce

Defendants also claim that the court's failure to admit impeachment evidence concerning Wang's divorce from his wife, S.P. Yang, was prejudicial. They argue that Wang "opened the door" by explaining his deposition perjury (re his father-in-law's whereabouts) as motivated by concern for his wife and her father, by a desire to protect his father-in-law from interrogation by defendants' attorneys during his visit to his dying daughter. Defendants contend that they should have been allowed to attack Wang's explanations on cross-examination.

Defendants wanted to go into the particulars of a bitter and [*149] acrimonious divorce that preceded S.P. Yang's illness. Wang's divorce from S.P. Yang was wholly collateral, if not entirely irrelevant, to the matter at bar. Any probative value of this evidence was substantially outweighed by its undue prejudicial effect. The court properly excluded this evidence pursuant to *FRE Rule 403*. The court ruled before the trial that all evi-

dence concerning the divorce would be inadmissible. S.P. Yang died the week before the trial began.

6. DENIAL OF ACCOUNTING REMEDY

Defendants claim that they are entitled to a new trial because the court, through its orders, required defendants to rely to their prejudice on the certainty of a post-trial accounting hearing. They contend that both sides anticipated an accounting hearing, and that in holding that defendants' claim for an accounting is moot, the court has denied defendants due process.

At the pretrial conference the parties agreed to bifurcate the accounting and the trial of the legal claims. The parties subsequently entered into a stipulation to that effect. Stipulation re Accounting Hearing, filed April 24, 1990. The judicial accounting, if necessary, was to follow the jury trial. The final pretrial [*150] order provided that Wang not present any claims at trial other than dissolution of partnership (accounting), breach of contract, fraudulent representation, fraudulent concealment, defamation, interference with prospective economic advantage, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, declaratory relief, and constructive trust. Final Pretrial order, filed May 2, 1990, at 3. Defendants were ordered to present no counterclaims at trial other than service mark infringement, fraudulent registration, unfair competition, breach of contract, conversion, defamation, interference with contractual relations, breach of fiduciary duty, fraud and deceit, conspiracy, and claim for an accounting. *Id.* The final pretrial order also noted that "the parties have stipulated and the court has ordered that after the jury verdict, the trial shall be continued for certain accounting issues to be decided by the court." *Id. at 7-8.*

On June 7, 1990, the first day of jury deliberations, the court received a note from the foreperson of the jury. The note stated that the jury could not reach a unanimous decision on special verdict questions 1-3, which asked what [*151] the terms of the agreement between the parties were, and whether one party had wrongfully repudiated the agreement. The note also asked for clarification regarding the terms "equity partner" and "joint venture."

Outside the presence of the jury and in open court, the court discussed the foreperson's questions with counsel and told counsel how it proposed to instruct the jury. Counsel did not object to the court's proposed instruction. The jury was called into court and the court stated:

What you should understand here, is that there is no dispute with regard to the plaintiff and the defendant as to the fact that there was an agreement made in 1979. The dispute is about what was -- what were the terms of that agreement. But they don't argue the fact they did enter into an agreement. All they are arguing about is, hey, whose version of the agreement is right?

The plaintiff alleges that the agreement was that he was going to become a full partner of the Lee and Li law firm. The defendant says [sic], no, we never agreed to take you in as a full partner. The agreement was reached with just some of the partners of Lee and Li, Mr. Hsu, Mr. Chen and Mr. Lee [should be spelled Mr. Li], to enter [*152] into a joint venture to set up a law firm in San Francisco.

That basically is what the dispute is about with regard to what is the contract. So what you have to decide is which contract you think has been proved by clear and convincing evidence.

Reporter's Transcript, June 7, 1990, at 7-8.

Defense counsel noted that the court had inadvertently neglected to mention that the alleged members of the joint venture included Frank C.S. Wang. The court said counsel was correct. *Id. at 9.* Other than that single technical objection, which the court sustained and corrected, defense counsel made no objections to the court's instruction.

On June 11, 1990, the jury returned the special verdict. The jury found that Wang and defendants agreed in 1979 that Wang would be an equity partner in the Taipei law firm of Lee and Li; that defendants wrongfully repudiated their agreement with Wang; that Wang did not wrongfully repudiate his agreement with defendants; that defendants breached their fiduciary duties to Wang, for which the jury awarded him compensatory and punitive damages; and that Wang breached his fiduciary duties to defendants, for which the jury awarded them solely compensatory damages. [*153] *See* Special Verdict, questions 1, 3, 22-29.

On June 13, 1990, William Brockett, Wang's attorney, wrote requesting that the court immediately proceed with a hearing on the accounting issues. Ronald Mallen, attorney for defendants, responded to Brockett's request in a letter to the court dated June 25, 1990:

Presumptively, [Brockett] recognizes that a judgment cannot be entered until the accounting phase is completed. There are, however, fundamental concerns which must first be resolved to determine which issues will be the subject of the accounting hearing. These concerns involve the proper construction and effect to be given to the special verdict. We request a status conference so we can discuss how to proceed. We will then seek a briefing schedule to enable us to detail the serious deficiencies of the verdict, and which issues remain for the bifurcated proceeding and the accounting.

On July 6, 1990, the court conducted a status conference, and in an order filed the same day, ordered the parties to file briefs on the issue of whether the parties had a right to an accounting. Order Following Status Conference, filed July 6, 1990, at 1. After considering the papers submitted [*154] by both sides, the court issued its Supplemental Memorandum re Judgment, which stated, in part, that

defendants assume that the judgment of August 30, 1990 does not apply to all the claims in this action, specifically excluding defendants' accounting claims. This assumption is not correct. The August 30th judgment is the final judgment in this action. It states that the court "considered all claims presented." The court will issue an order explaining why defendants' accounting claims are moot.

Supplemental Memorandum re Judgment, filed September 5, 1990, at 1-2. The court had no opportunity to issue an order concerning the denial of the accounting claim, however, before defendants filed this motion on September 14, 1990.

Wang argues that defendants' accounting claims are moot because both parties consciously chose to seek damages for breach of the agreement under a theory of wrongful repudiation. Pltf's Opp. at 47. He also claims that even if defendants did have the right to an accounting, an accounting would be inconsistent with the jury's verdict and defendants are barred from an accounting under the doctrine of unclean hands. [33] Plaintiff's Supplemental Brief, filed July 10, [*155] 1990, at 2-3.

> 33 Because the court holds defendants have no right to an accounting under California partnership law, it is unnecessary for this opinion to address Wang's "unclean hands" argument. Nevertheless, the court wishes to emphasize that it would be inappropriate to award defendants an accounting of the partnership assets in this case because the jury found that defendants wrongfully repudiated the partnership agreement. Accounting is an equitable remedy, and equity does not aid those who come with unclean hands.

Defendants, on the other hand, maintain that although Wang has waived his right to an accounting, defendants have not, because an accounting is required any time there is a dissolution. *See* Defendants' Revised Opposition Brief Re Waiver of Accounting, filed July 16, 1990. ("Dfs' Opposition"). Defendants have consistently sought both remedies at law and an accounting in support of their claims. In their motion in support of this motion, defendants argue that

in holding that defendants' claim for [*156] an accounting is moot, the Court apparently has concluded that the presentation to the jury of the theory of wrongful repudiation was an alternative to an accounting. However, neither party presented jury instructions on that theory. The jury was told in opening statement of the bifurcation procedure. Defendants relied on the Court's order and bifurcated discovery, electing to save much of their discovery concerning accounting experts until after the jury verdict.

Memo in Support at 47. Defendants claim that this "belated change in the 'rules of the game'" denied them due process and prejudiced their right to a fair trial because every aspect of the reserved discovery and the trial relating to accounting would have been different had they known the jury would decide the financial aspects of their relationship with Wang.

It is certainly true that defendants did not waive their accounting remedy, since waiver is defined as the "intentional or voluntary relinquishment of a known right." *Black's Law Dictionary* 1417 (5th Ed. 1979). The pertinent inquiry, however, is not whether Wang or defendants have waived their accounting remedy, but whether either party has the right to an accounting. [*157] Whether defendants intentionally and voluntarily relinquished their right to an accounting is irrelevant if defendants are no longer legally entitled to an accounting.

As discussed in section 1(C), *supra*, under California law, one partner must ordinarily enforce his rights against other partners by an equitable suit for dissolution and accounting. The general rule prohibiting an action at law is subject to a number of exceptions. The sole exception applicable to this action is that a partner who has wrongfully caused a dissolution may be sued for damages by the wronged partner. The innocent partner may (1) waive the tort or breach and sue to specifically enforce the partnership agreement, including the remedy of a judicial dissolution and an accounting, *Cal. Corp. Code 15038(b)(1)(A)*, or submit to the repudiation and sue for damages for conversion of his interest in the partnership assets, *Wilson v. Brown, 96 Cal. App. 140, 143, 273 P. 847, 849 (1929)*, or (2) submit to the repudiation and sue for damages for breach of contract, *Cal. Corp. Code § 15038(b)(1)(B)*, or *(3)* sue in tort, *Boyd v. Bevilacqua, 247 Cal. App. 2d 272, 288, 55 Cal. Rptr. 610, 621 (1966)*. [*158] *See Gherman, 72 Cal. App. 3d at 564-65, 140 Cal. Rptr. at 343*. "It *does not lie in the mouth of the wrongdoer to demand that his victim be limited to that cause of action which is most beneficial to the wrongdoer." Id. at 565, 140 Cal. Rptr. at 343* (emphasis in original).

[HN47] Conduct amounting to a wrongful repudiation is inconsistent with an accounting, because wrongful repudiation denies the existence of the partnership agreement, while the purpose of an accounting is to seek

an adjustment of partnership interest predicated upon the partnership agreement. *See Gherman, 72 Cal. App. 3d at 565, 140 Cal. Rptr. at 344.* In this case, both parties consciously chose to seek damages for breach of the agreement based on wrongful repudiation, and this choice renders the accounting remedy moot as a matter of law. In *Gherman,* the plaintiffs elected prior to trial to seek only damages rather than establish an interest in the dissolved partnership. The appellate court held that once plaintiffs "elected not to assert any partnership rights and to stand solely on the cause of action arising out of the [*159] repudiation, then as between the parties the cause of action for judicial dissolution and an accounting in equity became moot." *Id.*

This action is procedurally different from *Gherman* because plaintiff did not dismiss his cause of action for dissolution and an accounting prior to trial. In this action, both parties assumed there was the possibility of an accounting by the court. After the jury returned its verdict, however, plaintiff elected to forego an accounting and requested judgment on his legal claims. [34]

34 Defendants mistakenly interpret *Gherman's* alternative remedies to permit a cumulative recovery. *See* Dfs' Opposition at 12-13, Defendants' Proposed Judgment, received July 13, 1990, at 2. When the *Gherman* court stated that under Corporations Code *section 15038*, these "are actually cumulative remedies," *72 Cal. App. 3d at 564 n.12, 140 Cal. Rptr. at 343 n.12*, the court's meaning was that the partner not wrongfully causing the dissolution of the partnership ordinarily has the right, if he or she so chooses, to both an accounting and damages for breach of the agreement. In *Gherman,* however, the plaintiff dismissed his accounting claim before the trial, and in this case, Wang waived the right to an accounting after the jury verdict. *See* Memorandum Re Judgment, filed August 30, 1990, at 2-3.

[*160] The court sees no reason to distinguish *Gherman* on the basis of this procedural distinction. *Gherman* is applicable because in both *Gherman* and this action the parties proceeded at trial under a theory of wrongful repudiation. Both the *Gherman* plaintiffs and plaintiff Francis Wang ultimately elected not to specifically enforce the partnership and proceed on the remedy of a judicial dissolution and an accounting.

Defendants cannot seriously deny that both parties submitted this case to the jury under a theory of wrongful repudiation. [35] Three jury instructions, Nos. 14, 24, and 27, formed the core of the parties' partnership claims. Jury Instruction No. 14, *see supra* note 6, summarized the factual positions of the parties. [36] Jury Instruction No. 24, *see supra* note 4, specifically directed the jury's inquiry on the parties' partnership claims. [37] Finally, wrongful repudiation was defined in Jury instruction No. 27:

Once you have determined the terms of the 1979 Agreement, you should consider whether either party wrongfully repudiated that agreement. Wrongful repudiation is the denial of existence of the agreement despite the knowledge that said agreement did [*161] in fact exist. [38]

35 Defendants argue the "defendant's accounting [in *Gherman]* was barred primarily because he tried to assert it in a belated cross-complaint which was completely inconsistent with his primary theory of the case, that is, that there was no partnership of any kind." Dfs' Opposition, at 12. This is not correct. *Gherman* permits a party to plead inconsistent causes of action. However, when a plaintiff makes an election of remedies and chooses to proceed on his or her legal claims, defendant has no right to an accounting. *72 Cal. App. 3d at 565, 140 Cal. Rptr. at 344.*

36 Jury Instruction No. 14 was modeled after Defendants' Proposed Jury Instruction No. 1038. *See* Defendants' Proposed Jury Instructions, filed April 9, 1990, at 52-54. Defendants did not object to Jury Instruction No. 14. *See* Defendants' Record of Objections to Court's Instructions and Special Verdict, filed June 7, 1990, at 1 (hereinafter Dfs' Objections).

37 Jury Instruction No. 24 was proposed by the court and defendants did not object to it. *See* Dfs' Objections, at 2.

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38 Defendants did not object to the language of Jury Instruction No. 27. Instead, their objection was as follows: "Defendants object to Instruction No. 27 regarding wrongful repudiation as establishing an unsupported condition precedent to the jury's consideration of defendants' contract and tort claims." Dfs' Objections, at 2.

The court told the parties that it intended for the special verdict to ask the jury whether either party had wrongfully repudiated the parties' agreement; and if the jury determined that neither party had wrongfully repudiated, the jury could skip the partnership questions. Neither party would have a right to any legal remedies arising from breach of the partnership or joint venture if the jury did not first find that a wrongful repudia-

tion had occurred. Both parties convinced the court not to do this. The special verdict contained no such "condition precedent." Thus, the court had already modified the special verdict in accordance with defendants' objection when defendants filed their objections on June 7, 1990 to the court's instructions and the special verdict.

The essence [*163] of the dispute between the parties was that Wang argued that he had entered into a partnership with defendants and defendants wrongfully repudiated the partnership agreement, while defendants denied the existence of any partnership agreement involving the Lee and Li law firm, and insisted instead that Wang and the individual defendants and Frank C.S. Wang entered into a joint venture among themselves and that Wang wrongfully repudiated the joint venture.

The jury found for Wang and against the defendants. Nevertheless, defendants now claim they are entitled to an accounting of the assets of the San Francisco office. But defendants' claim for an accounting is based upon a joint venture which the jury found never existed. Any losses sustained by defendants as part of their partnership with Wang were considered by the jury under Wang's theory of the case and were incorporated in the judgment as offsets to Wang's damages. *See Gherman, 172 Cal. App. 3d at 566, 140 Cal. Rptr. at 344*; Memorandum Re Judgment, at 4. As the *Gherman* court explained, the fact that defendants are deprived of an accounting does them no injustice:

After all defendants are the ones who wrongfully [*164] repudiated the existence of a partnership or joint venture. Having done so, they can hardly complain that their repudiation has been accepted by plaintiffs at face value. Defendants cannot complain of the failure to order an accounting of a partnership or joint venture which they say is nonexistent where the nonexistence is attributable solely to their wrongful conduct. Defendants should not be permitted to say, we repudiate the contract, but then if we do not get away with it, we repudiate our repudiation and demand an accounting. A repudiation is, by its inherent nature, irretrievable after an action is filed.

172 Cal. App. 3d at 565, 140 Cal Rptr. at 344.

For the foregoing reasons, the court finds that defendants' motion for a new trial on the ground that they were prejudiced by the court's refusal to allow them an accounting should be denied. In accordance with the Order Following Status Conference, Wang's motion for *Jewel v. Boxer* discovery, filed July 3, 1990, is also denied as moot.

7. JURY MISCONDUCT

On June 25, 1990, defendants filed a motion for sanctions alleging that Wang's counsel had committed misconduct by advising the jurors that they were [*165] not to discuss the case with counsel for defendants. The court subsequently ordered that counsel not communicate directly or indirectly with any juror without prior leave of court, and also ordered any attorney in this action who had communicated with any juror to file an affidavit under seal containing the details of the communication. After a review of the affidavits, the court ordered on July 10, 1990, that each party file a brief addressing the issue of whether an evidentiary hearing should be held to determine whether the court should order a new trial "based on whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Order Requiring Briefing on Issue of Need for Evidentiary Hearing, filed June 10, 1990, at 1.

Defendants submitted a brief arguing that a new trial was warranted, without need for an evidentiary hearing, because 1) the jury improperly based its award of punitive damages on extrinsic material which was not part of the evidence introduced at trial; 2) at least one juror improperly communicated with a third party during trial regarding the merits of the [*166] case and considered information communicated by that party; and 3) at least one juror failed to disclose on voir dire certain racial biases she held against Chinese nationals. Brief in Support of Defendants' Request for Evidentiary Hearing, filed July 24, 1990, at 1. On September 4, 1990, the court issued a 45-page opinion and order denying defendants' request for an evidentiary hearing and new trial and denying defendants' motion for sanctions. Rather than repeating those findings here, we hereby incorporate by reference our order of September 4, 1990.

Defendants now reiterate their contention that the court should order a new trial because of the three above-described instances of jury misconduct. They complain that "the Court denied the request for evidentiary hearing, and apparently treated it as a motion for new trial." They add that "to the extent defendants misconstrued the court's ruling, we procedurally resubmit the arguments and request the court order a new trial based on said three specified items." Memo in Support at 50.

The court affirms its September 4th order, to which it refers defendants for an explanation of why it now finds that a new trial is not mandated on grounds [*167] of juror misconduct. Furthermore, because defendants' claim of jury misconduct was originally put forth as an attempt by defendants to challenge the punitive damages award, and because the court has now recalculated the punitive damage award, any such alleged defect has been cured.

CONCLUSION

For the reasons stated above, defendants' motion for judgment notwithstanding the verdict and motion for a new trial are DENIED, conditional upon plaintiff's acceptance of a remittitur to $ 5,380,000.

IT IS SO ORDERED.