

IN THE COURT OF APPEALS OF THE STATE OF OREGON

EVERGREEN WEST BUSINESS CENTER, LLC,  
an Oregon limited liability company,  
Plaintiff-Respondent  
Cross-Appellant,

v.

TERRY W. EMMERT,  
Defendant-Appellant  
Cross-Respondent,

and

PREMIER WEST BANK,  
Impartial.

Clackamas County Circuit Court  
CV07020348

A146301

Jeffrey S. Jones, Judge.

Argued and submitted on March 01, 2012.

Stuart M. Brown argued the cause for appellant - cross-respondent. With him on the briefs was Wiles Law Group.

John M. Berman argued the cause for respondent - cross-appellant. With him on the briefs was J. Rion Bourgeois.

Before Schuman, Presiding Judge, and Armstrong, Judge, and Wollheim, Judge.

SCHUMAN, P. J.

Reversed and remanded on appeal and on cross-appeal.

Wollheim, J., concurring in part, dissenting in part.

1 SCHUMAN, P. J.

2 Defendant Terry Emmert was a member of plaintiff Evergreen West  
3 Business Center, LLC (Evergreen), a limited liability company formed to purchase and  
4 develop property located in Washington County. Evergreen purchased the property with  
5 a loan from West Coast Bank, but eventually fell behind on payments and was at risk of  
6 losing the property to foreclosure. According to Evergreen, Emmert agreed to work with  
7 West Coast Bank to postpone the foreclosure, but, rather than do as promised, Emmert  
8 instead purchased the note and trust deed to the property from West Coast Bank, allowed  
9 the foreclosure sale to proceed, and then purchased the property for himself at the  
10 trustee's sale--all without notifying any of Evergreen's other members.

11 Evergreen then brought this action alleging that Emmert had breached a  
12 fiduciary duty to Evergreen by secretly acquiring the property. The complaint sought  
13 damages or, alternatively, imposition of a constructive trust whereby the property would  
14 be sold and the proceeds distributed to Evergreen's creditors and its members; Evergreen  
15 later amended the complaint to request punitive damages.

16 A jury returned a verdict in Evergreen's favor, awarding nominal damages  
17 of \$1 but punitive damages in the amount of \$600,000. Neither side was satisfied with  
18 that verdict. Emmert asked the trial court to reduce the punitive damages award, arguing  
19 that the 600,000-to-1 ratio of punitive to compensatory damages violated his right to due  
20 process. Evergreen, for its part, asked the court to rule on the remedy of a constructive  
21 trust as an alternative to the jury's nominal damages award, but wanted to keep the



1 Evergreen, a manager-managed limited liability company. The company was formed to  
2 purchase a 4.57-acre parcel and develop that property as a small business park that would  
3 have Senour, a cabinet maker, as the anchor tenant. Evergreen purchased the property for  
4 \$846,044, most of which (\$552,500) was borrowed from West Coast Bank and secured  
5 by a trust deed.

6           While the property was being developed, the acquisition loan matured, and,  
7 in March 2004, West Coast Bank notified Evergreen that the bank intended to foreclose  
8 the trust deed on the property. Taggart, who was Evergreen's manager, sought a new  
9 loan in the amount of \$3.4 million to pay off the acquisition loan and to fund construction  
10 on the property. That loan application was denied.

11           Taggart then approached Emmert about Evergreen's financial situation, and  
12 the two agreed to work on a two-step process to obtain financing. First, Evergreen would  
13 obtain a "bridge loan" of \$900,000 to pay off West Coast Bank and a few other parties.  
14 Second, Evergreen would obtain separate construction financing. Emmert suggested that  
15 Taggart contact Bob Dyer, a banker at Oregon Pacific Banking Company, with whom  
16 Emmert had done other business. Taggart did so, and Dyer told him that "a small loan"  
17 of \$900,000 "wouldn't be a problem."

18           Dyer, though, was in the process of leaving Oregon Pacific Banking  
19 Company and preferred to take the loan application with him to his future employer,  
20 Premier West Bank. After Dyer joined Premier West Bank, he asked Taggart for a new  
21 appraisal of the property and an explanation of how the \$900,000 in loan proceeds would

1 be used.

2           In the meantime, West Coast Bank advised Taggart that the scheduled  
3 foreclosure sale was being postponed to September 15, 2004. Taggart assured a loan  
4 officer for West Coast Bank that the bridge loan from Premier would be approved and  
5 would allow Evergreen to pay off the promissory note, but West Coast Bank required  
6 "something in good faith"--namely, a \$50,000 payment toward the loan--to further delay  
7 the foreclosure proceedings while the bridge financing was finalized.

8           Taggart then met with Emmert and explained West Coast Bank's demand  
9 for a \$50,000 payment to postpone the foreclosure sale beyond September 15. At that  
10 point, Emmert told Taggart to "do nothing but focus on this [bridge] loan with Bob Dyer"  
11 at Premier West Bank and that Emmert himself "will take care of the West Coast Bank  
12 loan." From time to time after that discussion, Taggart asked Emmert about the West  
13 Coast Bank situation, and Emmert told Taggart "not to worry about it; that he [Emmert]  
14 was taking care of it and he had everything under control[.]"

15           Emmert, it turned out, was negotiating with West Coast Bank--but not for  
16 the benefit of Taggart or Evergreen. Rather, beginning in early September 2004, Emmert  
17 began negotiating to purchase the promissory note and related trust deed from West  
18 Coast Bank. On September 15, Emmert paid \$50,000 to West Coast Bank to postpone  
19 the foreclosure sale. From that point, West Coast Bank sent letters only to Emmert; it did  
20 not copy Taggart on a letter stating that the foreclosure was rescheduled to October 15,  
21 2004.

1           Despite status inquiries from Taggart, Emmert never disclosed that he was  
2 in the process of purchasing the underlying promissory note and trust deed to Evergreen's  
3 property. Rather, Emmert allowed Taggart to continue working with Dyer to obtain a  
4 \$900,000 loan for Evergreen. On September 22, 2004, in response to Dyer's earlier  
5 request for an explanation of how those loan proceeds would be used, Taggart drafted an  
6 explanation and sent it to Emmert for his approval. Emmert approved the draft, and  
7 Taggart sent the explanation to Dyer on September 27, 2004. Dyer then told Taggart that  
8 he was leaving on a hunting trip and would process the loan application when he  
9 returned.

10           Emmert, though, told Dyer not to proceed with that bridge loan to  
11 Evergreen because Emmert had "worked something out" with the noteholder, West Coast  
12 Bank. And Emmert had worked something out: the purchase of the note. On October  
13 14, 2004, the day before the scheduled foreclosure sale, Emmert purchased the note and  
14 trust deed from West Coast Bank for \$563,979.49. Emmert signed the assignment of the  
15 note and trust deed on October 21, 2004. The following day, Emmert's attorney, as  
16 trustee, held a foreclosure sale. Emmert bid on and obtained the property himself, at a  
17 total investment of \$613,979.49. An appraisal obtained for the Premier West Bank loan,  
18 and dated one month earlier, had valued the property at \$1,390,000. After purchasing the  
19 property for himself, Emmert then used the property as security to obtain, in his own  
20 name, the \$900,000 loan from Premier West Bank to develop the property.

21           Evergreen subsequently filed this action for breach of fiduciary duty.

1 Evergreen alleged, among other contentions, that Emmert "agreed to provide financial  
2 assistance to [Evergreen] in order to avoid the pending foreclosure and to obtain said  
3 development loan \* \* \*[,]" and that, instead of doing so, Emmert "purchased the lender's  
4 note and trust deed from the lender and then foreclosed on said real property and took  
5 ownership of it for his own account, all without notifying [Evergreen] or the other  
6 members that he was doing or had done so." Evergreen sought alternative remedies: On  
7 the one hand, Evergreen alleged that Emmert "obtained title to said real property by fraud  
8 and breach of his fiduciary duty" and asked the court to "declare that Defendant Emmert  
9 holds title to said real property in trust for Plaintiff and said members" and "said real  
10 property [be] sold for the benefit of [Evergreen], and the proceeds distributed first to  
11 creditors and then to members as their interests may appear." Alternatively, Evergreen  
12 alleged that it was "damaged in a sum to be determined at trial, but not less than  
13 \$800,000." Later, Evergreen was allowed to amend the complaint to add a claim for  
14 punitive damages.

15           The breach of fiduciary duty claim was tried to a jury. As to the elements  
16 of the claim, the jury was instructed as follows:

17           "To recover for breach of fiduciary duty, the plaintiff must prove, one, the  
18 existence of a fiduciary relationship between the parties; two, a breach of  
19 one or more of the fiduciary duties arising out of that relationship; and  
20 three, damage to the plaintiff resulting from a breach of one or more of  
21 those duties."

22           The jury was further instructed that, under Oregon law, "A member of a limited liability  
23 company who is not also a manager, owes no duties to the limited liability company or

1 other members solely by reason of being a member." In the event of a breach of  
2 fiduciary duty, the jury was told, "then the non-breaching party is entitled to any profits  
3 made by the breaching party as a result of the breach."

4           The jury returned a verdict in which it found that Emmert had breached a  
5 fiduciary duty to Evergreen. As for damages, the jury awarded Evergreen \$1 in  
6 economic damages and \$600,000 in punitive damages. At that point, Emmert filed a  
7 motion for judgment notwithstanding the verdict (JNOV) and a motion to reduce the  
8 punitive damages award. In his JNOV motion, Emmert argued that, as a member of  
9 Evergreen, he owed no duty to Evergreen or its other members under ORS 63.155(9),  
10 which provides that, for manager-managed LLCs like Evergreen, "[a] member who is not  
11 also a manager owes no duties to the limited liability company or the other members  
12 solely by reason of being a member[.]" In his motion regarding punitive damages,  
13 Emmert argued that the \$600,000 award was grossly excessive in light of the nominal  
14 damages awarded; he asked the court to "either grant a JNOV with regard to punitive  
15 damages, or reduce the punitive damages award to \$4."

16           In response to those motions, Evergreen defended the jury's determinations  
17 regarding the breach of fiduciary duty and the punitive damages award, but it also asked  
18 the court to impose a constructive trust as an alternative to the jury's damages award.  
19 Evergreen argued that "the measure of damage is the profit available to Defendant  
20 Emmert" but that "the jury concluded that Defendant Emmert has not yet received any  
21 profit. The jury recognized in accordance with the evidence, that at any time Defendant



1 Emmert can obtain profit, but apparently they concluded that they could not tell how  
2 much he would receive." Thus, Evergreen argued, the property should be subject to a  
3 constructive trust and sold such that Emmert "will be entitled to the \$613,979.49 that he  
4 paid for the note and trust deed, and Plaintiff will be entitled to the balance of the  
5 proceeds."

6           After a hearing on the various motions, the trial court reduced the punitive  
7 damages award from \$600,000 to \$4, concluding that anything greater than an award of  
8 four times the \$1 economic damages award would violate due process. *See [Goddard v.](#)*  
9 *[Farmers Ins. Co.](#)*, 344 Or 232, 259-61, 179 P3d 645 (2008) (explaining that punitive  
10 damage awards in cases of purely economic injury should generally be limited to a 4-to-1  
11 ratio). The court also concluded that imposition of a constructive trust was available to  
12 Evergreen as an alternative remedy, but that the equitable relief could not be joined with  
13 a punitive damages award. Faced with the choice between a \$5 award and the imposition  
14 of a constructive trust, Evergreen elected the latter remedy. The court then entered a  
15 judgment "that Plaintiff Evergreen West Business Center, LLC is granted a constructive  
16 trust of the Property" and that the "Property shall be sold by [Evergreen]. From the  
17 proceeds [Evergreen] shall repay to [Emmert] the first \$613,979.49. [Emmert] shall be  
18 responsible for paying any obligations for which [Emmert] has pledged the Property. To  
19 the extent [Emmert] does not do so, and proceeds from the sale of the Property are used  
20 to pay [Emmert's] debt in excess of \$613,979.49, [Evergreen] shall be entitled to a  
21 supplemental judgment for any such sums." Emmert appeals that judgment, and

1 Evergreen cross-appeals.

2 II. ANALYSIS

3 A. *Emmert's Appeal*

4 We begin by addressing Emmert's first and second assignments of error on  
5 appeal because our resolution of those assignments obviates the need to address many of  
6 the remaining issues in the case. Emmert's first two assignments of error concern the trial  
7 court's imposition of a constructive trust.

8 Although Evergreen pleaded a claim for "constructive trust," "the concept  
9 of constructive trust does not stand on its own as a substantive claim, but exists solely as  
10 an equitable remedy, available to divest an individual who has been unjustly enriched of  
11 property that he or she ought not, in equity and good conscience, hold and enjoy."  
12 [Tupper v. Roan](#), 349 Or 211, 219, 243 P3d 50 (2010) (internal quotation marks and  
13 emphasis omitted). For that reason, the "concepts of constructive trust and unjust  
14 enrichment thus are intertwined: When 'the law employs a constructive trust, the doctrine  
15 of unjust enrichment governs generally the substantive rights of the parties.'" *Id.* (quoting  
16 *Barnes v. Eastern and Western Lbr. Co.*, 205 Or 553, 597, 287 P2d 929 (1955)).

17 Oregon cases do not "provide any really comprehensive exposition of that  
18 doctrine" but instead "simply describe the kinds of actions and circumstances that would  
19 constitute unjust enrichment warranting imposition of a constructive trust, and then  
20 observe that the concept extends to other similar acts and circumstances." *Id.* at 220. For  
21 purposes of this case, suffice it to say that those circumstances include "when a person in

1 a fiduciary or confidential relationship acquires or retains property in violation of a duty  
2 impressed upon him by that relationship." *Id.* (citing *Albino v. Albino*, 279 Or 537, 550,  
3 568 P2d 1344 (1977)). The remedy is limited to those circumstances in which there is no  
4 other remedy available. *See Belton v. Buesing*, 240 Or 399, 409, 402 P2d 98 (1965)  
5 (constructive trust is a "remedial institution invented by equity to avoid unjust enrichment  
6 in situations where there is no other available equitable remedy"); [Brown v. Brown](#), 206  
7 Or App 239, 251, 136 P3d 745, *rev den*, 341 Or 449 (2006) ("Oregon courts impose  
8 constructive trusts as remedial devices to avoid unjust enrichment when no other  
9 adequate remedy is available."); *see generally Alsea Veneer, Inc. v. State of Oregon*, 318  
10 Or 33, 43, 862 P2d 95 (1993) ("Equitable relief does not lie if there is an adequate  
11 remedy at law"; "remedy at law must be practical, efficient, and adequate, as full a  
12 remedy as that which can be obtained in equity.").

13           With those precepts in mind, we turn to the trial court's imposition of a  
14 constructive trust. Emmert's first two assignments of error advance three reasons why the  
15 court erred in imposing that equitable remedy: (1) Emmert did not owe any fiduciary  
16 duty to Evergreen; (2) if he did owe a duty, he did not breach it; and (3) the jury  
17 determined his "unjust benefit" to be nominal and, for that reason, "the constructive trust  
18 should either not have been imposed (because the legal remedy of damages would be  
19 adequate as a matter of law) or limited to payment of \$1 from the sale of the Property."

20           The first two of those arguments merit little discussion. Emmert's concept  
21 of fiduciary duties is premised on a misreading of ORS 63.155, a statute concerning

1 fiduciary duties for members and managers of limited liability companies. Section 9 of  
2 that statute provides:

3 "In a manager-managed limited liability company:

4 "(a) A member who is not also a manager owes no duties to the  
5 limited liability company or the other members solely by reason of being a  
6 member;

7 "(b) A manager is held to the same standards of conduct prescribed  
8 for members in subsections (2) to (8) of this section;

9 "(c) A member who, pursuant to an operating agreement, exercises  
10 some or all of the rights of a manager in the management and conduct of  
11 the limited liability company's business is held to the standards of conduct  
12 described in subsections (2) to (8) of this section to the extent that the  
13 member exercises the managerial authority vested in a manager by this  
14 chapter; and

15 "(d) A manager is relieved of liability imposed by law for violation  
16 of the standards prescribed by this section to the extent, if any, of the  
17 managerial authority delegated to the members who are not also managers  
18 by an operating agreement."

19 According to Emmert, that statutory scheme should be construed so that "any fiduciary  
20 duty owed by one member to another (or to the company) is to be strictly limited to  
21 managerial duties imposed on that member by the Operating Agreement."

22 ORS 63.155(9), however, addresses an LLC member's fiduciary duties  
23 "*solely* by reason of being a member" and when a member, "pursuant to an operating  
24 agreement, exercises some or all of the rights of a manager in the management and  
25 conduct of the limited liability company's business \* \* \*." (Emphasis added.) Contrary  
26 to Emmert's suggestion, the statute does not preclude a member from establishing a  
27 fiduciary relationship with anyone--including the LLC--in other ways. In this case,

1 Evergreen's claim was not based on the fact that Emmert was a member of the LLC or  
2 that he was exercising rights pursuant to the LLC's operating agreement. Rather, it was  
3 based on the common-law theory that Emmert, by promising to handle the West Coast  
4 Bank loan on behalf of Evergreen, had entered into a relationship of confidence with the  
5 company that required him to act "in good faith and with due regard to the interests of the  
6 one reposing the confidence." *Starkweather v. Shaffer*, 262 Or 198, 205, 497 P2d 358  
7 (1972). The jury instructions on fiduciary duties, as well as Evergreen's closing  
8 argument, the former of which is set out above, \_\_\_ Or App at \_\_\_ (slip op at 6-7), are  
9 explicit as to that theory. Nothing in ORS 63.155 prevents one member from assuming  
10 fiduciary duties by entering into a relationship of confidence with another.

11           Emmert's second argument--that even if he owed a fiduciary duty to  
12 Evergreen, he did not breach it--simply disregards the jury's findings. Emmert  
13 selectively identifies facts that are favorable to his case while ignoring the ample  
14 evidence that he secretly negotiated on his own behalf while purporting to act on behalf  
15 of Evergreen. The jury was entitled to--and did--reject Emmert's version of events. In  
16 short, there was sufficient evidence for the jury to conclude that Emmert had breached a  
17 fiduciary duty, and, consequently, for the trial court to conclude that he violated the type  
18 of a "duty imposed by a confidential or fiduciary relationship" that would support the  
19 imposition of a constructive trust. *See Albino*, 279 Or at 550 ("A constructive trust arises  
20 where a person in a fiduciary or confidential relationship acquires or retains property in  
21 violation of his duty to the grantor.").

1            Emmert's remaining contentions focus on the effect of the jury's verdict in  
2 this case--specifically, the fact that the jury determined that he had profited only in a  
3 nominal amount. *See Frazee v. Brazda*, 239 Or 624, 627, 399 P2d 346 (1965) ("Nominal  
4 damages are usually defined as a trivial sum and are usually represented by a judgment  
5 for one dollar or a lesser sum."); *Hall v. Cornett Et al.*, 193 Or 634, 644, 240 P2d 231  
6 (1952) ("Nominal damages means no damages at all." (Internal quotation marks and  
7 citations omitted.)). According to Emmert, the jury's verdict determined that the "unjust  
8 benefit" to Emmert was \$1 and, for that reason, the court should not have imposed a  
9 constructive trust that would allow Evergreen to recover more than that amount.

10            Evergreen, for its part, argues that Emmert was unjustly enriched far more  
11 than the \$1 jury verdict, because he "received property worth \$1,390,000 by paying only  
12 \$613,979.49 as a result of his breach of fiduciary duty." Moreover, Evergreen argues,  
13 real property is unique, and the constructive trust remedy and damages remedy serve  
14 different purposes: "The constructive trust is imposed to give [Evergreen] back its  
15 property, not so that [Evergreen] can obtain a dollar."

16            In the abstract, we agree with Evergreen's contention that damages might be  
17 an inadequate remedy where an agent's breach of fiduciary duty has divested his principal  
18 of real property. However, that is not true here, given how this case was tried to the jury.  
19 As set out above, Evergreen did not seek damages in the amount of its own loss from  
20 Emmert's actions; rather, Evergreen sought damages measured by Emmert's *gain*. The  
21 jury was instructed, at Evergreen's request, that "the non-breaching party is entitled to any

1 profits made by the breaching party as a result of the breach." Evergreen offered  
2 evidence that the property was worth more than \$1.3 million at the time of the foreclosure  
3 sale and that Emmert, by breaching his fiduciary duties to Evergreen, had obtained that  
4 property for approximately \$600,000. During closing arguments, Evergreen's counsel  
5 emphasized that evidence and told the jury that Emmert had therefore profited  
6 "overnight" more than \$700,000. Evergreen asked the jury to award that amount--that is,  
7 the profit that Emmert obtained--to Evergreen.

8           For whatever reason, the jury returned an award of damages in the amount  
9 of \$1. It was only after the jury awarded nominal damages on that claim that Evergreen  
10 requested that the court rule on its alternative request for a constructive trust. Given that  
11 posture, we agree with Emmert that the constructive trust imposed by the court was not a  
12 permissible equitable remedy.

13           Equitable remedies are not for the purpose of correcting disappointing jury  
14 verdicts or remedying a failure of proof. As we recently explained in [Kazlauskas v.](#)  
15 [Emmert](#), 248 Or App 555, 275 P3d 171 (2012), there is a difference between a jury  
16 verdict that is inadequate as a matter of *law* and one that is inadequate as a matter of *fact*.  
17 In *Kazlauskas*, the defendant (the same Terry Emmert) argued that the trial court had  
18 erred in allowing the plaintiff, Kazlauskas, to elect a remedy of specific enforcement  
19 rather than the jury's damages verdicts on breach of contract claims. We agreed with  
20 Kazlauskas that, "at least in the abstract, a party is entitled to elect from among different  
21 remedies for a breach of contract." *Id.* at 569. We also explained, however, that if

1 "adequate relief may be obtained in law, then equitable jurisdiction will not be invoked."

2 *Id.* (quoting [Thompson v. Coughlin](#), 329 Or 630, 638, 997 P2d 191 (2000)). Thus, the  
3 question was whether Kazlauskas had an adequate remedy at law in the form of damages.

4 We concluded that he did, notwithstanding the inadequacy of the actual award:

5 "Kazlauskas tried his claim for damages to the jury, which awarded  
6 damages--albeit not in as great an amount as he sought. Moreover, as  
7 noted, in his cross-appeal concerning the jury's deliberations, Kazlauskas  
8 asserts that, if we were to reinstate the jury's initial verdict for a greater  
9 amount of damages than it ultimately awarded, he would elect that damages  
10 remedy rather than specific performance. Thus, Kazlauskas's position in  
11 this litigation *is not that monetary damages for the breaches were*  
12 *inadequate as a matter of law, but that the monetary damages that the jury*  
13 *actually awarded were inadequate as a matter of fact. We disagree with*  
14 *Kazlauskas's proposition that equitable relief is available under such*  
15 *circumstances.*

16 \* \* \* \* \*

17 "Kazlauskas nonetheless asserts that monetary damages were  
18 inadequate because the future profits from the sale of Victory Lane and  
19 Flax Plant Road 'cannot be ascertained.' That argument is both legally and  
20 factually unavailing on this record. At trial, Kazlauskas presented expert  
21 testimony from a real estate appraiser who testified as to the value of  
22 Victory Lane in light of its prospects for future development. The appraiser  
23 concluded that, within the next seven to 10 years, the property was likely to  
24 be brought within the urban growth boundary. In light of its potential for  
25 future development, he valued the property at \$2,520,000, which was  
26 approximately twice the amount that Emmert had paid Kazlauskas for it.  
27 Counsel for Kazlauskas argued to the jury:

28 "And so the profit--right now, Mr. Emmert has a profit on  
29 this property of \$1,282,500. That's the--if it were to be sold today,  
30 that's the amount of the upside, 20 percent of which is \$258,500.'

31 "With respect to the Flax Plant Road property, Kazlauskas relied on  
32 Emmert's current financial statement as evidence of its value. In closing, he  
33 argued to the jury:



1                   "The current value is a million eight. The purchase price  
2                   from the Carters was \$451,000. [A local improvement district  
3                   assessment is] \$460,000. So the profit today is \$889,000, 30 percent  
4                   of which is \$226,700. That's what the profit is.'

5                   "In sum, Kazlauskas presented evidence of a precise amount of lost  
6                   profits damages, and he asked the jury to award that amount. Moreover, as  
7                   noted, *see* 248 Or App at 559-60, he asserts on appeal that, if we were to  
8                   direct the trial court on cross-appeal to reinstate the jury's initial verdict for  
9                   \$258,500 on the Victory Lane claim and \$266,700 on the Flax Plant Road  
10                  claim, he would abandon his election of specific performance and, instead,  
11                  elect his damages remedy. Thus, Kazlauskas provided the jury with a  
12                  precise amount of damages to which he sought entitlement, and he adduced  
13                  particularized evidence in support of that amount. In addition, he has made  
14                  it clear that a jury verdict in that amount would, in fact, adequately  
15                  compensate him for the breaches. In such circumstances, specific  
16                  performance was not an appropriate remedy. Kazlauskas's remedy at law  
17                  was 'practical, efficient, and adequate.' *Alea Veneer*, 318 Or at 44."

18   248 Or App at 555 (emphasis added).

19                  Here, likewise, Evergreen has not seriously contended that Emmert was  
20   unjustly enriched in a way that could not have been valued for or compensated by a  
21   damages award in this case. Rather, the contention is that the jury, as a matter of *fact*, did  
22   not actually award damages in accordance with the evidence. Evergreen has offered  
23   various explanations for the jury's nominal award. In the trial court, Evergreen suggested  
24   that the jury was misled by closing arguments when Emmert's counsel stated (without  
25   objection from Evergreen) that the measure of damages was the value to Evergreen rather  
26   than the profit by Emmert. Evergreen also speculated that the jury simply was unwilling  
27   to award lost profits because it believed that, until the property was sold, Emmert had not  
28   profited. Similarly, Evergreen on appeal suggests that "the jury's determination of  
29   damages probably resulted from the improper admission of testimony as to [Emmert's]

1 holding costs, because until [Emmert] sold or did something with the property, he had not  
2 yet earned a profit." However, those criticisms are directed toward the jury's  
3 deliberations and the proof adduced at trial, not the adequacy of a damages award as a  
4 matter of law.<sup>1</sup>

5 Under the circumstances--that is, where the jury is presented with evidence  
6 of a damages claim that would wholly compensate the nonbreaching party--the equitable  
7 remedy of a constructive trust is not available simply because the jury returns a lesser  
8 verdict than requested.<sup>2</sup>

9 B. *Evergreen's Cross-Appeal*

10 Evergreen's first two assignments of error on cross-appeal involve the  
11 subject of punitive damages; its third assignment concerns the admission of evidence  
12 regarding the costs Emmert incurred to hold and maintain the property after the

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<sup>1</sup> We appreciate that real property is unique, but Evergreen has never suggested that the property should have been conveyed back to it; from the beginning, Evergreen has asked that the property be sold for its benefit. We also appreciate that the valuation of the property has changed over time, but that alone does not render damages an inadequate remedy. *Cf. Kazlauskus*, 248 Or App at 571 (rejecting argument that future profits could not be ascertained and describing appraiser's testimony about future development).

<sup>2</sup> At a later hearing on the form of judgment, Emmert's counsel conceded that a constructive trust could be imposed to ensure payment of the \$1, and Emmert argues on appeal that any constructive trust must be limited to an award of \$1. The court's intent plainly was not to enter a constructive trust to ensure payment of a \$1 nominal damages award, and we therefore simply reverse the judgment in that regard rather than modifying it to impose a \$1 limit.

Moreover, because we are reversing the judgment imposing the constructive trust, we need not reach Emmert's third assignment of error, in which he argues that his costs in maintaining and keeping the property should have been reimbursed from any sale of the property.

1 foreclosure sale. We start with Evergreen's third assignment of error--the admission of  
2 purportedly inadmissible evidence--because reversal on that assignment would require a  
3 retrial, including on the issue of punitive damages.

4           In its third assignment of error, Evergreen contends that the "trial court  
5 erred in admitting testimony concerning [Emmert's] holding costs after he obtained title  
6 to the property." Specifically, Evergreen argues that the trial court allowed Emmert to  
7 testify that he had incurred substantial expenses holding the property after he acquired it,  
8 which, Evergreen believes, "influenced the jury to conclude that he did not have any  
9 profit to return to [Evergreen]." Thus, Evergreen requests that we remand the case "for  
10 trial solely as to the issue of damages."

11           Evergreen's third assignment of error, however, cannot clear the initial  
12 hurdle of preservation of error. The relevant exchange at trial was as follows:

13           "Q. [EMMERT'S COUNSEL] Looking at what's in front of you  
14 that's marked as Exhibit 163, can you identify that document, sir?

15           "A. [EMMERT] Well, sort of. It is a--an accounting of the checks  
16 that made--were made payable on my behalf to Evergreen West Business  
17 Center, plus the amount of the loan, plus the taxes and plus the--the--the  
18 interest on the loan to date.

19           "Q. All right. And this would be the loan that was taken on the  
20 property after you bought it at the foreclosure sale?

21           "A. Yes, sir.

22           "Q. And what is that amount, sir?

23           "[EVERGREEN'S COUNSEL]: Objection; he's relying on a  
24 document that's not been introduced and would be subject to an objection of  
25 relevancy.

1 "THE COURT: He can--he can answer based on his own  
2 knowledge. If he needs the document to refresh his memory, he can do  
3 that."

4 At that point, Emmert testified, without further objection,

5 "As I said they brought it to me in pieces, so that I'm -- I'm adding it  
6 up. And at the time, I'm rounding this one number off, but basically there  
7 was \$761,010, including the contributions that--that I made to the  
8 Evergreen West, the \$50,000 for West Coast Bank for Evergreen Business  
9 Park, the \$50,000 and the \$563,979.49. So that comes to a total of  
10 \$761,010.

11 "There was a principal reduction of [\$56,000] which is not counted,  
12 but the interest would be \$388,240, and there were taxes and fees of  
13 \$35,000 paid. And, of course, they do have legal expenses on it, but that  
14 was not added into the number."

15 As that colloquy demonstrates, Evergreen's objection was to Emmert's  
16 reliance *on a document* that, according to counsel, would have been subject to a  
17 relevancy objection, and that is how the court understood it. The court allowed Emmert  
18 to testify based on his own recollection and to refresh his recollection with the document.  
19 That objection did not alert the court in the slightest to the argument that Evergreen now  
20 makes on appeal--namely, that "[w]hen a party wrongfully takes property belonging to  
21 another, and incurs holding costs that do not result in any physical improvement to the  
22 property, that party has to pay his own self-inflicted costs, even including interest." We  
23 therefore decline to reach Evergreen's third assignment of error on cross-appeal.

24 Finally, we turn to Evergreen's arguments regarding punitive damages. In  
25 its first assignment of error, Evergreen argues that the court erred in ruling that "punitive  
26 damages are not legally available for [Evergreen's] claim for a constructive trust." Given  
27 our conclusion that the constructive trust was erroneously imposed in this case,

1 Evergreen's first assignment of error is moot.

2           The only remaining issue, then, is whether the trial court erred in reducing  
3 the jury's punitive damages award from \$600,000 to \$4. As noted above, the trial court  
4 reduced the jury's punitive damages award after applying the familiar guideposts for  
5 assessing the constitutionality of such awards: "(1) the degree of reprehensibility of the  
6 defendant's misconduct; (2) the disparity between the actual or potential harm suffered by  
7 the plaintiff and the punitive damages award; and (3) the difference between the punitive  
8 damages awarded by the jury and the civil penalties authorized or imposed in comparable  
9 cases." *State Farm Mut. Ins. Co. v. Campbell*, 538 US 408, 418, 123 S Ct 1513, 155 L  
10 Ed 2d 585 (2003). The court's ruling turned on the second guidepost and, more directly,  
11 the Oregon Supreme Court's observation in *Goddard*, 344 Or at 275, that "when the  
12 conduct has solely economic effects and does not cause or risk physical harm to another,  
13 the ratio between the punitive damages award and compensatory damages normally  
14 cannot exceed four to one."

15           After the trial court's ruling in this case, the Oregon Supreme Court  
16 explained that there are circumstances--namely, "when the compensatory damages award  
17 is small and does not already serve an admonitory function"--in which the second  
18 guidepost and its ratio test are "of limited assistance in determining whether the amount  
19 of a jury's punitive damages award meets or exceeds state goals of deterrence and  
20 retribution." [\*Hamlin v. Hampton Lumber Mills, Inc.\*](#), 349 Or 526, 536-37, 246 P3d 1121  
21 (2011). In *Hamlin*, the jury had awarded \$6,000 in lost wages and \$175,000 in punitive

1 damages to a plaintiff who alleged that his employer had refused to reinstate him after he  
2 suffered an injury at work, thereby violating ORS 659A.043. This court, employing a 4-  
3 to-1 ratio, reduced the punitive damages award to \$24,000, four times the plaintiff's lost  
4 wages. The Supreme Court reversed, concluding that the jury's punitive damages award  
5 was constitutionally permissible, despite being 22 times larger than the compensatory  
6 award (once prejudgment interest was included).

7           In reaching that outcome, the court explained that "\$6,000 in lost wages is a  
8 relatively small recovery that we would not expect to serve an admonitory, as well as a  
9 compensatory, function." *Id.* at 538. And, because there was no indication that \$6,000  
10 would have been particularly onerous for the employer, the court concluded that "the fact  
11 that the ratio between the punitive and compensatory damages is greater than a single  
12 digit does not, in itself, indicate that the punitive damages that the jury awarded were  
13 'grossly excessive.'" *Id.* at 539. Thus, the court looked to the other guideposts as better  
14 indicators of the outer limits of due process.

15           The court, quoting *Campbell*, described the first guidepost--the  
16 reprehensibility of the defendant's conduct--as "[t]he most important indicium of the  
17 reasonableness of a punitive damages award[.]" 349 Or at 539. Viewing the evidence in  
18 the light most favorable to the plaintiff, the court explained that the employer in *Hamlin*  
19 had acted with "intentional malice, trickery, or deceit" and that the defendant's conduct  
20 "was sufficiently reprehensible that, in the circumstances presented--where the  
21 compensatory damages are low and the ratio between the compensatory and punitive

1 damages is not a reliable indicator of the constitutionality of the punitive damages award-  
2 -defendant's conduct may justify an award of punitive damages in excess of a single-digit  
3 multiplier of the compensatory damages awarded." *Id.* at 541.

4           The remaining guidepost--the difference between the punitive damages  
5 awarded and the civil penalties authorized or imposed--did not play a significant role in  
6 the court's analysis, because neither party challenged this court's conclusion that  
7 comparable civil penalties "neither militate[d] against, nor support[ed], a punitive  
8 damages award in excess of a single-digit multiplier of the compensatory damages  
9 awarded." *Id.*

10           After reviewing the guideposts and determining that "the punitive damages  
11 award in this case may exceed a single-digit multiplier of the compensatory damages  
12 award without violating due process," *id.*, the court addressed the ultimate question:  
13 "whether the amount of punitive damages actually awarded--\$175,000--is, nevertheless,  
14 'grossly excessive.'" *Id.* at 542. The court answered that question in the negative after  
15 measuring the award against "awards that legislatures and courts have permitted in  
16 similar circumstances." *Id.* Accordingly, the court held:

17           "[T]he compensatory damages are small and the ratio between the  
18 punitive and compensatory damages--22:1--is in the low double digits.  
19 That ratio is higher than would be constitutionally permissible if the  
20 compensatory damages were more substantial, but is not so high that it  
21 makes the award 'grossly excessive.' The amount of the punitive damages  
22 award--\$175,000--also is not so high that we can say that it exceeds, rather  
23 than serves, this state's interests in deterring and punishing the violation of  
24 ORS 659A.043. We hold that the Court of Appeals erred in reversing the  
25 jury's punitive damages verdict, and we reinstate it."

1 *Id.* at 543-44 (footnote omitted).

2           In the wake of *Hamlin*, we reconsidered an earlier decision, [\*Lithia Motors,\*](#)  
3 [\*Inc. v. Yovan\*](#), 226 Or App 572, 204 P3d 120 (2009) (*Lithia Motors I*), *vac'd and rem'd*,  
4 349 Or 663, 249 P3d 1281 (2011), in which we had reduced a punitive damages award  
5 from \$100,000 to \$2,000, an amount four times the jury's \$500 compensatory award. On  
6 remand, we applied the reasoning in *Hamlin* and concluded that the jury's full punitive  
7 damages award of \$100,000 should be reinstated. *Lithia Motors, Inc. v. Yovan*, \_\_\_ Or  
8 App \_\_\_, \_\_\_ P3d \_\_\_ (Dec. 19, 2012) (*Lithia Motors II*).

9           *Lithia Motors II* involved a consumer, Yovan, who purchased a vehicle  
10 from Lithia Motors, an auto dealer. Yovan prevailed on a claim against the dealership for  
11 "threatening arrest or criminal prosecution of [Yovan]" and by "attempting to or  
12 threatening to enforce a right or remedy with knowledge or reason to know that the right  
13 or remedy did not exist," thereby violating Oregon's Unlawful Trade Practices Act. The  
14 jury awarded no economic damages, \$500 in noneconomic damages, and \$100,000 in  
15 punitive damages. The trial court then granted the dealership's motion for remittitur,  
16 reducing the punitive damages award to \$2,000.

17           On appeal, we initially affirmed the trial court's ruling by an equally  
18 divided court. The Supreme Court, however, vacated that decision and remanded for  
19 reconsideration in light of its intervening decision in *Hamlin*. On remand, we concluded  
20 that the second guidepost was indeed of limited assistance in the case, and that the other  
21 two guideposts demonstrated that "the ratio between punitive damages and compensatory



1 damages in this case can constitutionally exceed 9-to-1." *Lithia Motors II*, \_\_\_ Or App at  
2 \_\_\_ (slip op at 23-24).

3           In reaching that conclusion, we first explained that the record established  
4 that the dealership's conduct was more than "minimally reprehensible." \_\_\_ Or App at  
5 \_\_\_ (slip op at 23). We relied on the fact that "the Oregon legislature has recognized the  
6 harm that creditors may inflict on consumers and debtors, such as [Yovan], and has  
7 indicated its intent to deter and to punish creditors who engage in that type of conduct,"  
8 *id.* at \_\_\_ (slip op at 20); the fact that the dealership "knew that [Yovan] was financially  
9 vulnerable," *id.* at \_\_\_ (slip op at 21); and the fact that the dealership "engaged in trickery  
10 or deceit to further its own financial interests," *id.* at \_\_\_ (slip op at 22). In light of those  
11 facts, we concluded, "the most important guidepost, the reprehensibility of [the  
12 dealership's] conduct, supports the jury's award of punitive damages in excess of a single-  
13 digit multiplier of the \$500 compensatory damages award in this case." *Id.* at \_\_\_ (slip  
14 op at 22-23).

15           Then, turning to the third guidepost (civil penalties in comparable cases),  
16 we explained that the UTPA itself provided a civil remedy rather than monetary penalties  
17 for the dealership's conduct, so the UTPA "itself is not significant in the analysis." *Id.* at  
18 \_\_\_ (slip op at 24). Nonetheless, we concluded that "[t]he civil penalty for comparable  
19 UTPA violations \* \* \* is relevant." *Id.* (slip op at 24). Specifically, we reasoned that, in  
20 a suit brought by a prosecuting attorney on behalf of the state, "a penalty of up to \$25,000  
21 can be assessed for *each* willful use of a method, practice, or act in violation of the

1 UTPA," and that the dealership had "engaged in multiple acts of deception and abuse."  
2 *Id.* (slip op at 24) (emphasis in *Lithia Motors II*). Thus, we concluded, "The civil penalty  
3 available for UTPA violations further suggests that the punitive damages award in this  
4 case could exceed a single-digit multiplier of compensatory damages to serve the state's  
5 interest in deterring and punishing violations of the Act." \_\_\_ Or App at \_\_\_ (slip op at  
6 24).

7           After concluding that we were "not bound to impose a single-digit ratio,"  
8 we turned to the final step of the analysis directed by *Hamlin*: "'whether the amount of  
9 punitive damages actually awarded \* \* \* is, nevertheless, "grossly excessive.'"" \_\_\_ Or  
10 App at \_\_\_ (slip op at 25) (quoting *Hamlin*, 349 Or at 542). We began that analysis, as  
11 the court did in *Hamlin*, by canvassing punitive damages awards in comparable cases  
12 from Oregon and other states:

13           "The Oregon Supreme Court has repeatedly approved punitive damages  
14 awards in amounts equal to or greater than \$100,000, the amount in  
15 question here. *See, e.g.*, [*Hamlin*, 349 Or] at 542, 543 (\$175,000 for  
16 violation of unlawful employment practice); *Parrott*, 331 Or at 565 (\$1  
17 million for violation of the UTPA). Courts in other jurisdictions have done  
18 so as well in consumer protection cases. *See, e.g.*, *Grabinski v. Blue*  
19 *Springs Ford Sales, Inc.*, 203 F3d 1024, 1026-27 (8th Cir), *cert den*, 531  
20 US 825 (2000) (affirming punitive damages award of \$100,000 and  
21 \$50,000 against dealership; actual damages award of \$5,300 and \$2,535,  
22 for concealment of prior automobile wreck damages by dealerships in  
23 violation of the Missouri Merchandising Practices Act); *Electro Services,*  
24 *Inc. v. Exide Corp.*, 847 F2d 1524, 1525 (11th Cir 1998) (affirming  
25 punitive damages award of \$3.5 million; compensatory damages award of  
26 \$750,000, for an action against automotive battery manufacturer for  
27 deceptive trade practices); *Saunders v. Equifax Information Services,*  
28 *L.L.C.*, 469 F Supp 2d 343, 346, 356-57 (ED Va 2007) (in consumer action  
29 against bank and credit reporting agencies after bank improperly demanded  
30 full payment of car loan, repossessed car, and reported default to agencies,

1 affirming \$80,000 punitive and \$1,000 compensatory damage award);  
2 *United Technologies Corp. v. American Home Assur. Co.*, 118 F Supp 2d  
3 174, 175, 181 (D Conn 2000) (affirming punitive damages award of \$16  
4 million for violations under the Connecticut Unfair Trade Practices Act);  
5 *Griffith v. Barnes*, 560 F Supp 2d 29, 37-38 (DDC 2008) (awarding  
6 punitive damages of \$100,000 under the D.C. Consumer Protection  
7 Procedures Act where the defendant made misrepresentations to the  
8 plaintiff, but the plaintiff did not seek actual damages); *Thorsen v. Durkin*  
9 *Development, LLC*, 129 Conn App 68, 76-78, 20 A3d 707, 713-14 (2011)  
10 (affirming punitive damages award of \$280,000; compensatory damages  
11 award of \$30,211.43 for violations of the Connecticut Unfair Trade  
12 Practices Act)."

13 *Lithia Motors II*, \_\_\_ Or App at \_\_\_ (slip op at 25-26). Based on that survey, we  
14 concluded that "a \$100,000 punitive damages award is not outrageous or 'grossly  
15 excessive' as measured by similar types of cases." *Id.* (slip op at 27). We further  
16 concluded that the dealership was "fully on notice" that the jury could assess punitive  
17 damages of that magnitude and that the \$100,000 award was not "grossly excessive given  
18 the deterrent function that it serves and the resources [the dealership] has to pay it." *Id.* at  
19 \_\_\_ (slip op at 27). Accordingly, we reversed the trial court's judgment remitting  
20 punitive damages and instead reinstated the jury's full award.

21 We conclude that this appeal, like *Hamlin* and *Lithia Motors II*, is a case in  
22 which the jury's compensatory award was too small to serve any admonitory function,  
23 and that the second guidepost is therefore a poor indicator of the constitutional limits on a  
24 punitive damages award.<sup>3</sup> And, in light of the first and third guideposts, we further

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<sup>3</sup> Evergreen's argument starts from the premise that the "actual harm" in this case was far greater than the nominal damages award--again arguing that, "[i]n light of the evidence that the property was worth \$1,390,000, and the debt was only \$613,979.59, resulting in an equity of more than \$700,000 having been taken by [Emmert], there is no

1 conclude that the trial court erred in applying a strict 4-to-1 ratio to the punitive damages  
2 award.<sup>4</sup>

3           The "most important indicium of reasonableness of a punitive damages  
4 award"--the reprehensibility of the defendant's conduct--is consistent with a punitive  
5 damages award in this case that well exceeds a single-digit multiplier of nominal  
6 damages. Emmert, although risking purely economic harm to Evergreen, engaged in  
7 "intentional malice, trickery, or deceit" on par with that in *Hamlin* and *Lithia Motors II*--  
8 conduct "sufficiently reprehensible" to merit a punitive damages award that will serve a  
9 correspondingly sufficient admonitory function, certainly something larger than the  
10 typically permissible ratios.

11           With regard to the third guidepost, we are not aware of any civil penalties  
12 that provide an exact fit for the type of breach of fiduciary duty at issue here. There are  
13 two statutory schemes, however, that suggest significant fines for deceitful business  
14 practices involving real estate or procuring debt instruments. Oregon's Unlawful Trade

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constitutional barrier to such an award." We cannot simply disregard the jury's award of nominal damages when assessing what was taken by Emmert. The jury, rightly or wrongly, concluded that he profited only nominally from the breach of fiduciary duty, and there is scant evidence that Evergreen itself, already experiencing significant financial distress, was significantly harmed by losing the property to foreclosure; that was, after all, where the property was headed anyway, and Evergreen's options appear to have been limited to a bankruptcy filing.

<sup>4</sup>       *See also Hamlin*, 349 Or at 547 (Gillette, J. pro tempore, dissenting) ("No matter what the tort is, if a jury awards only \$1 in nominal compensatory damages, a single-digit ratio of punitive damages--\$9--is far too low. In such cases, the award must be greater than the single-digit ratio \* \* \*").

1 Practices Act, which we relied upon in *Lithia Motors II*, makes it unlawful for a person,  
2 in the course of the person's business, to "employ[ ] any unconscionable tactic in  
3 connection with the sale, rental or other disposition of real estate, goods or services or  
4 collection or enforcement of an obligation," ORS 646.607, and, more generally, to  
5 "engage[ ] in any other unfair or deceptive conduct in trade or commerce," ORS  
6 646.608(1)(u). In an enforcement action by a prosecuting attorney, the civil penalties for  
7 that type of conduct include a fine as high as "\$25,000 per violation." ORS 646.642(1).

8           Oregon's securities laws, albeit not directly in play here, provide a similarly  
9 substantial penalty for deceit in the procurement of a debt instrument. ORS 59.135  
10 makes it "unlawful for any person, directly or indirectly, in connection with the purchase  
11 or sale of any security" to "employ any device, scheme or artifice to defraud" or "to  
12 engage in any act, practice or course of business which operates or would operate as a  
13 fraud or deceit upon any person[.]" "Securities," in turn, include "a note, \* \* \* debenture,  
14 evidence of indebtedness, \* \* \* real estate paper sold by a broker-dealer, mortgage  
15 banker, mortgage broker \* \* \*." ORS 59.015(19)(a). The civil penalties for violating  
16 Oregon's securities laws--including fraudulently obtaining a security instrument--include  
17 fines of "not more than \$20,000 for each violation and a maximum penalty of \$100,000  
18 for a continuing violation." ORS 59.255(2).

19           Those statutory schemes, in our view, further suggest that the business  
20 practices engaged in by Emmert--breaching his fiduciary duties and secretly obtaining the  
21 promissory note and deed of trust, which allowed him to foreclose on the property and

1 obtain it for himself--justify something exceeding a single-digit ratio in this case.

2           Having decided, as the court did in *Hamlin*, "that the punitive damages  
3 award in this case may exceed a single-digit multiplier of the compensatory damages  
4 award without violating due process," 349 Or at 541, we must now consider "whether the  
5 amount of punitive damages actually awarded--[\$600,000]--is, nevertheless, 'grossly  
6 excessive.'" *Id.* at 542. For the reasons that follow, we conclude that the award, although  
7 high, is not grossly excessive, particularly in light of punitive damages awards that courts  
8 have approved in other cases involving breaches of fiduciary duty, and in light of the  
9 financial deterrent required to prevent the type of calculated breach of duty involved in  
10 this case.

11           In cases in which parties have suffered significant financial harm from the  
12 acts of disloyal agents, juries often have awarded--and courts have approved--large  
13 punitive damages awards. *E.g.*, *Whitney v. Citibank, N.A.*, 782 F2d 1106 (2d Cir 1986)  
14 (approving award of \$1.5 million in punitive damages and \$236,677.25 compensatory  
15 damages for bank's knowing participation in breach of fiduciary duties to plaintiff);  
16 *Armstrong v. Republic Realty Mortg. Corp.*, 631 F2d 1344 (8th Cir 1980) (upholding  
17 punitive damages award of \$125,000 and \$14,000 in compensatory damages for breach  
18 of fiduciary duty by mortgage broker); *McDermott v. Party City Corp.*, 11 F Supp 2d 612  
19 (ED Pa 1998) (jury's award of \$375,000 in punitive damages was not constitutionally  
20 excessive based on \$42,537.61 in compensatory damages for agent's breach of duty by  
21 usurping of corporate opportunity); *E.J. McKernan Co. v. Gregory*, 252 Ill App 3d 514,

1 623 NE2d 981 (1993) (affirming jury's award of compensatory damages totaling  
2 \$1,067,000 and punitive damages of \$420,000 for agents' exploitation of fiduciary  
3 relationship by usurping corporate opportunities); *National Bank v. Doss*, 141 Ill App 3d  
4 1065, 491 NE2d 106 (1986) (approving punitive damages of \$2,000,000 and  
5 compensatory damages of \$500,000 against a lawyer who purchased farm for a nominal  
6 sum from client of "limited mental capability"). But courts have also upheld large  
7 awards when the actual damages suffered were relatively small. *E.g.*, *Schaffer v. Edward*  
8 *D. Jones & Co.*, 1996 SD 94, 552 NW2d 801 (1996) (affirming jury's punitive damages  
9 award of \$750,000 against brokerage that deceived its investors, despite fact that jury  
10 awarded only \$25,000 in compensatory damages).

11           Comparable cases involving breaches of fiduciary duty tell us that the jury's  
12 award of \$600,000 in punitive damages in this case is a serious sanction, but they do not  
13 persuade us that it is unconstitutionally excessive. One of the guiding principles in those  
14 breach of fiduciary duty cases, as in all punitive damages cases, is that the award serve,  
15 rather than exceed, the state's interest in deterring the conduct at issue. *See Hamlin*, 349  
16 Or at 543. In this case, there was evidence that Emmert had a net worth of approximately  
17 \$160,000,000; that he saw potentially large profits in breaching his fiduciary duties to  
18 Evergreen and obtaining the company's real property for himself; and that he made a  
19 calculated decision to breach his duties to the company in pursuit of that perceived  
20 individual profit. The jury, hearing that evidence, as well as evidence of Emmert's  
21 previous behavior in other business dealings, concluded that an award of \$600,000 was

1 necessary, given his net worth and history, to deter him from engaging in a similar  
2 calculation in the future. We cannot, on this record, say that the jury's decision in that  
3 regard went beyond the state's interests in preventing future tortious conduct by Emmert.  
4 We therefore reverse and remand for further proceedings consistent with that conclusion.

5           Reversed and remanded on appeal and on cross-appeal.

6           **Wollheim, J.**, concurring in part, dissenting in part.

7           I concur with the majority opinion with one exception. For the reasons  
8 expressed in my dissent in *Lithia Medford LM, Inc. v. Yovan*, \_\_\_ Or App \_\_\_, \_\_\_\_, \_\_\_  
9 P3d \_\_\_ (Dec 19, 2012) (Wollheim, J. concurring in part, dissenting in part), I  
10 respectfully dissent from the award of punitive damages in the sum of \$600,000.

11           I respectfully dissent.

12