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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CATHLEEN L. CARDOZA et al., Plaintiffs and Respondents, v. DAVID H. REED, Defendant and Appellant.	A143447 (Sonoma County Super. Ct. No. SCV245387)

Following their purchase of commercial real property in Santa Rosa, plaintiffs Cathleen and Edward Cardoza sued the seller, David Reed, and others on fraud and other tort and contract theories. A jury found Reed liable for fraud and awarded substantial compensatory and punitive damages. After hearing posttrial motions, the trial court modified the jury's award and entered judgment against Reed. Reed appeals, challenging on various grounds the awards of consequential damages, prejudgment interest and punitive damages. We affirm.

I. BACKGROUND

In its order addressing Reed's posttrial motions, the trial court summarized the transaction and related events giving rise to the present litigation: "This is an action for damages arising out of the sale of a commercial property located at 1724 and 1726 Corby Road, Santa Rosa, California (the 'Corby Property'). The escrow closed on the transaction on February 17, 2006. It involved a sale with a lease back by the seller'[s] corporation, RPM Optoelectronics, Inc. ('RPM'), which was the primary tenant at the time of the sale. The Cardozas were buying the property in a [26 U.S.C. §] 1031

exchange as a like-kind investment property. They were represented in the transaction by a team of four advisors, brokers Hally Swan and Robert Schepergerdes, James Perez, a CPA, and attorney Arthur LaFranchi.[1] The majority shareholders in RPM were David Reed ('Reed') and [his then-wife] Sheryl Reed, who owned the Corby Property in their own names. They were represented in the sale by real estate agent Kevin Gonsalves and the broker he worked for, Leading Edge Properties, Inc. The sale was conditioned on a long-term lease for RPM. Sometime prior to the close of escrow, Reed formed a new company, Reflex, LLC [Reflex], later renamed David H. Reed Enterprises, LLC [DHRE] . . . . Reed was the sole owner of Reflex and is the sole owner of DHRE. In 2005 and early 2006 Reed began to move assets, employees, and corporate opportunities of RPM to Reflex. RPM stopped paying rent [at the Corby Property] in July 2006 and quickly moved out. The evidence showed that the Reeds and RPM had consulted a bankruptcy attorney several months earlier."

The Cardozas paid $4.7 million for the Corby property on February 17, 2006. This sum included $2.2 million of the Cardozas' money (apparently proceeds from the sale of the family ranch) and $2.5 million in borrowed funds. The Cardozas sold the property to an electrician's union in 2012 for about $1.2 million, all of which went to pay off a bank loan and expenses related to the sale.

The Cardozas' operative Seventh Amended Complaint asserts multiple tort and contract causes of action against Reed, DHRE and other defendants. The complaint alleges in part that Reed made misrepresentations and concealed material facts pertaining to RPM's financial condition and his intention to make rental payments to the Cardozas.

At the conclusion of the first phase of trial in June 2014, the jury returned special verdicts addressing numerous claims and issues. As pertinent to this appeal, the jury

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[1] In 2005, the Cardozas and other relatives sold a family ranch. To complete a "like kind" exchange for purposes of federal tax law (see 26 U.S.C. § 1031(a)(1)), the Cardozas needed to use their share of the proceeds to purchase an income-producing property. There was evidence that the Cardozas were relying on the new property and the income it would produce for their security in retirement.

found in favor of the Cardozas and against Reed and DHRE on claims for fraud and interference with contractual relations. As we discuss in more detail below, the jury awarded $5 million in compensatory damages, consisting of $2.3 million for lost rents and $2.7 million in consequential damages. The jury also awarded prejudgment interest of $1,512,000 (calculated at 7 percent of the $2.7 million consequential damages figure for the 8-year period from the 2006 transaction until the 2014 trial).

In addition, as later described by the trial court, the jury found in the first phase trial "clear and convincing evidence that Reed engaged in conduct with malice, oppression or fraud that damaged the Cardozas and that he was acting within the scope of his authority as an officer, director, or managing agent of DHRE when he engaged in conduct with malice, oppression or fraud." After a second-phase trial, the jury awarded $6.1 million in punitive damages against Reed and DHRE.

Following the initial entry of judgment, Reed filed motions for judgment notwithstanding the verdict (JNOV) and for a new trial. Granting the JNOV motion in part, the court reduced the lost rents component of the compensatory damages award from $2.3 million to $605,515.27 (replacing gross rents with net rents), held the contractual interference claims were time-barred, and allowed a credit of $400,000 to reflect settlement payments made by other defendants. The court otherwise denied the motions, rejecting challenges to the awards of consequential damages, prejudgment interest and punitive damages. The court entered an amended judgment reflecting its rulings. Reed appealed.

II. DISCUSSION

A. Compensatory Damages

1. The Special Verdict and the Judgment

A special verdict form addressing compensatory damages for fraud (Special Verdict Form No. 19) included spaces for the jury to specify the amount of (1) any difference between what the Cardozas paid to purchase the property and the fair market value of the property on February 17, 2006 (i.e., the date of the close of escrow) (item 1.A on the form), (2) "past lost rents" (item 1.B), and (3) "[c]onsequential damages"

(item 1.C). The jury left blank the space for item 1.A and wrote in $2.3 million for item 1.B (lost rents) and $2.7 million for item 1.C (consequential damages).[2] As noted, the court rejected Reed's posttrial challenge to the latter component of the award, which is included in the amended judgment entered against him.

2. The Award is Proper

Reed contends the award of $2.7 million in consequential damages is not supported by the evidence and is barred by Civil Code section 3343, the statutory provision governing damages for fraud in connection with the sale of property.[3] We reject these arguments.

"Whether a plaintiff 'is entitled to a particular measure of damages is a question of law subject to de novo review. [Citations.] The amount of damages, on the other hand, is a fact question . . . [and] an award of damages will not be disturbed if it is supported by substantial evidence.' " (*Rony v. Costa* (2012) 210 Cal.App.4th 746, 753.) " 'The evidence is insufficient to support a damage award only when no reasonable interpretation of the record supports the figure.' " (*Id.* at p. 754.)

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[2] Special Verdict Form No. 19 ("Damages on Multiple Legal Theories") states in part: "We answer the questions submitted to us: 'What are the **Cardozas'** compensatory damages?'

"1. Enter the amount below if you find that any defendant is liable to the Cardozas for damages under any fraud theory (Intentional Misrepresentation or Concealment) or Negligent Misrepresentation:

"A. The difference, if any, between the amount paid by the **Cardozas** to **David H. Reed** and **Sheryl G. Reed** to purchase the property; and the fair market value of the Corby Property on February 17, 2006: $_____ [The jury left this item blank.]

"B. Amount of past lost rents[:] $_____ [The jury filled in $2.3 million.]

"C. Consequential damages[:] $_____ [The jury filled in $2.7 million.]

"**Total Damages for Intentional Misrepresentation or Concealment or Negligent Misrepresentation:** $_____ [The jury filled in $5 million.]" The jury attributed 100 percent of the fault for these damages to David Reed.

[3] Undesignated statutory references are to the Civil Code.

Here, there is a clear evidentiary basis for the jury's award of $2.7 million. The Cardozas presented expert testimony that in July 2006, when RPM stopped paying rent and moved out, the value of the property was $2 million, in contrast to the $4.7 million the Cardozas paid in February 2006. In its order addressing Reed's JNOV motion, the trial court concluded there was substantial evidence that Reed's fraudulent conduct caused this damage. Specifically, the court found there was substantial evidence that Reed, as part of a fraudulent scheme to deprive his then-wife Sheryl Reed of her share of the community estate, planned to and did cause RPM to abandon its lease on the Corby property and move out, which caused the property to decline substantially in value.

On appeal, Reed acknowledges the testimony of plaintiffs' expert is the foundation for the $2.7 million figure, and he makes no claim that there is a lack of substantial evidence that his fraudulent scheme caused the value of the property to decline by that amount. He contends, however, that section 3343 prohibits an award of damages to compensate the Cardozas for this harm. We disagree.

Section 3343 provides that, in a case involving fraud in the purchase, sale or exchange of property, a plaintiff may recover two categories of damages. First, a defrauded person may recover "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received[.]" (§ 3343, subd. (a).) This provision reflects the Legislature's selection (for this type of fraud case) of the " 'out-of-pocket' " measure of damages, which seeks to " 'restor[e] the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction[.]' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 (*Alliance Mortgage*).)

Second, a plaintiff may recover "*any additional damage* arising from the particular transaction" (§ 3343, subd. (a), italics added), including such elements as "[a]mounts actually and reasonably expended in reliance upon the fraud" (*id.*, subd. (a)(1)) and, under specified circumstances, a loss of profits caused by the fraud (*id.*, subd. (a)(4)). Section 3343 thus authorizes recovery of "consequential" damages in addition to the basic out-of-pocket measure noted above. (*Stout v. Turney* (1978) 22 Cal.3d 718, 724, 729 [equating the " 'additional' " damages authorized by § 3343 with "consequential"

damages]; see 6 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 1897 [§ 3343, subd. (a) sets forth "a specific nonexclusive recital of certain kinds of consequential damages"].)

Finally, section 3343 states, in subdivision (b)(1), that it does not authorize recovery of "any amount measured by the difference between the value of the property as represented and the actual value thereof" (§ 3343, subd. (b)(1)), thus rejecting a " 'benefit-of-the-bargain' " measure of damages (which is an alternative to the out-of-pocket measure and is available in some other circumstances) (*Alliance Mortgage*, *supra*, 10 Cal.4th at pp. 1240–1241).[4]

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[4] Section 3343 states: "(a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:

"(1) Amounts actually and reasonably expended in reliance upon the fraud.

"(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.

"(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it.

"(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:

"(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

Reed contends the jury, by not filling in the space for item 1.A on Special Verdict Form No. 19, found there was no difference between the amount paid by the Cardozas and the value of the property on the sale date (and thus found the Cardozas suffered no out-of-pocket loss under § 3343, subd. (a)). He then asserts that the $2.7 million figure the jury wrote in item 1.C (labeled " '[c]onsequential' damages") must have been an attempt to award "the difference between the actual value of the property and its value as represented by Reed," and thus was a benefit-of-the-bargain award prohibited by section 3343, subdivision (b)(1). There is no basis for the latter assertion. Nothing in the form suggests the jury's calculation was based on any value represented by Reed. More persuasive in our view is the trial court's interpretation of the form (including the blank space for item 1.A, pertaining to the value of the property) as a finding that there was no compensable discrepancy arising from the property's value *on the sale date* (even under the inapplicable benefit-of-the-bargain standard). The court read this portion of the verdict form as a jury finding that "there was no difference in the value of the property *as represented at the time of the sale* and the actual value of the property on that date." (Italics added.)

Instead, as the trial court found, the jury awarded two separate items of consequential damages (i.e., "additional damage" recoverable under § 3343, subd. (a))

> "(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.
>
> "(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

"(b) Nothing in this section shall do either of the following:

> "(1) Permit the defrauded person to recover any amount measured by the difference between the value of property as represented and the actual value thereof.
>
> "(2) Deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

that the Cardozas sustained *after the sale*: (1) lost profits from rent (profits that, as the court noted, were "one form of consequential damages," although "listed separately on the verdict form"), and (2) the $2.7 million decline in the value of the property as a result of Reed's fraudulent scheme. The court concluded the $2.7 million decline in value was "additional damage arising from the fraudulent sale of the Corby property" and rejected Reed's argument that the award was improper. We agree. Since the damages in question were not barred by section 3343, subdivision (b)(1) and were caused by the fraudulent sale of the property, they are recoverable. (See § 3343, subd. (a) [permitting recovery of "any additional damage arising from the particular transaction"].)

Reed's remaining challenges to this item of consequential damages are not persuasive. He notes that, in documents submitted to the trial court, the Cardozas' counsel identified as "consequential damages" certain expenses associated with their ultimate sale of the property to the electricians' union, expenses that totaled about $170,890.39. But this did not preclude the jury from awarding a different amount that it found, based on the evidence, was additional damage flowing from the fraudulent sale. (§ 3343, subd. (a).)

Reed also asserts the expert testimony about the value of the property in July 2006 after RPM abandoned the lease was irrelevant, because the appropriate date to determine a difference in value for purposes of the out-of-pocket loss rule in section 3343, subdivision (a) was the sale date. As discussed, however, it appears based on the verdict form that the jury considered the expert testimony not only for purposes of determining whether there was a discrepancy between the sale price and the value received at the time of the sale, but for purposes of determining there was additional damage arising from the transaction. For the reasons outlined above, this was not improper.

Finally, Reed asserts the award of $2.7 million in consequential damages is duplicative of the award of about $605,000 for lost rents. We disagree. A plaintiff may not recover for the same item of damages multiple times under different legal theories, but "where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether

that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158–1159.) In particular, under section 3343, a plaintiff may recover multiple items of damages sustained in a particular case, such as (1) out-of-pocket loss, and (2) lost profits damages. (§ 3343, subd. (a); *Pat Rose Associates v. Coombe* (1990) 225 Cal.App.3d 9, 20, disapproved on other grounds in *Adams v. Murakami* (1991) 54 Cal.3d 105, 116.) The Cardozas were entitled to recover both items of damage found by the jury. (§ 3343, subd. (a).)

In the case Reed cites on this point, *Croeni v. Goldstein* (1994) 21 Cal.App.4th 754, 759–760, the appellate court held that, under the doctrine of election of remedies, the appellants were not entitled to (1) enforce a contract for the sale of their business and recover the sale price, *and* (2) recover lost profits they would have received had they not sold the business. The jury's award here does not provide the Cardozas with inconsistent remedies. It provides compensation for two injuries that flowed from the fraudulent sale: a loss of rental income and a decline in the value of the property.

B. Prejudgment Interest

Reed argues a reduction in the amount of consequential damages requires a corresponding decrease in the amount of the prejudgment interest award, which was calculated based on the consequential damages figure. Because we uphold the consequential damages award, there is no need to recalculate the prejudgment interest.

C. Punitive Damages

Reed contends the jury's award of $6.1 million in punitive damages is excessive and must be reversed. Both California law and federal due process principles govern the availability and size of punitive damage awards. "California law permits the recovery of punitive damages 'for the sake of example and by way of punishing the defendant.' (Civ. Code, § 3294, subd. (a).) In determining whether a punitive damage award is excessive under California law, a court must consider (1) the reprehensibility of the defendant's conduct; (2) the amount of compensatory damages or actual harm suffered by the plaintiff; and (3) the defendant's financial condition." (*Corenbaum v. Lampkin* (2013)

215 Cal.App.4th 1308, 1337 (*Corenbaum*).) On appeal, we view conflicting evidence as to punitive damages "in the light most favorable to the judgment pursuant to the familiar substantial evidence rule." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622.) " 'An appellate court will not reverse the jury's determination unless the award as a matter of law is excessive or appears so grossly disproportionate to the relevant factors that it raises a presumption it was the result of passion or prejudice.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 77.)

In addition to state law, the due process clause of the Fourteenth Amendment to the United States Constitution places constraints on awards of punitive damages. In evaluating whether an award is excessive under due process principles, reviewing courts must consider three "substantive guideposts": " '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' " (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 371–372 (*Nickerson*).) "A trial court conducts this inquiry in the first instance; its application of the factors is subject to de novo review on appeal" (*id.* at p. 372), although "findings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference" (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172 (*Simon*)).

As we discuss below, Reed invokes several of these principles in support of his challenge to the jury's punitive damages award. We find his arguments unpersuasive.

1. The Alleged Need for a Retrial on Punitive Damages Due to a Reduction in Compensatory Damages

Reed asserts that, under California case law pertaining to the proportionality of punitive to compensatory damages, the reduction in the compensatory award mandates a retrial as to the amount of punitive damages.[5] We disagree. First, Reed bases this

[5] Reed suggests federal due process principles also require a retrial on this ground. But the cases he cites in support of a retrial (which we discuss in the text) are California

argument in part on his claim that the consequential damages portion of the compensatory award should be reduced from $2.7 million to $170,890.39, an argument we have rejected above. Second, as we shall explain, the reduction of the compensatory award that did occur (the trial court's reduction of lost rents from $2.3 million to $605,515.27) does not require a retrial on punitive damages.

Reed cites two cases in support of his argument that a retrial is required: *Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208 (*Frommoethelydo*) and *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172 (*Auerbach*). In *Frommoethelydo*, the plaintiff obtained a judgment for $265,271 in compensatory damages and $1.25 million in punitive damages, but the Supreme Court reduced the compensatory award to $8,771. (*Frommoethelydo*, *supra*, 42 Cal.3d at pp. 211, 220.) Then, citing California case law requiring reasonable proportionality between punitive and compensatory damages (see *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928), the *Frommoethelydo* court held "[t]he award of punitive damages may not be upheld since most of the compensatory damages must be set aside." (*Frommoethelydo*, at p. 220.)

In *Auerbach*, the jury awarded the plaintiff $207,155 in compensatory damages for fraud, as well as $2.6 million in punitive damages. (*Auerbach, supra*, 74 Cal.App.4th at p. 1184.) The Court of Appeal held the recoverable compensatory damages on the fraud claim were only $6,750. (*Id.* at p. 1189.) Turning to the punitive damages award, the court stated: "We cannot . . . simply reduce the damages and modify the award on the fraud cause of action at this stage. Because the jury was misled about the amount of compensatory damages it could award, its punitive damage award is suspect. Although

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decisions applying California law. In any event, he has not shown that the federal due process guideposts provide a basis for ordering a *retrial* on punitive damages in these circumstances. Instead, when a court determines a jury's award is constitutionally excessive, the remedy is not to set the award aside but "to reduce the award to constitutional limits [citation]." (*Nickerson*, *supra*, 63 Cal.4th at p. 375; see *id.* at p. 369, fn. 1 ["the 'appropriate order' under these circumstances 'is for an absolute reduction, rather than a conditional reduction with the alternative of a new trial, i.e., a remittitur' "].)

there is no fixed ratio, punitive damages must be proportional to recoverable compensatory damages. [Citation.] Because the punitive damages are out of proportion to the actual damages suffered by the [plaintiffs], the punitive damage claim will have to be retried." (*Id.* at p. 1190.)

In *Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962 (*Izell*), the Court of Appeal rejected an argument that "*Frommoethelydo* and *Auerbach* draw a bright-line rule requiring a new trial on punitive damages whenever a compensatory damages award is 'dramatically reduced.' " (*Izell*, *supra*, at p. 984.) The *Izell* court stated: "We read these cases differently. Contrary to the rule advanced by [the defendant], the courts' focus in *Frommoethelydo* and *Auerbach* was not simply on the magnitude of the compensatory damages reduction, but rather on the effect the reduction had on the proportionality between compensatory and punitive damages." (*Izell*, *supra*, at p. 984.) The *Izell* court noted that, in *Frommoethelydo*, after the Supreme Court's reduction of compensatory damages, the ratio of punitive to compensatory damages was 142.5 to 1; in *Auerbach*, after the Court of Appeal's reduction of the compensatory award, the ratio of punitive to compensatory damages was 385 to 1. (*Izell*, *supra*, at p. 984.) The *Izell* court stated that, while *Frommoethelydo* and *Auerbach* did not discuss constitutional standards in reversing the punitive damage awards, "it is clear that such grossly disproportionate awards could not withstand constitutional scrutiny." (*Izell*, *supra*, at p. 984; see *Nickerson*, *supra*, 63 Cal.4th at p. 367 ["Absent special justification, ratios of punitive damages to compensatory damages that greatly exceed 9 or 10 to 1 are presumed to be excessive and therefore unconstitutional."].)

In *Izell*, the trial court reduced the jury's compensatory damages award from $30 million to $6 million (with the appealing defendant, Union Carbide, bearing 65 percent of the fault for the reduced compensatory award), but left undisturbed the jury's award of $18 million in punitive damages against Union Carbide. (*Izell*, *supra*, at pp. 967–968, 982.) The Court of Appeal concluded that, because the resulting ratio of the punitive damages award to Union Carbide's share of compensatory damages (4.62 to 1) was not presumptively excessive, a retrial on punitive damages was not required, and the

appellate court instead proceeded to evaluate the award under the federal due process guideposts. (*Id.* at pp. 982, 984.)

Similarly, here, no retrial is required. Following the trial court's reduction of the lost rents component of the compensatory damages award, the ratio of punitive to compensatory damages is about 1.85 to 1: (1) the punitive damages award is $6.1 million, and (2) the modified compensatory damages award totals about $3.3 million ($2.7 million in consequential damages, plus about $600,000 in lost rents),[6] an amount for which Reed was found to bear 100 percent of the fault.[7] This ratio is far from being presumptively excessive, and we agree with the *Izell* court that there is no need for a retrial on punitive damages in these circumstances.

Reed attempts to distinguish *Izell* by arguing the jury here was "misled" about the types of damages it could award. To the extent Reed contends the jury based the award of consequential damages on improper considerations, we have rejected that argument above. And although the trial court concluded the lost rents award needed to be recalculated, we are not persuaded any error in that respect tainted the jury's consideration of the other elements of damages it considered, including punitive damages.

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[6] This is true even if we do not include in the compensatory damages category the jury's award of approximately $1.5 million in prejudgment interest on the consequential damages award. (Compare *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 17–18 [prejudgment interest component of jury's award should be included in compensatory damages total for purposes of calculating ratio between punitive and compensatory damages] with *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1565 [prejudgment interest should not be included in the ratio calculation], disapproved on another point in *Nickerson, supra*, 63 Cal.4th at p. 377, fn. 2.)

[7] As noted, the court allowed a $400,000 credit for amounts paid in settlement by other defendants, so the compensatory damage figure included in the amended judgment (excluding prejudgment interest) is about $2.9 million, rather than $3.3 million. Even if we were to use that lower figure, the ratio of punitive to compensatory damages would be about 2.1 to 1.

2. The Reprehensibility of Reed's Conduct

Reed also contends that, applying the federal due process guideposts for assessing punitive damages, his conduct was not sufficiently reprehensible to support the jury's award of punitive damages. Of the three guideposts, " 'the most important is the degree of reprehensibility of the defendant's conduct. On this question, the high court instructed courts to consider whether "[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident." ' " (*Bankhead v. ArvinMeritor, Inc.*, *supra*, 205 Cal.App.4th at p. 85.)

As Reed concedes, the jury's findings establish the fifth of these factors, i.e., his intentional malice, trickery, or deceit. In denying the portion of Reed's JNOV motion attacking the award of punitive damages, the trial court noted there was "substantial evidence that Reed acted with a flagrant and callous disregard for the impact of his fraudulent schemes on the Cardozas," and Reed does not dispute this conclusion on appeal. He instead contends briefly that the other reprehensibility factors are not present. Reed argues his deceptions did not cause physical harm or threaten the health or safety of the Cardozas, and he characterizes his fraudulent scheme as a single act. As to the degree of the Cardozas' financial vulnerability, Reed notes the Cardozas were assisted by professional advisors in connection with the Corby transaction, while the Cardozas argue Reed took advantage of the fact they were elderly and had no prior experience with commercial real estate transactions.

We need not sort out with precision the degree of reprehensibility to assign to each of the factors disputed by the parties. We are satisfied that, in the circumstances of this case, the substantial degree of reprehensibility established by Reed's intentionally deceptive conduct as found by the jury supports the award of punitive damages here. That award, as noted, is a low multiple of the compensatory damage award (a ratio of about 2 to 1). And as we have discussed above, the compensatory damage award, while

large, is an appropriate measure of the injuries actually sustained by the Cardozas. In our view, it is not comparable to a large award of emotional distress damages that may already contain a punitive element. (Cf. *Simon, supra,* 35 Cal.4th at pp. 1188–1189 [a substantial compensatory award for emotional distress "may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent"].) The amount awarded by the jury will " 'further [California's] legitimate interests in punishing unlawful conduct and deterring its repetition' " (*id.* at p. 1189), and, in our judgment, it does not exceed the maximum amount permitted by the United States Constitution,[8] nor is it unreasonable under California law.[9]

3. Reed's Financial Condition

Finally, Reed asserts the award of punitive damages must be reversed because it exceeds his net worth and his ability to pay. We reject this argument as well.

As noted, under California law, a defendant's wealth is an important factor in determining whether a punitive damages award is excessive. (*Corenbaum, supra,* 215 Cal.App.4th at p. 1337.) " 'Even if an award is entirely reasonable in light of the other two [California law] factors . . . , the award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone*." (*Adams v. Murakami, supra,* 54 Cal.3d at p. 111.) Absent meaningful evidence of a defendant's financial condition, a reviewing court cannot determine whether a punitive damages award is

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[8] As to the federal due process guideposts other than reprehensibility, Reed does not develop any argument about the disparity between punitive and compensatory damages other than the one based on *Frommoethelydo* and *Auerbach* that we have addressed above. He also does not contend the jury's award is excessive in light of the civil penalties available in comparable cases (and indeed he argues that guidepost is irrelevant here). (See *Nickerson, supra,* 63 Cal.4th at pp. 371–372 [summarizing the due process guideposts].)

[9] As to the first two factors governing excessiveness of punitive damage awards under California law (reprehensibility of the defendant's conduct and the proportionality of the punitive and compensatory damage awards), Reed does not present any challenges other than those we have discussed in the text. We discuss his challenge as to the final factor (the defendant's financial condition) in part II.C.3 below.

excessive under California law. [Citation.] Accordingly, evidence of the defendant's financial condition at the time of trial is a prerequisite to an award of punitive damages." (*Corenbaum, supra,* 215 Cal.App.4th at p. 1337.)

But this principle does not entitle a defendant to withhold properly requested information about his financial condition and then escape an award of punitive damages on the ground there is insufficient evidence of his wealth. Instead, "[a] defendant who fails to comply with a court order to produce records of his or her financial condition may be estopped from challenging a punitive damage award based on lack of evidence of financial condition to support the award." (*Corenbaum, supra,* 215 Cal.App.4th at p. 1337; accord, *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608–609.)

Here, the Cardozas presented expert testimony by forensic accountant William Twitchell, who opined (based on certain of Reed's financial records that were produced for the punitive damages phase, including some bank records) that Reed's net worth was approximately $3.6 million. Reed seizes on this testimony to argue the award of $6.1 million in punitive damages exceeds his ability to pay. But Reed ignores the fact that Twitchell also testified in some detail about the categories of financial records that he and the Cardozas sought unsuccessfully to obtain from Reed, records that Twitchell believed necessary to make a full and accurate assessment of Reed's net worth. These included loan applications, credit requests, bank records for Reed's corporations, deeds and notes on Reed's real property, and records accounting for funds received by Reed or his entities from their Taiwanese and German business partners. In particular, there was evidence that the German corporation with which Reed dealt transferred $2.5 million to him, but Twitchell and his staff were never able to locate a record showing receipt of this sum in the materials provided by Reed.

In its order addressing Reed's JNOV and new trial motions, the trial court found (based on Twitchell's testimony and on Reed's conduct in connection with financial discovery and the punitive damages trial) that waiver and estoppel principles barred Reed from contending the punitive damages award was disproportionate to his net worth. The

court concluded Reed's conduct "support[ed] the inference" he was "hiding evidence/assets."

Elaborating on this conclusion, the court stated Reed "failed to deposit his financial records with the court during Phase I [of the trial] despite a proper request by [the Cardozas], repeated several times." At the conclusion of phase I, Reed did not have his financial records ready to deliver to the Cardozas, which led to "more than a month of battles over location and production of the financial records sought by" the Cardozas. The court stated that it repeatedly ordered Reed to turn over records needed by the Cardozas. Reed was disruptive in depositions and walked out of one of them. Reed's conduct caused delays and substantially increased the cost of discovering his financial information. Some records were produced late, including some less than 24 hours before the phase II trial began. The court noted Twitchell's testimony that some financial records were never produced.

The court also noted Reed's conduct during the punitive damages trial likely further undercut his credibility with the jury. Reed failed to appear for the evidentiary portion of the phase II trial, thus depriving the Cardozas of the opportunity to cross-examine him about his finances. Reed then appeared for the second day of the phase II trial, fired his attorney and presented closing argument himself, effectively gaining the opportunity to address the jurors personally about his financial condition without being subject to cross-examination. The court noted the jury could infer from this conduct that Reed was concealing evidence.

The court did note, in the context of its ruling on Reed's new trial motion, that it might draw different inferences than the jury apparently did as to Reed's net worth. But the court stated it could not articulate a basis for an alternate award, due to Reed's "incomplete financial disclosure" and "withholding of relevant evidence." The court concluded by stating it agreed with the jury "that Reed prevented the jury and the court from receiving a true, complete, and accurate picture of his net worth; any failure of proof by [the Cardozas] as to defendant Reed was caused by Reed."

Based on Reed's failure to provide adequate discovery as to his financial condition and his related conduct as outlined by the trial court, we conclude "that he is estopped from challenging the punitive damage awards based on lack of evidence of his financial condition or insufficiency of the evidence to establish his ability to pay the amount awarded." (*Corenbaum, supra,* 215 Cal.App.4th at p. 1338.)

In his appellate brief, Reed does not dispute the accuracy of the trial court's description of his failure to provide adequate financial discovery. He also acknowledges that a defendant who is found to have failed to cooperate with discovery "may not thereafter argue that there was insufficient evidence of net worth presented to the jury." Reed contends, however, that estoppel and waiver principles should not apply here because he "does not argue that there was insufficient evidence"; instead, he "argues that based on the evidence presented, the award was excessive." This is a distinction without a difference. As the trial court found, it was Reed's failure to comply with discovery that prevented the Cardozas from presenting a complete evidentiary picture of his financial condition. Reed's conduct estops him from arguing the resulting award exceeds his ability to pay.

III. DISPOSITION

The judgment is affirmed. The Cardozas shall recover their costs on appeal.

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STREETER, J.

We concur:

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POLLAK, P.J.

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BROWN, J.

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