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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**ROSA DeSANTIS et al.,**

**Plaintiffs and Appellants,**

**v.**

**OAKMONT LLC, et al.,**

**Defendants and Appellants.**

**A128220**

**(Sonoma County  
Super. Ct. No. SCV 241704)**

This appeal arises from litigation spawned by a failed real estate transaction. In early 2006, Rosa and Matteo DeSantis purchased a commercial building owned by appellant Oakmont LLC (Oakmont).<sup>1</sup> The DeSantises were interested in buying an income-producing property, and at the time they bought the building, the master tenant was a hospital that held several options to renew its lease. Unbeknownst to the DeSantises, before the building was offered for sale, the hospital had approached defendants about an early buy-out of its lease and had told them it did not intend to exercise its options to renew. Although defendants were aware this would likely leave the building vacant after expiration of the master lease, neither they nor their real estate broker disclosed the contents of these communications to the DeSantises. In fact, the broker represented the master lease would be renewed.

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<sup>1</sup> Oakmont was owned by appellant Ruppert LLC, and appellant Gloria Ruppert (Ruppert) was the general manager of both Oakmont and Ruppert LLC. We will refer to Oakmont, Ruppert, and Ruppert LLC collectively as “defendants.”

The DeSantises obtained a loan to finance their purchase. Several months after the transaction closed, they learned the master lease would not be renewed. Their efforts to find new tenants and to sell the building proved fruitless, and without rental income, the DeSantises were unable to make the payments on their loan. The lender ultimately foreclosed on the property.

The DeSantises then sued defendants, alleging multiple causes of action. After a jury trial, they prevailed on their claims for breach of contract, misrepresentation, and concealment and were awarded compensatory and punitive damages. The trial court denied their claims under California's unfair competition law. The DeSantises were also awarded attorney fees.

Both defendants and the DeSantises appeal from the resulting judgment. We reject all of the parties' claims of error and accordingly affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

Ruppert LLC was formed in December 1999 by Ruppert and her husband, Peter. Ruppert was named manager of the new LLC and was responsible for making all business decisions affecting the company's funds and assets. In October 2002, Ruppert, acting on behalf of Ruppert LLC, entered into an agreement to buy commercial property located at 6575 Oakmont Drive in Santa Rosa (the Property). The Property was a medical/dental office building with almost 9,900 square feet of rentable space.

To purchase the Property, Ruppert assumed a loan issued by Wells Fargo Bank. To meet Wells Fargo's requirements for assumption of the loan, Ruppert and Ruppert LLC formed Oakmont, which was the entity that acquired the Property. Wells Fargo also required that Ruppert personally guarantee repayment of the loan. The sale of the Property closed in early 2003.

At the time Oakmont purchased the Property, Santa Rosa Memorial Hospital (the Hospital) was the master tenant. The Hospital's tenancy was governed by the terms of a

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<sup>2</sup> In this section of our opinion, we set out the facts concerning the underlying transaction and the proceedings below. Additional facts related to the issues raised by the parties are included in our legal discussion.

“triple net lease” that made the Hospital responsible for all of the expenses associated with the building, such as maintenance, utilities, and property taxes. The term of the master lease ended May 31, 2007, but the lease agreement gave the Hospital four five-year options to renew.

The Hospital’s physical therapy and radiology departments occupied a portion of the Property, and other space was leased to subtenants, such as medical practice groups and a laboratory. In 2002, the Hospital shut down its departments at the Property for lack of patients. It was having difficulty leasing space to subtenants and was losing money on the lease. By 2005, about half of the building had been empty for several years, and some of the subtenants had expressed a desire either to downsize or get out of their subleases.

As a result, in March 2005, the Hospital’s contract administrator, Ann Sutherland, contacted Oakmont’s property manager, Carol Molln. Sutherland asked Molln to approach Ruppert about the possibility of arranging an early exit or buyout of the Hospital’s lease. Molln then e-mailed Ruppert on April 1, 2005, to inform her that Sutherland had called to set up a meeting regarding the Hospital’s lease. In her e-mail, Molln told Ruppert, “I get the impression that they’re going to try to get out early.” Ruppert informed her real estate broker, Michael Gundersen, that the meeting was going to take place.

Sutherland met with Molln on April 4, 2005, and at that meeting, she told Molln the Hospital was interested in either an early end or buyout of the lease. Molln indicated this would be difficult because of Ruppert’s financial situation. After the meeting, Molln confirmed to Ruppert the Hospital wanted to get out of the lease early. Ruppert then sent Molln an e-mail stating that she was obligated on the Wells Fargo loan until 2009 but would check to see “if there is a way around it.” Molln replied, “You should, because it is likely [the Property] would be vacant for the two years after [the Hospital] is no longer obligated.” Thus, as of early April 2005, Ruppert knew the Hospital wanted to buy out of its lease.

A few days later, Ruppert forwarded Molln's e-mail to Gundersen to let him know the Hospital was seeking an early exit from its lease. Ruppert asked Gundersen to obtain Wells Fargo's agreement that the loan on the Property could be assumed, as she hoped to avoid a \$250,000 penalty that would be due if she paid off the loan early. Wells Fargo approved the request on May 17, 2005, and Ruppert had Gundersen list the Property for sale two days later. Although Gundersen knew the Hospital had tried to buy out of its lease before the end of the term, his listing for the Property advertised it as having a triple net master lease through June 2007 with four five-year options to renew. As of the date of the listing, Ruppert knew the Hospital had no intention of exercising those options.

In August 2005, Ruppert signed a purchase agreement on the Property with prospective buyers Carlo Bruno and Frank Mandarino. Gundersen represented Ruppert in the transaction, while Bruno and Mandarino were represented by real estate agents Steven Crane and Andrew Boxberger. Boxberger investigated the Property for his clients, and he had discussions with Gundersen about whether the Hospital would renew the lease when it expired. Gundersen gave the impression that the Hospital would renew, but Boxberger was dissatisfied with Gundersen's response. Boxberger managed to contact Sutherland, who told him definitively the Hospital did not intend to renew the master lease. As a consequence, Bruno and Mandarino cancelled the escrow and terminated the sale. Crane and Boxberger informed Gundersen that their clients had chosen not to go forward with the purchase because the Hospital was not going to renew its lease.

After the deal with Bruno and Mandarino fell through, Gundersen continued to market the Property. At a meeting of commercial agents in November 2005, Gundersen distributed a marketing flyer for it. At that time, Coldwell Banker real estate agents Virginia Weber and Damien Friary were working with the DeSantis, who were looking to purchase commercial property. Friary was at the meeting with Gundersen, and after learning of the Property, he discussed it with his clients.

The DeSantis are Italian immigrants with a limited command of English. They had sold a farm in Clovis, California, on October 31, 2005, and were interested in

acquiring commercial property so they could make a tax-deferred exchange pursuant to Internal Revenue Code section 1031 (section 1031).<sup>3</sup> To effectuate the tax-deferred exchange, the DeSantises had 45 days from the date of the Clovis sale to identify exchange properties and 180 days to close the transaction on the identified properties. They therefore needed to contract to buy qualifying property quickly. In early November 2005, the DeSantises visited the Property with Friary. They thought the building was an attractive investment because of the Hospital's triple net lease. Based on the advertising flyer for the Property and on their discussions with Weber and Friary, the DeSantises believed the Hospital would renew the lease. Had they known the Hospital did not intend to renew, they would not have bought the Property.

On November 19, 2005, the DeSantises made an offer to purchase the Property for \$4.2 million. Their written offer was made using a standard form Commercial Property Purchase Agreement.<sup>4</sup> Ruppert signed the agreement as managing partner of Oakmont. Also signed and included with the agreement were other standard forms stating that both Oakmont and the DeSantises intended to utilize the transaction as part of a section 1031 exchange. The parties also signed a Buyer's Inspection Advisory form. That form states, "Seller is required to disclose to you material facts known to him/her that affect the value or desirability of the Property." Paragraph B of the advisory informs the buyer, "You have an affirmative duty to exercise reasonable care to protect yourself, including discovery of the legal, practical and technical implications of disclosed facts, and the investigation and verification of information and facts that you know or that are within your diligent attention and observation. The purchase agreement gives you the right to investigate the Property."

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<sup>3</sup> "Under section 1031, no taxable gain or loss is recognized on the exchange of properties of like kind if both the property surrendered and the property received are held either 'for productive use in a trade or business or for investment.' (26 U.S.C. § 1031(a)(1).)" (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1140, fn. 5.)

<sup>4</sup> The form agreement was drafted by the California Association of Realtors and bears the legend "CPA REVISED 10/02."

Both prior to the offer and during the escrow period, Friary asked Gundersen what he knew about the Hospital's intentions regarding renewal of the master lease. Gundersen told Friary and the DeSantises that the Hospital had not signed an extension, but he believed it would. Gundersen also told Friary on numerous occasions he thought the Hospital would renew its lease; he never told Friary it would not do so. When Friary asked Gundersen whom he should contact at the Hospital to discuss the lease, Gundersen did not give him Sutherland's name.<sup>5</sup> Instead, he referred Friary to Molln, whom Friary attempted to contact without success. Molln eventually sent Gundersen an e-mail telling the latter Friary should direct any questions to Gundersen rather than to her. Friary's direct inquiries to the Hospital fared no better, and Friary was finally told the Hospital could not give him the requested information. Friary was told to speak to the owner of the Property.

In December 2005, while the sale was still in escrow, Gundersen took an estoppel certificate to Sutherland's office at the Hospital. During that visit, Sutherland stressed to Gundersen that the Hospital was not going to renew its lease. In October 2006, Sutherland prepared a letter to Molln informing her that the Hospital would not renew its lease. The letter stated, "At the time of the last sale of the building we advised the selling broker that the Hospital will not exercise its option to renew at that time."

After the DeSantises removed the buyers' investigation contingency, the sale closed in January 2006.<sup>6</sup> In June of that year, Molln told Friary she did not think the Hospital was going to renew its lease. She advised him to contact Sutherland about the Hospital's intentions, and on July 3, 2006, Sutherland wrote to Friary confirming that the Hospital would not renew the lease when it expired on May 31, 2007.

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<sup>5</sup> Gundersen testified at trial that he did not believe he had any duty to give Friary Sutherland's name. He stated he was not required to disclose information he possessed to the agent for another party in response to that agent's question.

<sup>6</sup> As part of the same section 1031 exchange, the DeSantises also bought property located in Selma, California.

The DeSantises then tried unsuccessfully to find other tenants for the Property. They later put the Property up for sale, and although they reduced the asking price to \$2.4 million, they received no offers. After the Hospital left the Property, the DeSantises' payments on the loan greatly exceeded the rent they were receiving from the remaining tenants. In addition, they were also required to pay all of the expenses on the Property. The DeSantises were unable to make their payments on the loan, and the lender foreclosed on the Property in April 2009.

The DeSantises filed their original complaint on October 22, 2007. The complaint sought damages from Coldwell Banker, Weber, and Friary, as well as from the DeSantises' accountant, Richard Lake. It also included causes of action for fraud, deceit, and concealment against Oakmont, Ruppert LLC, Ruppert, and Gundersen. Against those same defendants, the complaint alleged violations of Business and Professions Code sections 17200 and 17500 and a cause of action for civil conspiracy. The complaint also sought rescission of the contract with Oakmont. The DeSantises settled with Coldwell Banker, Weber, Friary, and Lake prior to trial. The DeSantises then filed a second amended complaint against the remaining defendants, and the trial court permitted them to file a third amended complaint just before trial.

After the case was tried, the jury returned a verdict in favor of the DeSantises. It found Oakmont liable for breach of contract. It also found defendants liable on the DeSantises' claims for intentional misrepresentation, concealment, and negligent misrepresentation. The jury awarded punitive damages of \$330,000 against Oakmont, and \$1 each against Ruppert and Ruppert LLC. The trial court then entered judgment.

Defendants filed a motion for judgment notwithstanding the verdict (JNOV) as to Ruppert LLC's liability. They also filed five separate motions for new trial on various issues. The DeSantises moved for an award of attorney fees against defendants and for prejudgment interest.

The trial court disposed of these motions by written order. It denied defendants' motion for JNOV as well as their motions for new trial. It granted the DeSantises' request for attorney fees and awarded them \$530,034, but it reduced that amount by 10

percent to account for work the DeSantises' counsel had performed related to the defendants who had settled prior to trial. The total fees awarded amounted to \$477,031. The court denied the DeSantises' request for prejudgment interest for the period prior to the jury's verdicts. It also granted defendants an offset against the jury's verdict for the total amount the DeSantises had obtained from their pretrial settlements against the verdict, but denied defendants' request for an additional offset.

The court entered an amended judgment on April 19, 2010. The defendants and the DeSantises each filed a notice of appeal.

## DISCUSSION

Defendants and the DeSantises present a number of challenges to the verdict and the trial court's rulings.<sup>7</sup> We will address the defendants' arguments before turning to the DeSantises'. As we explain below, we are unable to resolve many of the issues the parties raise, commonly because counsel have either failed to support their arguments with proper citations to the record or have neglected to provide any relevant legal authority. In other instances, counsel have not furnished us with a record adequate to permit informed appellate review.

### I. *Oakmont LLC's Appeal*

#### A. *The Special Verdict Form Was Not Defective*

Oakmont contends the breach of contract verdict must be reversed because the special verdict form did not require the jury to make findings as to each contested element of the breach of contract action. Specifically, Oakmont argues the special verdict form was fatally defective because it did not allow the jury to resolve the

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<sup>7</sup> The three defendants have all filed separate briefs. Each joins in the arguments of the others "[t]o the extent that the issues overlap." Thus, our discussion of the arguments made by one defendant generally applies to all.

In addition to the briefs of the parties, we granted leave to the California Association of Realtors to file a brief amicus curiae in support of defendants. Because we do not reach the issues raised by amicus, we deny the DeSantises' related motion for judicial notice, filed February 7, 2012.

controverted issue of whether the DeSantis had performed their duty to investigate under paragraph B of the Buyer’s Inspection Advisory. We reject this argument.

1. Standard of Review

Our review of the special verdict form is de novo. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325.) A special verdict “must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.” (Code Civ. Proc., § 624.) “A special verdict is ‘fatally defective’ if it does not allow the jury to resolve every controverted issue. [Citations.]” (*Saxena v. Goffney*, at p. 325.)

2. The Jury Was Not Required to Make Separate Findings on Each Element of the Claim for Breach of Contract

Oakmont appears to argue the verdict form should have required the jury to make specific findings on each of the elements of a cause of action for breach of contract.<sup>8</sup> “[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damage to the plaintiff. [Citation.]” (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) In Oakmont’s view, the failure to include a separate interrogatory for each of these elements renders the verdict form defective. But Oakmont cites no authority for this contention, and the only case we have found that

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<sup>8</sup> The verdict form on the breach of contract cause of action read as follows:

“1. Did Oakmont, LLC breach its contract with Rosa and Matteo DeSantis?

“  X  Yes   No

“ If you answered Question 1 yes, then answer question 2. If not, skip questions 2 and 3 and answer question 4.

“2. Were the DeSantis harmed by that breach?

“  X  Yes   No

“ If you answered Question 2 yes, then answer question 3. If not, then skip question 3 and answer question 4.

“3. What are plaintiffs’ damages for breach of contract?

“  \$ 2,608,520 ”

considered such a question came to a contrary conclusion. (See *Babcock v. Omansky* (1973) 31 Cal.App.3d 625, 630 [where jury was instructed on elements of fraud, court did “not believe that a cumbersome interrogatory embracing each of the several elements [of a fraud claim] was necessarily required”], disapproved on another point in *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 485-486, 496.) While some reported opinions have considered special verdict forms asking the jury to find the existence of all elements of a breach of contract action (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1229), in others the forms asked only whether one party “breached its contract” with another. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 957 (*Myers*).) In light of these cases, we are unwilling to hold that the special verdict form at issue here was defective merely because it did not ask the jury to make separate findings on each element of the DeSantises’ cause of action for breach of contract. (*Babcock v. Omansky*, at p. 630.)

Moreover, there is no dispute that the jury was correctly instructed on all of the elements of breach of contract, including the requirement that “the [DeSantises] did all, or substantially all, of the significant things that the contract required them to do or that they [were] excused from doing those things.” The jury then found Oakmont had breached its contract with the DeSantises. To so find, the jury must necessarily have concluded the DeSantises had discharged any duty they had to conduct an inspection or investigation of matters affecting the value of the Property. (See *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1558 [where jury was properly instructed that element of claim for breach of duty of good faith was harm to plaintiff, jury’s finding of breach of duty necessarily included finding that plaintiff had been damaged]; *Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 364-365 [jury was instructed that party’s performance under contract was discharged if affirmative defense of impossibility or impracticability was proved; finding of breach showed jury rejected affirmative defense].) The finding that the DeSantises discharged

their duties under the contract is necessarily subsumed within the jury's finding of breach.<sup>9</sup>

B. *The Trial Court Did Not Err in Refusing to Construe the Contract as a Matter of Law*

Oakmont urges us to reverse the breach of contract verdict because it claims the trial court improperly refused to construe the purchase agreement to ascertain the scope of the seller's duty of disclosure. Oakmont claims it asked the trial court "to construe several inconsistent provisions contained in these agreements" and to determine as a matter of law the seller's duty of disclosure. This request was contained in the first of Oakmont's revised motions in limine.

Oakmont's argument suffers from a number of fatal procedural defects. First, Oakmont claims the trial court denied its motion in limine, but the portion of the reporter's transcript to which it cites does not reveal a ruling on the motion. Oakmont has therefore failed to satisfy its burden on appeal. (See *County of Orange v. Smith*

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<sup>9</sup> The cases Oakmont cites in support of its argument are all factually distinguishable. In those cases, the special verdict was defective because it failed to include a factual finding essential to support a cause of action alleged. For example, in *Behr v. Redmond* (2011) 193 Cal.App.4th 517, the plaintiff's complaint included separate causes of action for fraudulent concealment and fraudulent misrepresentation, but the verdict form asked only about concealment and did not call for any finding that the defendant had made an affirmative misrepresentation. (*Id.* at p. 531.) As the defendant could be liable for fraudulent misrepresentation only if he were found to have made a misrepresentation, the lack of a finding on that point precluded judgment for the plaintiff on that cause of action. (*Ibid.*) The same is true of the other cases upon which Oakmont relies. (See *Saxena v. Goffney, supra*, 159 Cal.App.4th at pp. 325-326 [special verdict form that asked only whether plaintiff patient had given informed consent to medical procedure could not support verdict on battery claim, because it did not ask whether plaintiff had given any consent at all]; *Fuller-Austin Insulation Co. v. Highlands Ins. Co.* (2006) 135 Cal.App.4th 958, 1004-1006 [in insurance coverage action, special verdict form defective because it asked only whether insured had engaged in inequitable misconduct, but did not ask distinct question of whether insured's bankruptcy settlement was reasonable]; *Myers, supra*, 13 Cal.App.4th at pp. 960-961 [special verdict did not support punitive damage award where jury found only that defendant had breached contract but did not find defendant had committed a tort]; *Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 855 [in personal injury action, special verdict defective where jury answered only two of six questions on special verdict form and could not agree on question of damages].)

(2005) 132 Cal.App.4th 1434, 1443 [to satisfy burden on appeal, “the appellant must identify each order that he asserts is erroneous, cite to the particular portion of the record wherein that ruling is contained, and identify what particular legal authorities show error with respect to each challenged order”].) In fact, our independent review of the record discloses that the trial court expressly declined to rule on the motion in question. It explained that the motion dealt with what the court viewed as “essentially jury instructions.” The trial judge noted that motions in limine generally “affect specific pieces of evidence or people’s testimony or witnesses,” and she refused to rule on what she viewed as legal issues before she heard the evidence.

Second, Oakmont does not tell us what standard of review we should apply to the trial court’s refusal to construe the contractual language prior to trial. Oakmont’s “[f]ailure to acknowledge the proper scope of review is a concession of lack of merit. [Citation.]” (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465 (*Sonic Manufacturing*)). In any event, whatever standard of review might apply, we are disinclined to hold the trial judge committed prejudicial error by refusing to decide this kind of legal issue on a motion in limine. Her view of the proper use of motions in limine is amply supported by the case law. (E.g., *Johnson v. Chiu* (2011) 199 Cal.App.4th 775, 780-781 [motions in limine deal with evidentiary issues; inappropriate to use motion in limine as substitute for dispositive motion on issue of defendant’s standard of care].) Indeed, some courts have concluded that a motion in limine is not the proper vehicle for seeking the type of ruling Oakmont desired. (See *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 670 [motions in limine that “sought rulings which would merely be declaratory of existing law” were improper]; cf. *Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 377.)

Third, despite devoting more than a dozen pages of argument to this issue, Oakmont has not cited a single case squarely holding that in a breach of contract action, a trial court commits reversible error by refusing to construe contractual language prior to hearing all of the evidence. In the absence of such authority, we may treat the argument

as forfeited.<sup>10</sup> (See *Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826-827, fn. 1 (*Sheily*).)

*C. The DeSantises Made a Good Faith Effort to Mediate and Were Not Barred From Seeking an Award of Attorney Fees*

Oakmont claims paragraph 22.A. of the purchase agreement bars the DeSantises from recovering attorney fees because the latter failed to make a good faith effort to mediate the dispute before filing suit.<sup>11</sup> Oakmont does not dispute that the DeSantises' counsel made an offer to mediate prior to filing this action. Nor could Oakmont do so, because on September 12, 2007, the DeSantises' attorney, Donald McMillan, wrote directly to Ruppert and asked whether she would agree to mediation. Instead, Oakmont's claim is that McMillan improperly attempted to communicate with Ruppert about mediation through an insurance adjuster employed by Oakmont's general liability carrier, and because the adjuster was not the actual or ostensible agent for Ruppert, "McMillan could not give legally sufficient notice to Gloria Ruppert about mediation issues through"

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<sup>10</sup> Under this same argument heading, Oakmont contends the trial court allowed the DeSantises' expert, J. Patrick Burke, to offer improper opinion testimony on legal issues regarding the seller's duties under the contract. Oakmont has forfeited this argument because it does not appear to have raised this objection to Burke's testimony in the trial court. Oakmont cites to two instances in which it objected to Burke's testimony, but the grounds for those objections were that Burke's testimony "falsifie[d] the evidence" and that Burke could not "argue to the jury his version of the facts." Thus, while Oakmont objected to Burke's testimony, its failure to do so on the grounds it now raises on appeal forfeits its challenge. (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 564-565 (*SCI*).) We note that although the DeSantises have addressed Oakmont's argument on the merits, that does not preclude us from finding the issue forfeited. (*S.M. v. Los Angeles Unified School Dist.* (2010) 184 Cal.App.4th 712, 722.)

<sup>11</sup> The relevant portion of paragraph 22.A. states: "Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. . . . If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action."

the adjuster. We need not resolve this issue, because we conclude Oakmont has forfeited the argument by failing to raise it below.

After trial, the DeSantises moved for an award of attorney fees. Oakmont opposed the motion and argued the DeSantises had failed to make a good faith attempt to mediate the dispute, but its opposition made no mention of the agency issue it now raises on appeal. Below, Oakmont argued only that the DeSantises had failed to comply with the purchase agreement's mediation provision because they filed suit without waiting for Oakmont's general liability insurer to complete its investigation. Oakmont's failure to raise the agency argument in its opposition below forfeits the argument on appeal. (*Blackburn v. Charnley* (2004) 117 Cal.App.4th 758, 769 [party claiming an award of attorney fees was barred by noncompliance with mediation provision of real estate purchase agreement forfeited argument by failing to raise it in opposition to motion for attorney fees].)

Even if the argument were not forfeited, it would be meritless. McMillan unquestionably offered to mediate the dispute. His letter to Ruppert stated he would file suit if he had not heard from her by September 21, 2007. Ruppert responded on September 19, telling McMillan, "we have forwarded [your letter] onto our attorney to contact you and to review and resolve this dispute through mediation amicably." In a declaration submitted below, McMillan stated that when the adjuster for Oakmont's insurer contacted him on September 25, the adjuster told McMillan he would be meeting with Ruppert during the week of October 1. McMillan told the adjuster that if he had not heard from Ruppert by October 9, he would file suit. McMillan did not hear from Ruppert or her attorney by that date, but nevertheless he did not file suit until 18 days later on October 27, and he did not effectuate service until December 16. In its ruling on the DeSantises' request for attorney fees, the trial court found no merit in Oakmont's argument that the DeSantises had failed to attempt to mediate.<sup>12</sup> Oakmont has not suggested that the trial court's determination is unsupported by substantial evidence.

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<sup>12</sup> The trial court entered a written order disposing of this motion. Neither party has cited, let alone discussed, the trial court's order.

(See *Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512 [in determining compliance with mediation provision, standard of review is substantial evidence]; cf. *Van Slyke v. Gibson* (2007) 146 Cal.App.4th 1296, 1300 [trial court determines weight of evidence and credibility of declarant in matters submitted upon declarations].) We therefore reject the argument that the award of attorney fees was barred by the DeSantises' failure to mediate.

D. *The Trial Court Did Not Abuse Its Discretion in Granting the DeSantises Leave to Amend Their Complaint*

Oakmont contends the trial court abused its discretion in permitting the DeSantises to amend their complaint on the eve of trial to include a claim for breach of contract. Oakmont argues the DeSantises unreasonably delayed seeking the amendment and that it suffered prejudice as a result. We disagree.

1. Facts

The DeSantises filed their original complaint in October 2007, seeking to rescind their contract with “the Oakmont Defendants” (Oakmont, Ruppert LLC, Ruppert, and Gundersen). At the time the complaint was filed, the DeSantises were still the owners of the Property, but they later lost it in foreclosure when they were unable to make payments on the loan. Just prior to trial, the court remarked that the remedy of rescission was no longer available to the DeSantises.<sup>13</sup> Their counsel then made an oral motion to amend their complaint to add a count for breach of contract based on the seller’s violation of its duty to disclose under the buyer’s inspection advisory. Counsel argued there could be no unfair surprise or prejudice to Oakmont, because contractual claims had been inherent in the DeSantises’ cause of action for rescission, and Oakmont had been put on notice of the

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<sup>13</sup> “An action for rescission and an action for breach of contract are alternative remedies. The election of one bars recovery under the other.” (*Akin v. Certain Underwriters at Lloyd’s London* (2006) 140 Cal.App.4th 291, 296.) Because rescission “restores the parties to their former positions by requiring them to return whatever consideration they have received,” that remedy would have required the DeSantises to return the Property to Oakmont. (*Sharabianlou v. Karp, supra*, 181 Cal.App.4th at p. 1145; see also *id.* at p. 1147.) After the DeSantises lost the Property in foreclosure, the remedy of rescission became unavailable. (See *id.* at p. 1147.)

specific claim for breach three months earlier when the DeSantises raised it in their trial brief and in their proposed jury instructions.

Oakmont opposed the motion, and the trial court asked Oakmont's counsel to explain what prejudice his clients would suffer if the amendment were permitted. Oakmont's counsel argued that (1) if he had known of the claim for breach, he would have retained different experts; (2) the claim for breach would expose his clients to an award of attorney fees under the contract; and (3) the breach of contract claim was based upon new and different facts.

The trial court found Oakmont's arguments unpersuasive. The court opined that the breach of contract claim was based on the same facts as the DeSantises' other claims and Oakmont could not have been surprised by it. It found the amendment would not be prejudicial, and the DeSantises were permitted to file an amended complaint. The trial court asked Oakmont's counsel if he desired a continuance of the trial, but he responded equivocally. When counsel for the DeSantises presented his proposed amended complaint the next day, Oakmont's attorney said, "I will respond to it." The DeSantises then filed the amended complaint, and Oakmont answered it. There is nothing in the record showing that Oakmont requested a continuance of the trial, named additional expert witnesses, or sought to redepose the DeSantises' experts.

## 2. Standard of Review

We uphold the trial court's grant of leave to amend " 'unless a manifest or gross abuse of discretion is shown.' [Citation.]" (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) Leave to amend may be granted "even during trial [citation] if the defendant is alerted to the charges by the factual allegations, no matter how framed [citation] and the defendant will not be prejudiced." (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965 (*Honig*)). "[I]t is irrelevant that new legal theories are introduced as long as the proposed amendments 'relate to the same general set of facts.' [Citation.]" (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.)

### 3. Oakmont Has Failed to Show it Was Prejudiced by the Amendment

Oakmont claims it was prejudiced in three ways.<sup>14</sup> First, it asserts defense of the breach of contract claim would have required it “to obtain an opinion of an expert on issues of liability under the contract, and to depose [the DeSantises’] liability expert.” It contends it was “unable to do either” because the amendment was permitted after trial had begun. This argument flies in the face of the facts. The trial judge offered to continue the trial, but Oakmont chose instead to answer the complaint and proceed. It may not now complain that it had no opportunity for additional trial preparation when it refused the trial court’s offer of additional time to prepare. (Cf. *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564 [defendants not prejudiced by amendment where case could have proceeded “after a few days’ continuance *if one had been requested*” (italics added)].) Oakmont’s argument that it did not have the opportunity to retain an expert on the issue of the DeSantises’ contract damages, or to depose the DeSantises’ expert, fails for the same reason. Oakmont declined the offer of a continuance during which time it could have retained an additional expert or deposed the plaintiffs’ expert. Finally, Oakmont makes the one-sentence argument that it would have made a different Code of Civil Procedure section 998 offer had it known the DeSantises would seek breach of contract damages. We need not respond to this argument because it is insufficiently articulated, and Oakmont does not claim it was made below. (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 800-801 (*Dietz*) [reviewing court will not consider issue unless appellant demonstrates it was raised in court below]; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 [“The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived.”].)

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<sup>14</sup> Oakmont also contends the DeSantises were guilty of unreasonable delay in moving to amend their complaint. The trial court necessarily concluded otherwise, and its conclusion was well within its discretion. (See, e.g., *Honig, supra*, 6 Cal.App.4th at pp. 965-967 [abuse of discretion to deny motion to amend complaint where leave was sought more than two years after events giving rise to amendment]; *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 636-637 [upholding grant of leave to amend complaint during trial to add new cause of action].)

## II. *Ruppert LLC's Appeal*

### A. *The Theory of Trial Doctrine Precludes Ruppert LLC From Raising a New Defense on Appeal*

Ruppert LLC argues it should never have been named a party defendant because it allegedly played no role in the transaction and there is no evidence to support the extension of liability to Ruppert LLC for the actions of Oakmont or Ruppert.<sup>15</sup> Although the DeSantis respond to this argument on the merits, they also contend Ruppert LLC is estopped from making it. They further contend that, in the trial court, defense counsel asserted Ruppert, Ruppert LLC, and Oakmont were effectively the same. The theory of trial doctrine precludes Ruppert LLC from raising this argument on appeal.

The trial court disposed of appellants' motion for JNOV in a written order,<sup>16</sup> finding "defendants stipulated that . . . Ruppert, Oakmont . . . , and Ruppert LLC were one and the same for the purposes of the jury's consideration." It also noted that "at numerous times and in numerous ways throughout the trial, . . . defendants themselves asked the jury to consider all three defendants together." Further, the trial court explained defendants had stipulated to a jury instruction stating that if the jury found Gundersen had been acting within the scope of his agency when the incident occurred, then Oakmont, Ruppert, and Ruppert LLC "are responsible for any harm caused by . . .

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<sup>15</sup> It is not clear from Ruppert LLC's opening brief that this argument was made below. The brief cites only a few ambiguous statements by counsel suggesting that the various entities controlled by Ruppert were distinct, and our review of appellants' appendix discloses no documents showing Ruppert LLC raised this issue in the trial court. Ordinarily, that failure would result in forfeiture of the argument on appeal. (See *Dietz, supra*, 177 Cal.App.4th at pp. 800-801.) Here, however, the DeSantis have remedied this deficiency by including Ruppert LLC's motion for JNOV in *their* appendix. The argument was made in that motion and has thus been preserved for appeal.

<sup>16</sup> Although neither party discusses the issue, the trial court denied the motion for JNOV on procedural grounds. It concluded it lacked jurisdiction to grant the motion because it was not timely filed, and it ruled it could not grant the requested relief because the defendants had not filed a notice of motion. The court went on to explain why it would have denied the motion on the merits even if it had been timely filed. Since we affirm the trial court's order on its merits, we will not address procedural issues the parties have not briefed.

Gundersen’s misrepresentation and concealment of material facts . . . .” Finally, the court relied on the fact that when it reviewed the proposed verdict forms with counsel, “it was . . . DEFENDANTS who insisted on lumping all three defendants together in the verdict forms.”

1. Standard of Review

The trial court’s denial of a motion for JNOV is reviewed for substantial evidence. (*Ajaxo Inc. v. E\*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 49.) The same standard of review applies to the lower court’s finding that defendants had stipulated they were one and the same for purposes of tort liability. (See *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632-633, 636 (*Winograd*) [where stipulation consisted of colloquy on the record between court and counsel, trial court’s evaluation of parties’ intent subject to substantial evidence review].) Substantial evidence in this record supports the trial court’s decision.

2. Defendants Conceded Below They Were a Single Defendant for Purposes of Tort Liability

The trial court could properly find that defendants’ counsel had asked the court and the jury to consider all the defendants together. In his opening statement, defendants’ counsel made no distinction among the various entities, telling the jury “[t]he [d]efendant is Gloria Ruppert.” Later, when the DeSantises proposed verdict forms asking the jury to make separate findings for each defendant, the trial court responded, “Well, . . . [d]efendants in all their long verdict forms didn’t even have that, right? You do not suggest a verdict against, let’s say, . . . Ruppert and a verdict in favor of Oakmont . . . on a fraud claim. I’m really having difficulty figuring out how that could happen. [¶] And I think you agree with me on that small point, don’t you? [¶] MR. EYTAN [defendants’ counsel]: Yeah.” Similarly, defendants’ counsel agreed there could be no conspiracy among Oakmont, Ruppert LLC, and . . . Ruppert, because “[t]here’s only one person.” The trial court later observed that defendants’ counsel had told the jury “the truth of the matter when [he] said Ruppert [is] Oakmont, she [is] Ruppert [LLC].” Defendants’

counsel responded, “She is. But she [is] Oakmont.”<sup>17</sup> Furthermore, defendants’ counsel did not object to the jury instruction to which the trial court alluded on the ground that Ruppert LLC was not a proper defendant. Instead, counsel objected on a number of other grounds, including that the instruction assumed Gundersen was an agent for Ruppert LLC and Ruppert. Having proceeded below on the assumption that Oakmont, Ruppert LLC, and Ruppert were a single defendant for purposes of tort liability, Ruppert LLC cannot now argue a new theory of defense on appeal. (See *Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 960-961 [where appellant stipulated prior to trial that individual was an agent and an employee, appellant could not argue on appeal that he was independent contractor].)

*B. Ruppert LLC’s Claims of Trial Error Are Meritless*

Ruppert LLC argues the trial court committed a number of errors in admitting or excluding certain evidence, as well as in refusing to grant defendants an additional credit against the judgment for compensation the DeSantis received from a settling codefendant. We disagree.<sup>18</sup>

1. Boxberger’s Deposition Testimony Was Properly Admitted

Ruppert LLC contends the trial court erred in admitting a portion of the deposition testimony of Boxberger, an agent for prospective buyers Bruno and Mandarin.

Boxberger testified that when a proposed real estate transaction in which he was involved

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<sup>17</sup> In its reply brief, Ruppert LLC argues it is impossible to tell what counsel intended to say when he made that statement. Counsel’s words may well be subject to different interpretations, but this only serves to illustrate why we defer to the trial court on such matters. (See *Winograd, supra*, 68 Cal.App.4th at p. 633.)

<sup>18</sup> We will not address the argument regarding the trial court’s refusal to admit the testimony of George Perez. Ruppert LLC’s opening brief does not discuss the trial court’s reasons for excluding Perez’s testimony, and it cites no authority suggesting that the court abused its discretion in doing so. (See *Sheily, supra*, 122 Cal.App.4th at pp. 826-827, fn. 1 [court may disregard arguments unsupported by record and legal arguments unsupported by citation to authority].) To the limited extent these issues are addressed in the reply brief, those arguments come too late. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 [appellant cannot salvage forfeited argument by raising it belatedly in reply brief]; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 723, p. 790.)

fell through, it was his custom and practice to tell the brokers for the other party why his clients were backing out of the purchase agreement. Ruppert LLC argues the testimony did not meet the requirements of Evidence Code section 1105, which allows the introduction of “[a]ny otherwise admissible evidence of habit or custom . . . to prove conduct on a specified occasion in conformity with the habit or custom.” We reject this argument.

First, Ruppert LLC has forfeited the argument by failing to satisfy its burden on appeal. Its brief contains no citation to the record showing that it objected to Boxberger’s deposition testimony, nor does the brief direct us to the trial court’s ruling on any such objection. (See *County of Orange v. Smith, supra*, 132 Cal.App.4th at p. 1443.) “This court has no obligation to cull the lengthy record, ascertain the procedural context in which [Ruppert LLC] may have raised these claims in the trial court, determine whether and how [the DeSantises] opposed the claims, determine whether [Ruppert LLC’s] contentions were ever addressed . . . , and, thereafter, employ the proper standard of review in resolving such claims. [Citations.]” (*Dietz, supra*, 177 Cal.App.4th at pp. 800-801.) Although we need not search through the 32 volumes of reporter’s transcript in this case to locate the challenged ruling, we note that our unassisted review of the record reveals that *defendants* proposed “to put the entire [deposition] transcript as a separate exhibit,” and that defendants themselves intended to offer portions of Boxberger’s deposition in evidence.

Second, even if we were to treat the argument as properly presented, we would find it meritless. Ruppert LLC contends custom and habit deals only with conduct and not with speech, but the cases interpreting Evidence Code section 1105 make no such distinction, and counsel offers no other authority that would support it. (*Marshall v. Brown* (1983) 141 Cal.App.3d 408, 416 [testimony that it was the defendant’s policy to give bad recommendations concerning former employees admissible under Evid. Code, § 1105]; *Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 793-796 [proper to admit testimony concerning customary response of doctor and medical staff to patient phone calls].)

Ruppert LLC also asserts Boxberger did not have enough experience in handling commercial real estate transactions to establish he had a particular custom or habit in dealing with them. Boxberger testified that in every instance in which a deal was cancelled, he and Crane “would provide the other broker with the reason why [their] clients were not going forward with the deal.” Boxberger was involved in five to 10 such transactions, and he testified that he and Crane followed this practice in every one of those instances.<sup>19</sup> We have found no California cases addressing how many instances of particular conduct are sufficient to establish a custom or habit, and cases interpreting the federal analogue to Evidence Code section 1105—Federal Rule of Evidence 406—have held there is no precise standard for measuring how frequently conduct must occur to establish a habit or pattern. (See *Wilson v. Volkswagen of America, Inc.* (4th Cir. 1977) 561 F.2d 494, 511-512.) Nevertheless, the “regularity of conduct . . . requires some comparison of the number of instances in which any such conduct occurs with the number in which no such conduct took place.” (*Id.* at p. 512.) In other words, “[t]he requisite regularity is tested by the ‘ratio of reaction to situations.’” [Citations.]” (*U.S. v. Newman* (1st Cir. 1992) 982 F.2d 665, 668.) Here, Boxberger’s conduct appears to have been uniform in *all* cases. Consequently, even if the argument had been preserved, we would be unwilling to hold that the trial court abused its discretion in finding that five to 10 instances of conduct were sufficient to constitute a custom. (See *People v. Hughes* (2002) 27 Cal.4th 287, 337 [admission of evidence of habit under Evid. Code, § 1105 lies within trial court’s discretion].)

Nor is Boxberger’s testimony impermissible character evidence. As the California Supreme Court explained over 90 years ago, character evidence “is clearly distinguishable from that establishing a custom or habit of doing some particular thing in

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<sup>19</sup> Ruppert LLC notes that only three or four of these deals involved commercial real estate, and claims “Boxberger did not testify that his dealings with brokers for the opposite contracting party where residential properties were involved were handled the same way as commercial properties.” To the contrary, Boxberger stated in deposition that his practice was no different “if it was a commercial building or a multifamily building.”

a particular way. Because one is a skillful workman in a given occupation does not tend to disprove negligence in some specific act, but if the question in controversy is whether he did the thing at all or his manner of doing it, his custom or habit regarding that particular matter would be significant.” (*Wallis v. Southern Pacific Co.* (1921) 184 Cal. 662, 666.) Boxberger’s deposition testimony appears to have been appropriately offered to show that, acting according to his customary practice, he and Crane informed Gundersen of the reasons their clients declined to go forward with the purchase of the Property.

2. Defendants Forfeited Any Objection to the Admission of the Lehman Brothers Appraisal

Ruppert LLC also contends the trial court erred in refusing to admit into evidence an appraisal of the Property prepared by Lehman Brothers. Its brief does not cite to the trial court’s ruling excluding this document, and we therefore deem the contention forfeited. (*County of Orange v. Smith, supra*, 132 Cal.App.4th at p. 1443.) Prior to trial, the DeSantises moved to exclude the appraisal, but the trial court denied their motion without prejudice and indicated it might admit the document if defendants could qualify it for admission and overcome the DeSantises’ hearsay objections. It therefore appears the trial court ruled on the admissibility of the appraisal at some point during the trial, but defendants’ counsel has not directed us to that ruling. As we have previously explained, it is *counsel’s* obligation to provide us with proper citations to the record. (*Dietz, supra*, 177 Cal.App.4th at pp. 800-801.)

3. The Trial Court Properly Denied Defendants an Additional Settlement Credit

Ruppert LLC next argues the trial court erred in failing to grant defendants an additional \$20,611 in settlement credits. There is no merit to this argument.

In their complaint, the DeSantises sued their former accountant, Lake, for professional negligence in connection with advice Lake gave them regarding certain real property transactions, including the acquisition of the Property. Lake cross-complained, alleging the DeSantises had failed to pay him for his services. Prior to trial, the DeSantises settled with Lake, who paid them \$25,000. At some point after the jury

rendered its verdict, defendants moved for an offset credit for money the DeSantises had received in settlements with other parties, and they appear to have sought an additional credit of \$20,611 in connection with the DeSantises' settlement with Lake. In an order filed January 27, 2010, the trial court denied the request for this additional credit.<sup>20</sup>

After the trial court denied defendants' request for this additional credit, defendants filed a motion for new trial in which they again sought an adjustment of the settlement credits to reflect the additional \$20,611, an amount allegedly representing Lake's surrender of his claim for payment of services rendered to the DeSantises. The DeSantises opposed the motion, and they asked the trial court to strike a declaration by Lake's former counsel purporting to explain why Lake had entered into the settlement. One basis of the request to strike appears to have been an integration clause in the settlement agreement. The trial court denied the motion for new trial, and it struck all references as to why Lake entered into the agreement.

Contrary to defendants' contentions, we review a trial court's ruling granting or denying a settlement credit only for abuse of discretion. (*Wade v. Schrader* (2008) 168 Cal.App.4th 1039, 1044.) We discern no such abuse here, in part because the parties have not provided us with a record sufficient to permit informed appellate review.

Ruppert LLC does not argue that the trial court's January 27, 2010 order, which denied defendants' initial request for additional settlement credit, was erroneous. Indeed,

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<sup>20</sup> There are a number of gaps in the record on this issue. For example, we have only one page of the DeSantises' settlement agreement with Lake. In addition, neither defendants' motion for settlement credit nor the DeSantises' opposition appear to be included in the record on appeal. We are aware of this motion only because the trial court referred to it in its January 27, 2010 "order after hearing," and the DeSantises have included that order in their appendix. Similarly, the parties' briefs do not tell us whether the trial court itemized the individual settlement credits, or whether it simply determined the total amount of settlement credits to which defendants were entitled. The parties do not dispute, however, that the trial court deducted \$25,000 from the judgment against the defendants to reflect the settlement with Lake. (See *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 506, fn. 1 [court may base its substantive analysis on facts conceded in briefs].)

Ruppert LLC's brief does not even mention this order.<sup>21</sup> It discusses only the trial court's denial of its later motion for new trial on the settlement credit issue. In challenging the denial of its motion for new trial, however, Ruppert LLC seeks to rely on portions of the declaration of Lake's former counsel, but it does not claim the trial court erred in striking all references as to why Lake entered into the settlement agreement. Having failed to challenge the correctness of the court's decision to strike, Ruppert LLC may not base its argument on that declaration.

Moreover, the trial court's order denying the motion for new trial relies on a declaration by counsel for the DeSantises. This declaration refers to a provision of the DeSantises' settlement agreement with Lake in which "the parties agreed that there are no other understandings, oral or written, express or implied, relating to the terms of the Settlement Agreement, except what is set forth in the Agreement itself." But because the parties have provided us with only one page of the settlement agreement, we cannot assess what effect this provision might have on the arguments Ruppert LLC raises on appeal.

It is clear the trial court allowed a settlement credit for the \$25,000 Lake paid to the DeSantises. (Cf. *Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 878 [under "an ordinary settlement agreement . . . the amount the settling defendant has paid—and correspondingly the amount to be deducted from the plaintiff's claims against the remaining defendants—is typically easy to identify"].) Although defendants complain the trial court "gave no compelling reason" for disallowing the additional settlement credit, the record does not disclose exactly what the trial court's reasons were. As explained above, however, we know from the record that on January 27, 2010, the trial court denied defendants' *first* motion for additional settlement credit. In this court, defendants challenge the denial of a *second* motion seeking the very same relief. "It is conceivable that, having denied a previous motion by defendants [for additional settlement credit], the trial court may have been vexed to see something like the same

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<sup>21</sup> The parties' briefs likewise failed to inform us that the trial court heard argument on that motion on January 5, 2010.

motion presented again. So long as such possible grounds may exist for the trial court to have denied defendants' motion in the exercise of its discretion, defendants have not sustained their burden as appellants to demonstrate error, thus overcoming the presumption of correctness attending the order denying their motion." (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 (*Gee*).

*C. Defendants Forfeited Their Objections to the Jury's Damage Award*

On behalf of all defendants, Ruppert LLC contends the jury's damage award must be reversed because: (1) it rests on an appraisal of the Property by the DeSantises' expert, Gary Vice, that allegedly misstated the Property's rentable square footage; (2) the jury instructions on damages were confusing and incorrect as a matter of law; and (3) the DeSantises' damages expert used improper measures of damages. We reject all three contentions.

Defendants forfeited the first argument because in the trial court, they did not object to Vice's testimony on the ground they assert on appeal. (*SCI, supra*, 203 Cal.App.4th at pp. 564-565.) We note that in their 50-page "Revised Motions In Limine," defendants raised the issue of Vice's testimony, but they did not claim he had misstated the Property's rentable square footage. Defendants' failure to make an objection to Vice's testimony on this ground below precludes them from asserting it for the first time on appeal. (*Ibid.*) Moreover, although the DeSantises' brief calls attention to defendants' failure to raise this objection below, defendants' reply brief directs us to nothing in the record indicating they presented the objection to the trial court. We therefore need not address it further. (See *Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 1237, 1245, fn. 4.)

To the extent defendants challenge the jury instructions relating to tort and contract damages as "confusing," they have forfeited this argument by failing to request clarifying instructions. (See, e.g., *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131 [party complaining that instruction lacks clarity must request additional or clarifying instructions to have claimed error reviewed on appeal].) Defendants also claim that the instructions were incorrect as a matter of law because they directed the jury "to

award the [DeSantises] both the \$1.4 million valuation differential, and the \$2.2 million which [the DeSantises] paid out of pocket at the close of escrow to purchase the [Property].”<sup>22</sup> Defendants offer no support for their tortured interpretation of the instructions, and we fail to see how they could have been misunderstood. The fraud and deceit instruction told the jury that if it found for the DeSantises, it was to award the difference between the amount they paid for the Property and the Property’s fair market value at the time of sale. The jury was instructed it could also award the DeSantises any amount they spent in reliance on defendants’ tortious conduct, but only “if those amounts *would not otherwise have been spent in the purchase or acquisition of the property.*” (Italics added.) The instruction therefore properly informed the jury that it could award the DeSantises their “ ‘out-of-pocket loss’ (i.e., an amount by which the consideration paid exceeded the value of the property received) . . . ‘together with any additional damage arising from the particular transaction.’ ” (*Stout v. Turney* (1978) 22 Cal.3d 718, 729.) Similarly, the breach of contract instruction correctly reflected the damages available to a buyer for breach of a contract for sale of real property. (See Greenwald &

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<sup>22</sup> The instruction on damages for fraud or deceit was based on CACI No. 1920, which is derived from Civil Code section 3343. The portion of the instruction to which defendants object stated:

“The following are the specific items of damages claimed by the [DeSantises]:

“1. The difference between the amount that the [DeSantises] paid and the fair market value of the property at the time of sale;

“2. Amounts that the [DeSantises] reasonably spent in reliance on Oakmont[,] . . . Ruppert, and Ruppert LLC’s false representation/failure to disclose/concealment if those amounts would not otherwise have been spent in the purchase or acquisition of the property; and . . .

“3. Lost profits and interest.”

The instruction on breach of contract was based on CACI No. 356. In pertinent part, it stated:

“To recover damages for the breach of a contract to sell real property, the [DeSantises] must prove:

“1. The difference between the fair market value of the property on the date of the breach and the contract price;

“2. The amount of any payment made by the [DeSantises] toward the purchase . . . .”

Bank, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2012) ¶ 11:182, p. 11-44 (rev. #1, 2012.) We therefore reject defendants’ claim that the instructions were legally erroneous.

Defendants claim that the DeSantises’ expert used an improper measure of damages has not been preserved for appeal. Their brief contains no citation to the record showing that they raised this argument in the trial court, and they have thus forfeited it. (See Evid. Code, § 353, subd. (a).)

### III. *Gloria Ruppert’s Appeal*

#### A. *The Trial Court Permitted Defendants to Present Evidence on Their Equitable Defenses*

Ruppert first argues the trial court abused its discretion by refusing to allow defendants to present evidence of their equitable defenses. This argument is both insufficiently developed and unsupported by citation to legal authority. As a consequence, it has been forfeited. (*In re Marriage of Falcone & Fyke, supra*, 164 Cal.App.4th at p. 830 [absence of any cogent legal argument permits reviewing court to treat contention as forfeited]; *Sheily, supra*, 122 Cal.App.4th at pp. 826-827, fn. 1.)

In addition, Ruppert’s claim that the trial court refused to hear defendants’ equitable defenses is flatly contradicted by the record. The court considered defendants’ request that it hear the equitable defenses first, but it determined that it would rule on those defenses after allowing the jury to hear the evidence. The trial judge explained, “[W]e’re going to do the jury trial first. I’m going to be listening with my equitable hat on to everything that is said. When the time comes for me to—you know, it could even be after all the evidence is in, I might agree with you and say I don’t want the case going to the jury. But they’ll be listening to it, and the witnesses will only testify once.” After hearing the evidence, the trial court found that the facts did not support the defenses of unclean hands and estoppel.<sup>23</sup> Ruppert’s brief quotes the trial court’s ruling on this issue,

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<sup>23</sup> Although Ruppert does not mention it in her brief, the jury was instructed on defendants’ affirmative defense of waiver. The trial court told the jury that defendants claimed the DeSantises had “waived the consequences associated with their decision not

and the quotation demonstrates the court did permit defendants to present evidence of their equitable defenses. The trial court stated, “I don’t need another hearing. *I’ve heard all the evidence that pertains to the point of equitable estoppel or unclean hands . . . .* And I don’t think they apply under these facts, so that’s my ruling, my formal ruling.” (Italics added.) Thus, the trial judge heard the evidence defendants presented, and found the claimed equitable defenses did not apply on the facts of this case. Similarly, since the jury found for the DeSantises on the breach of contract claim, it obviously rejected the waiver defense.

*B. The DeSantises’ Claims Are Not Barred by Unclean Hands, Waiver, or Estoppel*

Ruppert next contends the DeSantises’ claims against defendants should have been barred by the doctrines of unclean hands, waiver, and estoppel. This argument suffers from two fatal procedural defects—it is inconsistent with the jury’s verdict and it ignores our standard of review. We therefore reject it.

First, all of defendants’ equitable arguments assert that in signing the purchase agreement, the DeSantises undertook an affirmative duty to investigate matters material to the sale but breached that contractual duty by failing to conduct an adequate investigation. Based on Ruppert’s premise that the DeSantises are guilty of breach of contract, she contends “a party who breaches a contract may not be heard to complain of the other party’s breach.” But this premise conflicts with the jury’s verdict. The trial court instructed the jury that to find for the DeSantises on the breach of contract claim, the DeSantises had to prove that they “did all, or substantially all, of the significant things that the contract required them to do or that they [were] excused from doing those things.” As we have explained above, the jury’s finding that Oakmont breached its contract with the DeSantises necessarily includes the finding that the DeSantises either performed their obligations under the contract or were excused from doing so. Additionally, the jury found that defendants or Gundersen “intentionally failed[ed] to

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to perform an affirmative duty to investigate the intentions of the hospital to renew its lease with diligent attention and observation.”

disclose an important fact that the DeSantises did not know and *could not reasonably have discovered.*” (Italics added.) The jury also found that the DeSantises had reasonably relied on defendants’ false representations. Thus, even if the DeSantises had performed a more extensive investigation, the jury found they could not reasonably have discovered important facts defendants had concealed from them. The jury’s findings therefore preclude any argument that the DeSantises breached the contract by failing to perform an adequate investigation before buying the Property. (See *McKee v. Peterson* (1963) 214 Cal.App.2d 515, 528 [finding that defendant reasonably relied on plaintiff’s acts necessarily means defendant acted in good faith and thus had clean hands].) And since defendants’ unclean hands and estoppel defenses are founded entirely upon the DeSantises’ alleged breach of contract, the trial court did not err in concluding the defenses did not apply on these facts. (Cf. *DeGarmo v. Goldman* (1942) 19 Cal.2d 755, 764.)

Second, Ruppert argues at length that the DeSantises could not have been misled about the Hospital’s intention not to exercise the options, because she claims she provided them with “a mountain of evidence that [the Hospital] was unlikely to renew.” As a consequence, Ruppert contends equity should have precluded the DeSantises from asserting their claims against defendants. This argument is entirely factual, and it “misapprehends our role as an appellate court.” (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 866 (*OCM*).) Because Ruppert’s argument challenges the sufficiency of the evidence supporting the trial court’s conclusion on the issues of unclean hands and estoppel, we are limited to determining whether the record contains substantial evidence to support that conclusion. (*City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 484 (*City of Hollister*) [equitable estoppel]; *Health Maintenance Network v. Blue Cross of So. California* (1988) 202 Cal.App.3d 1043, 1061 (*Health Maintenance Network*) [unclean hands].)

“Review for substantial evidence is not trial de novo.” (*OCM, supra*, 157 Cal.App.4th at p. 866.) We do not reweigh the evidence, and “ [a]ll of the evidence most favorable to respondent must be accepted as true, and that unfavorable discarded as

not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.’ [Citation.]” (*Ibid.*) Ruppert has the burden to identify and establish deficiencies in the evidence, and to do so she “ “ “must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient. [Citation.]” [Citation.]’ ” (*City of Hollister, supra*, 165 Cal.App.4th at p. 484.) Ruppert makes no effort to present a fair summary of the evidence and instead discusses only the evidence favorable to defendants. Her “accounts of the evidence before the trial court are far too one-sided to trigger any duty on our part to consider its sufficiency.” (*Id.* at p. 485.) In any event, the evidence set forth in our statement of facts is more than sufficient to sustain the trial court’s findings.<sup>24</sup>

*C. The Trial Court’s Ruling on the DeSantises’ Claims Under the Business and Professions Code Does Not Affect the Verdicts for Misrepresentation and Concealment*

Ruppert contends we must reverse the verdicts for intentional misrepresentation, negligent misrepresentation, and concealment because those claims were based, in part, on the theory that the advertising materials for the Property were misleading. Ruppert argues this theory should not have been presented to the jury because, after the jury had reached its verdict, the trial court determined that defendants had not violated two provisions of California’s unfair competition law (UCL) (Bus. & Prof. Code, §§ 17200, 17500).<sup>25</sup> Ruppert asserts that it is impossible to determine whether the jury based its decision on a statement that, in Ruppert’s view, was not fraudulent. Ruppert is wrong.

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<sup>24</sup> Furthermore, application of the defenses of unclean hands and equitable estoppel is within the trial court’s discretion. (See *City of Hollister, supra*, 165 Cal.App.4th at p. 483 [whether estoppel should be imposed is entrusted to trial court’s discretion]; *Health Maintenance Network, supra*, 202 Cal.App.3d at p. 1061 [issue of unclean hands “is best left to the trial court sitting as chancellor in equity unless manifest abuse is shown in the decision”].) Ruppert does not even mention this standard of review, and she makes no argument that the trial court abused its discretion.

<sup>25</sup> Business and Professions Code section 17200 provides: “As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited

Here again we confront a number of procedural impediments to informed appellate review.<sup>26</sup> Even if we were to overlook those defects, Ruppert’s argument would fail for another reason. The foundation of the argument appears to be her claim that the jury was improperly instructed. She relies on cases in which the jury was presented with two factual theories, was misinstructed as to one, and then rendered a general verdict which made it impossible to determine whether the jury chose the theory affected by the instructional error. (See *Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 479-480 [jury instruction failed to define what constituted substantial impairment in

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by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.”

Business and Professions Code section 17500 provides in relevant part: “It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property . . . , to make or disseminate or cause to be made or disseminated before the public in this state . . . , in any newspaper or other publication, or any advertising device . . . , including over the Internet, any statement, concerning that real or personal property . . . , or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . .”

<sup>26</sup> Ruppert’s brief does not demonstrate that she raised this issue in the trial court. (See *Dietz, supra*, 177 Cal.App.4th at p. 800 [party must cite to the record showing where point was made].) We therefore have no way of knowing “whether [the DeSantises] opposed such contentions (and if so, how), nor the manner in which the trial court may have ultimately resolved the issues.” (*Ibid.*; see *County of Orange v. Smith, supra*, 132 Cal.App.4th at p. 1443 “[T]he appellant must identify each order that he asserts is erroneous, cite to the particular portion of the record wherein that ruling is contained, and identify what particular legal authorities show error with respect to each challenged order. [Citation.]”). Further complicating the matter is the fact that neither Ruppert nor the DeSantises hint at what standard of review might apply to the trial court’s ruling, assuming such a ruling exists. Since the standard of review determines the degree of deference we owe the trial court’s decision (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667), counsel should generally tell us which standard they believe applies (see *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018). And we repeat that “[f]ailure to acknowledge the proper scope of review is a concession of lack of merit. [Citation.]” (*Sonic Manufacturing, supra*, 196 Cal.App.4th at p. 465.) Since Ruppert has not met her burden on appeal, we may treat the issue as forfeited.

value of automobile and general verdict may have rested on improper theory]; *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1062-1063 [omission of mens rea instruction in criminal case not harmless error where jury might have convicted defendant either as direct perpetrator or as aider and abettor].) But Ruppert does not identify the instruction she believes was erroneous, and thus we cannot determine where the purported instructional error lies. Absent some demonstration of instructional error, the cases upon which Ruppert relies are simply inapposite.

Procedural issues aside, we also question the legal premise of Ruppert's argument. The trial court found it was not misleading for defendants to advertise the fact that there were four five-year options to renew the lease on the Property, and thus it concluded defendants did not violate Business and Professions Code sections 17200 or 17500. Ruppert contends the trial court's conclusion means the jury should not have been allowed to consider the advertisement of the options as part of the evidence it considered on the claims of misrepresentation or concealment. Under California law, however, a defendant may be held liable for misrepresentation when the defendant presents misleading half-truths as if they were the whole story. (See, e.g., *OCM, supra*, 157 Cal.App.4th at pp. 854-855 [misrepresentation claim based on offering memorandum that represented success of company's business strategy while omitting reference to poor quarterly earnings and inflated financial estimates].) The advertisements unquestionably formed part of the information defendants conveyed to the DeSantis about the Property, and it was not error to permit the jury to consider them as part of the evidence bearing on the issues of concealment and misrepresentation.

*D. The DeSantis Reasonably Relied on Defendants' Misrepresentations and Concealment*

Ruppert contends the jury's verdicts on the causes of action for intentional misrepresentation, negligent misrepresentation, and concealment must be reversed because, she claims, the DeSantis could not and did not reasonably rely on defendants' statements regarding the Hospital's intention to renew the lease. We decline this invitation to reweigh and reassess the evidence before the jury. We also reject Ruppert's

argument that the DeSantises' reliance on defendants' representations was unreasonable as a matter of law. Before addressing these arguments further, we again point out Ruppert's noncompliance with both the rules of appellate procedure and established principles of appellate review.

For the most part, Ruppert's argument is a challenge to the sufficiency of the evidence supporting the jury's verdict on these three causes of action. Without acknowledging the limited scope of substantial evidence review, Ruppert devotes almost 11 pages of her brief to a discussion of carefully selected bits of the testimony and evidence presented to the jury on these issues. Instead of fulfilling her duty to present a fair summary of *all* the evidence, both favorable and unfavorable, Ruppert offers a factual recitation far too one-sided to require us to consider her claims of insufficiency. (*City of Hollister, supra*, 165 Cal.App.4th at pp. 484, 485; see Cal. Rules of Court, rule 8.204(a)(2)(C) [appellant's opening brief must "[p]rovide a summary of the significant facts"].) "What [Ruppert] attempts here is merely to reargue the 'facts' as she would have them, an argumentative presentation that not only violates the rules noted above, but also disregards the admonition that she is not to 'merely reassert [her] position at . . . trial.' [Citation.]" (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531.) Ruppert may not simply ignore evidence unfavorable to her "as if it did not exist," and she may not treat the Court of Appeal as "a second trier of fact." (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.)

The crux of Ruppert's argument is that there were only two potentially fraudulent statements upon which the DeSantises could have relied. Ruppert asserts that when Gundersen was asked whether he knew if the Hospital would renew the lease, his responses were, "I don't know" and "They might."<sup>27</sup> Strikingly, Ruppert does not even mention one of the central facts upon which the DeSantises based their case—defendants' failure to disclose the fact that the Hospital had approached Ruppert seeking an early

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<sup>27</sup> In her brief, Ruppert places these responses in quotation marks, as if repeating Gundersen's words verbatim. She provides no citation to the record, however, so we have no assurance that the quotations are accurate.

buy-out of the lease. There is substantial evidence in the record that prior to the closing of the sale to the DeSantises, defendants (including Ruppert herself) knew the Hospital was interested in getting out of its lease before the end of the lease term. As of May 19, 2005, Ruppert also knew the Hospital had no intention of renewing its lease starting in June 2007. Despite this, Gundersen never told Friary the Hospital was not going to renew its lease. In fact, Gundersen told Friary many times he believed the Hospital *would* renew its lease. Thus, while Ruppert's brief characterizes Gundersen's statements as "noncommittal," the evidence certainly permitted the jury to find otherwise, particularly in light of defendants' failure to inform the DeSantises about defendants' discussions with the Hospital concerning the latter's expressed desire to get out of its lease early. (See *Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 510 [where agent told the plaintiff the State of California had no interest in acquiring property at issue, jury could conclude statement was a misrepresentation of existing material fact, even though state could not make affirmative commitment to property's acquisition].)

Ruppert contends the DeSantises' reliance on defendants' representations was unreasonable as a matter of law. The reasonableness of the DeSantises' reliance was a question of fact, as this is not one of the rare cases in which the undisputed facts leave no room for a difference of opinion. (See *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) Even if the Hospital had not made a definitive decision not to renew its lease prior to the DeSantises' purchase of the Property, this did not preclude the jury from finding defendants liable for the failure to disclose what they knew of the Hospital's intentions. (*Storage Services v. Oosterbaan, supra*, 214 Cal.App.3d at p. 508.) And this is true even if one assumes, contrary to the jury's findings, that the DeSantises might have been able to discover the whole truth if they had made more diligent efforts to contact the Hospital itself. (*Ibid.*) Furthermore, as set out in our statement of facts, Ruppert decided to sell the Property only after she was informed the Hospital would not renew its lease. Ruppert complains the DeSantises failed to heed obvious warning signs that the lease might not be renewed and it might be difficult to re-rent the space. But this complaint is disingenuous; it appears that it was Ruppert's knowledge of the Hospital's

intentions that spurred her to put the Property up for sale. From this, the jury could reasonably infer that the “warning signs” were not obvious, and the failure to inform the DeSantises of the Hospital’s express intentions was material.

Ruppert also claims the DeSantises did not rely on her representations regarding the Hospital’s intentions, since the DeSantises supposedly admitted they relied on their own brokers in deciding to purchase the Property. Ruppert ignores settled law that an actionable misrepresentation may be communicated to the plaintiff indirectly through an agent. (E.g., *Gawara v. United States Brass Corp.* (1998) 63 Cal.App.4th 1341, 1351-1352.)

*E. Ruppert Had a Duty to Disclose Facts Affecting the Value and Desirability of the Property*

Last, Ruppert asks us to overturn the verdict on the concealment count because she claims she did not conceal anything she was under a duty to disclose. Although Ruppert groups a number of different arguments under this heading, we will address only the issue of duty. (See *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294 [“Although we address the issues raised in the headings, we do not consider all the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument. [Citation.]”].) Ruppert had the duty to disclose facts materially affecting the value of the Property. (E.g., *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1383.) We think there can be no doubt that the facts Ruppert concealed—the Hospital’s inquiry regarding an early buy-out of its lease and its expressed intention not to renew—were facts materially affecting the value or desirability of the Property. (See *Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 300 [in action for concealment, facts regarding what other stores would be leasing space in shopping center were material].) Ruppert was therefore under a duty to disclose those facts to the DeSantises.

#### IV. *The DeSantises' Appeal*

##### A. *The DeSantises Have Failed to Show They Are Entitled to Additional Damages Under the UCL*

The DeSantises contend the trial court erred in rejecting their claims under Business and Professions Code sections 17200 and 17500. (See, *ante*, fn. 25.) The trial court ruled that advertising the options was not deceptive and therefore not a violation of the UCL. Although she based her ruling on her view that there had been no violation of the statute, the trial judge explained that if she had reached the issue of damages, she would have found the DeSantises' injury indivisible. In the trial judge's words, the DeSantises "weren't damaged several ways. They were only damaged one way. They bought a piece of property, and it wasn't worth what they paid for it . . . . Then they lost it in foreclosure. That's the same damage. They were never damaged some other way here. [¶] . . . And I'm not finding that they should be awarded more damages for the same conduct."

The DeSantises' opening brief focuses exclusively on whether or not it was an unfair business practice for defendants to advertise the existence of the Hospital's four five-year options to renew its lease on the Property. Defendants raise the trial court's alternative rationale in their brief and contend the UCL limits the DeSantises to restitution of the amount of money they invested as a result of the alleged violation. They argue the trial court was correct because "the DeSantises [have] already received full restitution in the form of fraud damages." The DeSantises present no argument on this issue in their reply brief, and relegate their only response to a footnote. We would therefore be justified in refusing to address the matter further. (See *Blue Cross of California, Inc. v. Superior Court*, *supra*, 180 Cal.App.4th at p. 1245, fn. 4 [declining to address issue petitioner failed to discuss in petition, particularly as real party in interest pointed out lack of argument on issue and petitioner made no reply].)

Even if we were to agree with the DeSantises that the advertisements violated the UCL—a question we do not reach—we would uphold the trial court's decision. We must affirm the trial court's order if it is correct on any theory. (*Pollard v. Ericsson, Inc.*

(2004) 125 Cal.App.4th 214, 217, fn. 2.) The UCL limits a plaintiff's remedies to injunctive relief and restitution; it does not permit the recovery of "damages, including punitive damages and increased or enhanced damages." (*Clark v. Superior Court* (2010) 50 Cal.4th 605, 610.) The California Supreme Court has explained that an award of damages for fraud "includes an element of restitution—the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received. To that extent the award of damages literally includes restitution." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 174.)

The trial court correctly concluded the DeSantises would not be entitled to *additional* damages for any violation of the UCL. The facts underlying the DeSantises' UCL claims also formed part of the basis of their claims for misrepresentation and concealment. Because the UCL claims have no independent factual basis, it follows that the DeSantises could not recover increased damages even if the advertisements violated the statute. (See *Rolling v. E\*Trade Securities, LLC* (N.D.Cal. 2010) 756 F.Supp.2d 1179, 1193 [where UCL claims are derivative of others, "damages will be limited in accordance with the amount of duplication"].) We therefore hold that even if the trial court erred in concluding the advertisements did not violate the UCL, the DeSantises have not shown they would have been entitled to any additional damages for a violation of the statute.

*B. The DeSantises Failed to Present Sufficiently Certain Proof to Support Their Claim for Lost Tax Benefits*

The DeSantises argue the trial court erred in refusing to permit the jury to award additional damages representing the lost value of certain federal and state income tax advantages. After selling their farm in Clovis, their intention was to defer payment of capital gains taxes on the proceeds of the Clovis sale by effecting a section 1031 exchange. The DeSantises contend the fraudulent sale and subsequent foreclosure on the Property deprived them of the ability to defer taxation on the gains they realized from the Clovis sale. This is because the foreclosure was treated as a sale of the Property for income tax purposes. The DeSantises argue they should have been allowed to ask the

jury to award the amount of the lost tax advantage as part of their damages. We conclude we need not decide whether loss of the tax advantages conferred by a section 1031 exchange may be recovered as damages, because the DeSantises failed to establish with reasonable certainty the amount of the lost tax benefit. (Cf. *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 665 [court could have refused to consider issue of tax consequences because plaintiff failed to make adequate offer of proof on future income taxation and effect on plaintiff's earnings].)

1. The Trial Court's Decision

The court below heard pretrial argument on this issue, and it permitted the DeSantises' damages expert, William Essig, to testify that the foreclosure had prevented the DeSantises from availing themselves of the tax benefits of section 1031. After close of the evidence, however, the trial court heard further argument from counsel on whether the jury could be asked to award the DeSantises the amount of the lost tax benefit. Relying on *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982 (*Walker*), counsel for the DeSantises argued that the loss of the tax advantages of a section 1031 exchange could be included as an element of his clients' damages. The trial court ultimately disagreed, and it refused to allow the jury to consider the adverse income tax consequences as part of the DeSantises' damages. The court remarked that information on how taxes affect a damage award is generally not given to a jury. It also expressed the view that any award would be speculative because the DeSantises had also purchased property in Selma as part of their section 1031 exchange, and Essig had been unable to make any allocation of the tax benefit between the two properties.

2. The DeSantises Bore the Burden of Proving to a Reasonable Certainty the Amount of the Lost Tax Benefit

The DeSantises urge us to reverse the trial court's decision and remand the case for a limited retrial on this discrete issue. We decline to do so. "[T]he settled law in California [is] that the trier of fact is not to consider evidence of tax considerations in determining damage awards. [Citation.]" (*Cox v. Superior Court* (2002) 98 Cal.App.4th 670, 674.) Thus, the jury generally may not hear evidence of the amount of tax that will

be due on the damages payable to a plaintiff. (*Id.* at p. 676.) The DeSantis contend this case is an exception.

We recognize that many courts have adopted a more flexible approach “when a taxable award compensates a plaintiff for lost monies that would not have been taxable.” (*Home Savings of America v. U.S.* (Fed. Cir. 2005) 399 F.3d 1341, 1356 [citing cases].) In those cases, the defendant’s breach of its contract or tort duties does not deprive the plaintiff of *taxable income* but rather denies the plaintiff a *tax deferral or other benefit*. (See *Oddi v. Ayco Corp.* (7th Cir. 1991) 947 F.2d 257, 267 [applying Illinois law].) Thus the plaintiff’s damages may include a “tax gross-up” “on the postulate that the damage award will be subject to income taxation when received but that the award should not actually be taxed as income because it reflects a replacement capital item.” (*American Federal Bank, FSB v. U.S.* (2006) 72 Fed. Cl. 586, 624-625 (*American Federal Bank*)).

To recover the amount of a lost tax advantage, however, “the party seeking an increase in an award to reflect tax effects bears the ‘burden of presenting evidence that shows he will be liable for the prescribed amount of taxes.’ [Citation.]” (*Medcom Holding Co. v. Baxter Travenol Laboratories* (7th Cir. 1997) 106 F.3d 1388, 1404.) One part of plaintiff’s burden is to show with reasonable certainty the rate at which the award will be taxed. (*American Federal Bank, supra*, 72 Fed. Cl. at p. 625.) If the tax rate is uncertain, an increase in the damage award to account for tax effects is rarely warranted. (*Bank of America, FSB v. Doumani* (Fed. Cir. 2007) 495 F.3d 1366, 1374 (*Doumani*)).

In addition, the parties must generally be aware that obtaining a tax advantage is one of plaintiff’s objectives in entering into the transaction. If the defendant then causes plaintiff to lose the contemplated tax advantage, that loss may be included as an element of plaintiff’s damages. (*Alexsey v. Kelly* (1994) 205 A.D.2d 650, 651 [614 N.Y.S.2d 736, 736-737] [where breaching defendants were aware plaintiffs intended to accomplish § 1031 exchange by means of real property sale, plaintiffs could recover federal and state taxes they had paid upon transfer of the parcel].) *Walker, supra*, 84 Cal.App.3d 982, was such a case. There, the court permitted the homeowner plaintiffs to recover as special damages the amount of taxes they were compelled to pay when the defendant contractor

failed to complete a new residence quickly enough for the plaintiffs to defer taxation of the capital gain realized from the sale of their prior residence.<sup>28</sup> (*Id.* at pp. 990, 993.) From the court’s opinion, it appears the defendant was conscious of the plaintiffs’ need to have the new residence completed within the time required by the Internal Revenue Code. (*Walker*, at pp. 990, 993.)

3. The DeSantises Failed to Show the Amount of Tax Deferral Attributable Solely to the Property

In our case, the evidence in the record shows defendants were aware that one of the DeSantises’ objectives in buying the Property was to obtain the tax benefits of a section 1031 exchange. Nevertheless, the DeSantises did not present reasonably certain evidence of the amount of tax benefit they lost as a result of the foreclosure. In addition to the Property, the DeSantises bought real estate in Selma as part of their intended section 1031 exchange. The DeSantises’ counsel himself noted that not all of the gains “from the sale of the Clovis farm . . . were then put into the purchase of the Oakmont property.” Part was “put into the Selma property.” When asked how the foreclosure had affected the DeSantises’ ability to defer taxation of the gain realized on the Clovis farm, Essig testified, “*To the exten[t] that it was in that Oakmont property, that is gone.*” (Italics added.) But when Essig was asked on cross-examination what portion of the gain from the sale of the Clovis farm “was deferred by the purchase . . . of the Oakmont property,” he said he did not know. For this reason, the trial court opined there would be no way for “the jury to know how much of . . . the tax . . . attributable to the gain relates to Oakmont and how much would relate to Selma.”

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<sup>28</sup> *Walker* involved a provision of the Internal Revenue Code similar to section 1031. As the court explained, “Internal Revenue Code section 1034 in 1972 provided for the recognition of gain from the sale of a principal residence only to the extent the adjusted sales price of the taxpayer’s old residence exceeded the cost to him of purchasing a new residence. Construction of new residence must begin before the expiration of one year from the date of the sale of the old residence and must be completed and occupied by the taxpayer as his principal residence within 18 months beginning with the date of such sale.” (*Walker, supra*, 84 Cal.App.3d at p. 990, fn. 1.)

Citing Essig’s testimony, defendants argue the amount of the lost tax benefit is speculative because the DeSantises’ section 1031 exchange involved multiple properties, and the implementing regulations require that the portion of the gain rolled into each property be computed. (See 26 C.F.R. § 1.1031(j)-1 (2012) [rules for computing gain recognized in exchange of multiple properties and basis of properties received].) In their reply brief, the DeSantises seem to argue that only one property is at issue for tax purposes. They therefore claim the amount of their gain—and presumably the amount of the lost tax benefit—is not uncertain. They argue, “The only property in question that was purchased by the DeSantises was the Oakmont Property, *i.e.*, there are no other purchased properties to even speculate about, since any gain from the sale of the Clovis farm attributed to the Selma property applies only to that property.” This fails to clarify the matter.

First, there is no dispute that the DeSantises bought both the Property and the real estate in Selma as part of the contemplated section 1031 exchange. Thus, the first clause of the above-quoted sentence is simply incorrect; the DeSantises clearly bought more than one property.<sup>29</sup> In addition, the DeSantises appear to concede that *some* portion of the gains from the Clovis sale were “attributed to the Selma property,” but they do not explain why this does not affect the calculation of the amount of taxes they were forced to pay because of the failed section 1031 exchange. In their briefs, the DeSantises direct us to nothing in the record that specifies what portion of the gain from the Clovis sale was attributable solely to the Property.

The jury would be left to guess at the amount of additional taxes the DeSantises were required to pay as a result of the foreclosure, because they may have retained whatever tax benefits were attributable to the Selma property. Moreover, Essig expressed some uncertainty as to whether the gain recognized as a result of the foreclosure would

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<sup>29</sup> This distinguishes the case before us from *Walker, supra*, 84 Cal.App.3d 982, because in that case only a single property was at issue, and the exact amount of the tax paid was known. (See *id.* at p. 993 [noting that “the adverse tax consequences” amounted to \$5,632].) The trier of fact thus had no need to speculate about how much the lost tax benefit had cost the plaintiffs.

be taxed entirely as ordinary income or partly as capital gains.<sup>30</sup> Although this is not the primary factor in our analysis, it bolsters our conclusion that the DeSantises failed to offer sufficiently certain proof of the amount of the claimed damages. (*Doumani, supra*, 495 F.3d at p. 1374; see also *Sharabianlou v. Karp, supra*, 181 Cal.App.4th at p. 1150 [the appellant has burden to explain precisely how damages should have been calculated].) Thus, even if we assume that damages may properly be awarded to compensate for the loss of the tax deferral that would have been available under section 1031, the trial court did not err in ruling that those damages were too speculative to be considered by the jury.

*C. The DeSantises Have Shown No Prejudice From the Failure to Assess Attorney Fees Against All Three Defendants*

The DeSantises contend the trial court erred by allowing them to recover attorney fees only from Oakmont, rather than from each of the defendants. They offer three theories in support of this contention. First, they argue Ruppert and Ruppert LLC are also liable for attorney fees pursuant to Civil Code section 1717 and Code of Civil Procedure section 1032. Second, they contend the trial court's award of fees against the defendants imposes a joint and several obligation on each defendant. Third, the DeSantises assert defendants are liable for attorney fees under the "tort of another" doctrine. We conclude we need not address these arguments.

First, the DeSantises do not explain how they were prejudiced by the trial court's refusal to hold all the defendants liable for their attorney fees. Their briefs do not suggest that Oakmont will be unable to pay the fees awarded. We may not reverse the trial court's order absent a showing of prejudicial error. (See Code Civ. Proc., § 475.) Indeed, it is not entirely clear the DeSantises even have standing to appeal this aspect of the attorney fee order. Only an "aggrieved party" may appeal from an adverse judgment.

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<sup>30</sup> Essig's view was that the gain would be taxed at the rate applicable to ordinary income, but he admitted he could not say "with any certainty which way the DeSantises' personal accountants will try to approach this scenario." He also conceded that the applicable tax rate would be affected by the year in which the DeSantises collected any judgment awarded to them.

(Code Civ. Proc., § 902.) The DeSantises have not shown how a determination that all three defendants were liable for their attorney fees would produce any pecuniary benefit to them, and we therefore question whether they are aggrieved by this order. (See *Crook v. Contreras* (2002) 95 Cal.App.4th 1194, 1201 [the appellant lacked standing to appeal trial court’s determination where he would have received no pecuniary benefit from contrary determination].)

Second, to satisfy their burden on appeal, the DeSantises “must identify each order that [they] assert[] is erroneous, cite to the particular portion of the record wherein that ruling is contained, and identify what particular legal authorities show error with respect to each challenged order. [Citation.]” (*County of Orange v. Smith, supra*, 132 Cal.App.4th at p. 1443.) They have not done so. The trial court disposed of the attorney fee request in a written order, and after discussing the issue for one and one-half pages, it determined Ruppert and Ruppert LLC could not be held liable for contractual attorney fees because they were not signatories to the contract. In this portion of their briefs, neither the DeSantises nor the defendants cite that order or discuss its reasoning. The DeSantises make the bald assertion that Ruppert and Ruppert LLC should be liable because the former signed the contract on behalf of Oakmont and the latter was required to approve the sale, but they offer no legal authority to support their argument, and it is contrary to the case upon which the trial court relied.<sup>31</sup>

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<sup>31</sup> The trial court relied upon *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 545-546, 549-550, where the defendant broker, who had prevailed in an action for rescission and fraud, was held not entitled to a contractual fee award because he was not a signatory to the contract, and the claims against him sounded in tort. *Santisas v. Goodin* (1998) 17 Cal.4th 599, upon which the DeSantises rely, does not support their argument. Neither that case nor *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 says anything about the circumstances under which nonparties to a contract may be held liable for attorney fees.

While our independent research discloses that multiple losing parties are generally jointly and severally liable for a contractual attorney fee award, the general rule does not deprive the trial court of discretion to allocate the fee award among various defendants in appropriate circumstances. (*Walker v. Ticor Title Co. of California* (2012) 204 Cal.App.4th 363, 374-375.) Because the DeSantises present no relevant argument or

Finally, although the DeSantises do provide some legal authority for their contention that they may recover their attorney fees under the tort of another doctrine, the trial court ruled that doctrine inapplicable because the DeSantises had not claimed attorney fees as damages in their case-in-chief. The DeSantises do not dispute that finding, and it appears the trial court's legal conclusion was correct. (See *Hsu v. Abbara* (1995) 9 Cal.4th 863, 869, fn. 4 ["a claim for attorney fees under the 'tort of another' doctrine may not be asserted by post-trial motion but rather must be pleaded and proved to the trier of fact".])

*D. The Trial Court Did Not Abuse Its Discretion in Reducing the Attorney Fee Award*

The DeSantises contend the trial court abused its discretion by reducing their claimed attorney fees by 10 percent to account for "fees . . . generated as a result of suing other defendants." We disagree.

The trial court's order explains that "for about a year and a half, [the DeSantises] focused their efforts not only on litigating against the three defendants who went to trial, but also the realtor and business consultant defendants they had sued." This is consistent with the record. The DeSantises filed their initial complaint on October 22, 2007. As they stated in their motion seeking an award of attorney fees, they settled with the Coldwell Banker defendants and Lake on or about April 29, 2009. According to the DeSantises themselves, by that time "the vast majority of percipient witness discovery had already been completed." Thus, the Coldwell Banker defendants and Lake were parties to the case during the time in which, by the DeSantises' own admission, the vast majority of discovery occurred.

Counsel's declaration in support of the fee request states that the attached time records do not include all of the firm's billings to the DeSantises, but it does not claim to

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authority on the question, however, we need not explore it further. (*Sheily, supra*, 122 Cal.App.4th at pp. 826-827, fn. 1.)

have separated the work involving only the settling defendants.<sup>32</sup> The trial court’s statement that some fees were incurred as a result of the DeSantises’ claims against the other defendants seems to be accurate, and the DeSantises do not dispute it. While the court declined “to parse plaintiffs’ fees using the sensitivity of a surgeon’s scalpel,” it determined “to allocate the fees 90 [percent] to the Oakmont defendants and 10 [percent] to the settling defendants.” This was not error. (See *El Escorial Owners’ Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1366 (*El Escorial*) [trial court’s reduction of fee award could have been justified on grounds that “there was no adequate system to track the time for multiple defendants”].) Nor was it an abuse of discretion for the trial court to reduce the overall fee to account for the time counsel spent on work involving other defendants. (Cf. *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 100-101; *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 424; *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1274, 1277-1278.)

The DeSantises’ reliance on *Wilshire Westwood Associates v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732 (*Wilshire*) is misplaced. *Wilshire* states, “ ‘Attorney’s fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.’ [Citation.]” (*Id.* at p. 747.) That fees *need not* be apportioned in certain circumstances does not mean they *may not* be apportioned in those circumstances. Moreover, here the trial court did not reduce the fee award by apportioning fees between causes of action. Instead, it based the reduction on the apparently undisputed fact that the DeSantises’ counsel devoted some of their time to work involving the settling defendants.<sup>33</sup>

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<sup>32</sup> We have reviewed some of the billing records submitted in support of the DeSantises’ fee request, and we have found entries describing activities that appear to be devoted only to the claims against the settling defendants.

<sup>33</sup> The DeSantises point out that neither the trial court nor the defendants have cited any published decision supporting the type of apportionment applied here. This does not mean no such cases exist, however. The Ninth Circuit has addressed this issue on a number of occasions. (See, e.g., *Jones v. Espy* (9th Cir. 1993) 10 F.3d 690, 691-692 [“Apportionment is mandated in these situations in order to ensure that a defendant is not liable for a fee award greater than the actual fees incurred against that defendant”].) It

E. *The DeSantises Have Forfeited Their Challenges to the Trial Court's Rulings Allocating Settlement Credit and Denying Prejudgment Interest*

The DeSantises contend the trial court erred in allocating to defendants the full amount of the money the DeSantises collected in pretrial settlements. They also fault the trial court's refusal to award prejudgment interest on the amounts awarded by the jury. We conclude they have forfeited both of these arguments by failing to provide us with a record sufficient to permit informed appellate review. (See *El Escorial*, *supra*, 154 Cal.App.4th at p. 1362 [appellants forfeited argument about amount of settlement credits by failing to cite to record of proceedings on settlement allocations]; cf. *Jones v. Wagner* (2001) 90 Cal.App.4th 466, 481-482 [appellants could not challenge award of prejudgment interest where they failed to object to award in trial court].) In the absence of such a record, we presume the trial court correctly denied the DeSantises' motions on these issues. (*Gee*, *supra*, 99 Cal.App.4th at p. 1416.)

On the question of settlement offsets, the DeSantises "do not dispute that . . . defendants are entitled . . . to a significant offset, reducing the [damages] against them by a substantial measure of the settlements achieved . . . prior to trial." They argue, however, that the trial court should not have granted defendants a 100 percent credit and suggest that a 90 percent credit is an equitable solution.

It appears that at some point after the jury rendered its verdict, the DeSantises filed a written motion concerning allocation of the settlement proceeds they had received from Coldwell Banker and Lake. Neither this motion nor defendants' opposition to it is included in the record on appeal. The trial court held a hearing on this motion on January 5, 2010, and although the reporter's transcript of that hearing is included in the record, the parties have not cited to it. We know from the hearing transcript that the trial court issued a tentative ruling on the motion, relying in part on a "very detailed

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has explained that cases involving apportionment of attorney fees among multiple defendants "have focused on the *time expended* by the plaintiff in pursuing each defendant when deciding whether apportionment was proper. [Citations.]" (*Corder v. Gates* (9th Cir. 1991) 947 F.2d 374, 382.)

declaration” submitted by defendants’ counsel. The tentative ruling and counsel’s declaration are also absent from the record.

At the hearing, counsel for the DeSantises alluded to a prior good faith settlement determination, but it is unclear what the trial court may have concluded regarding the settlements with the Coldwell Banker defendants and Lake.<sup>34</sup> The trial court commented that because no allocation was made in the settlement agreement, it was obliged to make the allocation in the manner most advantageous to the nonsettling defendants. This conclusion appears to accord with applicable law. (See *Dillingham Construction, N.A., Inc. v. Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264, 287.) We need not decide whether the trial court’s conclusion was correct, however, since the DeSantises have failed to provide an adequate record.

We reach the same conclusion with regard to the DeSantises’ claim for prejudgment interest. The DeSantises have included in their appendix the trial court’s order denying their request for prejudgment interest. From that order, we know the DeSantises filed a motion seeking an award of prejudgment interest on the jury’s damage award, but the motion is not part of the record. The defendants appear to have filed an opposition, but the opposition is not before us. The trial court held a hearing on that motion on January 19, 2010, and while the hearing transcript is part of the record, the parties’ briefs do not refer to it. From the arguments of counsel and the trial court’s comments at the hearing, it appears the court issued a tentative ruling in which it agreed with three of the arguments made in defendants’ opposition. Since the tentative ruling is also not part of the record, we have no way of knowing what those arguments were. Consequently, we do not know why the trial court denied prejudgment interest.<sup>35</sup>

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<sup>34</sup> The DeSantises’ counsel stated, “But the settlement may not have gone forward had the court not issued a good faith settlement determination as to the settling defendants. And, therefore, there was no ultimate settlement because the court did not agree with the settling parties, both plaintiff[s’] and the settling defendant[s’] allocation[] of the settlement payments for the separate injuries.”

<sup>35</sup> We glean from the hearing transcript that one of defendants’ arguments was that the jury had already been asked to consider an award of interest, and the DeSantises’ counsel

Because the DeSantises have not provided us with a record sufficient to demonstrate the trial court erred, we must presume the record supports the trial court's ruling. (*Gee, supra*, 99 Cal.App.4th at p. 1416.) As a result, we hold the DeSantises have failed to demonstrate the trial court erred in denying their request for prejudgment interest.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

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SIMONS, Acting P.J.

We concur.

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NEEDHAM, J.

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BRUINIERS, J.

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seemed to concede this argument had some validity. We note the jury was instructed that the DeSantises were seeking interest as part of their damages.