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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CARLOS MONFIGLIO,

Plaintiff and Respondent,

v.

ROBERTO RODRIGUEZ CANAL,

Defendant and Appellant.

A132870

**(San Francisco County
Super. Ct. No. CGC09491898)**

Roberto Rodriguez Canal appeals from a judgment entered after a trial without a jury. He contends the court erred in concluding that he breached fiduciary duties he owed to a co-owner upon dissolution of their wine business. He asserts further that the court erred in calculating the damages arising from the breach. We will reverse the judgment in part.¹

I. FACTS AND PROCEDURAL HISTORY

In January 2003, Roberto Rodriguez Canal and Carlos Monfiglio formed a corporation for their business venture, Platense Wines (Platense). Platense imported wines from Argentina and sold them in the United States under Platense labels. The wines were stored at a warehouse operated by Vintners Express.

Rodriguez Canal and Monfiglio were each 50 percent shareholders of the corporation and the sole members of its board of directors. They each contributed \$38,000 to capitalize the corporation, in exchange for capital stock. In addition, they

¹ Monfiglio has filed a motion seeking sanctions against Rodriguez Canal for filing a frivolous appeal. In light of our ruling in this appeal, we deny his motion.

each made a loan to Platense in the amount of \$38,000. For a number of years, they both worked on sales, marketing, and the sourcing of wine for Platense, while Monfiglio alone handled the company's accounting.

A. The Parties' Unsuccessful Attempts to End the Business

In 2007, Monfiglio accepted a job offer from General Electric, which required him to live on the east coast. After April 2007, Monfiglio spent little time on Platense business. Eventually, Rodriguez Canal and Monfiglio discussed ways to end their business relationship.

By June 2008, it was clear that Rodriguez Canal and Monfiglio were unable to agree on the specific terms of the termination. Monfiglio wrote to Rodriguez Canal in a June 23, 2008 e-mail that, if he and Rodriguez Canal could not agree on a buyout, they should "dissolve the corporation and [the] assets equally." A wine industry asset valuation expert, David Campbell, opined in the fall of 2008 that Platense "was not viable as a 'going concern'" and its wine inventory should be liquidated.

At times in 2007 and 2008, Rodriguez Canal had paid from his own funds for legal services rendered on his behalf by Jeffrey Gibson, an attorney with Goldstein, Gellman, Melbostad, Gibson & Harris. Rodriguez Canal considered Gibson to be his personal attorney through December 2008, representing him in negotiations concerning the termination of the business. Meanwhile, Monfiglio was represented by his own attorney.

On October 10, 2008, Rodriguez Canal sent an e-mail to his attorney Gibson in regard to their negotiations of the company's dissolution with Monfiglio and Monfiglio's attorney. Rodriguez Canal stated in part: "I don't know if this is the right moment, but I have been thinking in different plan [B's] in case I cannot reach agreement:

[¶] Copyright the brands under my name. Simultaneously create a new legal entity and get new alcohol licenses. [¶] Register and copyright new brands with close enough similar names, to keep some of the branding. [¶] Selling my 50% to a friend. [¶] Bringing a potential ['buyer'] to the scenario to buy 100% of the Company."

B. Rodriguez Canal's Dissolution of Platense

In January 2009, Rodriguez Canal retained attorney Gibson, with a \$5,000 check from a Platense account, for legal services in connection with the dissolution of Platense. Rodriguez Canal did not seek Monfiglio's approval on this matter, but he believed it was the most effective way to proceed with the dissolution. Gibson performed services for Platense through April or May of 2009.

Gibson's work included a letter he wrote to Monfiglio's attorney on March 18, 2009. In the letter, Gibson informed Monfiglio's lawyer that Rodriguez Canal, as the sole active shareholder, had initiated proceedings to dissolve Platense. Gibson advised that, given Monfiglio's "failure and refusal to participate in the operation of the business or the wind-up process," Rodriguez Canal would divide the assets equally and take sole responsibility for half of Platense's debt, leaving "an equal balance of the assets and debts for Mr. Monfiglio to manage or dispose of." Gibson added, in boldfaced type: "To that end, Mr. Rodriguez-Canal is removing one-half of the wine currently stored at Vintners Express . . . and will leave one-half of the wine at that location with prepaid rent for the storage facility through April 30, 2009. If Mr. Monfiglio does not either enter into a contract for the storage of the wine or remove it, it is expected that the storage facility will confiscate the wine."

Gibson's March 2009 letter went on to clarify that Rodriguez Canal would personally pay off Platense's \$44,356.52 debt to Wells Fargo Bank, with the expectation that Monfiglio would pay off the loans he took from Capital One and Bank of America up to that amount. Any debt in excess of that amount would be shared between them, so there would end up being "an equal division of the current bank debt." Gibson concluded: "Again, please note again that if Mr. Monfiglio does not remove his wine of [sic] arrange for storage of it by April 30, 2009, he will likely forfeit it."

Rodriguez Canal paid off the Wells Fargo debt of approximately \$44,000 from his own funds. Monfiglio never asserted that he spent more than that paying off the Bank of America and Capital One loans. At trial, however, Monfiglio testified that he had taken loans for Platense's benefit and had paid \$55,000 on those loans.

On April 23, 2009, Rodriguez Canal executed a Domestic Stock Corporation Certificate of Dissolution and a Domestic Stock Corporation Certificate of Election to Wind Up and Dissolve, stating that Platense had elected to wind up and dissolve by vote of 5,000 shares of the corporation, representing at least 50 percent of the voting power. The Secretary of State's office received the Certificate of Dissolution on April 27, 2009.

By the time the corporation was dissolved, Rodriguez Canal had sold off Platense wine inventory to pay \$140,000 of the outstanding \$200,000 debt Platense owed to banks and Argentine suppliers. It is unclear what happened with the \$60,000 balance, but this debt appears to be separate from the \$110,000 paid by Rodriguez Canal and Monfiglio to Wells Fargo, Bank of America, and Capital One. Also separate were the loans Rodriguez Canal and Monfiglio had previously extended directly to Platense, in the amount of \$38,000 each. At bottom, it seems that neither Rodriguez Canal nor Monfiglio were repaid for their respective \$38,000 loans, and the only substantial asset left in Platense was the wine inventory at Vintners Express.²

C. *The Wine Inventory at Vintner's Express*

On May 6, 2009 – a week after the April 30 deadline mentioned in Gibson's March 2009 letter – Monfiglio asked Vintners Express how he might open his own

² The record is somewhat confusing on this point. Rodriguez Canal insists that neither party was repaid the initial \$38,000 loan, pointing to certain testimony. Monfiglio insisted in the trial court that Rodriguez Canal caused Platense to pay off its debt to Rodriguez Canal, but not its debt to Monfiglio. We find no substantial evidence to support Monfiglio's argument. As to the actual amount of loan debt owed to the shareholders, trial exhibit 3 is a bit of a mystery. The last page purports to be a Platense balance sheet "[a]s of December 31, 2009," eight months after the corporation was dissolved, indicating "Inventory Asset[s]" with a book value of \$207,508.80 and "Loans" of \$170,639.43. Monfiglio explained this loan balance as consisting of \$36,000 and \$55,000 from him (perhaps the original loan and the amount paid to Bank of America and Capital One) and \$36,000 and \$43,000 from Rodriguez Canal (reflecting the original loan and the Wells Fargo loan). We need not resolve whether Platense owed Monfiglio \$91,000 or just \$38,000. As discussed *post*, even if Rodriguez Canal should have liquidated Platense assets to pay off the debt owed to Monfiglio, the *market* value of those assets fell short of either figure, and both parties did just as well with a split of the inventory.

account to control his share of the Platense wine. Vintners Express provided Monfiglio with the necessary forms, but Monfiglio did not complete the paperwork to open an account.

On May 14, 2009, Rodriguez Canal formed a new venture, RRC Global, for the purpose of selling his share of the wine in Platense's inventory at Vintners Express. Eventually, RRC Global also brought in new wine under new labels.

Rather than open an account with Vintners Express, Monfiglio went to a Wells Fargo branch on May 30, 2009, and withdrew all the money (\$10,008) from Platense's checking and savings accounts, without Rodriguez Canal's permission. At trial, Monfiglio testified that he did this "[t]o cover costs that I was incurring in negotiating and resolving a dispute with Mr. Canal," without any further details.

While we do not know exactly what Monfiglio did with Platense's money, we do know that he did not spend it on safeguarding his share of the wine inventory. On June 24, 2009, Vintners Express sent Monfiglio notice that approximately \$435 in storage fees for his share of the wine inventory was still owing. On June 25, 2009, Monfiglio expressed interest in setting up an account with Vintners Express, but he never did. Nor did he ever pay the storage fees.

By letter dated June 26, 2009, Vintners Express (through its parent American Wine Distributors, Inc.) informed Rodriguez Canal – the person with whom Vintners Express had previously communicated on Platense matters – that it still had not received payment from Monfiglio and was requesting that Rodriguez Canal pay "Monfiglio's debt ASAP in order to keep the account active." Although the letter did not expressly threaten the destruction of the wine, Rodriguez Canal learned from Vintners Express that, in his words, "generally when people don't pay their bills, they just dump the wine somewhere," meaning "[t]hey sell it for almost nothing."

Rodriguez Canal was purportedly concerned that Vintners Express' "dump[ing]" of Monfiglio's share of the wine at a low cost would affect Rodriguez Canal's prospects for selling his share of the wine. To prevent that, and to maintain a good relationship with Vintners Express, Rodriguez Canal paid Monfiglio's storage fees of \$435.

Because Rodriguez Canal paid for the storage of both Monfiglio's wine and his own wine (now kept under the name of RRC Global), Vintners Express insisted that all of the wine had to be included in the RRC Global account for "administrative purposes." Monfiglio's wine was not relocated physically, but merely transferred administratively from the former Platense account to the RRC Global account. This transfer officially took place on or about June 30, 2009. As a result, while Monfiglio's share of the Platense wine inventory at Vintners Express was not lost or destroyed, Monfiglio was no longer able to access it – a predicament that apparently continued until at least December 2010.

Around July 14, 2009, Monfiglio sent an e-mail to Vintners Express, asking that 25 cases of wine be prepared for him to pick up on July 16. Vintners Express responded on July 15 that it was "unable to fill the order as there is no product," since Rodriguez Canal had paid off the Platense account and the account was closed. Monfiglio wrote that "the inventory needs to be reinstated and no one is authorized to act on it in any way without my authorization." Vintners Express responded on July 16: "The inventory was under the account of Platense Wines with Roberto [Rodriguez Canal] as the contact person. [¶] Roberto paid off the Platense Wines account, and moved the inventory. [¶] Please follow-up with Roberto."

On July 27, 2009, Monfiglio sent Rodriguez Canal an e-mail that he called "demand notice for you pay [*sic*] me \$168,770.46 for theft and inappropriate expenses regarding Platense Wines' former assets." Monfiglio asserted: "According to the records of Vintners Express, you stole 803 cases of wine from Vintners Express . . . on or about July 1, 2009."

By July 2009, Rodriguez Canal obtained a license for RRC Global, and RRC Global did business with former Platense distributors: about 29 of 46 RRC Global customers had previously dealt with Platense. Also as of July 2009, attorney Gibson's law firm began again to represent Rodriguez Canal personally; Rodriguez Canal did not inform Monfiglio that he was again using Gibson as his personal lawyer.

D. The Litigation

In August 2009, Monfiglio filed a complaint and amended complaint against Rodriguez Canal, alleging causes of action for breach of fiduciary duty, breach of contract, conversion, and constructive trust and tracing.

Rodriguez Canal filed a cross-complaint against Monfiglio, alleging causes of action for breach of fiduciary duty, conversion, common count, and equitable indemnity.

Following a bench trial, the court issued a tentative decision in May 2011, concluding that each party had a valid claim against the other for \$10,000. After the court heard oral argument and the parties submitted objections to the tentative decision, the court issued a statement of decision on May 26, 2011.

In its statement of decision, the trial court rejected most of the claims of Monfiglio's amended complaint. The court did find, however, that Rodriguez Canal had breached his fiduciary duty to Monfiglio in two respects: (1) hiring a law firm to assist in the dissolution of Platense, without consulting Monfiglio and contrary to Monfiglio's express desires, where the firm "morphed into Rodriguez-Canal's personal counsel as the dispute here escalated;" and (2) winding up the corporation "without ensuring the liabilities of the creditor Monfiglio 'were adequately provided for'." The court awarded Monfiglio \$5,000 in regard to the hiring of the law firm, and \$38,000 with respect to the failure to provide for Monfiglio's liabilities, for a total of \$43,000 on Monfiglio's amended complaint. On Rodriguez Canal's cross-complaint, the court awarded Rodriguez Canal \$10,000 for Monfiglio's breach of fiduciary duty in withdrawing \$10,008 from Platense's bank accounts and using the funds for his own benefit.

Judgment in the net amount of \$33,000 was entered in favor of Monfiglio on June 16, 2011. Rodriguez Canal filed motions for a new trial and for judgment notwithstanding the verdict, which the court denied on July 29, 2011.

Rodriguez Canal filed this appeal from both the judgment and the order denying his posttrial motions.

II. DISCUSSION

The parties do not dispute that they owed each other fiduciary duties. Nor do they dispute that Rodriguez Canal had the right, as a 50 percent shareholder, to initiate dissolution proceedings. (Corp. Code, § 1900.) The question is whether Rodriguez Canal dissolved the corporation in a manner that benefitted him over co-owner Monfiglio or knowingly acted against Monfiglio's interests in connection with the corporate windup. (E.g., *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108 [controlling shareholder had fiduciary duty not to control corporation to detriment of minority shareholder] (*Jones*); CACI No. 4102.) Specifically, at issue is whether Rodriguez Canal breached his fiduciary duty by: (1) failing to sell or liquidate Monfiglio's share of the wine inventory or other assets in winding up the company; and (2) retaining attorney Gibson's law firm as counsel for Platense.

A. *Disposition of the Wine Inventory*

We begin by ascertaining the trial court's basis for its conclusion that Rodriguez Canal breached his fiduciary duty in winding up the company. The trial court ruled: “. . . Rodriguez-Canal wound up the corporation without ensuring the liabilities of the creditor Monfiglio ‘were adequately provided for’. Corporations Code § 2004. It may be, as Rodriguez-Canal argues in his May 12, 2011 Objections Pursuant to CRC 3.1590(G), that he was empowered to wind up the company (*cf.* Corporations Code § 2001), but that does not provide immunity for actions taken during that dissolution. The action violated his fiduciary duty to Monfiglio, and caused damages in the sum of \$38,000. I do not find Rodriguez-Canal proceeded knowing he was acting in violation of his duties.”

The court's reference to Monfiglio's damages of “\$38,000” is unclear. The court's only other mention of \$38,000 was in regard to a sum Monfiglio was owed by Platense as “the result of loans taken out from banks by Monfiglio” and deposited with Platense. The logical inference is that the court concluded Monfiglio was damaged because his loan of \$38,000 was not paid down by Rodriguez Canal in dissolving the corporation.

Rodriguez Canal argues – as he did in his motion to vacate the judgment or for a new trial – that Rodriguez Canal was also owed \$38,000 by Platense for the loan *he* made, and that he did not cause Platense to repay his loan either, suggesting that Rodriguez Canal treated each co-owner the same in this regard. In its order denying Rodriguez Canal’s posttrial motions, the court stated: “Rodriguez-Canal next argues that he treated himself and Monfiglio equally, in that he paid down each partner’s debt to the same extent (or, equally, to no extent). The fundamental problem, again, is that Rodriguez-Canal made a series of unilateral decisions, including paying down some debt, but not Monfiglio’s debt, as well [as] reserving various assets such as wine in lieu of paying off Monfiglio’s debt. The fact of the matter is that Rodriguez-Canal did not, in fact, correctly wind up the company: for example, he *did not provide Monfiglio the opportunity for a buy-out* or comparable court-supervised allocation, Corp. Code, § 2000, and he *did not adequately provide for all the ‘debts and liabilities of’ the company before distributing (to himself, at least) assets*, such as wine: [quoting Corp. Code, § 2004].” (Italics added.)

The upshot of the court’s ruling, therefore, is that Rodriguez Canal (1) should have given Monfiglio the opportunity for a buy-out or comparable court-ordered allocation (Corp. Code, § 2000), (2) should not have paid down debt owed to him without paying down the debt owed to Monfiglio, and (3) should have liquidated the wine or other assets to pay off the debt owed to Monfiglio before distributing to himself his share of the Platense inventory at Vintners Express. We examine each of these issues, as well as Monfiglio’s additional arguments.

1. *Buy-Out Opportunity (Corp. Code, § 2000)*

Corporations Code section 2000 provides in part: “Subject to any contrary provision in the articles, . . . in any proceeding for voluntary dissolution initiated by the vote of shareholders representing only 50 percent of the voting power, . . . the holders of 50 percent or more of the voting power of the corporation (the ‘purchasing parties’) may avoid the dissolution of the corporation and the appointment of any receiver by purchasing for cash the shares owned by the . . . shareholders so initiating the proceeding

(the ‘moving parties’) at their fair value.” (Corp. Code, § 2000, subd. (a).) If the “purchasing parties . . . *elect* to purchase the shares owned by the moving parties” but cannot agree with the moving parties on the fair value of the shares, the court shall stay the winding up and dissolution proceeding so that the value may be determined by appraisal. (Corp. Code, § 2000, subds. (b), (c), italics added.)

Here, Rodriguez Canal did not breach his fiduciary duty by any failure to provide Monfiglio the opportunity for a buy-out or comparable court-supervised allocation. Rodriguez Canal and Monfiglio – represented by their respective counsel – negotiated the terms of the dissolution for months. In a June 23, 2008 e-mail, Monfiglio noted the parties’ discussion of a potential buyout, the prospect that they would not reach agreement on the issue, and his view that it made the most sense to liquidate the assets. On March 18, 2009, Rodriguez Canal’s attorney wrote to Monfiglio and his attorney that the dissolution process was initiated and he was “going to divide the assets equally and take sole responsibility for one-half . . . of the debt of the company.” The dissolution papers were not filed until April 27, 2009, and Monfiglio had the opportunity to “elect to purchase the shares owned by [Rodriguez Canal]” (Corp. Code, § 2000, subd. (b)) or seek court-supervised allocation. The fact that Monfiglio chose not to seek a buy-out does not mean that Rodriguez Canal breached his fiduciary duty; there is no substantial evidence that he prevented Monfiglio from doing so.

2. *Paying Rodriguez Canal But Not Monfiglio*

At trial, Monfiglio’s attorney represented to the trial court that Rodriguez Canal used Platense funds to pay off the debt he was owed by Platense, but did not pay off Monfiglio for the debt Monfiglio was owed by Platense. In his motion for a new trial or judgment notwithstanding the verdict, Rodriguez Canal argued to the contrary. Based on the record and the parties’ briefing of this issue, there is no substantial evidence to support the conclusion that Rodriguez Canal used Platense funds to pay off the \$38,000 loan he made, while failing to pay of the \$38,000 loan Monfiglio made. There was no breach of fiduciary duty on this basis.

3. *Failing To Sell Off Assets To Pay Debts (Corp. Code, § 2004)*

Corporations Code section 2004 provides in relevant part: “*After determining that all the known debts and liabilities of a corporation in the process of winding up have been paid or adequately provided for, the board shall distribute all the remaining corporate assets among the shareholders according to their respective rights and preferences . . .*” (Italics added.) The essential point is that creditors must be paid before shareholders.

Because Platense owed Monfiglio \$38,000 for a loan he made to the corporation, Monfiglio argues that Platense should have “paid or adequately provided for” the \$38,000 obligation, before distributing assets (the inventory) to Rodriguez Canal and Monfiglio. (Corp. Code, § 2004.) He does not explain how Platense could have “paid or adequately provided for” the \$38,000 obligation except by selling the inventory at Vintners Express, thus suggesting that Rodriguez Canal, on Platense’s behalf, should have sold that inventory in April 2009 to pay off Monfiglio, rather than distributing to Monfiglio his share (and then allegedly preventing him from accessing it, discussed *post*). Because Rodriguez Canal was also a creditor to the tune of \$38,000, however, and there is no indication that the debt owed to Monfiglio had priority over the debt owed to Rodriguez Canal, the question is whether Rodriguez Canal should have sold off the inventory in April 2009 to pay off Monfiglio *and* Rodriguez Canal in equal shares, rather than distributing the inventory in equal shares.

Literally speaking, Rodriguez Canal distributed assets to shareholders (by providing for the wine inventory at Vintners Express to be available to Rodriguez Canal and Monfiglio), while Platense’s debts and liabilities (including those to Monfiglio) were not “paid or adequately provided for.” (Corp. Code, § 2004.) Under the statute, at least absent some pertinent agreement by Monfiglio, Rodriguez Canal acted improperly by not selling or liquidating the wine inventory.

Whether this violation of Corporations Code section 2004 constituted a breach of fiduciary duty, however, is a closer question. Rodriguez Canal argues that, although he split the assets, he did so accurately, giving an equal share of the wine inventory to Monfiglio. He further argues that liquidating the wine at Vintners Express would not

have yielded sufficient proceeds to pay off Platense's debts anyway, and the debt to Monfiglio was much more "adequately provided for" by allocating to Monfiglio his half of the wine (so Monfiglio could make sales efforts comparable to those RRC Global eventually made) as opposed to liquidating it for little or no cash. As the trial court noted, the fact remains that Rodriguez Canal did not comply with the literal requirements of Corporations Code section 2004, and Rodriguez Canal provides no legal authority to the contrary. But Rodriguez Canal's point is that a violation of Corporations Code section 2004 does not constitute a breach of his fiduciary duty to Monfiglio if it did not put Monfiglio at a *disadvantage*. (See, e.g., *Jones, supra*, 1 Cal.3d at p. 108 [majority shareholders must use their power to control the corporation so as to "benefit all shareholders proportionately"].)

Nonetheless, we conclude that there is sufficient evidence of a breach of fiduciary duty. When Rodriguez Canal made the decision to split the inventory rather than sell it, Rodriguez Canal was motivated by his desire to sell his share of the inventory under his own name or the name of his own company, such as RRC Global. Although Monfiglio theoretically could have also sold his share of the inventory, it was apparent that Monfiglio was not actively engaged in the wine-selling business at the time. It could therefore be inferred that splitting the inventory was of greater potential benefit to Rodriguez Canal than it was to Monfiglio. Accordingly, substantial evidence supports the trial court's conclusion that Rodriguez Canal breached his fiduciary duty by distributing the wine inventory at Vintners Express rather than selling or liquidating it.³

4. *Monfiglio's Further Argument: Inaccessibility of Monfiglio's Wine*

Before we proceed to the issue of damages for the breach just described, we consider Monfiglio's argument that Rodriguez Canal also breached his fiduciary duty by taking over Monfiglio's share of the wine inventory at Vintners Express, in the sense that

³ Although the parties make little mention of it, Rodriguez Canal also acknowledged at trial that he did not give Monfiglio the option of asking the court to force a liquidation of the wine inventory. Because of our conclusion *post* that the liquidation value of the wine inventory was no more than the value of the inventory Monfiglio ultimately received, we need not address this testimony to resolve the appeal.

both of their shares of the inventory ended up being held at Vintners Express under the name of Rodriguez Canal's new business, RRC Global.

There is no substantial evidence to support Monfiglio's theory. As the trial court found in its statement of decision, the fact that Monfiglio's share of the wine became inaccessible to him "was spawned by [Monfiglio's] decision not to pay \$435 in storage fees; and while he argues that Rodriguez-Canal stole the wine, Monfiglio did take out some 60 cases [in 2009 after the split with Rodriguez Canal, but before the inventory became part of RRC Global's account], and could have taken out more." The trial court concluded: "Monfiglio was at least as responsible as Rodriguez-Canal for the fact that Rodriguez-Canal put all the wine under his account at [Vintners Express]; and Rodriguez-Canal did nothing to interfere with Monfiglio's rights to the wine remaining in Argentina." The fact is, Rodriguez Canal informed Monfiglio of an April 30 deadline to pay the Vintners Express storage fee or risk losing the wine; Monfiglio waited until after April 30 to contact Vintners Express about opening an account to take over his share of the wine; and even then Monfiglio did little to pursue the matter, despite repeated opportunities to do so. Furthermore, after Monfiglio's share of the wine became part of the RRC Global account for Vintners Express's administrative purposes, neither Rodriguez Canal nor RRC Global sold or otherwise disposed of it.

In addition, the trial court found that Rodriguez Canal did not breach his fiduciary duties by using Platense labels and customer lists to sell off *his* share of the wine, Monfiglio could have done the same with his own share of the wine, and Rodriguez Canal did not interfere with Monfiglio's access to his wine. The court added: "Even were there liability [in this regard], the only damages related to the wine Monfiglio might be entitled to would be attributable to the supposed reduced value of that wine, now some years older than it was. It is practically impossible to estimate the loss, because Monfiglio never obtained a license to sell the wine, had no demonstrable record of success since 2007 and did not appear to have customers for his wine; and I heard no reliable evidence on the diminishment of the value of the wine."

Monfiglio makes much of what he calls the “Different Plan” Rodriguez Canal communicated to attorney Gibson in October 2008. In that communication, Rodriguez Canal contemplated possible resolutions of the parties’ dispute including copyrighting Platense brands under his name, creating a new legal entity, and obtaining new alcohol licenses – akin to what he eventually did by forming RRC Global and selling his share of the Platense inventory at Vintners Express. This is not the nefarious scheme Monfiglio suggests, however, since (1) Rodriguez Canal did not indicate in his October 2008 communication that he had his sights on *Monfiglio*’s share of the wine inventory, and (2) even if that had been Rodriguez Canal’s intent, there would have been no affect on Monfiglio or his wine if Monfiglio had simply paid the storage fees as repeatedly requested.

5. *Damages*

As discussed *ante*, substantial evidence supports the trial court’s conclusion that Rodriguez Canal breached his fiduciary duty by failing to sell the corporate assets – the wine inventory at Vintners Express – instead of merely splitting that inventory. The damages resulting from this breach would be the difference between what Monfiglio would have received as payment toward his loan if his inventory had been sold (i.e., the market value of his wine at Vintners Express at the time of Platense’s dissolution in around April 2009) and what he actually received (i.e., the market value of his wine at Vintners Express in around June 2009).⁴ We conclude that there is no substantial evidence that Monfiglio obtained less from receiving his share of the wine than he would have obtained if Rodriguez Canal had sold it.

As to damages, the court concluded: “An orderly liquidation (or other wind up) of the company, including selling off all assets such as wine, would have resulted in the

⁴ Although Monfiglio argues that he did not actually have access to the wine as of trial or at least until December 2010, the trial court found that to be a consequence of his own conduct and, in any event, it was impossible to determine any reduction in the value of the wine between June 2009 and December 2010.

payment to Monfiglio of some of his debt, and the sum allocated in the Statement of Decision [\$38,000] is a reasonable estimate.”

To evaluate the court’s conclusion, we must first consider the court’s phrase “all assets such as wine.” The phrase suggests there may have been some assets other than the wine inventory at Vintners Express available for sale or liquidation. There is, however, no substantial evidence of any market value of assets other than the Vintners Express inventory, after Rodriguez Canal paid off \$140,000 of the corporation’s \$200,000 in debt.⁵ The question, therefore, is the value of the wine inventory at Vintners Express.

The only evidence about the potential “liquidation” value of Platense’s wine was the testimony of David Campbell, an expert in wine industry asset valuation. Campbell opined: “given the sales cycles that are applicable to wines in the United States and to the vintage dates of the wine in question, that the wines, absent a persistent and strong sales effort, were of limited or no value in and of themselves.” As to whether Platense wines had any liquidation value in the spring of 2009, Campbell testified: “There are two ways of liquidating wine. One is to try and sell them to someone in the industry. I don’t believe that any rational and reasonable wine industry participant would have purchased these wines. [¶] The other way of disposing of wines actually is through salvage. And rather than having a positive value, the wines that have a negative value, you have to pay to have those taken.”

Campbell’s written report was in accord. Campbell opined that, as of the April 2009 date of Platense’s dissolution, the wines stored at Vintage Express “were badly out of vintage cycle” and “essentially worthless” without a persistent sales effort. Further, Campbell stated, “the maximum realistic value of these wines cannot be placed above \$5000 for either party and no U.S. wine distributor would pay anything close to that amount.” Ultimately, Campbell valued each party’s wine inventory at Vintners Express at \$1,000.

⁵ The Platense customer list and wine labels were estimated to be of no value as of the time of the dissolution.

The evidence therefore supports the conclusion that, if Rodriguez Canal had liquidated the wine inventory at Vintners Express in April 2009, he would have obtained \$1,000 to pay down the loan from Monfiglio. This same evidence, however, also indicates that Rodriguez Canal's decision to split the wine inventory gave Monfiglio wine having a market value equal to that \$1,000 amount, as of the time he could have accessed it by paying the storage fees in May or June 2009. There being no evidence to the contrary, the necessary conclusion is that Monfiglio was not harmed by Rodriguez Canal's failure to liquidate the wine inventory: he still received the equivalent of \$1,000. Without substantial evidence that the value of Monfiglio's wine had decreased as of June 2009 – or even as of the time Monfiglio had access to the wine in December 2010 or the time of trial – there is no substantial evidence to support the court's award of damages.

Another potential valuation of the wine inventory in April 2009 would be its value *with* a “persistent and strong sales effort,” as opposed to its liquidation value. There is, however, no substantial evidence of a market value for the wine with persistent sales efforts, except perhaps Campbell's estimate of a “maximum realistic value” of \$5,000. Accordingly, even if some argument could be made that Rodriguez Canal had an obligation not just to liquidate the wine, but to engage in a persistent sales effort to sell it, there is no substantial evidence to support the conclusion that such efforts would have yielded a sum sufficient to repay Monfiglio his \$38,000, or to support the court's award of \$38,000 in damages. Nor is there substantial evidence to support a conclusion that persistent sales efforts by Rodriguez Canal would have yielded a net profit greater than what Monfiglio would have obtained if he had timely accessed his inventory by paying the storage fees.

Monfiglio testified that he believed he would have been able to sell his share of Platense's inventory of wine if he had been given access to it. Specifically, he testified, while it was “difficult to say” whether he could have sold the wine to wholesale customers, “I think I had very interesting and strong leads into very serious buyers that I could have sold a significant amount of wine through.” Even if this evidence could be

considered substantial evidence, it does Monfiglio no good. His rosy estimate of his ability to sell the wine confirms that Rodriguez Canal's division of the inventory actually put Monfiglio in as good or better position than if Rodriguez Canal had liquidated or sold the wine himself. And because the trial court concluded it was Monfiglio's own actions that precluded him from accessing (and selling) his wine, Monfiglio failed to capture this sale value not because of anything Rodriguez Canal did, but because of what Monfiglio himself did. Thus, no matter what the wine was worth, Monfiglio's evidence does not support a conclusion that he was damaged by Rodriguez Canal's decision to divide rather than liquidate the wine inventory.

Monfiglio also prepared a spreadsheet, admitted into evidence as trial exhibit 109, indicating that the total Platense inventory of 5,802 cases of wine in both the United States and Argentina could be sold for \$664,692, less \$187,678 in costs such as freight and sales commissions, for a "subtotal value" of \$477,014.⁶ Since Monfiglio owned half of the inventory, he calculated that his share of the wine could have been sold to larger buyers for \$238,507. The record does not show substantial evidence of the profit Monfiglio would have obtained if his share of the inventory had been sold in this manner, or even whether he would have been able to sell it. In any event, the trial court did not point to these global assets as a basis for its conclusion that Rodriguez Canal's failure to liquidate Platense assets resulted in \$38,000 in damages to Monfiglio.

In sum, there is no substantial evidence that, if Rodriguez Canal had acted differently in the dissolution of the corporation, there would have been \$38,000 available for Platense to pay Monfiglio on his loan. No evidence supports the trial court's calculation of damages, and no substantial evidence supports a conclusion that Monfiglio suffered any monetary damages at all.

⁶ The trial court's statement of decision notes that Platense had rights to wine in Argentina, Rodriguez Canal instructed the producers to split the wine equally between Rodriguez Canal and Monfiglio, and Monfiglio was unsuccessful in his attempts to contact them.

The judgment must be reversed as to the award of \$38,000 for breach of fiduciary duty.

B. Selection of Counsel for Platense

Rodriguez Canal contends the trial court erred in ruling that he breached his fiduciary duties by hiring Gibson’s law firm to represent Platense in the corporate dissolution proceedings. In this regard, the court found: “Rodriguez-Canal hired a law firm to assist in the dissolution, without consulting Monfiglio and indeed contrary to Monfiglio’s express desires. The firm obtained about \$5,000 in [Platense] funds. This same firm morphed into Rodriguez-Canal’s personal counsel as the dispute here escalated. This does appear to be a clear breach of fiduciary duty with a demonstrable economic impact on Monfiglio.”

The basis of the court’s finding of a breach of fiduciary duty, therefore, was that Rodriguez Canal hired Gibson’s law firm to represent Platense without Monfiglio’s consent and later retained it to represent himself again. We examine the trial court’s conclusion and its award of \$5,000 in damages.

1. Hiring of Gibson’s Law Firm

There is no dispute that Rodriguez Canal was statutorily authorized to hire a law firm to assist in the dissolution of Platense. Corporations Code section 2001 provides: “The powers and duties of the directors (or other persons appointed by the court pursuant to Section 1805) and officers after commencement of a dissolution proceeding include, but are not limited to, the following acts in the name and on behalf of the corporation: [¶] (a) To elect officers and to *employ agents and attorneys to liquidate or wind up its affairs*. [¶] . . . [¶] (h) In general, to make contracts and to do any and all things in the name of the corporation which may be proper or convenient for the purposes of winding up, settling and liquidating the affairs of the corporation.” (Italics added.) A voluntary dissolution proceeding “commences upon the adoption of the resolution of shareholders or directors of the corporation electing to wind up and dissolve, or upon the filing with the corporation of a written consent of shareholders thereto.” (Corp. Code, § 1903,

subd. (a).) Indeed, Monfiglio acknowledges that Rodriguez Canal could hire a law firm to assist in the dissolution process and could have Platense pay for it.

The real question is whether Rodriguez Canal breached his fiduciary duty by hiring *Gibson's* law firm to represent Platense, without Monfiglio's consent. The trial court did not explain why Rodriguez Canal's action favored Rodriguez Canal's interests over those of Monfiglio, and the record discloses no substantial evidence that it did.

It was no secret that Gibson's law firm had represented Rodriguez Canal, in connection with the termination of the parties' business relationship, before Rodriguez Canal hired it to represent Platense. When Monfiglio learned that the firm had been retained to represent Platense in accomplishing the dissolution, he objected. But with Monfiglio and Rodriguez Canal in disagreement on this point, Rodriguez Canal was left with having to make a decision: whether to keep the law firm as Platense's counsel or not. Rodriguez Canal testified that he chose Gibson's law firm to handle Platense's dissolution initially because it was the most efficient way to handle the matter – presumably because the firm was already familiar with Platense and the preceding negotiations regarding the termination of the parties' enterprise. In any event, Rodriguez Canal's decision to retain the Gibson firm and continue its representation over Monfiglio's objection would constitute a breach of his fiduciary duty only if it favored his interests over Monfiglio's interests.⁷

⁷ A law firm's successive representation of an individual director or shareholder and a corporation tends to raise red flags for those of us accustomed to analyzing the matter from the standpoint of an *attorney's* professional responsibility obligations. That issue, fraught with requirements of disclosures and consent as set forth in professional canons applicable to Gibson's firm – but inapplicable to Rodriguez Canal – is not present in this appeal. The issue here is whether one owner of the corporation (Rodriguez Canal) breached a fiduciary duty he owed to his co-owner (Monfiglio) by favoring his interests over those of the co-owner. In the matter before us, it is not established that Gibson's law firm violated any ethical duties to Monfiglio or Platense by representing Platense for the dissolution or by representing Rodriguez Canal thereafter. Moreover, Monfiglio presents no legal authority that, even if Gibson's law firm *had* violated its ethical duties, *Rodriguez Canal* could be held liable for breach of fiduciary duty *without* substantial evidence that the representation favored Rodriguez Canal's interests over those of

Monfiglio essentially argues, and the trial court seemed to imply, that because Gibson's law firm had represented Rodriguez Canal *before* it represented Platense for the dissolution (including in October 2008 when Rodriguez Canal wrote about his "different plan"), and again represented Rodriguez Canal *after* the dissolution, the law firm was more or less pursuing Rodriguez Canal's interests *all* the time, even when it was representing Platense (only) and being paid by Platense. During this period, Monfiglio surmises, the law firm was helping Rodriguez Canal implement his "different plan," by which he would market his share of the wine inventory under his own brand.

Monfiglio's supposition, however, falls short of establishing a breach of fiduciary duty by Rodriguez Canal, because there is no substantial evidence that Rodriguez Canal's decision favored his interests over those of Monfiglio. While Monfiglio complains that Gibson, while working for Platense, did Rodriguez Canal's bidding in implementing his "different plan B's," there is no indication the corporation would have been dissolved in a different manner if Rodriguez Canal had hired a law firm *other* than Gibson's firm.

The October 2008 e-mail from Rodriguez Canal to Gibson shows that the "different plan" was the idea of Rodriguez Canal. There is no evidence that, had Rodriguez Canal proposed his plan to new attorneys representing Platense in January 2009, those new attorneys would not have written a letter like Gibson's March 2009 letter, informing Monfiglio of Rodriguez Canal's intent to divide the assets and liabilities equally. Nor is there any evidence that the dissolution would have been concluded on different terms than occurred with Gibson's law firm as Platense's counsel. In short, Rodriguez Canal's plan would have been implemented anyway, and the result would have been the same, no matter what law firm Rodriguez Canal retained for Platense.

Monfiglio. Or, to put it another way, a law firm might violate its ethical obligations to its client by failing to comply with rules applicable to an apparent or presumed conflict; but to recover from Rodriguez Canal, Monfiglio had to prove Rodriguez Canal's action resulted in an actual conflict of interest or other detriment.

Monfiglio points us to Rule 3-300 and Rule 3-310 of the State Bar Rules of Professional Conduct. We are not sure why, since he offers no explanation and neither rule seems to have any application to the matter at hand. State Bar Rule 3-300 provides that an attorney should not enter into a business relationship with a client except upon satisfaction of certain requirements. That has no bearing here. State Bar Rule 3-310 precludes an attorney from accepting or continuing representation of a client without written disclosure in certain situations. These rules do not apply to Rodriguez Canal, and Monfiglio fails to establish that he should be held liable for breach of fiduciary duty based on them.

Monfiglio emphatically argues that Rodriguez Canal and Gibson's law firm failed to disclose Rodriguez Canal's "different plan." Gibson's March 2009 letter, however, advised Monfiglio that Rodriguez Canal was going to divide the Platense assets equally and be responsible for one-half of Platense's debt, so there would be "an equal balance of the assets and debts for Mr. Monfiglio to manage or dispose of." From this notification, it was quite obvious that each party could do what he wanted with his share of the assets after the Platense dissolution, and it would not be unreasonable to suspect that Rodriguez Canal would create a new entity and obtain new licenses to sell his share of the wine. For that matter, Monfiglio did not apprise Rodriguez Canal what *he* was going to do with his share of the wine either. In any event, there is no substantial evidence that Monfiglio would have acted differently if in fact he had been given actual notice that Rodriguez Canal was going to implement his "different plan."

Monfiglio's argument that Rodriguez and Gibson "effectively kept Mr. Monfiglio out of the dissolution process" also lacks evidentiary support. In June 2008, it was Monfiglio who informed Rodriguez Canal that they "should move to dissolve the corporation and assets equally." In January 2009, Monfiglio's attorney advised Gibson that Monfiglio would cooperate in the dissolution of Platense and the "division of its assets" and was "open to hearing how [Rodriguez Canal] would propose concluding the dissolution." In March 2009, Gibson informed Monfiglio's attorney that Rodriguez Canal had not "heard back" from Monfiglio regarding the process for dissolving Platense,

and Rodriguez Canal therefore elected to divide the assets equally and take sole responsibility for one half of the Platense debt. Gibson further advised that one-half of the Platense wine would be left at Vintners Express for Monfiglio, with prepaid rent through April 30, 2009 (a date after the filing of the Platense dissolution papers with the Secretary of State). Monfiglio replied to Gibson's letter on April 17, 2009, responding to some of Gibson's statements, questioning Gibson's representation of Platense due to his prior representation of Rodriguez Canal, but *not* disputing the essential dissolution plan or suggesting that Platense assets should be sold instead of divided in order to pay off any loan he had made to Platense. On April 23, 2009, a few days before the Secretary of State's office received the Certificate of Dissolution of Platense, Rodriguez Canal asked Monfiglio and his attorney which of the two Platense brand names Monfiglio would like to be able to use in the future. Neither Rodriguez Canal nor attorney Gibson kept Monfiglio out of the dissolution process.

There may well be situations in which a shareholder's or director's hiring of his personal attorneys as corporate counsel would constitute a breach of fiduciary duty, and by no means do we make light of the scenario. But based on the record before us and the arguments of the parties *in this case*, the trial court erred in finding Rodriguez Canal liable for breach of fiduciary duty based on his hiring of attorney Gibson's law firm to handle the Platense dissolution.

2. *Damages*

Even if Rodriguez Canal had violated his fiduciary duty to Monfiglio by hiring Gibson's law firm and paying it \$5,000 of Platense's money (or even by later rehiring Gibson as his personal attorney), no substantial evidence supports the trial court's award of \$5,000 – the entire amount paid to the law firm by Platense – as damages to Monfiglio. In so ruling, the trial court effectively concluded that Gibson's work for Platense was worth nothing and Monfiglio should recover the entire amount paid by the corporation.

The record is insufficient to show that Gibson's representation of Platense was worth *nothing*. To the contrary, Gibson provided at least some services with a value to Platense and, thus, to Monfiglio. Monfiglio was in favor of the corporation being

dissolved, and to accomplish the dissolution certain documents had to be prepared and certain work performed. There is no dispute that Gibson's law firm prepared the documents, and no contention that the documents themselves favored Rodriguez Canal over Monfiglio. Nor is there any evidence of the value of services Gibson provided, as compared to the value of services some other attorneys would have provided.⁸

The trial court erred in concluding that Rodriguez Canal's retention of the Gibson law firm harmed Monfiglio in the amount of \$5,000.

III. DISPOSITION

The judgment is reversed only insofar as it awards Monfiglio \$43,000 on his claims and a net amount of \$33,000. Accordingly, a new judgment shall be entered in favor of Roberto Rodriguez Canal and against Carlos Monfiglio in the amount of \$10,000. Appellant shall recover his costs on appeal from respondent.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.

⁸ Again we distinguish the case at hand from a situation in which a client *sues his own attorney* for breach of fiduciary duty on the ground of conflict of interest. In those cases, for public policy and other reasons inapplicable here, the attorney might be required to disgorge to the client the entirety of the fees that the client paid during the course of the attorney-client relationship. Here, however, Monfiglio was not technically Gibson's client and, moreover, Monfiglio sued Rodriguez Canal, not Gibson.