

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROBIN SINGH EDUCATIONAL
SERVICES, INC.,

Plaintiff and Respondent,

v.

BLUEPRINT TEST PREPARATION,
LLC, et al.,

Defendants and Appellants.

B204775 and B211422

(Los Angeles County Super. Ct.
Nos. BC330098, BC346066,
BC347174)

ROBIN SINGH EDUCATIONAL
SERVICES, INC.,

Plaintiff and Appellant,

v.

BLUEPRINT TEST PREPARATION,
LLC et al.,

Defendants and Appellants.

B218775

(Los Angeles County Super. Ct.
Nos. BC330098, BC346066,
BC347174)

**ORDER MODIFYING OPINION
AND DENYING REHEARING
(NO CHANGE IN JUDGMENT)**

THE COURT:

It is ordered that the opinion filed herein on January 23, 2013 be modified as follows:

1. On page 3, the second sentence of the last paragraph, the name “Riley” is deleted and replaced with “Teti” so the sentence reads:

Defendants also appeal from the portion of the judgment awarding TestMasters damages for defamation against Triplett, Riley, and Blueprint, while Teti appeals from the punitive damages award against him.

2. On page 71, the sentence beginning with “TestMasters’ two expert witnesses, Singh and Rachel Vincent,” is modified to read:

Two of TestMasters’ expert witnesses, Singh and Rachel Vincent, TestMasters’ Director of Research and Development (LSAT score of 172, in the 99th percentile), gave their opinions that creating Blueprint’s course materials would have taken defendants or anyone else years to create and that defendants could not have developed their written course materials in the time they claim they did.

3. On page 86, footnote 46, the words “Singh’s girlfriend and” are to be inserted between the words “Naim,” and “in-house counsel” so the sentence reads:

^{46.} At the jury trial Sharon Naim, Singh’s girlfriend and in-house counsel for TestMasters, testified that she sent over 100 cease and desist letters to TestMasters students, threatening to sue them if they sold their books on the Internet.

4. On page 108, the second sentence in the Disposition, “\$592,260.45” is changed to “\$703,410.65” so the sentence reads:

The January 24, 2008 order awarding TestMasters \$703,410.65 in monetary sanctions is affirmed.

There is no change in judgment. Robin Singh Educational Services, Inc.’s petition for rehearing is denied.

PERLUSS, P. J.

ZELON, J.

SEGAL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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BC347174)

APPEALS from a judgment of the Superior Court for the County of Los Angeles,
William F. Highberger, Judge. Affirmed in part, reversed in part.

Horvitz & Levy, H. Thomas Watson, Jeremy B. Rosen, Kris Bahr; Cotkin Law Group, Joan M. Cotkin; Ropers, Majeski, Kohn & Bentley, James C. Potepan, Susan H. Handelman, Courtney E. Curtis for Defendants and Appellants.

Horvitz & Levy, H. Thomas Watson, Jeremy B. Rosen, Kris Bahr; Knee, Ross & Silverman and Howard P. Knee for Defendant and Appellant.

Norminton, Wiita & Fuster, Thomas M. Norminton, Kathleen Dority Fuster; Tycko & Zavareei, Hassan A. Zavareei, Andrea R. Gold, Greines, Martin, Stein & Richland, Robin Meadow, Cynthia E. Tobisman, Lara M. Krieger; Zohar Law Firm and Daniel Yehuda Zohar, for Plaintiff and Respondent.

As the importance of standardized tests has increased for admission to undergraduate and graduate schools, the business of preparing students to take those tests has flourished. This case arises out of the creation of a new Law School Admissions Test (LSAT) preparation business by five employees of one test preparation company who left to start a competing company. This professional move generated seven and a half years of litigation, including three and a half years of vigorously contested pretrial discovery and motions, a three-month trial, four appeals, and multiple writ proceedings.

Defendants Trent Teti, Matthew Riley, Justin Capuano, and Jodi Triplett (defendants), along with their colleague Courtney Martin, were LSAT preparation instructors employed by plaintiff Robin Singh Educational Services, Inc., doing business as TestMasters (TestMasters). They thought they could do better on their own. So in the fall of 2004 they began working on what would become in early 2005 a competing LSAT preparation course, defendant Blueprint Test Preparation, LLC (Blueprint). Much of the work they did in creating their new LSAT preparation course was on their personal computers. Because defendants did not want anyone to know that they were working on creating Blueprint in 2004 while they were still working for TestMasters, however, they were not very forthcoming in producing documents during discovery evidencing that they were working on Blueprint in 2004. This tactic generated lengthy and expensive

controversies in discovery, especially when TestMasters' forensic electronic discovery experts discovered documents in defendants' computers from 2004 that defendants had not produced, and the trial court found that defendants had misused the discovery process.

Defendants' discovery abuse resulted in considerable monetary and nonmonetary sanctions, which gave TestMasters a significant advantage at trial. On TestMasters' main claims for breach of the duty of loyalty by an employee and breach of oral employment contract, the jury found in favor of TestMasters and against Blueprint and Teti, but in favor of the other defendants. The jury, however, awarded TestMasters only \$183,000 of the \$18 million in damages TestMasters had requested, plus \$10,000 in punitive damages against Teti only. On TestMasters' defamation claims, the jury awarded TestMasters a total of \$45,000 against Triplett, Riley, and Blueprint.

In these three appeals, defendants appeal the pretrial orders imposing monetary and nonmonetary sanctions against them for misuse of the discovery process. TestMasters appeals from the judgment that awarded TestMasters much less than it had sought to recover. Defendants also appeal from the portion of the judgment awarding TestMasters damages for defamation against Triplett, Riley, and Blueprint, while Riley appeals from the punitive damages award against him. We affirm the trial court's pretrial discovery sanctions orders, and, with the exception of the defamation claims, affirm the judgment.

FACTUAL BACKGROUND¹

A. *The Parties*

Robin Singh is a self-described “LSAT enthusiast” and “LSAT junkie.” He took the LSAT as a college senior at Duke University, and earned a perfect score of 48.² Between 1988 and 2003 Singh took the LSAT 26 times,³ scored in the 99th percentile every time, and achieved a perfect score 13 times, which he claims is a world record. Singh never gets tired of taking the LSAT, which keeps him “in touch with the pressure students feel.”

¹ “As we must, we state the facts in the matter most favorable to the judgment, resolving all conflicts and drawing all reasonable inferences in favor” of the prevailing party. (*Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 178, fn. 1; see *Chapala Management Corp. v. Stanton* (2010) 186 Cal.App.4th 1532, 1535 [“[w]e view the facts most favorable to the judgment under the principle requiring us to presume the lower court’s judgment is correct, and draw all inferences and presumptions necessary to support it”].) Here, on TestMasters’ breach of loyalty and breach of contract claims we state the facts most favorable to TestMasters as against Blueprint and Teti, but most favorable to Capuano, Riley, and Triplett as against TestMasters. On TestMasters’ defamation claims we state the facts most favorable to TestMasters as against Triplett, Riley, and Blueprint, but most favorable to Teti and Capuano as against TestMasters.

² The LSAT was originally scored on a 200 to 800 points scale, like the Scholastic Aptitude Test (SAT), until 1981, when the LSAT was scored on a 48-point scale. In 1991, the Law School Admission Council (LSAC) began using the current 120 to 180 point scale. (See *Weser v. Glen* (E.D.N.Y. 2002) 190 F.Supp.2d 384, 388, fn. 1 [“The maximum possible score is 180. In the past, LSAT scores were out of a possible 48.”]; *Phelps v. Washburn University of Topeka* (D.Kan. 1986) 634 F.Supp. 556, 561 [applicant for admission to fall of 1983 class submitted one LSAT score on a scale of 800 and one score on a scale of 48]; Selmi, *The Life of Bakke: An Affirmative Action Retrospective* (1999) 87 Geo. L.J. 981, 1016 [“the LSAT has undergone a series of changes in its scoring methods—moving from the 800-point scale to a 50-point scale to the current 180-point scale”]; Oko, *Laboring in the Vineyards of Equality: Promoting Diversity in Legal Education Through Affirmative Action* (1996) 23 Southern U. L.Rev. 189, 200, fn. 56 [“[t]he [LSAT] . . . was formerly scored 200-800,” then in “the 1980s the scoring changed to 10-48 and has recently changed again to 120-180”].) At its inception, “the LSAT was linked to success in law school, not success at the bar.” (LaPiana, *A History of the Law School Admission Council and the LSAT* (1998), available online at www.lsac.org/LSACResources/Publications/PDFs/history-lsac-lsat.pdf [as of January 23, 2013].) Over time, “the LSAT became much more than a screen for sifting

In the spring of 1989 Singh began tutoring a group of his college friends for the LSAT. After graduating with a degree¹ in history and Latin, Singh enrolled in USC Law School. He took a leave of absence, however, during his first year of law school. Singh never returned because he went into the LSAT preparation business, first as an instructor at Kaplan Test Prep from August 1990 to August 1991, and then as the owner of his own LSAT preparation company, TestMasters, in mid-October 1991.

TestMasters held its first class in the fall of 1991 at USC. By the end of the 1990's, TestMasters was teaching classes throughout California. By 2001 TestMasters had expanded to 18 states, by 2002 to 30 states, and by 2004 to England, Japan, and Canada. Overall, TestMasters' annual enrollment went from 15 students in 1991 to 9,000 in 2004, and during that period 80,000 students took TestMasters' LSAT preparation course. In order to work at TestMasters, an instructor must score in the 99th percentile on the LSAT. TestMasters instructors do not have written contracts.

Trent Teti worked as an LSAT instructor first at Kaplan, and then at TestMasters from approximately 2000 to January 7, 2005. He earned a B.A. in philosophy from UC Berkeley, and studied logic and philosophy as a graduate student at the University of Virginia and UCLA, where he enrolled in but did not complete a Ph.D. program in philosophy. Teti felt that he was the best instructor at TestMasters and that Singh was not giving him "proper due or credit." In his January 7, 2005 resignation email, he told TestMasters that he was leaving to "attend to matters I have long neglected."

out those who had little chance of success. It became a sorting mechanism helping to control admission not to the legal profession but to its most remunerative levels." (*Id.* at p. 9.)

³ Singh did not always take the entire LSAT. Singh figured out a way, by looking at the LSAT examination booklets of those sitting around him taking the test, to determine which section in a given examination was the experimental section that does not count toward the score and then did not take that section of the test. The LSAT has changed, and Singh's method of determining which section is the experimental section no longer works.

Matthew Riley took the TestMasters course as a student and then worked as a TestMasters LSAT instructor from late March or early April 2003 until February 3, 2005. He has taken the LSAT three times, earning 99th percentile scores of 179, 175, and 176, and has never answered a question wrong in the logic games section. When he resigned from TestMasters on February 3, 2005, he stated that he felt “like it is time to move on.”

Justin Capuano graduated from UCLA in 2003 with a degree in mechanical engineering. He earned a score of 172 on the LSAT, also in the 99th percentile. In college he taught SAT preparation classes for three years. He was a TestMasters student, and worked at TestMasters from the spring of 2003 to the end of 2004 as an LSAT instructor and in the research and development department. His last TestMasters class was November 10, 2004, and he sent a resignation email on December 31, 2004, telling TestMasters that he had “to start getting serious with myself and find a more permanent career.”

Jodi Triplett was Teti’s fiancée in 2004. She studied English literature as an undergraduate at Stanford University and as a graduate student at the University of Virginia and UC Irvine. Her LSAT area of expertise is reading comprehension. She worked for TestMasters from 2001 through 2004, resigning with Teti on January 7, 2005. Triplett was not an LSAT instructor at TestMasters; she taught GRE classes and performed law school admissions consulting work for students applying to law school. She also worked in marketing and trained TestMasters instructors, and would go to classes to observe and evaluate TestMasters instructors. She told TestMasters in her resignation email that it was time for her “to stop working a part time job and move on with my life.”

Courtney Martin was one of Teti’s close friends. Like Singh, Martin came to TestMasters from Kaplan as an LSAT instructor. She worked at TestMasters from 2002 until she resigned on February 17, 2005 and joined Blueprint, where she stayed until April or May 2006.

Blueprint is an LSAT preparation company founded by Teti, Riley, Capuano, Triplett, and Martin that competes with TestMasters. The process of defendants’

departure from TestMasters to form Blueprint began in September 2004 while they were all still working for TestMasters, and continued into February 2005 when Blueprint launched its website, March 2005 when defendants taught their first Blueprint class, and May 2005 when defendants finished writing the last of Blueprint's course lessons. Martin and Capuano are no longer associated with Blueprint.

B. *From TestMasters . . .*

In September 2004 Teti contacted his close friend of over 20 years, Tom McCarthy, about Teti's idea of starting an LSAT preparation company that would compete with TestMasters, where Teti was employed as an instructor. McCarthy worked for TestMasters until early 2003 performing web and graphic design services, and had access to TestMasters' course materials in digital format. Despite a written confidentiality agreement with TestMasters, McCarthy in July 2002 downloaded TestMasters' course files without authorization, and then in September 2004 provided Teti with electronic files containing the 2002 version of TestMasters' course materials both for TestMasters' entire full length course and its weekend course, as well as pages from TestMasters' website. Teti downloaded these files onto his computer. On September 20, 2004 Teti wrote McCarthy that he had opened some of the files "and it seems to have worked. These will save us hundreds of hours, if we, indeed, go ahead with this. Really, Tom, thank you so much. I owe you big on this one."

Defendants, who referred to TestMasters as an "evil empire," began working together in September and October 2004 on what would become Blueprint while all of them were still working for TestMasters. For example, on September 28, 2004 Teti wrote to Martin about the terms of a potential partnership agreement and how to compete successfully with TestMasters. On October 12, 2004 Teti wrote to Capuano, Triplett, and Martin "collectively for the first time," distributing a list of "vital questions to consider" for their new business. By October 13, 2004 defendants were discussing the viability of forming a new business together, undercutting TestMasters' price (by \$250), and preparing for litigation with TestMasters. Defendants made plans in October 2004 to meet with attorneys to discuss these issues, and to get advice on what they "were and

were'n't allowed to do in terms of figuring out whether this potential business was feasible while still employed by TestMasters.” Teti, Capuano, Triplett, and Martin met several more times in October 2004 to discuss creating their own LSAT preparation company, and by October 25 were referring to each other as partners and were working on structuring their course and creating course material for their new business that would be “very similar to the TM [TestMasters] course structure.” Capuano promised the others he would “not do anything ‘Callrisian-esque,’” which was his way of saying that he would not betray defendants to TestMasters, as the character Lando Calrissian (“the mayor of Cloud City” played by Billy D. Williams) had done in the Star Wars movie *The Empire Strikes Back* (Lucasfilm 1980).

Riley first became involved in the Blueprint project in mid-November 2004. Riley had been “doing the math.” He calculated that each class he was teaching was “netting \$100,000 in revenue,” he was “making \$4,000 teaching the class,” and he felt that he was the one “doing all the work . . . teaching the class” and was the one the students were coming to see. Riley, whose LSAT expertise was the logic games section of the test, began working with Teti to categorize logical reasoning and logic games questions for use in defendants’ prospective LSAT preparation business. Although he was still teaching at TestMasters at this time, Riley never spoke to any TestMasters’ students about taking Blueprint’s courses.

But he was working on ways to fund Blueprint. Riley approached a retired businessman he knew through his UCLA fraternity named Jerry Nelson, who was like a mentor to Riley and whom Riley affectionately referred to as “Jer-Dog.” Among other activities, Nelson sponsored current members of the fraternity by providing them with start-up funding and ran a retreat or “leadership conference for young men” in Cabo San Lucas, Mexico called “Cabo Alpha.”

On December 11, 2004 defendants sent Nelson a business plan they had prepared for Blueprint, and on December 21, 2004 Riley told Nelson, “We would like to have our investments secured by the end of December in order to form the LLC and begin advertising in January.” During the last week of December 2004 Riley, Capuano, and

Teti met with Nelson in Scottsdale, Arizona about sponsoring them and their business venture. Nelson wrote a check for \$150,000 dated January 5, 2005 with the notation “Blueprint test prep,” and signed a partnership agreement dated January 5, 2005 that Riley had drafted based on a form he found on the Internet that gave Nelson a 10 percent interest in Blueprint. Because Riley subsequently became concerned about depositing the check while he was still teaching for TestMasters, he decided not to cash the check at that time and to ask for another check from Nelson at a later date. That later date was the weekend before February 4, 2005, when Riley had a second meeting with Nelson, this time in Cabo San Lucas. Sitting by the pool, Nelson gave Riley another check for \$150,000 and signed a second partnership agreement for Blueprint, this one dated February 5, 2005. Blueprint eventually repaid Nelson in full, and gave him an extra repayment bonus of \$45,000. Riley admittedly lied in his deposition about Nelson’s existence and involvement in Blueprint in order to protect him from the litigation.

By November 2004 Teti and Triplett were communicating with McCarthy about creating a website for their new LSAT preparation company. In a November 3, 2004 email, Teti asked McCarthy, who was supportive of Teti’s efforts to start a competing LSAT preparation business, for a quote for the cost of designing Blueprint’s website and helping Teti gain a competitive advantage over TestMasters. Teti told McCarthy at that time that he was “going to take L.A. from that bastard” Singh, that TestMasters’ best teachers wanted to join his new company, and that he was spending all of his time working on the development of the new LSAT course.⁴ McCarthy responded: “Fucking, A man! You are going to eat his lunch, I know it, and barf it right back onto him. This is so cool. Payback is awesome, especially when it is so richly deserved. . . . [¶] I can start to build a cost estimate and a delivery schedule for you, as well as help you flesh out how the web can fit into your overall strategy and how it can give you a competitive

⁴ Parroting a line from Mr. Spock in *Star Trek II: The Wrath of Khan*, Teti testified at trial that the statement in his email to McCarthy that he was spending all of his time working on the development of the new course was not a lie, but only an exaggeration. “Q: So you were lying to Tom McCarthy? A: I was exaggerating.”

advantage in kicking [Singh's] bony ass.” In a November 14, 2004 email to McCarthy, Teti confirmed, “we are starting a new company.” Riley also worked with McCarthy and Teti on the Blueprint website.

Also in November 2004 defendants formulated a plan to promote their new competing LSAT preparation business by posting comments on law school and LSAT Internet bulletin boards and chatroom sites. Teti testified that he had done this kind of activity as part of his job at TestMasters. The goal of defendants’ “chatroom marketing” plan was to generate comments and discussion that the quality of an LSAT preparation class depends on the quality of the teacher, and that “TestMasters is good but only if you get” Teti, Capuano, or Martin as a teacher, without letting on that defendants were “skill[s].” Defendants collaborated on and coordinated their chatroom posts, which Martin and Capuano admitted included “disparaging remarks about TestMasters and TestMasters instructors.” These posts helped defendants promote Blueprint before they resigned from TestMasters. In December 2004 defendants were also working on marketing their new company with Google and setting up bank accounts for Blueprint.

In addition to securing funding for Blueprint, Riley also in November 2004 contacted the Law School Admission Council (LSAC), which writes and administers the LSAT, and learned that for a “huge fee” LSAC licenses all of its past LSAT questions (other than those in the experimental sections) in portable document format (PDF) and Microsoft Word format. Every LSAT preparation company uses these licensed questions. LSAC also publishes a book called “Super Prep” that gives students practice LSAT questions, provides explanations for the questions, and advises students on what LSAC thinks students should study to prepare for the test. Super Prep also explains to students (and LSAT preparation course instructors) the types or categories of questions on the examination, how the examination introduces each type of question, and what words the examination uses to pose each type of question. Singh testified that the Super Prep book “does . . . an excellent job of acquainting students with the various kinds of questions they could expect to encounter when they take the LSAT.” Unlike the actual LSAT tests, which LSAC sends only to licensees such as TestMasters, Blueprint, Kaplan,

and Princeton Review, the Super Prep publication is publicly available at bookstores.

Defendants were also already concerned about getting into legal trouble for what they were doing and that TestMasters would sue them. Defendants met with several attorneys from November 2004 to January 2005 to obtain advice about how to set up Blueprint, but had to schedule their Blueprint meetings with the attorneys around their teaching schedules at TestMasters. Defendants met on December 31, 2004 to discuss legal issues (such as filing an LLC statement, obtaining insurance, and choosing an attorney), curriculum development, marketing (including chatrooms, Google, undergraduate pre-law societies, and “fraternity and sorority walks”),⁵ and logistics (such as licensing the LSAT questions, opening a bank account, and getting new phone lines).

C. . . . to *Blueprint*

Blueprint filed limited liability papers with the California Secretary of State on January 10, 2005, naming Triplett as the first president. Because Riley was still working for TestMasters, defendants filed the papers without listing Riley as a member “officially.” Among the original principals of Blueprint, Teti had primary responsibility for the logical reasoning part of the LSAT preparation course because that was his strength, Riley had logic games because he enjoyed them and was good at them, Triplett had reading comprehension because of her background in English literature, and Capuano did “all the high-level technical stuff, putting things together.”

Capuano’s biggest responsibility at Blueprint initially was formatting and doing the layout of Blueprint’s practice questions and course materials. Capuano also developed a blue handwriting font that Blueprint used to replicate the kinds of things the students should be writing on paper, and then normal Times New Roman font type for the kinds of things the students should be thinking while working on a problem. Capuano drafted some of the Blueprint course material, but his “task at the time was largely type setting.”

⁵ Fraternity and sorority “row walks” were tours Teti made of the houses at UCLA on Monday nights where Teti would speak at the chapter meetings about Blueprint.

On February 8, 2005 Teti on behalf of Blueprint signed a license agreement with LSAC, which then sent Blueprint via email the text of all of the questions from the prior LSAT examinations. The material from LSAC was in a rough format, so Capuano had to convert the questions he received from LSAC into a readable, Times New Roman format. Capuano “set up sort of a conversion scheme to get from the really poorly formatted text” he received from LSAC “into really nice, easy-to-work-with text boxes” Capuano “went through the arduous process of figuring out what the right software was to use and what exactly [defendants] were going to do with [the] raw text files that [they had] received from” LSAC. This was a “huge project,” one of Capuano’s major contributions to creating the Blueprint course material, and he had to learn how to use a new program called Indesign to do it.⁶ He along with the other defendants also had to correct typographical errors contained in the LSAC questions.⁷ In the end, approximately 1,600 pages (containing 4,500 questions) of the approximately 2,100 pages of Blueprint course materials consisted of questions that Capuano had formatted from LSAC.

Triplett had primary responsibility for creating the reading comprehension portion of the Blueprint course, developed Blueprint’s reading comprehension technique, and proofread all of the course materials. To do this, Triplett read all of the LSAT reading comprehension passages from prior tests that defendants had obtained from LSAC and “put them into piles according to similarities that [she] noticed among them.” Triplett referred to this process as the “kind of structure-based reading” with which she was familiar from graduate school. In contrast to other LSAT preparation companies like Kaplan, TestMasters, and Princeton Review, all of which divide reading comprehension passages by subject matter (i.e., science, law, art history), Triplett divided reading comprehension questions into three categories (thesis, antithesis, and synthesis)

⁶ Steve Che, TestMasters’ executive director, testified that in the fall of 2004 Capuano borrowed TestMasters’ licensed copy of Indesign, saying he wanted to learn how to use Indesign to help TestMasters update its GMAT course.

⁷ These typographical errors did not appear in TestMasters’ course materials.

depending on the passage's point of view, which Triplett believed better helped students find the answer to the questions on the test.

Capuano, Triplett, Riley, and Martin did not see the electronic files that McCarthy had sent to Teti in September 2004. Martin testified that no one told her about an electronic version of TestMasters' files or a CD from McCarthy with TestMasters course materials, and that while defendants were creating Blueprint's course materials no one was looking at any TestMasters materials. Riley testified that he did not copy any of TestMasters' course materials in creating Blueprint's course materials, and that it was always his goal in writing logic games explanations "to come up with a brand new and better way of approaching the entire LSAT." Capuano testified that he never saw any of the electronic data McCarthy had provided to Teti until he saw the data as exhibits in the litigation. Capuano testified that he and the other defendants were looking for a way to get the LSAT questions from LSAC in electronic format in late 2004 and early 2005, which they would not have had to do if they already had electronic copies of TestMasters' course materials. Capuano also testified that defendants researched whether other test preparation companies used the same kind of symbols defendants used in Blueprint's course materials, to make sure they did not "intrude on anything that only TestMasters was using." On the other hand, although defendants "were making a concerted effort to be distinct from everyone else[,] . . . when there was a concept that was pervasive throughout the industry," defendants believed that they "were entitled to express that concept in the same way as everyone else."

Blueprint began teaching its first course in April 2005, and priced it \$251 less than TestMasters' course. Riley testified that, although defendants did not specifically target TestMasters students, they did try to sell Blueprint "to students who would have otherwise taken any other classes" by any other LSAT preparation company, which he said is the "definition of competition."

Since its inception in 2005, Blueprint has taught almost 5,000 students. Blueprint's gross revenues were approximately \$500,000 in 2005, \$1 million in 2006, \$1.75 million in 2007, and over \$5.5 million in 2008, with projected revenue of more

than \$7 million in 2013. Defendants took salaries from Blueprint of approximately \$32,000 in 2005, \$40,000 in 2006, and \$100,000 in 2007. Blueprint's net profits after salaries were \$3,000 in 2005, \$4,000 in 2006, and a \$40,000 loss in 2007 due to expenses associated with expansion.

D. *The Claims*

On March 10, 2005 TestMasters sued Blueprint, Teti, Riley, Capuano, and Triplett (but not Martin). TestMasters' operative third amended complaint asserted 22 causes of action for tortious breach of the duty of loyalty, conversion, recovery of personal property, misappropriation of property, false advertising in violation of Business and Professions code section 17500, unfair competition in violation of Business and Professions Code section 17200, interference with prospective economic advantage, slander, conspiracy, and breach of oral employment agreement. TestMasters alleged that defendants breached their duty of loyalty as employees of TestMasters by misappropriating TestMasters' course materials and other tangible property to set up a competing business, formulating and implementing a strategy of false and misleading advertising to solicit TestMasters' students, and forming a competing business based on their wrongful conduct. TestMasters also alleged that defendants, posing as students, posted disparaging statements about TestMasters on Internet bulletin boards.

In August 2005 Blueprint, Teti, Capuano, Riley, and Triplett filed a cross-complaint against TestMasters. Defendants asserted 11 causes of action for invasion of privacy, failure to pay overtime wages, waiting-time penalties, trade libel, defamation, violation of Penal Code sections 632 and 637.2 for recording telephone conversations, false advertising, unfair competition, and interference with prospective economic advantage. Defendants alleged that since they formed Blueprint "TestMasters has done everything in its power to subvert Blueprint's business, including disseminating false and intentionally misleading information about [defendants] and their business," including false Internet posts and statements that defendants "are liars." Defendants alleged that TestMasters agents infiltrated Blueprint workshops and distributed private and false information about Teti, including that TestMasters had terminated him for sexual

harassment and for refusing to submit to psychological testing, and that Blueprint students were experiencing LSAT score decline. Defendants also alleged that TestMasters engaged in unfair competition by including unlicensed LSAT and GRE questions in its course materials. TestMasters settled this cross-complaint for \$500,000 prior to trial.

On February 8, 2006 TestMasters filed a separate lawsuit against the same five defendants (i.e., still not Martin), asserting 32 causes of action for defamation, trade libel, conspiracy to commit defamation, and conspiracy to commit trade libel. TestMasters' operative first amended complaint in this action alleged that defendants, again posing as students, "published on an Internet bulletin board false statements of fact disparaging TestMasters" that "dissuaded students from contracting with TestMasters and encouraged them to contract with Blueprint" TestMasters alleged several defamatory Internet posts by defendants, including that (1) a TestMasters "instructor was really boring," (2) "Robin and his 180s thing" was a gimmick and TestMasters' material was out of date, (3) a TestMasters instructor was "awful, really boring and [had a] thick accent" and "answered questions wrong in class," (4) a TestMasters instructor was "terrible," "boring and bad," and the class "sucked" and "dwindled to about 10 people" from more than 100, and (5) a TestMasters instructor "was boring as hell" and "didn't know his sh*t very well," and the "class seemed to shrink with every lesson." TestMasters also alleged that Teti orally published to a group of prospective students that TestMasters' course materials, unlike Blueprint's course materials, had no explanations. TestMasters alleged that Capuano orally published to a group of prospective students at USC that he had not taught a TestMasters class "with less than eighty [students] for a really long time," and that Riley orally published to a group of students at UC Irvine that he had not taught a TestMasters class with "under ninety people in the last year and a half."

On January 18, 2006 TestMasters filed a third action, this one against Martin only. TestMasters asserted causes of action against Martin for breach of the duty of loyalty, libel, and interference with prospective economic advantage. TestMasters alleged that Martin, during her employment with TestMasters, breached her duty of loyalty by

injuring TestMasters' reputation and discouraging "TestMasters' past, present and prospective students from taking the very LSAT test-preparation course she was teaching as a TestMasters' employee." TestMasters alleged that Martin, posing as a TestMasters student, published false and disparaging statements on an Internet bulletin board that TestMasters was a waste of time and money and used "kinda old" materials, and that after taking TestMasters' course twice she was still not ready to take the LSAT.

The trial court initially consolidated all three actions, but subsequently severed TestMasters' action against Martin only. Martin is not a party to this appeal.

E. *The Preliminary Injunctive Relief*

On August 25, 2008 TestMasters filed an ex parte application for a temporary restraining order and an order to show cause why the court should not issue a preliminary injunction, seeking to enjoin Blueprint from disseminating a video entitled "Blueprint: The Movie" and other "online videos that contain the entire Blueprint course." TestMasters argued that the course materials Blueprint was planning on posting on line "can be easily copied and saved to illegal file sharing 'torrent' websites,"⁸ making Blueprint's course materials, which TestMasters maintained included or were based on its course materials, "available for free to anyone in the world indefinitely, without any recourse by TestMasters." TestMasters submitted evidence that potential LSAT

⁸ "Torrent" or "BitTorrent" websites allow users to download content from the computers of other users. "Rather than downloading a file from an individual user, users of a bit-torrent network will select the file that they wish to download, and, at that point, the downloading will begin from a number of host computers that possess the file simultaneously. . . . During this simultaneous downloading process users form what is known as a 'swarm,' which allows for the quick exchange of the downloading material." (*Columbia Pictures Industries, Inc. v. Fung* (C.D.Cal. Dec. 21, 2009, No. CV06-5578)) 2009 WL 6355911, at p. 2.) "The BitTorrent client does not have the ability to search for files. Users visit torrent sites, which are Web sites that contain an index of available files on the network. The Web site hosts and distributes small files known as torrents. Torrents do not hold copies of the program, but instead the torrents automatically and invisibly instruct a user's computer where to go and how to get the desired file. After the user downloads the file, the user has a perfect digital copy that can be viewed, burned to a portable medi[um] like a DVD, or copied by and distributed to another user." (*Disney Enterprises, Inc. v. Delane* (D. Md. 2006) 446 F.Supp.2d 402, 404, fn. 3.)

preparation course customers were discussing on top-law-schools.com, “an online Internet discussion board frequented by pre-law students,” how to steal Blueprint’s Internet video using a program called “stream ripper.”

On August 28, 2008 the trial court granted TestMasters’ application for a temporary restraining order and issued an order to show cause. The trial court ordered defendants “to immediately cease providing downloads via the Internet site or by other electronic distribution (e.g. CD or DVD) of any course material, practice tests, instruction sessions, tutorials, or anything else which has been provided on the Blueprint website . . . or any similar instructional, training or practice materials relevant to the LSAT test and any similar test.” On September 12, 2008 the court entered a preliminary injunction adopting the terms of the temporary restraining order, and further “requiring defendants to cease providing any and all LSAT preparation or similar test preparation services on October 4, 2008.” The trial court found “defendants’ conduct—in making their entire teaching program susceptible to illegal downloading—to be a clear ‘scorched earth’ policy intending to harm [TestMasters] since defendants can no longer foresee how they will avoid a career-ending outcome to this litigation.”

Blueprint appealed (Case No. B210775). On October 2, 2008 this court ruled that “the preliminary injunction issued by the respondent [trial court] compels the performance of an affirmative act that changes the position of the parties and is thus mandatory in nature,” and stayed enforcement of the preliminary injunction.

F. *The Trials*

The jury trial on TestMasters’ claims for damages lasted 25 court days over three months. On TestMasters’ breach of duty of loyalty claim, the jury found in favor of TestMasters and against Teti and Blueprint, and in favor of Capuano, Riley, and Triplett. On this claim, the jury awarded \$18,000 in damages against Teti and \$165,000 in damages against Blueprint. On TestMasters’ breach of oral employment contract claim, the jury found in favor of TestMasters and against Teti, and in favor of Capuano, Riley, and Triplett. On this claim, the jury awarded \$18,000 in damages against Teti. Finally, on TestMasters’ defamation claim, the jury found in favor of TestMasters and against

Riley and Triplett, and in favor of Teti, Capuano, and Blueprint. On this claim, the jury awarded damages of \$10,000 against Riley, \$10,000 against Triplett, and \$25,000 against Blueprint. The jury also found that Teti engaged in malice, oppression, or fraud, but that the other defendants did not.

At the relatively short second phase of the jury trial on the amount of punitive damages against Teti, Teti was the only witness. The jury awarded punitive damages against Teti in the amount of \$10,000.

Finally, after the jury trial, the trial court conducted a three-day court trial on TestMasters' claim for a permanent injunction against defendants and on TestMasters' Business and Professions Code section 17200 claim. The trial court denied TestMasters' request for an injunction, and ordered judgment in favor of all defendants on TestMasters' section 17200 claim. The trial court also vacated the September 12, 2008 preliminary injunction "forthwith," finding that the preliminary injunction was "fundamentally inconsistent with the final merits determination of this case." On December 9, 2009 this court granted TestMasters' motion to dismiss the appeal from the trial court's (previously stayed) preliminary injunction (Case No. B210775) as moot.

DISCUSSION

A. Pretrial Orders

1. Relevant proceedings

a. The first motion for discovery sanctions

After initially raising the issue of discovery abuse in an ex parte application, TestMasters filed a regular noticed motion for sanctions on November 2, 2007. TestMasters sought 50 specific monetary, evidence, issue, and terminating sanctions, including orders striking defendants' answers, precluding defendants from offering evidence in support of any of their sixteen affirmative defenses, and imposing monetary sanctions to be determined by a separate motion for attorneys' fees. TestMasters also asked the court to give various adverse jury instructions, including instructions that defendants had breached their duty of loyalty to TestMasters and had used TestMasters' course materials to create Blueprint's course materials. TestMasters submitted, attached

to the declarations of its attorneys, documents that defendants had not previously produced but that TestMasters had recently obtained in electronic discovery showing that defendants had concealed and destroyed documents that tended to support TestMasters' claims, which were inconsistent with defendants' deposition testimony. TestMasters argued that this electronic discovery showed that defendants were working with each other and with McCarthy (whom TestMasters referred to as a recently discovered "sixth conspirator") on setting up Blueprint while they were still employed by TestMasters in 2004, not, as defendants had all testified, only after they left TestMasters in 2005. TestMasters also argued that defendants had destroyed relevant, if not the most important, evidence, such as handwritten drafts of defendants' original course material and scantron sheets filled in by Blueprint students taking diagnostic tests.⁹ TestMasters also filed a motion to conduct more extensive electronic discovery than the trial court had previously allowed.¹⁰

Defendants opposed the motion, but did not object to the admissibility of any of the emails or other evidence submitted by TestMasters, nor did defendants submit any evidence in opposition to the motion, such as declarations or deposition testimony explaining why defendants had not previously produced the emails forensically uncovered by KPMG. Defendants argued only that "the electronic documents revealed little that is new and nothing that is significant." Defendants argued that McCarthy was

⁹ The scantron sheets related to TestMasters' claim that defendants were falsely advertising Blueprint's ability to raise its students' test scores. Scantron is the name of the company that makes the sheets on which students fill in their answers.

¹⁰ On August 3, 2006 and August 17, 2006 the trial court granted TestMasters' motion to compel inspection by a "qualified examiner" of "computer work stations," computer "systems," and laptop computers that defendants had used since August 2004. The discovery referee appointed KPMG to serve as the electronic discovery expert. Because the trial court was concerned that "this kind of wide range in electronic discovery . . . has a high likelihood of tromping on privileged information," the trial court stated that once the special master and independent electronic discovery expert had been selected, the parties and the discovery referee could then work out a system for reviewing and filtering privileged documents.

an independent website contractor and “had the right to work on any other website,” and that the emails merely reflected “inquiries about [McCarthy’s] website designing services.” Defendants also argued that the new electronic discovery did not prove that they had lied under oath because developing a website is not the same as planning one, and because one of the recently-discovered emails from Teti, dated November 17, 2004, “[i]f anything . . . merely establishes that the defendants were preparing to initiate a competing business, an undeniably legal endeavor in California.” Defendants also argued that there was “no evidence that the defendants intentionally destroyed evidence related to the creation of their course materials” and that their “failure to produce these documents was not prejudicial.”

On December 12, 2007 the trial court issued its ruling on TestMasters’ first motion for discovery sanctions and motion for further electronic discovery. The trial court found that defendants had “intentionally and seriously misused the discovery process and did not timely comply in good faith with prior discovery requests for disclosure of pre-separation communications and writings, electronic and otherwise,” and had “breached their duties of honest and reasonable cooperation in discovery.” The trial court made the following factual findings: (1) Defendants had disposed of “several relevant computers and related electronic storage devices which contained key information after” defendants had become aware “of actual or threatened litigation against them”; (2) one of the defendants (Capuano) had abandoned a computer at an old apartment when he moved; (3) defendants had engaged in “dissembling outright prevarication in various statements of sworn testimony,” including statements about lost documents; (4) defendants had failed “to provide any handwritten or other seminal drafts of their extensive, allegedly independently created student course material,” and had shredded “Scantron sheets during the pendency of the litigation”; (5) defendants had not submitted any declarations in opposition to the motions; and (6) the contents of the electronic documents obtained by KPMG “after great expense and effort” were of considerable significance in explaining defendants’ course of conduct.

The trial court did not impose any of the terminating or jury instruction sanctions

TestMasters had requested. Nor did the trial court impose all of the evidence and issue sanctions requested by TestMasters. Instead, the court crafted a remedy for defendants' discovery abuse that was a combination of monetary, cost-shifting, and evidence sanctions. The trial court precluded defendants from offering evidence in support of their equitable defenses of unclean hands, estoppel, laches, and TestMasters' "bad faith," and authorized TestMasters to file separate motions to recover its attorneys' fees and electronic discovery costs that TestMasters had incurred as a result of defendants' discovery misconduct. The trial court awarded three categories of costs, one past and two future: (a) "actual sums incurred (whether paid, billed or merely incurred) to date" for the services of KPMG, the previous court-appointed computer expert (FIOS), and the discovery referee; (b) "costs for future services by KPMG" not to exceed \$200,000; and (c) "costs of future services of court reporters and videographers" not to exceed \$100,000. The trial court also granted TestMasters' request for additional electronic discovery, finding that "the combination of the finding of noncompliance with discovery obligations by defendants and the utility of the electronic discovery obtained to date justify a much more extensive and thorough disclosure to [TestMasters] of the contents of the defendants' computers and electronic storage devices for relevant information." The trial court ruled that TestMasters could direct KPMG to "do a further search for emails in defendants' electronic files," and "to search generally for documents and files of any type based on search parameters established by" TestMasters, with notice to defendants.

TestMasters filed two motions to recover its attorneys' fees and costs, including electronic discovery costs, pursuant to the trial court's December 12, 2007 order. The first cost motion, filed December 20, 2007, requested \$592,260.45 in category (a) costs (pre-December 2007 discovery costs for the services of KPMG, KPMG's predecessor, and the discovery referee),¹¹ and \$116,150.26 in attorneys' fees incurred in bringing the first motion for sanctions. On January 24, 2008 the trial court granted the first cost

¹¹ \$532,695 of this \$592,260.45 claim was for forensic electronic discovery work performed by KPMG.

motion and awarded TestMasters all of the requested \$592,260.45 in electronic discovery and referee costs and \$111,150.20 in attorneys' fees, for a total of \$703,410.71. In March 2008 TestMasters filed a second cost motion pursuant to the December 12, 2007 order, and requested \$170,721.95 in category (b) and category (c) costs ("future costs" for post-December KPMG and deposition expenses).¹² On April 10, 2008 the court granted the second cost motion and awarded TestMasters \$154,952.85.

In opposition to TestMasters' first motion for discovery sanctions, defendants had argued that "TestMasters' continual accusations of discovery abuse call to mind the fable of the boy who cried wolf. The difference here is that, unlike the end of that story, the wolf never appears." That would soon change.

b. *The second motion for discovery sanctions*

On May 13, 2008 TestMasters filed its second motion for discovery sanctions, entitled a "renewed motion." In its second motion for discovery sanctions, TestMasters sought 48 enumerated monetary, evidence, issue, jury instruction, and terminating sanctions. In addition to the striking of defendants' answers and the entry of their defaults, TestMasters requested multiple jury instructions establishing liability on its claims and advising the jury that defendants had concealed and destroyed evidence and given false answers in discovery, and orders precluding defendants from introducing evidence on various issues and their remaining affirmative defenses.

TestMasters also filed on May 13, 2008 a separate motion for monetary sanctions pursuant to Code of Civil Procedure section 2023.010,¹³ seeking to recover \$2,289,651.76 in monetary sanctions that TestMasters claimed it had incurred as a result of defendants' misuse of discovery. This motion sought to recover several categories of costs and fees associated with specific issues of discovery misconduct. TestMasters sought fees and costs incurred in connection with (1) efforts to uncover the true facts

¹² Again, \$157,691 of this \$170,721.95 was for forensic electronic discovery work performed by KPMG.

¹³ Statutory references are to the Code of Civil Procedure unless otherwise indicated.

(initially concealed by defendants) that Jerry Nelson had provided funding for and was an owner of Blueprint, (2) efforts to uncover the true timing and formation of Blueprint, (3) additional electronic discovery, (4) defendants' interference with the depositions of McCarthy and other third party witnesses, (5) defendants' Internet defamation campaign, (6) the filing of the second motion for discovery sanctions, and (7) efforts relating to the destruction of scantron score sheets.

In support of the second motion for discovery sanctions, TestMasters submitted additional electronic discovery obtained by KPMG from defendants' computers. TestMasters argued that "further e-discovery has revealed that defendants concealed an entire hard drive full of incriminating information," and that KPMG had been able to recover "incriminating files" for which defendants had "deliberately and systematically searched their computers" and either hidden or deleted and then never produced in discovery. KPMG located many of these electronic files on an external hard drive, referred to as a "Firewire drive," used to store information from other computers, which defendants purchased in April 2006 while discovery requests from TestMasters were pending. The Firewire drive, which defendants directed their technical consultant not to produce to the forensic experts in discovery, contained emails or fragments of emails exchanged among defendants and Martin in 2004, while defendants were still working for TestMasters, concerning the formation of Blueprint. These emails appeared to contradict defendants' litigation position and deposition testimony that they did not work on the formation of Blueprint until 2005. These forensically recovered email files also revealed that Teti had received TestMasters electronic course files from McCarthy in September 2004. TestMasters also presented forensic evidence that defendants had run specific searches on their individual computers to collect some of the emails KPMG found on the Firewire drive, using key search terms found in those emails, and had run programs designed to remove or delete certain electronic documents from their computers. These computerized efforts to cover their tracks included a "Secure Erase option," run on July 26, 2007, which allows the user "to wipe all free space on the hard drive by overwriting the data once, seven, or thirty-five times with random ones and

zeros,” and a sophisticated program called “BASH” used to find and delete (or confirm the deletion of) computer files.¹⁴ TestMasters contended that this evidence showed that defendants knew about the emails and intentionally concealed them from production, deleted them, or both.

Some of the emails recovered by KMG from the Firewire drive that defendants had not previously produced were potentially damaging to defendants’ case and indeed could easily be characterized as “incriminating.” It is understandable why defendants may have been reluctant to produce them. For example, in a September 18, 2004 email from Teti to McCarthy on the possibility that McCarthy might be able to provide Teti with TestMasters’ electronic files, Teti wrote: “If you can do it, I’ll blow you so well snot will shoot out of your cock.” After McCarthy was able to provide Teti with the TestMasters files, writing “here’s the full-length course, I’ll follow up with the weekend course shortly,” Teti wrote McCarthy on September 20, 2004 that he had “opened some of them [the files], it seems to have worked,” and “this will save us hundreds of hours, if we go ahead with this.” Teti told McCarthy on September 24, 2004: “You’re a god. A god who will never be revealed as the source of these files, but a god nonetheless.” In another email recovered by KPMG, Teti wrote to McCarthy on November 7, 2004: “Don’t save these emails, for your sake and mine. They might be misconstrued if they were discovered by those looking for things to misconstrue.”

In an email to Teti written after litigation had commenced, McCarthy wrote: “I thought I should tell you that that worthless fuck’s Robin’s Boston thugs lawyers are coming to ass-rape depose me in a couple of weeks. . . . They’ll have better luck getting sperm from a cow [or] blood from a stone than they will getting any more info out of me.” Teti responded by advising McCarthy that he would have Riley contact him “to talk about particulars” before the deposition. TestMasters argued that this newly-discovered

¹⁴ There is also a function called “Secure Removal,” which “allows the user to delete a file either once, seven or thirty-five times.” KPMG did not find any evidence that anyone had run the Secure Removal option on defendants’ computers.

document showed that defendants had conspired with McCarthy to give false testimony in the litigation.¹⁵

In addition to the emails, KPMG recovered documents showing that as early as October and November 2004 defendants were well on their way to setting up their competing business. For example, KPMG recovered from the Firewire drive an October 24, 2004 document that outlined a sequence of events for the establishment of Blueprint. This timeline outlined defendants' goals of completing of a "working draft of the business plan" for Blueprint and "informal procural of faux franchise employees" by November 1, 2004; finalizing a draft business plan and general course outline, and setting up meetings with lawyers by November 15, 2004; completing logical reasoning curriculum and off-line website by December 1, 2004; completing reading comprehension and beginning logic games, and having legal counsel "look over timeline [and] determine[] its legal feasibility" by December 15, 2004; and completing logic games, course schedules, and website by January 1, 2005.

In support of its second motion for discovery sanctions, TestMasters submitted a four-volume document entitled "Compendium of Perjury," which collected numerous instances in which defendants had given testimony under oath that TestMasters claimed conflicted with the recently-obtained electronic discovery. For example, TestMasters submitted excerpts of deposition testimony by Teti (6 instances), Triplett (4 instances), and Capuano (9 instances) stating that defendants did not work together to set up Blueprint while they were working for TestMasters, and six electronic documents showing that they had done exactly that. TestMasters submitted excerpts of deposition testimony by Teti (9), Triplett (3), and Capuano (11) stating that Capuano had no involvement with Blueprint until he left TestMasters in December 2004, and

¹⁵ At trial Teti explained this email as follows: "I thought Mr. McCarthy was going to be as everybody is in these depositions, assaulted by you and Mr. Singh for hours on end and that he would have a miserable time. And when I say I wanted—'I would have Matt contact you to talk about particulars,' I think, as I look here today, that I was referring to whether or not we would have a lawyer present from Blueprint at that deposition or whether or not—or what day it would occur or stuff like that."

32 electronic documents showing that he had. Similarly, TestMasters submitted deposition excerpts of Teti (3), Triplett (2), Capuano (4), and Martin (31) stating that Martin had no involvement with Blueprint until she left TestMasters in February 2005, and 48 electronic documents showing that she had. TestMasters similarly submitted deposition excerpts of Teti (32), Triplett (21), Capuano (12), and Riley (51) stating that Riley had no involvement with Blueprint until he left TestMasters in February 2005, and 21 electronic documents showing that he had. TestMasters also submitted deposition excerpts of Teti (9), Triplett (4), and Capuano (15), Riley (5), and Martin (1) stating that defendants did not begin creating course materials for Blueprint until after they left TestMasters in January 2005, and eight electronic documents showing that they had. Same for the creation of Blueprint’s website before defendants left TestMasters: Teti (1) + Triplett (4) + Capuano (1) + Riley (13) vs. contradictory documents (57). And TestMasters submitted deposition excerpts of Teti (6), Triplett (4), Capuano (6), and Riley (16) stating that defendants did not receive any funding from Nelson in December 2004, and eight electronic documents showing that they had.

Defendants filed an opposition to the second motion for discovery sanctions and a four-volume document entitled “Treatise of Truth” in response to TestMasters’ “Compendium of Perjury.” Defendants argued first that they had and could present “definitive proof” that they did not use the electronic files containing TestMasters’ course materials,¹⁶ which defendants no longer disputed they received from McCarthy.¹⁷ Defendants also provided an innocent explanation of how the recently-discovered

¹⁶ This argument, of course, was beside the point because the issue was not which side could “definitively prove” the merits of its case, but whether one side could have a fair opportunity to prove its case when the other side had concealed and destroyed evidence relevant to the merits of the case.

¹⁷ Defendants originally maintained that the “TM” files Teti received stood for Tom McCarthy, not TestMasters. Defendants subsequently admitted that TM referred to TestMasters and that Teti had received electronic files from McCarthy, but maintained that Teti had deleted the files without reading them and that defendants had not used the TestMasters course files to create Blueprint’s course materials.

documents had been found by KPMG on the 2006 Firewire drive but not defendants' 2005 personal laptop computers. Teti said that he had purchased a new laptop computer in January 2005 when Blueprint was formed, transferred his files from his 2004 computer to the 2005 computer, and then transferred the files from his 2005 computer to the 2006 Firewire drive, and that through this process the emails he deleted from his 2004 computer migrated to the "unallocated space" of the 2006 Firewire drive, where KPMG found them. Defendants argued that "if some responsive documents were overlooked or lost in the shuffle, it was not deliberate." Defendants also argued that the emails recovered by KPMG from the Firewire drive were either exculpatory or irrelevant. Defendants' "Treatise of Truth" contained responses to TestMasters' "Compendium of Perjury" and argument for each deposition excerpt cited by TestMasters that TestMasters had either misrepresented testimony or the witness had corrected his or her testimony.

This time, all five individual defendants submitted declarations in opposition to the motion. Teti stated in his declaration that, although he "never tried to obstruct" TestMasters' discovery, he "underestimated the importance of maintaining extensive records potentially relevant to a legal proceeding," and he regretted his "failure to keep a complete record of documents and emails, both because of the inconvenience it's caused all parties involved and because it now threatens the adjudication of facts at trial" Teti admitted that he had received the TestMasters course materials McCarthy had sent him in 2004, but reviewed them only to "determine how they were entered and formatted," and never read them before he deleted them. Teti also explained that his reference to having Riley contact McCarthy about deposition "particulars" referred to "logistical facts about the deposition," not testimonial facts about the case, which Riley confirmed. Capuano and Martin stated that they had never seen or relied on TestMasters' course materials in developing Blueprint's course materials. All five individual defendants stated in their declarations how difficult and time-consuming responding to TestMasters' discovery had been.

During July 16 to 18, 2008 the trial court held a hearing on TestMasters' second motion for discovery sanctions. The trial court noted that the "volume of paper that has

been submitted” in connection with the motions “is about as much as I’ve ever seen in my whole experience as either a lawyer in big-firm practice for over a generation or as a judge for almost ten years.” At the hearing the parties presented extensive argument and evidence, made Powerpoint presentations, used demonstrative evidence, read deposition testimony, and played excerpts of videotaped deposition testimony, although neither side presented any live testimony.¹⁸ The trial court noted at the hearing that from all of the declarations and other evidence submitted it had “a pretty complete explanation by the defendants as to why [and] when they felt they were proceeding in good faith, during the totality of the case, regarding electronic discovery,” and an understanding of defendants’ explanations for why “KPMG found some things that hadn’t been produced.”

On August 6, 2008 the trial court issued a 40-page ruling on TestMasters’ second motion for discovery sanctions and TestMasters’ motion for additional monetary sanctions. The trial court ruled that TestMasters had “obtained substantial additional discovery, primarily electronic discovery of files which Defendants had heretofore withheld from [TestMasters] when the same kinds of information were sought pursuant to discovery, which shows how cavalier and dishonest Defendants were in providing prior sworn discovery responses, particularly in their deposition testimony. Defendants are now shown to have conspired to maliciously and intentionally withhold key information, to lie about the true facts surrounding the formation, funding and start-up of Blueprint, and to have attempted to encourage at least one key third-party witness (Thomas McCarthy) to give false, incomplete and/or misleading testimony under oath in this case.” The trial court found that defendants “knew full well that they were trying to hide their tracks; they made their best efforts to do so; for a long time they were successful due to their willing and repeated dishonesty; and it was only after KPMG scraped contrary proof

¹⁸ Defendants objected to the admissibility of TestMasters’ PowerPoint presentation on the grounds that it was argumentative, “presented matters of disputed opinion as fact,” and was “a slick distortion of the evidence.” The trial court sustained some but not all of defendants’ objections to the video clips and other testimony presented by TestMasters at the hearing.

off their computers and external hard drives that a truer (though still incomplete) picture of their actual conduct during the relevant period emerged.” The trial court concluded that defendants had “destroyed and disposed of evidence, including handwritten material, computers, computer files, and scantron sheets at a time when the lawsuit was pending or when the Defendants had reason to anticipate that the lawsuit would be filed.”

One of the primary bases for the trial court’s finding that defendants’ discovery abuse was intentional was that defendants “made no attempt whatsoever to explain or justify their prior erroneous testimony about the timeline for the creation of Blueprint.” The trial court found that defendants “tried to depict an intentionally false picture of their activities and now have been shown up as intentional liars.” The trial court placed particular emphasis on the October 24, 2004 outline of steps defendants planned to take to create Blueprint. The trial court found this document, “which Defendants had not voluntarily produced and whose existence is plainly inconsistent with their sworn testimony about the timeline of the creation of Blueprint,” showed all of the steps defendants believed they needed to take in November and December 2004 to set up their new business in 2005.

The trial court also based its decision on (1) the destruction by Teti of “thousands of pages of paper . . . including preliminary proofs of the company website and the course materials” at a time when “he was already under a duty to preserve the drafts as evidence,” (2) Martin’s shredding of “scantron sheets of Blueprint students’ tests,” (3) the disposal in late 2004 or early 2005 by Teti, Triplett and Capuano of the computers they used in 2004 “at a time when the lawsuit was pending or when the Defendants had reason to believe that they would be sued by [TestMasters] in connection with the formation of Blueprint,” and (4) the absence of electronic evidence from Teti’s 2005 computer that KPMG was able to retrieve from the Firewire drive. The trial court noted that defendants had not provided “an explanation for why the emails appear on the Firewire drive but none of them appear on Teti’s (or anyone else’s) 2005 computer. The only conclusion that can be drawn is that the emails were deleted from some 2005 computer after they were transferred to the Firewire drive. As the Firewire drive was not purchased

until 2006, which is well into the pendency of the lawsuit and well after [TestMasters had] engaged in focused discovery efforts to obtain electronic evidence, the destruction of the emails was in violation of the Defendants' discovery obligation" The trial court cited to the "You're a god," "Don't save these e-mails, for your sake or mine," "better luck getting a sperm from a cow," and "snot" emails recovered by KPMG as evidence of defendants' willfulness.

The trial court also found that defendants made materially false statements under oath in their discovery responses and deposition testimony, primarily because the electronic documents forensically recovered by KPMG from the Firewire drive directly contradicted defendants' testimony. For example, while defendants repeatedly stated under oath that they had not started working on establishing Blueprint until 2005 after they had left TestMasters, documents recovered from the Firewire drive showed that they were actively working on Blueprint in the fall of 2004 while employed by TestMasters. Similarly, while defendants repeatedly stated under oath that Riley did not join Blueprint until February 2005, the documents recovered from the Firewire drive showed that Riley was actively involved in 2004 and that defendants had filed a false Limited Liability Company Statement of Information in early 2005 that concealed Riley's identity as a member. And while defendants testified that they started Blueprint with contributions of \$5,000 each, TestMasters obtained documents, including a written partnership agreement, produced not by defendants but by the previously unknown investor/partner Jerry Nelson, showing that Nelson invested \$150,000.¹⁹ Commenting on Teti's response to McCarthy's email about McCarthy's upcoming deposition that Riley would be contacting McCarthy "to talk about particulars," the trial court found that Teti was "saying that Riley would contact McCarthy to go over McCarthy's testimony. Thus, Teti knew that McCarthy planned to lie under oath and he appears to even be sanctioning the lying. Such conduct strongly suggests that Teti's own untruthful statements under oath were

¹⁹ Defendants ultimately produced a Partnership Agreement signed by Nelson and Riley on February 4, 2005, the day after Riley resigned from TestMasters. Nelson, however, produced a copy of the same partnership agreement dated January 5, 2005.

deliberate lies as well.” The trial court found that defendants’ conduct “in terms of destroying or rendering evidence unavailable and giving patently untrue deposition testimony was more than just oversight or negligence. Rather, it is clear that the Defendants intended to destroy evidence and intended to lie during their depositions.”

The trial court recognized the tension between sanctioning parties for discovery abuse based in part on false testimony and letting the jury decide whether testimony is false. The trial court stated that “in the ordinary course as a judge you are taught to save credibility questions for the jury. And yet, if I’m basically asked to adjudicate one or several of the defendants as intentional perjurers and impose terminating sanctions for it, I’m going to be usurping what otherwise would be the jury function, deciding that at some point the legal system will not tolerate knowing perjury in the course of discovery. . . . [T]he ordinary instinct is to leave that for the jury to decide who the perjurers are. . . . But the legal system . . . expect[s] truthful answers The truth should be coming out.”

Turning to the remedy, the trial court imposed 32 of TestMasters’ 48 requested issue and evidence sanctions “which most directly related to the demonstrated misuse of discovery,” and set a briefing schedule for additional monetary sanctions, but again declined to impose terminating sanctions. The nonmonetary sanctions included (1) eight issue, evidence, and jury instruction sanctions that defendants owned or were partners of Blueprint while they were employed by TestMasters, (2) three issue, evidence, and jury instruction sanctions that defendants breached their employment duties to TestMasters while employed by TestMasters, (3) two issue, evidence and jury instruction sanctions that defendants received funding from Nelson in January 2005, (4) six issue and jury instruction sanctions that defendants concealed and destroyed computers and documents, (5) four issue, evidence, and jury instruction sanctions that defendants conspired with McCarthy to steal TestMasters’ course materials and to develop Blueprint’s course materials and web site, (6) two issue and jury instruction sanctions that defendants gave willfully false deposition testimony, and (7) seven evidence sanctions barring defendants from introducing evidence in support of seven more affirmative defenses. The trial court

even issued an instruction that would tell the jury that defendants’ destruction of documents and deletion of computer files “tends to show liability for the causes of action against them.”

The trial court “concluded as a matter of law that its available remedies under the Discovery Act are limited to the nonmonetary sanctions of issue and evidence preclusion sanctions and to monetary sanctions,” and that it could not impose terminating sanctions because TestMasters’ motion was not based on a violation of a court order. The trial found that under the Discovery Act, “no court has imposed terminating sanctions in the absence of a violation of a court order,” and therefore TestMasters’ “only remedy is issue and/or evidence sanctions.”²⁰ The trial court noted that TestMasters was “not moving for sanctions on the basis that the Defendants failed to comply with any court order,” nor was TestMasters “moving for sanctions based on the inherent power of the court.”²¹

On TestMasters’ motion for monetary sanctions pursuant to section 2023.010, which TestMasters had filed the same day as its second motion for discovery sanctions,

²⁰ TestMasters asserts that the trial court “made clear that it denied the request for terminating sanctions *only* on procedural grounds,” such as a “procedural defect in [TestMasters’] moving papers” or TestMasters’ failure to “properly tee up” the motion. This was not the basis of the trial court’s August 6, 2008 denial of TestMasters’ request for terminating sanctions. TestMasters’ citations to the record in support of its assertion are to subsequent hearings and proceedings.

²¹ The trial court stated that because TestMasters brought its motion under the Code of Civil Procedure and not pursuant to the court’s inherent power, the rule of *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736 did not apply. Although TestMasters cited the *Slesinger* case in a (very small font) footnote in its memorandum of points and authorities in support of the motion, TestMasters did not refer to *Slesinger* or the court’s inherent power in its notice of motion. (See *366-386 Geary Street, L.P. v. Superior Court* (1990) 219 Cal.App.3d 1186, 1199-1200 [generally trial court may only consider grounds specified in notice of motion]; *Gonzales v. Superior Court* (1987) 189 Cal.App.3d 1542, 1545; cf. *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn.1 [error raised only in a footnote is not “a serious effort to raise the issue on appeal”]; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624, fn. 2 [mentioning an issue only in a footnote is insufficient to preserve the issue on appeal].) TestMasters’ second motion for discovery sanctions was based expressly and exclusively on section 2023.030.

the trial court found that defendants “knowingly lied under oath at depositions concerning the timing of the formation of Blueprint, the ownership structure of Blueprint, and the source of the start-up funding for Blueprint” and that defendants “clearly engaged in conduct that was designed to thwart discovery[;] and the Court believes that [TestMasters] should be compensated for expenses incurred to uncover the destruction of this evidence, the misstatements under oath, and with respect to McCarthy’s deposition.” The trial court granted the motion as to five of seven categories of evidence to which it was directed: (1) ownership of Blueprint, (2) timing and formation of Blueprint, (4) interference with the McCarthy deposition only, (6) attorneys’ fees for filing the second motion for discovery sanctions, and (7) scantron sheets destruction. The trial court denied the motion as to categories (3) additional electronic discovery and (5) Internet defamation campaign. TestMasters’ price tags, after further briefing requested by the court, were \$172,250.97 for category (1), \$625,490.02 for category (2), \$8,384.25 for category (4) limited to McCarthy’s deposition, \$179,734.84 for category (6), and \$24,182.30 for category (7), for a total of \$1,010,042.38. Of this, the trial court awarded \$738,085.10, after detailing its deductions from the requested amount.

Finally, in ruling on a separate motion filed on August 19, 2008 for additional costs pursuant to the December 12, 2007 order, the trial court awarded \$70,325.76 in additional monetary sanctions for further KPMG and videographer expenses pursuant to category (b) and category (c) costs authorized by the court’s December 12, 2007 order (“future costs” for post-December KPMG and deposition expenses).

2. *The parties’ contentions concerning the discovery orders*

Defendants argue (in Case Nos. B204774 and B211422) that the trial court abused its discretion by imposing these monetary and nonmonetary discovery sanctions. Defendants argue that in issuing these orders the trial court erred by not holding an evidentiary hearing, imposing nonmonetary sanctions in the absence of defendants’ violation of a prior court order, violating defendants’ due process and other rights under California law, and imposing excessive monetary sanctions. TestMasters argues (in Case Nos. B204774 and B211422) that not only are defendants wrong on all counts, but also

(in Case No. B218775) that the trial court abused its discretion by not imposing even more severe discovery sanctions than it did and that the trial court should have issued terminating sanctions against defendants.

3. *Standard of review*

“The trial court has broad discretion in selecting discovery sanctions, subject to reversal only for abuse. [Citations.] The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should “attempt[] to tailor the sanction to the harm caused by the withheld discovery.” [Citation.] The trial court cannot impose sanctions for misuse of the discovery process as a punishment. [Citation.] [¶] The discovery statutes evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination. ‘Discovery sanctions “should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.”’ [Citation.] If a lesser sanction fails to curb misuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher sanctions until the sanction is reached that will curb the abuse. ‘A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.’” (*Doppes v. Bentley Motors, Inc.* (2008) 174 Cal.App.4th 967, 992 (*Doppes*)). “Discovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery, and should be proportionate to the offending party’s misconduct.” (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223.)

“We review the trial court’s order under the abuse of discretion standard and resolve all evidentiary conflicts most favorably to the trial court’s ruling. We will reverse only if the trial court’s order was arbitrary, capricious, or whimsical. It is appellant’s

burden to affirmatively demonstrate error and where the evidence is in conflict, we will affirm the trial court's findings. [Citation.] We presume the trial court's order was correct and indulge all presumptions and intendments in its favor on matters as to which it is silent." (*Williams v. Russ, supra*, 167 Cal.App.4th at p. 1224; see *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1286; *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102 (*Liberty Mutual Fire*) ["[s]anction orders are 'subject to reversal only for arbitrary, capricious or whimsical action'"]; *Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 928 ["[i]n choosing among its various options for imposing a discovery sanction, a trial court exercises discretion, subject to reversal only for manifest abuse exceeding the bounds of reason"].) The question on appeal "is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose." (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36-37.) The amount of monetary sanctions is also reviewed for abuse of discretion. (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 ["the trial court has broad authority to determine the amount of a reasonable fee"]; *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1017 ["the propriety or amount of an attorney fees award is reviewed using the abuse of discretion standard"].)

Where, as here, the trial court makes factual determinations in ruling on a motion for discovery sanctions, the ruling is subject to the substantial evidence standard of review. (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430.) Once the trial court has determined the facts, we review the trial court's ruling for abuse of discretion. (*Ibid.*) "A reviewing court must therefore first determine whether substantial evidence supports the factual basis on which the trial court acted, and then determine whether the orders made by the trial court were an abuse of discretion in light of those facts." (*Ibid.*) Where the trial court imposes monetary sanctions under section 2023.030 based on factual findings made by the court, "that ruling is subject to the substantial evidence standard of review." (*Obregon*, at p. 430.)

4. *Substantial evidence supports the trial court's pretrial discovery sanction orders imposing monetary and nonmonetary sanctions*

In support of its first motion for discovery sanctions, TestMasters submitted evidence that defendants had concealed, discarded, or destroyed electronic documents, hard copy and handwritten drafts, and laptop computers, all after defendants had actual knowledge of pending or imminent claims by, and litigation with, TestMasters. And all of this evidence was undisputed: Defendants did not object to the evidence submitted by TestMasters, nor did defendants submit any evidence in opposition to the motion. The electronic evidence obtained as a result of KPMG's initial efforts and submitted in support of the motion showed that defendants selectively produced documents dated after 2004 when they were no longer working for TestMasters, but had not produced documents from 2004 that showed they were working on establishing Blueprint while still employed by TestMasters. These documents also showed for the first time some (but not all) of McCarthy's efforts in November and December 2004 to help defendants set up their new competing company. Substantial (and uncontroverted) evidence supported the trial court's findings that defendants disposed of and destroyed electronic evidence and the computers on which the evidence was stored, and defendants gave untruthful testimony about the timing of their collaboration on Blueprint to support their defenses in the litigation, and none of this evidence ever would have come to light absent considerable and expensive electronic forensics and recovery by KMPG.

Substantial evidence also supports the trial court's January 24, 2008 order requiring defendants to pay monetary sanctions of \$592,260.45 in electronic discovery costs charged by KPMG and its predecessor FIOS and the cost of the electronic discovery referee, and \$111,150.20 in attorneys' fees for the first motion for discovery sanctions. In support of the motion TestMasters submitted the declaration of Robin Singh, stating that KPMG had charged TestMasters \$542,695, of which TestMasters had paid \$328,516. Although defendants challenged the reasonableness of the fees charged by KPMG, the trial found that the entire amount was reasonable. The trial court stated that it "frankly was not troubled by the extent of the details supplied by KPMG or, for that matter, the

prior vendor [FIOS], and I think that although KPMG is expensive by some analyses, that they have, as we see, accomplished something the first forensic vendor was unable to do in terms of actually retrieving data, so I'm inclined to award the full amount sought." Defendants cannot challenge this finding on appeal because they have not included the KMPG invoices in the record on appeal.

In addition, substantial evidence supports the trial court's April 10, 2008 order awarding TestMasters an additional \$154,952.85 in monetary sanctions pursuant to the December 12, 2007 order. In support of TestMasters' request for these costs, Singh detailed in his declaration the costs TestMasters had incurred for the "forensic technology services" rendered by KPMG in December 2007 and for court reporter and videographer services, and attached 35 pages of supporting invoices. In opposition to the motion defendants argued that the "exorbitant cost of KPMG's services is unreasonable, particularly in light of the marginal relevance and utility of the documents recovered," that attorneys for TestMasters were not using KPMG-recovered documents very often in depositions, and that defendants needed additional time and information to analyze KPMG's invoices. The trial court did not abuse its discretion by reviewing all of this evidence and awarding TestMasters most (\$154,952.85) but not all (\$170,721.95) of the amount TestMasters had requested.

Similarly, substantial evidence supports the trial court's August 6, 2008 order granting TestMasters' second motion for discovery sanctions. The quantity and quality of the obviously responsive, directly relevant, and often crucial electronic documents that KPMG had been able to recover from defendants' computers, which defendants had never voluntarily produced, alone constituted substantial evidence that additional discovery sanctions were warranted. As TestMasters correctly argues, "the evidence that KPMG did recover suggests that all of the evidence defendants deleted was incriminating." In addition, there was evidence that not only did defendants know about these documents (because they had run searches for them), but also that defendants made some efforts to run programs to delete the documents. There was also evidence that defendants had made efforts to conceal or destroy emails and intentionally influence the

testimony of third party witnesses. And there was evidence collected in TestMasters' "Compendium of Perjury" that defendants coordinated their efforts to give false testimony in their depositions about when they began working in 2004 on their competing business compared to when they left TestMasters in 2005, when they created Blueprint's course materials, and when and how they were able to obtain funding for Blueprint. TestMasters' "Compendium of Perjury" may have overstated some of the contradictions between defendants' deposition testimony and the electronic documents KPMG obtained, as defendants argued in their opposition to the motion and their "Treatise of Truth." Nevertheless, there were still ample instances in which the contradiction between defendants' testimony and the unproduced documents was simply too apparent to survive defendants' after-the-fact explanations.²² The trial court did not abuse its discretion in finding that defendants intentionally engaged in a premeditated campaign of discovery abuse and in imposing appropriate and commensurate monetary and nonmonetary sanctions.

Substantial evidence also supports the trial court's September 29, 2008 order imposing \$738,085.10 in monetary sanctions pursuant to section 2023.010 for categories (1) ownership of Blueprint, (2) timing and formation of Blueprint, (4) interference with the McCarthy deposition only, (6) attorneys' fees for filing the second motion for discovery sanctions, and (7) scantron sheets destruction, but not for categories

²² For example, Teti's deposition testimony that he did not recall maintaining a "Prospective Clients" email folder, Triplett's deposition testimony that nothing had been reduced to writing about forming a new company in the fall of 2004, and Capuano's testimony that he did not discuss marketing with Teti when they first starting talking about going into business together, do not necessarily contradict electronic documents retrieved by KMPG showing that they were working to establish their new business while still employed by TestMasters. But Teti's deposition testimony that defendants did not decide to go into business together in late December 2004, Triplett's deposition testimony that she and Teti did not actively pursue the new business until January 2005, and Capuano's deposition testimony that defendants did not begin working on Blueprint's business plan and course materials until late 2004 and January 2005, directly contradicted electronic documents showing that they were doing all these things in the fall of 2004 while still employed by TestMasters.

(3) additional electronic discovery and (5) Internet defamation campaign. For category (1) TestMasters requested and documented \$142,475.80 in attorneys' fees for its three law firms of record and \$29,775.17 in expenses it incurred in discovering that Nelson had funded and received an interest in Blueprint in 2004, while defendants were still working for TestMasters, after defendants had concealed or misrepresented these facts in response to TestMasters' discovery. For category (2) TestMasters requested and documented \$500,018.82 in attorneys' fees and \$125,471.20 in expenses it incurred in discovering the true timing and formation of Blueprint during 2004-2005 after defendants had misrepresented the true facts and concealed or destroyed documents inconsistent with their false testimony. For category (4), limited to the McCarthy deposition, TestMasters requested and documented in supplemental briefing \$7,124.14 in attorneys' fees and \$1,260.11 in costs it incurred in connection with two depositions TestMasters took of McCarthy before KPMG found the McCarthy emails, but after defendants had interfered by contacting McCarthy and discussing with him the "particulars" of his deposition.²³ For category (6) TestMasters requested and documented \$87,804.44 in attorneys' fees it incurred in preparing and briefing the second motion for discovery sanctions and the motion for monetary sanctions. And for category (7) TestMasters requested and documented \$24,182.30 in attorneys' fees it incurred in attempting to discover the source data for Blueprint's claim that its students increased their test scores by an average of 10.5 points, only to learn that defendants had withheld and destroyed those documents.

The volume of backup documentation in support of TestMasters' request for these monetary sanctions was enormous and included multiple supporting declarations, exhibits, and charts, broken down by category and nature of expense. Counsel for TestMasters submitted a 65-page declaration describing in detail the various charges and expenses incurred, explaining how the charges related to the categories awarded by the court, listing by category the electronic documents that defendants had not produced that

²³ Because some of these fees "necessarily overlapped" with category (2) fees (i.e., TestMasters was seeking to depose McCarthy about the timing and formation of Blueprint), counsel for TestMasters made an allocation to avoid double-counting.

contradicted the discovery defendants had produced, and attaching as exhibits the invoices for attorneys' fees and expenses TestMasters had incurred as a result of defendants' discovery abuse. Defendants argued in opposition that the invoices included excessive, unnecessary, and "archaic" billing charges, and submitted a 39-page report by a "nationally recognized legal fees expert," who opined on the reasonableness of the bills. There was, however, more than substantial evidence to support the trial court's decision to award TestMasters \$738,085.10 of the \$1,010,042.38 TestMasters requested. (See *M. C. & D. Capital Corp. v. Gilmaker* (1988) 204 Cal.App.3d 671, 681.)

Finally, substantial evidence supports the trial court's September 29, 2008 order awarding TestMasters \$70,325.76 in additional monetary sanctions pursuant to the December 12, 2007 order. In support of TestMasters' request for these costs, TestMasters submitted evidence that it had "incurred fees to KPMG of \$265,561.00 and to court reporters and videographers of \$12,247.66." TestMasters submitted, again attached to Singh's declaration, 41 pages of KPMG invoices for work performed from February 2008 through July 2008 for which TestMasters had not requested payment in prior motions, and 11 pages of court reporter and videographer invoices (for deposition sessions of Riley, Teti, Capuano, Martin, Triplett). Because there was only \$58,078.10 remaining for KPMG costs under the \$200,000 limit in the trial court's December 12, 2007 order, TestMasters sought only \$58,078.10 (out of the \$265,561) for KPMG fees and the full \$12,247.66 in court reporter and videographer fees, for a total of \$70,325.76. In opposition to the motion defendants argued that the KPMG discovery lacked "relevance" and "utility," that KPMG's bills were "rife with vague, block billed entries," and that KPMG had inappropriately billed "for administrative tasks necessary to the operation of KPMG." The trial court did not abuse its discretion by reviewing all of this evidence, enforcing its previously imposed \$200,000 cap on KPMG fees, and awarding TestMasters an additional \$70,325.76 in monetary sanctions.²⁴

²⁴ Defendants do not argue that the two categories in the trial court's December 12, 2007 order for "the costs of future services" provided by KPMG, court reporters, and videographers (for which the trial court later awarded \$154,952.85 on April 10, 2008 and

5. *The trial court did not abuse its discretion by imposing discovery sanctions without a full evidentiary hearing*

Citing a group of Federal Rules of Civil Procedure Rule 11 cases,²⁵ defendants argue that a trial court must hold an evidentiary hearing before it can impose monetary and issue sanctions. Not only are these federal cases distinguishable,²⁶ they are contrary

\$70,325.76 on September 29, 2008) were not “incurred” under section 2023.030. (See *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1563, 1564 [“the use of the past tense—‘incurred’—in section 2023.030 suggests the individual seeking sanctions must have already become liable for those expenses before those expenses can be awarded as sanctions,” and thus a “trial court does not have the authority to award the costs of a future deposition as a discovery sanction where the individual has not yet ‘incurred’ those costs”]; *Johnson v. Superior Court* (1968) 258 Cal.App.2d 829, 839-840 [under former § 2034].)

²⁵ *J.M. Cleminshaw Co. v. City of Norwich* (D. Conn. 1981) 93 F.R.D. 338, 351, fn. 11; *Flaks v. Koegel* (2d Cir. 1974) 504 F.2d 702, 712; *Chemiakin v. Yefimov* (2d Cir. 1991) 932 F.2d 124, 130; *Didie v. Howes* (11th Cir. 1993) 988 F.2d 1097, 1105 & fn. 8; *Schlaifer Nance & Co., Inc. v. Estate of Warhol* (2d Cir. 1999) 194 F.3d 323, 335; *In re Kunstler* (4th Cir. 1990) 914 F.2d 505, 521-522; *Rogal v. American Broadcasting Cos., Inc.* (3d Cir. 1996) 74 F.3d 40, 45.

²⁶ *J.M. Cleminshaw* involved a monetary sanction against an attorney who delayed serving interrogatory responses from March 1980 to September 1981. (*J.M. Cleminshaw, supra*, 93 F.R.D. at pp. 344-346.) In *Flaks* the court found that an evidentiary hearing was required on the issue of willfulness in order to evaluate the defendant’s claim that his attorney was responsible for his failure to respond to discovery and appear at deposition, and that he had difficulty obtaining new counsel. (*Flaks v. Koegel, supra*, 504 F.2d at p. 712.) In *Chemiakin* the court stated that, as a general principle, “[a]lthough appellants attempt to engraft onto Rule 11 a requirement that an evidentiary hearing be held prior to the imposition of sanctions, there is no such requirement, absent disputed facts or issues of credibility” (*Chemiakin v. Yefimov, supra*, 932 F.2d at p. 130.) The court in *Schlaifer Nance*, in finding that the district court had not abused its discretion in denying a request for a hearing, stated an “opportunity to be heard does not necessarily entitle the subject of a motion for sanctions to an evidentiary hearing.” (*Schlaifer Nance & Co. v. Estate of Warhol, supra*, 194 F.3d at p. 335.) In *Didie* the district court had refused to allow the defendant to represent himself after his attorney improperly substituted out of the case, the “factual recitations” in the motion papers were “starkly contradictory,” and the Court of Appeals stated that it was “mindful of the leniency accorded to review of the filings of pro se parties.” (*Didie v. Howes, supra*, 988 F.2d at p. 1105.) In *Kunstler* the court rejected the plaintiffs’ argument that the district court should have held a hearing

to California law.

As a general rule evidentiary hearings on motions are not required. (See *Beckett v. Kaynar Mfg. Co.* (1958) 49 Cal.2d 695, 698, fn. 3 [“[m]otions are usually made and determined on affidavits alone”]; *Doe v. U.S. Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1436 [“[o]rdinarily, discovery motions are resolved by declaration”]; *American Federation of State, County and Municipal Employees v. Metropolitan Water District* (2005) 126 Cal.App.4th 247, 263 (*American Federation*) [“[i]n a law and motion, writ of mandate hearing, the trial court has broad discretion to decide a case on the basis of declarations and other documents rather than live, oral testimony”]; *Eddy v. Temkin* (1985) 167 Cal.App.3d 1115, 1121 [although trial court has “discretion to accept oral testimony,” it properly “exercised that discretion in favor of deciding the matter upon the declarations, which incorporated the depositions and documentary evidence”]; *McLellan v. McLellan* (1972) 23 Cal.App.3d 343, 359 [“[w]hile a court has the discretion to receive oral testimony, it may refuse to do so and may properly rule solely on the basis of affidavits”]; Cal. Rules of Court, rule 3.1306(a) [“[e]vidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown”].) California law allows a trial court to rule on a wide variety of pretrial motions, including dispositive motions, based on declarations only and without an evidentiary hearing. (See, e.g., *American Federation*, at p. 263 [petition to compel arbitration and petition for writ of mandate]; *Smith v. Golden Eagle Ins. Co.* (1999) 69 Cal.App.4th 1371, 1375 [motion to

before imposing Rule 11 sanctions, holding that “[d]ue process does not require an evidentiary hearing before sanctions are imposed, even when sanctions are imposed in part under the improper purpose prong of Rule 11.” (*In re Kunstler, supra*, 914 F.2d at p. 521.) And in *Rogal* the court held that the decision whether to hold an evidentiary hearing before imposing Rule 11 sanctions was discretionary, and stated that its “holding was a narrow one [depending] heavily on the specific nature” of the testimony in the case and that “in many instances in which sanctionable conduct occurs in the court’s presence, no hearing is required.” (*Rogal v. American Broadcasting Cos., supra*, 74 F.3d at pp. 44-45.)

enforce settlement agreement under § 664.6]; *Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1496 [motion to determine good faith settlement under § 877.6]; *Eddy*, at p. 1121 [post-judgment charging order].)

Section 2023.030, subdivision (a), provides that the court, “after notice to the affected party, person, or attorney, and after opportunity for hearing,” may impose monetary and nonmonetary sanctions for discovery abuse. The statute does not require an evidentiary hearing; only notice and an opportunity to be heard, which defendants here undeniably received.²⁷ (*Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 207-208; see *Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075, 1982 [“[t]he ‘opportunity to be heard,’ in the context of a hearing on the issue of [monetary] sanctions, [under § 2023.030] does not mean the opportunity to present oral testimony”]; *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 5 [terminating sanctions under former § 2034, subd. (b)].)

As defendants recognize, there is no California case holding that a trial court must hold an evidentiary hearing before imposing nonmonetary sanctions, or monetary sanctions for that matter, under section 2023.010. The cases cited by defendants, *Corralejo v. Quiroga* (1984) 152 Cal.App.3d 871, *Lesser v. Huntington Harbor Corp.* (1985) 173 Cal.App.3d 922, and *In re Marriage of Fuller* (1985) 163 Cal.App.3d 1070, involved defects or inadequacies in the notice of a motion seeking sanctions under section 128.5,²⁸ not a refusal to conduct an evidentiary hearing. (See *Corralejo*, at

²⁷ *Koshak v. Malek* (2011) 200 Cal.App.4th 1540, cited by defendants, is distinguishable. *Koshak* was an appeal from multiple convictions of indirect contempt, a quasi-criminal proceeding, not from orders imposing discovery sanctions in a civil case. Moreover, the issue in *Koshak* was notice, not entitlement to an evidentiary hearing. The contempt trial in *Koshak* lasted three weeks. The problem was that the notice of the contempt proceedings did not give the contemnor notice that, in addition to possible fines and jail time, the court might also “consider entering a restitution order in excess of \$1 million.” (*Id.* at pp. 1549-1550.)

²⁸ Actually, in *In re Marriage of Fuller*, *supra*, 163 Cal.App.3d 1070, it was unclear whether the trial court imposed the monetary sanctions under section 128.5, 177.5 or 2034. (See *In re Marriage of Fuller*, at p. 1076.)

pp. 873-874; *Lesser*, at pp. 930-933; *In re Marriage of Fuller*, at p. 1078.) The dicta in *Corralejo* regarding “contemplation of an evidentiary hearing” refers to another case in which the issue was whether the attorney or the client was responsible for the failure to respond to discovery. (See *Corralejo*, at p. 873.)

Defendants place principal reliance on language from the Supreme Court’s decision in *Rosenthal v. Great Western Financial Security Corp.* (1996) 14 Cal.4th 394. In *Rosenthal* the Supreme Court held that a party opposing a motion to compel contractual arbitration does *not* have a right to a jury trial and that the summary procedure governing motions does not deny the opposing party its state constitutional right to a jury. (*Id.* at p. 413.) The opposing party argued that “when the declarations and documentary evidence present a material factual dispute as to the existence or enforceability of the arbitration agreement,” the trial court’s resolution of those material factual disputes without an evidentiary hearing was an abuse of discretion. (*Id.* at p. 414.) The Supreme Court disagreed: “There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony.” (*Ibid.*) Defendants obviously do not rely on this language of the *Rosenthal* opinion because it is directly contrary to their argument. The Supreme Court in *Rosenthal*, however, went on to state that, when “the enforceability of an arbitration clause may depend upon which of two sharply conflicting factual accounts is to be believed, the better course would normally be for the trial court to hear oral testimony and allow the parties the opportunity for cross-examination.” (*Ibid.*)

There were no “sharply conflicting factual accounts” in connection with TestMasters’ first motion for discovery sanctions (because defendants did not submit any evidence of their “account”), and not much in the way of “sharply conflicting factual accounts” in connection with the second motion. Defendants submitted declarations in opposition to the second motion that, as the trial court recognized, were unbelievable on their face and never fully explained defendants’ failure to produce a single piece of paper reflecting that defendants began working on Blueprint in 2004, not 2005. The trial court

did not need to observe Teti's testimony in court (in addition to observing Teti's videotape deposition played in court) to find that his explanation of how the 2004 emails disappeared from his 2005 laptop computer only to reappear on the 2006 Firewire drive made no sense, nor to recognize the inherent implausibility of defendants' explanations of how so many crucial and damaging emails disappeared from their computers, only to be found after extensive electronic detective work by KPMG. The trial court also did not need to hear Teti explain in person that he reviewed the electronic course files McCarthy had stolen from TestMasters only for formatting to determine that Teti's explanation was inherently implausible. As TestMasters aptly puts it, the "notion that Teti needed to steal his employer's computer files to see how the LSAC questions were formatted" is "absurd on its face," particularly because defendants admittedly could have simply called the LSAC. The trial court did not abuse its discretion by not allowing the parties to supplement their extensive presentations with live testimony. (See *Rosenthal, supra*, 14 Cal.4th at pp. 413-414 [trial court's refusal to conduct a non-mandatory hearing is reviewed for abuse of discretion]; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 981 & fn. 12 [in resolving "conflicting factual evidence" on a motion to compel arbitration, "the trial court on remand may, at its discretion, rely on the documentary evidence already presented, may request further documentary submissions, or may request oral testimony"].)

Finally, although there was no live testimony at the July 16, July 17, and July 18, 2008 hearings on TestMasters' second motion for discovery sanctions, there was an extensive hearing that included lengthy legal argument, reading and playing of videotaped deposition testimony, and PowerPoint presentations. This is not a case where the trial court had no opportunity to review and consider the demeanor and credibility of witnesses; the trial court actually observed recorded deposition testimony at the hearing.

6. *The trial court did not err by imposing discovery sanctions in the absence of a violation of a prior court order*

Defendants argue that the discovery sanctions orders must be reversed because the trial court imposed the sanctions without first finding that defendants had violated a prior

court order. Generally, in order for a court to impose a nonmonetary sanction, such as an evidence, issue, or terminating sanction for misuse of the discovery process, “there must be a failure to obey an order compelling discovery.” (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1423 (*New Albertsons*)). This requirement of a pre-sanction order and a violation “provides some assurance that such a potentially severe sanction will be reserved for those circumstances where the party’s discovery obligation is clear and the failure to comply with that obligation is clearly apparent.” (*Ibid.*)

But there are exceptions. As the court in *New Albertsons* explained, “if it is sufficiently egregious, misconduct committed in connection with the failure to produce evidence in discovery may justify the imposition of nonmonetary sanctions, even absent a prior court order compelling discovery, or its equivalent. Furthermore, a prior court order may not be necessary where it is reasonably clear that obtaining such an order would be futile.” (*New Albertsons, supra*, 168 Cal.App.4th at p. 1426; cf. *Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 76 [plaintiffs not entitled to evidence sanction absent violation of a court order “or other egregious misconduct”].) Thus, a court may impose nonmonetary sanctions for the misuse of discovery absent a failure to obey a court order when the sanctioned party is unable to provide discovery it promised it would provide; the sanctioned party misrepresented the existence or availability of the discovery; an order would be futile because the discovery was unavailable, stolen, or destroyed; or the sanctioned party repeatedly and falsely assured the requesting party that all responsive discovery had been produced. (*New Albertsons*, at pp. 1424-1426, 1428-1429; see *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327, fn. 8 [“imposition of evidence and issue sanctions without a court order violation” is proper when “requiring requesting party to seek such an order would have been futile in light of responding party’s claim that requested documents had been stolen,” and when “sanctioned party concededly could not provide the audit it had promised”].)

Another exception to the rule requiring violation of a prior court order, similar to and perhaps included in the other exceptions but particularly applicable to this case, is that a nonmonetary sanction for discovery abuse, including a terminating sanction, may

be “appropriate in the first instance without a violation of prior court orders in egregious cases of intentional spoliation of evidence.” (*Williams v. Russ, supra*, 167 Cal.App.4th at p. 1223; see *R.S. Creative, Inc. v. Creative Cotten, Ltd.* (1999) 75 Cal.App.4th 486 (*R.S. Creative*) [terminating sanction appropriate when the plaintiff’s principal deleted files on her laptop before defendant’s computer expert could inspect it].)²⁹ The court may also impose a nonmonetary sanction “in the absence of a violation [of] an order compelling an answer or further answer” to discovery when “the answer given is *willfully false*.” (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 334.) For this last exception, when “the court has not issued an order compelling a response or further response to an interrogatory (and where such an order has not been violated), the party moving for the exclusion of evidence has the burden of establishing the answer given by the responding party was willfully false, i.e., *intentionally not true*.” (*Ibid.*; see *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1561 [“*Saxena* held that where the trial court has not issued an order compelling a response or further response to an interrogatory, an evidence sanction may only be imposed where the answer to the interrogatory is willfully false”].)

This case falls squarely under the exceptions for destruction of evidence and intentionally false discovery responses. Therefore, the trial court had the authority to impose nonmonetary sanctions in the absence of a violation of a court order.³⁰

²⁹ The terminating sanction in *R.S. Creative* was also based on the violation of two orders compelling the deposition of the plaintiff’s principal. (See *R.S. Creative, supra*, 75 Cal.App.4th at pp. 492, 496.) The “primary issue” in *R.S. Creative*, however, “was the appropriate sanction for intentional destruction of evidence.” (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 278.) The court’s opinion in *R.S. Creative* suggests that the destruction of evidence was the more important basis for the decision affirming the imposition of terminating sanctions. (See *R.S. Creative*, at pp. 494-495 [“[t]his is the first reported California case to consider terminating sanctions for spoliation of evidence after the Supreme Court’s decision in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1”].)

³⁰ The parties dispute whether defendants violated a court order. TestMasters argues that defendants violated the trial court’s August 17, 2006 “electronic discovery order” by

7. *The trial court did not impose excessive or unconstitutional monetary sanctions*

Defendants argue that the trial court erred in awarding monetary sanctions under section 2023.030 in excess of the amount of reasonable attorneys' fees incurred by TestMasters in bringing its pretrial motions for discovery sanctions. Defendants argue that section 2023.030 does not authorize recovery of costs such as the expense of the forensic electronic discovery conducted by KPMG and its predecessor and that the most TestMasters can recover is the costs and fees incurred in bringing the motions. Defendants also argue that the trial court's orders granting TestMasters' requests for monetary sanctions improperly shifted the cost of electronic discovery from the propounding party to the responding party and that the monetary sanctions are impermissibly punitive.

The language of section 2023.030, subdivision (a), does not support defendants' position. The statute provides: "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." Section 2023.030, subdivision (a), authorizes the court to order the sanctioned party to pay "reasonable expenses, including attorney's fees," not just reasonable attorneys' fees, and the reasonable expenses of anyone, not just

withholding from production their 2004 computers and hiding or erasing files. Defendants argue that they did not violate a court order because they did not withhold their 2004 computers (they disposed of them before litigation commenced) and they did not hide or delete anything. We cannot determine whether defendants violated any of the terms of this "electronic discovery order" because there is no such formal order. On August 3, 2006 the trial court gave an oral tentative ruling on TestMasters' motion to permit inspection of defendants' computers from August 2004 to the date of inspection that impliedly granted the motion by outlining a procedure for the discovery referee, the electronic forensic expert, and the parties to search, identify, and litigate whether emails and other electronic documents found on defendants' computers were privileged. The trial court, however, did not state the terms of the order with sufficient specificity to evaluate compliance and violation. On August 17, 2006 the trial court adopted its August 3, 2006 tentative ruling, referring to it as "essentially a partial grant with limitations," but did not sign a written order.

the opposing party. The statute also authorizes payment of reasonable expenses incurred “as a result of” the misuse of the discovery process, not just expenses incurred in bringing the motion.

The cases cited by defendants are distinguishable. In *Lund v. Superior Court* (1964) 61 Cal.2d 698, the court stated that the provisions of former section 2034 “contemplate only that a defaulting party may be assessed the costs of bringing the motion, including attorneys’ fees,” but not the costs of taking a certificate of non-appearance at a deposition. (*Lund*, at p. 715.) But that was because former section 2034, unlike section 2023.030, subdivision (a), expressly limited the monetary sanction to “the amount of reasonable expenses incurred in obtaining the order” (See former § 2034, subd. (a) “[i]f the motion is granted and if the court finds that the refusal was without substantial justification the court may require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney’s fees”]; *Lund*, at p. 715; *Guzman v. General Motors Corp.* (1984) 154 Cal.App.3d 438, 445, fn. 8.) The same is true for *Johnson v. Superior Court* (1968) 258 Cal.App.2d 829, in which the court stated that under former section 2034, subdivision (a), “the sanctions which may be imposed are limited to the ‘reasonable expenses incurred [by the successful party] in obtaining the order’ compelling discovery.” (*Johnson*, at p. 840.)

In *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, the court held that under *Trope v. Katz* (1995) 11 Cal.4th 274, “an attorney who litigates in propria persona may not be awarded a monetary discovery sanction” for misuse of discovery under former sections 2030, subdivision (l) and 2023, subdivision (b)(1). (*Argaman*, at p. 1175; see *Musaelian v. Adams* (2009) 45 Cal.4th 512 [self-represented attorney may not recover attorneys’ fees as sanctions under § 128.7].) As TestMasters correctly points out, this is a very different issue from the issue in this case. The court in *Argaman* held that a self-represented attorney could not recover attorneys’ fees under these statutes because they were not incurred. The court explained that “an attorney litigating in propria persona

cannot be said to “incur” compensation for his time and his lost business opportunities” because he or she has not “become obligated to pay it.” (*Argaman*, at p. 1177.) The issue in *Argaman* was not whether a prevailing party on a motion for discovery sanctions can recover reasonable expenses beyond the attorneys’ fees incurred on the motion, but whether a self-represented attorney incurs any attorneys’ fees or expenses at all.³¹ Here, it is undisputed that TestMasters actually incurred forensic electronic discovery expenses charged by KPMG as well as attorneys’ fees charged by TestMasters’ attorneys of record. In addition, the court in *Argaman* stated: “A monetary discovery sanction may be based not only on attorney’s fees and costs, but also on any other reasonable expense incurred. The term ‘reasonable expenses’ includes other costs directly related to the discovery misuse.” (*Id.* at p. 1179.)

Brewster v. Southern Pacific Transportation Co. (1991) 235 Cal.App.3d 701 involved a different statute, section 128.5, which authorized a court to “order a party or the party’s attorney to pay ‘any reasonable expenses, including attorney’s fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.’” (*Brewster*, at p. 710.) The attorney in *Brewster* had served the defendant railroad company with a false temporary restraining order that caused the railroad company to stop operating certain trains. (*Id.* at p. 707.) When the railroad company learned that there was no temporary restraining order, it filed a motion for monetary sanctions under section 128.5, seeking to recover \$139,000 in consequential damages for the financial loss caused by the wrongful closing of rail operations, plus attorneys’ fees, which the trial court granted. (*Brewster*, at p. 711.) The Court of Appeal reversed, not because sanctions were limited to attorneys’ fees incurred in bringing the motion, but because “reasonable expenses” did not include consequential damages “unrelated to the cost of the actual proceedings before the court.” (*Id.* at pp. 710-711.)

³¹ The court in *Kravitz v. Superior Court* (2001) 91 Cal.App.4th 1015, 1020, while agreeing with *Argaman*, stated that “some of the costs that pro se litigants incur, if reasonably identifiable and allocable, are recoverable as sanctions—even though those costs are ones that lawyers ordinarily include in their hourly rates or other fee structures.”

The court noted that the effect of the sanctions award was to relieve the railroad “of the obligation to file a civil suit for damages against [the attorney] to recover the cost of rerouting [its] trains.” (*Id.* at p. 711.)

Unlike the sanctions order in *Brewster*, the trial court’s orders in this case compensated TestMasters for expenses directly related to defendants’ discovery abuse and TestMasters’ efforts to mitigate the effects of defendants’ misconduct. Moreover, courts have held that “reasonable expenses” under section 128.5 are *not* limited to the attorneys’ fees incurred in bringing the motion. (See, e.g., *Abandonato v. Coldren* (1995) 41 Cal.App.4th 264, 268 [“sanctions under that section [(§ 128.5)] are not limited to court costs and attorneys fees but include those reasonable expenses ‘directly related to and in furtherance of the litigation’”], disapproved on other grounds in *Musaelian v. Adams*, *supra*, 45 Cal.4th at p. 520; *Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, 307 [sanctions award of “compensation for airfare and reimbursement for lost vacation” proper under § 128.5 because “[r]easonable expenses’ have been interpreted to include more than attorney fees and costs”]; *580 Folsom Associates v. Promethius Development Co.* (1990) 223 Cal.App.3d 1, 27-28 [rejecting argument that “the ‘expenses’ to be awarded as sanctions under section 128.5 cannot include other than costs including attorneys’ fees”]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 9:1079, pp. 9(III)-12 to 9(III)-13 [“[t]he statute’s wording makes clear that sanctions may *exceed* the attorney fees incurred by the prevailing party in opposing the frivolous motion”].)

And in *Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, the court reversed a \$1,000 “penalty on plaintiff for failing to comply with her discovery obligations” (*id.* at p. 262), not because section 2023 only allowed recovery of attorneys’ fees incurred in connection with the discovery motion, but because the \$1,000 sanction “was in effect a fine” that was “unrelated to the expenses defendants incurred in compelling plaintiff to submit to X-rays” at a medical examination and “was simply an arbitrary amount defendants selected and the trial court awarded in order to punish plaintiff for her disobedience.” (*Id.* at pp. 262, 263.) In contrast, the monetary sanctions here

compensated TestMasters for the documented expenses it incurred because of defendants' discovery abuse; they were not arbitrary punishments. The basis of the monetary sanctions orders was not to punish defendants, but to compensate TestMasters for the reasonable expenses it incurred in investigating and discovering whether, why, and where electronic documents had been deleted and moved.

For this reason, the monetary sanctions imposed by the trial court, while large, were compensatory, not punitive. (See *Pratt v. Union Pacific Railroad Co.* (2008) 168 Cal.App.4th 165, 183 [“[m]onetary sanctions encourage ‘voluntary compliance with discovery procedures by assessing the costs of compelling compliance against the defaulting party’”].) As the trial court stated, defendants “clearly engaged in conduct that was designed to thwart discovery and the Court believes that [TestMasters] should be compensated for expenses incurred to uncover the destruction of evidence, the misstatements under oath, and with respect to McCarthy’s deposition.” The size of the monetary sanctions incurred by TestMasters as a result of defendants’ conduct reflects more on defendants’ conduct than on anything punitive in the trial court’s orders.

Because the orders imposing monetary sanctions against defendants were compensatory, defendants’ argument that the orders violated their due process rights as impermissibly punitive is unpersuasive. Indeed, defendants did not argue in opposition to either motion for discovery sanctions or the first motion to establish the amount of monetary sanctions incurred prior to December 12, 2007 that the amount of monetary sanctions sought by TestMasters was punitive or violated defendants’ due process rights.³² Moreover, the cases cited by defendants do not support defendants’ argument.

³² In opposing TestMasters’ first motion for costs, defendants argued that the fees charged by KPMG were unreasonable and that KPMG’s invoices were “vague and insufficient” and “inadequate,” and that KPMG’s services were of “marginal relevance and utility,” but not that the amounts TestMasters sought as monetary sanctions were punitive or unconstitutional. Defendants also argued that since the December 12, 2007 order they had gone back to their computers and located and produced additional electronic documents at a substantially lower cost. The trial court understandably viewed such an after-the-fact argument with skepticism.

For example, defendants assert that in *In re White* (2004) 121 Cal.App.4th 1453, 1487-1488, the court took “into account ‘ability to pay monetary sanctions’ in determining what sanction paid to the court would be ‘reasonable and responsible.’” Actually, the court in *White* stated that the attorney subject to the monetary sanction (for filing frivolous habeas petitions) had “presented no evidence of his financial ability to pay monetary sanctions,” and that the \$25,000 sanction was “reasonable and responsible” not because of the attorney’s ability to pay, but “to compensate this court in part for the cost of processing, reviewing, and deciding the writ petitions and the order directing [the attorney] to show cause why sanctions should not be imposed.” (*Id.* at pp. 1487-1488.) In *Rail-Transport Employees Assn. v. Union Pacific Motor Freight* (1996) 46 Cal.App.4th 469, the court merely held that an order imposing discovery sanctions in excess of \$5,000 was appealable, an order imposing sanctions of less \$5,000 was not, and that, because “[d]iscovery sanctions rarely exceed \$5,000 in California state courts,” the “vast majority of discovery sanctions” orders are not appealable. (*Id.* at pp. 474-475.) The court also noted that “those cases involving misuse of the discovery process which result in sanctions exceeding \$5,000 are reviewable by direct appeal.” (*Id.* at p. 475.)

Citing section 2031.280, subdivision (e) (subdivision (c) at the time), and *Toshiba America Electronic Components v. Superior Court* (2004) 124 Cal.App.4th 762, defendants argue that the trial court’s August 6, 2008 order improperly shifted the cost of retrieving deleted or not easily accessible emails from TestMasters to defendants. This argument is also unpersuasive. Section 2031.280, subdivision (e), provides that “[i]f necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonable usable form.” “Although the statute is not explicit, ‘reasonably usable form’ presumably means ESI [electronically stored information] must be produced in a form that a party can access and read, which in some cases may be a paper printout or in other cases may be an electronically readable and searchable file using commonly available programs.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 8:1472.5, p. 8H-27 (rev. #1 2012).) The statute addresses the issue of who bears the

cost of making readable electronic information that the responding party has produced, not the issue of who bears the cost of finding electronic information that the responding party has concealed. Section 2031.280, subdivision (e), does not preclude the kind of monetary sanctions the trial court ordered here.

In *Toshiba* the court held that the predecessor to section 2031.280, subdivision (e), in a “proper case,” placed on the demanding party the expense of translating data compilations into usable form. (*Toshiba America Electronic Components v. Superior Court, supra*, 124 Cal.App.4th at pp. 765, 769.) *Toshiba*, however, did not involve any misuse of discovery. The plaintiff in *Toshiba* served written discovery and the defendant responded. The court specifically noted that its decision did not “divest the trial court of its traditional discretion in discovery matters,” did not “always require a requesting party to pay all costs associated with any translation of a data compilation regardless of the particular circumstances of the case,” and did not affect the trial court’s authorization “to manage discovery and prevent misuse of discovery procedures.” (*Id.* at p. 771.) Moreover, the responding party in *Toshiba* admitted that there were “more than 800 backup tapes for the pertinent [eight-year] time period.” (*Id.* at p. 765.) The responding party did not object to the production of this information, but objected only to paying for the expense of searching it. In stark contrast, defendants concealed responsive emails from production, deleted or discarded computers and their contents, and at least initially did not disclose that the Firewire drive existed. The trial court’s awards of monetary sanctions did not run afoul of the court’s decision in *Toshiba*.

8. *The trial court did not abuse its discretion by failing to impose terminating sanctions or greater nonmonetary sanctions*

TestMasters argues in Case Nos. B204775 and B211422 that the trial court did not abuse its discretion by going too far in its December 12, 2007 and August 6, 2008 orders imposing monetary, evidence, issue, and jury instruction sanctions. We agree.

TestMasters argues in Case No. B218775 that the trial court abused its discretion by not going far enough, that is, in failing to impose terminating sanctions. TestMasters argues that at least by the time of its third, posttrial motion for discovery sanctions, “if not

sooner, the trial court was required to impose” either terminating sanctions or sufficient “issue and evidentiary sanctions to preclude defendants from litigating whether they used TestMasters’ course materials to create their own.” We think the trial court, in making its December 12, 2007 and August 6, 2008 discovery sanctions orders which included a heavy dose of preclusion orders, significant adverse jury instructions, and hefty monetary compensation, did not abuse its discretion.

In its December 12, 2007 order the trial court declined to impose terminating sanctions, without prejudice to TestMasters’ right to file “a renewed motion for terminating sanctions,” finding that “the noncompliance was [not] so egregious and incurable as to require the imposition of terminating sanctions” TestMasters’ second motion for discovery sanctions was that renewed motion. In its August 6, 2008 order the trial court stated its belief that, because TestMasters had not based its second motion for discovery sanctions on a violation of a court order, the trial court was limited “as a matter of law” to evidence, issue, and monetary sanctions. As we explain, we disagree with this latter conclusion: There are circumstances in which terminating sanctions may be appropriate even in the absence of a violation of a prior court order. Nevertheless, we conclude that the trial court’s decision not to impose terminating sanctions in either the December 12, 2007 or the August 6, 2008 order was within its discretion.

Discovery sanctions should be tailored “to the harm caused by the withheld discovery.” (*Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516; see *Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 229.) “Discovery sanctions ‘should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.’” (*Doppes, supra*, 174 Cal.App.4th at p. 992; see *Parker v. Wolters Kluwer U.S., Inc.* (2007) 149 Cal.App.4th 285, 301 (*Parker*).) Terminating sanctions “are to be used sparingly.” (*R.S. Creative, supra*, 75 Cal.App.4th at p. 496.)

The only nonmonetary sanction imposed by the trial court’s December 12, 2007 order was the striking of defendants’ equitable defenses (unclean hands, estoppel, laches,

and TestMasters’ “bad faith”), a limited nonmonetary sanction tailored to defendants’ inequitable conduct that the record disclosed at that time. And when the record revealed significantly worse conduct, the trial court in its August 6, 2008 order appropriately imposed more severe nonmonetary sanctions, albeit nonmentary sanctions still related to and commensurate with the nature and extent of defendants’ discovery abuse. Because defendants’ discovery misconduct involved the concealment and destruction of documents in discovery, and the giving of testimony that the concealed documents revealed was false, the trial court issued sanctions relating to the issues on which defendants’ discovery abuse had prevented a fair trial, but no more. The trial court’s 32 sanctions in its August 6, 2008 order consisted of findings, preclusion orders, and jury instructions on the issues of Blueprint’s formation, funding, ownership, and timing, and instructions that defendants had breached their employment duties to TestMasters while employed there. The trial court also issued sanctions instructing the jury that defendants had lied in their depositions and had concealed and destroyed documents in discovery. These issues were the ones most directly affected by defendants’ concealment and destruction of documents primarily from 2004. (See *Parker, supra*, 149 Cal.App.4th at p. 301 [discovery sanctions should “correct the problem presented”]; *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613 [discovery sanctions “cannot go further than is necessary to accomplish the purpose of the discovery”].) The trial court’s August 6, 2008 order imposed drastic sanctions, but sanctions appropriate to the nature and extent of defendants’ discovery abuse. The trial court could have imposed terminating sanctions, but its failure to do so was not an abuse of discretion.

The trial court’s failure to issue additional nonmonetary sanctions beyond the 32 it did order, such as issue, evidence, and jury instruction sanctions that defendants not only wrongfully obtained TestMasters’ course materials, but also used them in creating Blueprint’s course materials, which TestMasters had requested,³³ was also not an abuse

³³ Three sanctions (out of the 48 requested by TestMasters and the 32 imposed by the trial court) that the trial court did not grant were (1) a “finding and jury instruction that the Defendants used [TestMasters’] course materials to create the Blueprint course

of discretion. As the trial court subsequently stated, although TestMasters did not have all the emails defendants may have concealed or destroyed, TestMasters had some of them, and those TestMasters had were explosively incriminating (e.g., the “You’re a god,” “Don’t save these e-mails,” “sperm from a cow,” and “snot” emails). The evidence TestMasters had, combined with the powerful 32 nonmonetary sanctions that the trial court did order, gave TestMasters a great advantage in arguing that defendants used TestMasters’ course materials to create Blueprint’s course materials. But the trial court rightly left this final factual issue for the jury. True, TestMasters may not have had a perfect electronic trail from its course files to Blueprint’s, but TestMasters had a pretty good one, and according to the trial court “enough electronic discovery . . . that a fair fight on the merits could be had.” TestMasters also had an evidence preclusion order and jury instructions that defendants conspired with McCarthy to steal TestMasters’ course materials, while still employed by, and in breach of their duties of loyalty to, TestMasters. The trial court’s nonmonetary sanctions were enough.

Nor do we agree with TestMasters that the trial court’s failure to instruct the jury that defendants used TestMasters’ course materials in creating Blueprint’s course materials precluded TestMasters from having “a fair trial on the core question of how defendants used TestMasters’ course materials to create their own.” TestMasters complains that it was “impossible to prove that defendants used [TestMasters’ course files] to create the Blueprint course” and that “only the computers and handwritten drafts” concealed or destroyed by defendants “would have conclusively proved—or disproved—that defendants used TestMasters’ materials as the template for the Blueprint course” There are, however, many ways to prove use of misappropriated information. “[M]isappropriation and misuse [of trade secret information] can rarely be proved by convincing direct evidence.” (*Hanger Prosthetics & Orthotics, Inc. v.*

materials, in violation of their duty of loyalty” to and (2) “in breach of their oral employment contracts with,” TestMasters, and (3) an order barring defendants “from offering evidence as to the distinctiveness of their course materials.”

Capstone Orthopedic, Inc. (E.D. Cal. 2008) 556 F.Supp.2d 1122, 1136; accord, *UniRAM Technology, Inc. v. Taiwan Semiconductor Mfg. Co.* (N.D. Cal. 2007) 617 F.Supp.2d 938, 944.) “In most cases plaintiffs must construct a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what plaintiffs allege happened did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced defendants and defendants’ witnesses who directly deny everything.” (*SI Handling Systems, Inc. v. Heisley* (3d Cir. 1985) 753 F.2d 1244, 1261; see *Bradbury Co., Inc. v. Teissier-duCros* (D. Kan. 2006) 413 F.Supp.2d 1209, 1225 [“direct evidence of trade secret misappropriation is rarely available”]; *RKI, Inc. v. Grimes* (N.D. Ill. 2002) 200 F.Supp.2d 916, 923 [“direct evidence of misappropriation of trade secrets is typically not available”].) In one sense, TestMasters had something better than the discovery that defendants had concealed or destroyed: TestMasters had findings and jury instructions from the court establishing that defendants breached their duties of loyalty to TestMasters and their employment contracts with TestMasters, findings and jury instructions that defendants stole TestMasters’ course materials while they were working for TestMasters, and explosive and prejudicial (but not unduly) circumstantial evidence that included emails graphically displaying defendants’ desire and motive to harm their employer, all without having the need to respond to defendants’ explanations on these issues. (See *King-Indiana Forge, Inc. v. Millenium Forge, Inc.* (S.D.Ind. Mar. 18, 2009, No. 1:07-cv-341-SEB-WGH) 2009 WL 734720 at p. 5 [circumstantial evidence of misappropriation “can be as probative as direct evidence and sometimes is even more reliable”].)

Moreover, TestMasters was not entitled to a nonmonetary sanction that “would have conclusively proved” that defendants used TestMasters’ course material to create Blueprint’s course materials. Imposing such an issue sanction would have been a windfall to TestMasters by relieving TestMasters entirely of its burden proving any elements of its case other than the amount of its damages. (See *Parker, supra*, 149 Cal.App.4th at p. 301 [“purpose of discovery sanctions “is not ‘to provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits’””]; *McGinty v.*

Superior Court (1994) 26 Cal.App.4th 204, 214 [court must evaluate whether the discovery sanction would result in “a windfall in the litigation” to the other side]; *In re Marriage of Economou* (1990) 224 Cal.App.3d 1466, 1475 [“[d]iscovery sanctions cannot be imposed to punish the offending party or to bestow an unwarranted ‘windfall’ on the adversary”].) Indeed, the trial court stated that in exercising its discretion it was “mindful that the object of a nonmonetary sanction is not to punish the offending party but rather it is to protect the other party who was entitled to certain discovery by creating a satisfactory remedy.”

TestMasters places heavy emphasis on *Doppes*. The plaintiff in *Doppes* complained about an “obnoxious odor” in a Bentley Arnage he had purchased from the defendant. (*Doppes, supra*, 174 Cal.App.4th at p. 972.) The defendant failed to comply with several court orders requiring it to produce documents that ultimately showed the defendant had knowledge of and had received complaints about the odor problem. The plaintiff filed two motions for discovery sanctions, the second requested a terminating sanction, which the trial court heard on the defendant’s objection to the discovery referee’s report and recommendation on the first day of trial. (*Id.* at p. 982.) The trial court adopted the discovery referee’s recommendation of sanctions and adverse jury instructions, including instructions that the defendant had actual knowledge and had received complaints about the odor problem, that the odor problem was significant, that the defendant did not reveal to the plaintiff any information about the known odor problem, and that the defendant did not produce documents despite court orders to do so. (*Id.* at pp. 980-982.) The trial court did not impose terminating sanctions. (*Ibid.*)

After the trial started the plaintiff asserted that the defendant had still not complied with the court’s orders allowing counsel for plaintiff to access and “data-mine” electronic documents on the defendant’s computers. (*Doppes, supra*, 174 Cal.App.4th at p. 982.) So in the middle of trial the plaintiff and his attorney flew to Michigan for two days to review emails the defendant had not produced and learned that the defendant had deleted or concealed emails, files, reports, and other records relating to the odor problem. (*Id.* at pp. 984-986.) In ruling on the plaintiff’s request for additional sanctions (presumably

after returning from Michigan mid-trial), the trial court denied the request but decided to read the adverse jury instructions at that point in the trial. (*Id.* at pp. 985-986.) The jury ultimately found the defendant had violated the Song-Beverly Consumer Warranty Act, had concealed a material fact but had not done so intentionally, and had breached express and implied warranties, and awarded the plaintiff \$314,300, which the trial court reduced to \$214,300 to account for duplication. (*Id.* at p. 986.)

The Court of Appeal reversed, making the “extraordinary, yet justified, determination that the trial court abused its discretion by failing to impose terminating sanctions against defendant for the misuse of the discovery process,” and finding that the “record demonstrates defendant engaged in repeated and egregious violations of the discovery laws that not only impaired plaintiff’s rights, but threatened the integrity of the judicial process.” (*Doppes, supra*, 174 Cal.App.4th at p. 971.) The court held that “once it was learned *during trial* that [the defendant] had failed miserably to comply with discovery orders and directives, . . . the trial court had to impose terminating sanctions.” (*Id.* at p. 994; see *id.* at p. 996 [“the trial court had to impose terminating sanctions once it was learned during trial that [the defendant] still had failed to comply with the discovery orders and directives and [the defendant’s] misuse of the discovery process was even worse than previously known”].)

In some ways, defendants’ discovery misuse in this case was worse than the discovery misuse in *Doppes*. After all, the defendant in *Doppes* concealed documents and refused to produce them; defendants here actually deleted documents and lied in deposition about facts that those documents would have contradicted. On the other hand, TestMasters knew about the deleted documents and had obtained more extensive monetary and nonmonetary sanctions long before the trial began in November 2008, and the trial court continued the trial several times to allow TestMasters to take more extensive electronic and other discovery in response to defendants’ discovery abuse. Unlike in *Doppes*, in which the trial court heard the motions for terminating sanctions the day of and in the middle of trial, leaving the *Doppes* trial court with little time or few options to craft and impose effective nonmonetary sanctions other than terminating

sanctions, the trial court in this case heard TestMasters' two pretrial motions for discovery sanctions one year and three months, respectively, before the trial.³⁴ The discovery sanctions the trial court chose here allowed TestMasters to conduct forensic electronic discovery (at defendants' expense) to mitigate the effects of defendants' discovery conduct, and to obtain the benefit at trial of far more burdensome issue, evidence, and jury instruction sanctions than were possible in *Doppes*. The Court of Appeal in *Doppes* actually stated that the trial court did *not* abuse "its discretion initially in approving the discovery referee's recommendation" immediately before trial "of imposing the 'more narrow' sanction of giving the jury instruction." (*Doppes, supra*, 174 Cal.App.4th at p. 993.) The problem in *Doppes* was that the new evidence of additional discovery misconduct arose during trial.

Quoting *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 173, TestMasters asserts that "case law squarely holds that the spoliation of even a single piece of evidence justifies terminating sanctions where that evidence is the 'only accurate and unimpeachable source' of what occurred with respect to the central issue in the case." TestMasters misreads *Hartbrodt*. The "single piece of evidence" in *Hartbrodt* was a recording of a telephone call between the plaintiff and one of the defendants that the plaintiff had in his possession but refused to produce. The court in *Hartbrodt* rejected the plaintiff's arguments that he should not have to produce the recording because it would violate his Fifth Amendment rights and because the defendant, "as a party to the discussion, is an independent source" of what the parties discussed. (*Id.* at pp. 170-173.) The court's description of the recording as the "only accurate and unimpeachable source" of the telephone conversation, however, refers to the reason the recording was discoverable, not the reason that terminating sanctions were justified. (See *id.* at p. 173 ["[b]ecause the tape recording is the only accurate and unimpeachable source of what was discussed, it is discoverable".]) The court in *Hartbrodt* rejected the plaintiff's argument that the trial court had abused its discretion by granting the defendants' motion

³⁴ We discuss the trial court's third, posttrial motion for discovery sanctions below.

for terminating sanctions, rather than “fashion[ing] some appropriate evidence preclusion sanctions . . . which would not have the practical effect of imposing a dismissal,” because the plaintiff had not requested such a lesser sanction in the trial court. (*Id.* at pp. 173-174.) And in affirming the trial court’s order, the Court of Appeal stated that “the trial court has wide discretion to order discovery and broad powers to enforce those orders,” and the trial court’s orders “are presumed correct and will not be disturbed in the absence of an abuse of discretion.” (*Id.* at p. 175; see *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 206 [“[t]he implication” of this section of the *Hartbrodt* opinion “is that if, in the trial court’s discretion, the court had chosen some other way to enforce its discovery order short of termination (really large monetary sanctions? a tough evidentiary sanction?) that decision too would have been upheld as within the trial court’s discretion”].)

The trial court here did not abuse its discretion in imposing virtually every nonmonetary sanction TestMasters asked for other than terminating sanctions.

B. *The Jury Trial*

1. *Relevant proceedings*

TestMasters asked the jury to award \$18 million in compensatory damages. Defendants asked the jury to award, if the jury found them liable, \$183,000. Each side presented expert testimony on damages from a certified public accountant. The jury awarded \$165,000 against Blueprint and \$18,000 against Teti (for a total of \$183,000) for breach of the duty of loyalty, \$18,000 (non-duplicative) against Teti for breach of oral contract, and \$10,000 against Triplett, \$10,000 against Riley, and \$25,000 against Blueprint for defamation. TestMasters argues that the judgment should be reversed because the jury disregarded the trial court’s jury instructions by awarding a damages remedy that TestMasters did not ask for and the instructions did not permit, the damages verdict is not supported by substantial evidence, and the trial court abused its discretion by allowing defendants’ damages expert to give a legal opinion. TestMasters also argues that it is entitled to a new trial on damages because counsel for defendants engaged in prejudicial misconduct in his closing argument. We disagree.

2. *Standard of review*

On TestMasters' claim that the jury disregarded the trial court's instructions on damages, we presume the jury follows the instructions given by the trial court. "Jurors are presumed to have understood instructions and to have correctly applied them to the facts as they find them." (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 523; see *People v. Myles* (2012) 53 Cal.4th 1181, 1212 ["[w]e presume jurors 'generally understand and follow instructions'"]; *Summers v. Burdick* (1961) 191 Cal.App.2d 464, 468 ["[w]e presume that jurors possess common intelligence and that they follow the instructions of the court"].)

On TestMasters' claim that substantial evidence does not support the damages verdict, we review the record as a whole, resolving all conflicts and indulging all legitimate and reasonable inferences in favor of the prevailing party, to determine whether substantial evidence supports the verdict. (*Western State Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) "Substantial evidence" is "of ponderable legal significance, . . . reasonable in nature, credible, and of solid value." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873, italics omitted.) If there is substantial evidence, contradicted or uncontradicted, that will support the verdict, then we will uphold the verdict regardless of whether the evidence is subject to more than one interpretation. (*Western State Petroleum Assn.*, at p. 571.) The "testimony of a single witness . . . may be sufficient." (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 134.)

We review the trial court's rulings on the admissibility of the opinion of defendants' damages expert for abuse of discretion. (*Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 639; see *Rappaport v. Gelfand* (2011) 197 Cal.App.4th 1213, 1229 ["[t]he trial court's determinations on the admissibility of expert evidence are subject to review under the deferential abuse of discretion standard"].)

The standard of review for a claim of misconduct by counsel during closing argument is the prejudicial error standard. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 802-803 (*Cassim*).

3. *TestMasters is not entitled to a new trial on damages*

a. *Defendants' damages expert*

The trial court instructed the jury that TestMasters was claiming four “specific items of economic damages”: “Lost Profits (including lost profits from admissions consulting and tutoring undertaken by certain of the Individual Defendants for their own benefit while employed by Plaintiff), Lost Future Profits, Expenses to Mitigate Damages, and Assumed Damages [for TestMasters’ defamation claim].” TestMasters sought to recover \$18 million in damages that it claimed it lost as a result of defendants’ wrongful conduct, not any amount Blueprint may have gained as a result of defendants’ wrongful conduct. TestMasters did not seek, and the trial court did not instruct the jury on, disgorgement of defendants’ profits.

TestMasters argues that defendants’ damages expert, Scott Hampton, testified and “urged” the jury to award TestMasters Blueprint’s profits, not TestMasters’ damages, and that the jury did exactly that by ignoring the jury instructions and “adopting an improper remedy” of disgorgement. TestMasters claims that Hampton told the jury that if it found liability it should award TestMasters the profits defendants earned during the “head start” period that defendants obtained as a result of breaching their duties to TestMasters, that this “head start” period was four months in 2005, and that Blueprint’s profit for these four months was \$133,000, which is exactly what the jury awarded.

But that’s not what happened at trial.

TestMasters’ expert, Mark Stepka, described the assumptions he made and the methodology he used for his calculation of TestMasters’ damages. Stepka assumed that “defendants committed acts in breach of their duty of loyalty as TestMasters’ employees, that the defendants misused proprietary information and removed property from TestMasters,” that “defendants conducted defamatory actions and activity against TestMasters,” and that the court would find the defendants liable. Stepka also assumed

that that the court would issue a permanent injunction of infinite duration, that “Blueprint would no longer be in business as a result of these legal proceedings,” but that the damages caused by defendants’ conduct would continue for five years. Stepka explained that “a five-year period” for future damages is “reasonably reliable in regards to how far out you want projections.” Based on these assumptions, and using financial information from TestMasters and Blueprint as well as information about the LSAT industry and nationwide law student trends, Stepka calculated that TestMasters historic or past lost profits for 2005 to 2008 was \$4,359,774 and that TestMasters’ future lost profits (for five years) was \$5,424,441, so that along with TestMasters’ other damages claims TestMasters’ total damages were \$18,731,090.³⁵ Stepka made no damages calculation based on the assumption that defendants could never have created an LSAT preparation course and entered the LSAT preparation business without breaching any duties to, and using material stolen from, TestMasters.

Hampton testified relatively briefly towards the end of the trial. He testified that his assignment was to review Stepka’s report and schedules and comment on Stepka’s opinion that TestMasters had suffered \$18 million in damages. Hampton assumed, because he was a damages expert and as all damages experts for defendants do, that the plaintiff’s claims were valid. He stated: “In other words, I’m assuming that the court will find for the plaintiff[,] in order to create a model, if you will, of what damages might be.” Hampton then testified that Stepka “made a fundamental error—really a fatal error to his calculation that he assumes that TestMasters has the ability to exclude Blueprint from the market. And that’s really . . . the basis of his calculation. And it’s incorrect. And because that assumption that he made was incorrect, and because he didn’t consider what the rights were associated with the confidential information, he is essentially

³⁵ Stepka also calculated that TestMasters suffered additional categories of damages, such as \$7,003,800 in lost profits from TestMasters’ inability to raise its course price because of Blueprint’s competition, \$440,953 in lost investment income relating to TestMasters’ inability to raise its course price, and \$1,071,366 in additional marketing and advertising costs TestMasters incurred because of Blueprint’s entry into the LSAT preparation market.

measuring the wrong thing. . . . His calculation assumes that Blueprint can't compete with TestMasters. But there's no foundation for that [assumption], because Blueprint has a right to exist and to operate." Hampton added that Stepka's calculation was "really capturing the wrong thing. The \$18 million that he's calculated, you really would have to exclude a party from the market to get to a number anywhere near that size."

It is clear from his testimony that Hampton was trying to express the basic idea that Stepka's opinion that TestMasters suffered \$18 million in damages was based on the assumptions that (1) Blueprint would never enter the market absent any wrongful conduct, and (2) TestMasters' damages would continue into the future unaffected by any legitimate attempt by Blueprint to enter the market. These were in fact Stepka's assumptions, except that Stepka arbitrarily limited TestMasters' future damages to five years and Stepka stated that, if (contrary to his assumption) Blueprint survived the litigation and "continued to operate," then his calculation of TestMasters' damages would have been even larger. It was perfectly appropriate for Hampton, as an opposing damages expert, to attack Stepka's assumptions, or at least make different ones. So Hampton assumed that (1) Blueprint eventually would have entered the market even without any breach of loyalty or breach of contract by its principals and (2) TestMasters' revenues would be affected by a legitimate entry by Blueprint into the market.

Hampton assumed that absent any wrongful conduct defendants would have legitimately established a competing company in four months because that was how long it took Singh to create his competing LSAT preparation course when he left Kaplan. Hampton could have used a different assumption, such as it would have taken defendants six months to establish their company because they were less experienced than Singh, or it would have taken defendants one month because there were four times as many people working on the new company.³⁶ Stepka assumed that it would have taken defendants an

³⁶ Hampton actually did a calculation based on the assumption "that it would have taken . . . nine months, if, in fact, you found that that's a reasonable amount of time to create confidential information," which led to a figure of \$184,325, but he used the nine-

infinite number of months (i.e., never). Whether defendants engaged in any wrongful conduct, whether Blueprint would have entered the market absent any wrongful conduct by its principals toward TestMasters, and when Blueprint would have done so were factual questions for the jury. TestMasters presented evidence that defendants never would have entered the market absent any wrongful conduct, and defendants presented evidence that they would have and that they actually did. It was up to jury to decide this issue.

To translate his four-month assumption into a dollar amount Hampton could have used Stepka's calculations and derived a figure estimating what TestMasters' damages would be for four months (or six months or one month) based on TestMasters' financial information Stepka had used. But it was just as legitimate for Hampton to derive a figure estimating what TestMasters' damages would be for four months using Blueprint's financial information because the defendant's profits are relevant to and probative of the plaintiff's lost profits, at least where, as here, the parties are competitors. (See *Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1305 [“[a] defendant's profits often represent profits the plaintiff would otherwise have earned”]; *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1140 [the plaintiff's loss of profits can be measured by the defendant's actual profits]; *Klamath-Orleans Lumber, Inc. v. Miller* (1978) 87 Cal.App.3d 458, 466 [fact that plaintiff “chose to establish the extent of its loss, by showing defendants' profit from the diverted sales” was an “entirely legitimate method of proving its damages” and “did not change the nature of the jury trial phase of the case: it remained an action for damages and did not become one for an accounting” of defendant's profits]; *Western Electro-Plating Co. v. Henness* (1961) 196 Cal.App.2d 564, 572-574 [affirming trial court's judgment in unfair-solicitation-of-customers case awarding damages based on defendants' estimated profits of \$32,000 rather than plaintiff's accounting expert's calculation of the plaintiff's

month period of September 2004 to June 2005, rather than the probably more appropriate nine-month period of February 2005 to November 2005.

estimated lost profits of \$146,000]; *Proudfoot Consulting Co. v. Gordon* (11th Cir. 2009) 576 F.3d 1223, 1243 [“defendant’s profits may be relevant in measuring the amount of a plaintiff’s lost profits”], citing *TruGreen Cos., L.L.C. v. Mower Bros., Inc.* (Utah 2008) 199 P.3d 929, 932-933 [collecting cases].) And using Blueprint’s financial information for that four-month period, Hampton calculated that TestMasters’ lost profits were \$133,655.³⁷

Hampton was not the only expert who relied on Blueprint’s financial information in forming damages opinions. TestMasters’ experts did too. According to Stepka, “the revenues of Blueprint that they had are not that dissimilar in regards to the revenues that TestMasters had lost, based upon the students that it had lost,” and, in his “calculations of TestMasters students lost, it appears that the numbers are very comparable to the students gained by Blueprint.” Stepka even personally attended Riley’s deposition because, according to Stepka, Riley testified about “students that they were running through their system, and there is comparability with regards to students that Blueprint had in their system.” Singh also looked to Blueprint’s earnings when quantifying TestMasters’ damages. Testifying as a damages expert for TestMasters, Singh stated that TestMasters was entitled to the \$6 million in revenue Blueprint had earned because “that should be our revenue and they diverted it from us.” Singh stated: “I can tell you just in general, that our decline in enrollments, in the areas where Blueprint is competing, match up almost entirely with their growth.” And at one point in the trial, counsel for TestMasters

³⁷ Citing *Ojala v. Bohlin* (1960) 178 Cal.App.2d 292, TestMasters argues that in “the analogous context of common law unfair competition, courts have rejected attempts to limit a plaintiff to a disgorgement remedy,” and “the trial court permitted Hampton to tell the jury that disgorgement was TestMasters’ only remedy.” Neither the trial court nor Hampton, however, limited TestMasters to a disgorgement remedy, and the jury did not award a disgorgement remedy. Moreover, all *Ojala* stands for is the proposition that a successful plaintiff’s recovery “cannot in all cases be limited to the amount of the wrongdoer’s gain, which may be more or less than the loss suffered by the injured party.” (178 Cal.App.2d at p. 302.) TestMasters could have sought to recover either its damages or defendants’ gain. TestMasters chose to sue for its damages, which presumably TestMasters believed was “more.”

argued that Blueprint's earnings and finances were relevant to TestMasters' damages claims.

Of course, TestMasters had the option of arguing and presenting evidence that, if the jury found that defendants would have entered the LSAT preparation market legitimately after four months (or six months or two years), then the jury could calculate TestMasters' damages using Stepka's analysis and calculations. Although neither TestMasters nor defendants asked Stepka this question, the figures on Stepka's charts shown to the jury were not that different from Hampton's. In support of his opinion that TestMasters incurred \$4,359,774 in past lost profits, Stepka calculated \$356,352 in lost profits for 2005, \$797,546 for 2006, \$1,532,180 for 2007, and \$1,673,696 for 2008 (even though Stepka admitted on cross-examination that law school enrollments were trending down during that period). Putting aside the complicating details of student enrollment and the timing of the LSAT examinations in February and July, four months of Stepka's 2005 lost profit figure of \$356,352 is \$118,784 (one-third of \$356,352), not far from Hampton's lost profit figure for the first four months of 2005 of \$133,655. Had Stepka tried, as Hampton did (although he used the wrong months), to calculate an amount of TestMasters' lost profits for nine months of 2005, Stepka's calculations would have supported a damages figure of \$267,264 (three-fourths of \$356,352). But Stepka never gave the jury these opinions, and, if the jury found that defendants would have eventually created their own course and entered the LSAT preparation market after four or nine months, or some other time, the jurors had only Hampton's opinion (and perhaps Stepka's charts) to assist them in calculating the amount of these damages.

There is no one right measure of damages, and the appropriate measure of damages depends on the facts and "particular situation" of each individual case. (*Natural Soda Products Co. v. City of Los Angeles* (1943) 23 Cal.2d 193, 200-201; *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 367; see *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 874 ["[t]he selection of which measure of damages to apply is within the sound discretion of the trier of fact".]) Hampton's method was one permissible way to measure TestMasters' damages based on the assumptions Hampton

made. Stepka's was another permissible way based on different assumptions. As the trial court properly instructed the jury, in considering what weight to give to the experts' opinions based on their respective assumptions, the jury was entitled to consider whether the factual assumptions were true. The jury did not disregard the trial court's instructions on damages or make an unauthorized award of disgorgement.³⁸

Moreover, neither side requested a jury instruction on whether the jury could or could not award damages based on the "head start" principle. Neither side requested a jury instruction on the issue of whether the jury could or could not consider whether defendants obtained a "head start" in entering a business they would have entered anyway by obtaining confidential information, or whether and what effect this would have on damages. If TestMasters had requested such an instruction, then the trial court could have ruled on whether it was an appropriate instruction under California law, and this court could review that ruling.³⁹ The trial court did instruct the jury that it "is the

³⁸ Thus, although as TestMasters argues, that "whether a certain measure of damages is permissible given the legal right the defendants has breached, is a matter of law" (*New West Charter Middle School v. Los Angeles Unified School District* (2010) 187 Cal.App.4th 831, 843), the jury here did not award a legally impermissible measure of damages.

³⁹ The parties have not cited any cases on whether the head start limitation on damages applies under California law. Many jurisdictions have adopted the rule in trade secrets cases. (See, e.g., *Russo v. Ballard Medical Products* (10th Cir. 2008) 550 F.3d 1004, 1020 ["[u]nder the so-called 'head start' or 'lead time' rule, adopted in some jurisdictions, a trade secret defendant's damages may be limited to the time the defendant saved in getting a product to market by virtue of its misappropriation"]; *Sokol Crystal Products, Inc. v. DSC Communications Corp.* (1994) 15 F.3d 1427, 1433 (7th Cir. 1994) ["where a misappropriation of a trade secret only gives a competitor a 'head start' in developing a product, damages should be limited to the injury suffered in that 'head start' period"]; *Agilent Technologies v. Kirkland* (Del. Ch. Feb. 18, 2010, No. 3512) 2010 WL 610725, at p. 26 & fn. 230 ["[m]onetary damages for trade secret misappropriation may be calculated under the 'head start rule,' which allows a plaintiff to recover damages for 'the time it would have taken the defendant to discover the secret without misappropriation,'" and money damages have been limited to "the time it would have taken the defendants to develop a comparable product without the use of the plaintiff's trade secrets"]; 2 Callmann, *Unfair Competition, Trademarks and Monopolies* (4th ed.

policy of this state that every person shall retain the right to pursue any lawful employment or enterprise of their choice,” that a “former employee has the right to compete with his or her former employer provided such competition is fairly and legally conducted,” and that after “an employment relationship has terminated a former employee may use his or her general knowledge, skill and experience acquired in the former employment, even if such general knowledge, skill and/or experience is used in competition with a former employer.” The trial court further instructed the jury that to recover lost profits TestMasters had to “prove it is reasonably certain that it would have earned profits but for Defendants’ conduct” and that to “decide the amount of damages for lost profits” the jury had to determine the net profits TestMasters “would have had if Defendants’ conduct had not occurred.” TestMasters does not argue that these instructions were erroneous.

TestMasters argues that the verdict is not supported by substantial evidence because there was no evidence in the record to support Hampton’s assumption that defendants could have created materials for a new course in four months in 2005, as Singh had done in 1991. TestMasters argues that in 1991 Singh produced a very different and relatively basic set of course materials consisting of 30 to 35 pages that he subsequently developed and expanded over a decade or more, whereas in 2005 defendants burst upon the LSAT preparation scene with a fully-developed set of course

2012) Misappropriation of a Competitor’s Values, § 14:42 [“The head start period is the time it would have taken the defendant to discover the secret without misappropriation, and it has been suggested that recoverable damages should be limited to those suffered during that period because the loss of any profits suffered by the plaintiff thereafter were not caused by the misappropriation. But if the defendant would never have discovered the secret, then there should be no such temporal cut-off of damages.”], fns. omitted.) The comment to section 3 of the Uniform Trade Secrets Act, on which California Civil Code section 3426.3 is based, provides: “Like injunctive relief, a monetary recovery for a trade secret misappropriation is appropriate only for the period in which information is entitled to protection as a trade secret, plus the additional period, if any, in which a misappropriator retains an advantage over good faith competitors because of misappropriation.”

materials consisting of 633 pages. TestMasters' two expert witnesses, Singh and Rachel Vincent, Singh's girlfriend and TestMasters' Director of Research and Development (LSAT score of 172, in the 99th percentile), gave their opinions that creating Blueprint's course materials would have taken defendants or anyone else years to create and that defendants could not have developed their written course materials in the time they claim they did. Vincent, who testified that she "basically live[s], sleep[s], and breathe[s] the LSAT," estimated "that it would take at least 15,000 hours in order to create . . . Blueprint's course," which works out to seven and a half years. Vincent calculated that for defendants to have created the course they did in the five months they said they did, they would have had to work "23 hours every single day for five months . . . which, in my expert opinion, is not possible." Singh stated that he had never "in the industry seen somebody who just opened their doors and made the kind of money that Blueprint did right away."

The intensely factual issue of comparing how long it took Singh to develop his course materials in 1991 to how long it took or would have taken the five Blueprint principals to develop their course materials 15 years later was for the jury. And there is substantial evidence to support a finding that defendants could have developed their course material in four months, even if it might have taken Singh longer. For example, in 2004 to 2005 defendants used computers and "the best technology available to make things more efficient," whereas in 1991 Singh did not have such computer technology. There was also evidence that Singh worked "very, very slowly" at TestMasters in developing games set-ups, practice questions, and course material and took "a long time to do stuff." Indeed, Singh testified that it took him an average of seven or eight hours to write a logic games explanation and up to 20 hours for a difficult logic game. Capuano testified that when TestMasters employees were working with Singh they would review text "literally sentence by sentence" and "pour over the most ridiculous minutiae for hours." Triplett testified that "when we hear Rachel Vincent say things like, it would take 15,000 hours to make a course, I know that she's probably referring to the fact that she is working with [Robin] Singh, who when I observed him working on . . . the logic

games explanations, could take as much as an hour to decide on the use of a single word. So I know that estimate is based on a very slow work process.”

In contrast, Triplett testified that, when defendants wrote their course materials they were not “hampered” by Singh’s slow work style and they would just “write the copy and Matt [Riley] would type in the games explanations and Justin [Capuano] would format it and things were happening very quickly.” Riley testified that he could write a logic games explanation in 20 to 30 minutes for an easy game and 45 minutes to an hour for a more difficult game. Riley testified that he wrote 138 logic games explanations as defendants were teaching their first Blueprint course from February to May 2005, which by his math was “1.38 or a little more than one per day.” Capuano said that he could format four or five LSAT examinations from LSAC per day, and what would take TestMasters 10 minutes to create on a page he could do in 30 seconds. Thus, Triplett opined that Vincent’s 15,000-hour estimate for creating a course was “way off base . . . for most people’s normal work flow and then certainly for our very accelerated work flow.” Moreover, as noted above, defendants had four or five people working on the new course materials for Blueprint, working long hours as part of an “around the clock group effort,” whereas Singh developed his new course on his own.⁴⁰ And there was also evidence Singh may have actually developed his course in 200 hours over six or seven weeks from August 1991 to October 1991, making Singh’s development period even shorter than defendants’ four month development period.⁴¹

⁴⁰ Singh started TestMasters with one partner, David Killoran, who helped Singh with administrative tasks, such as photocopying LSAT examinations, experimenting with different fonts, and “cutting and pasting them on pages and such.” In 1997 Singh bought out Killoran, who left to start his own LSAT preparation company, Powerscore. Singh and Killoran agreed that each of them could use course material created while Singh and Killoran were partners, but not anything created by either of them after they dissolved their partnership. Singh and Killoran sued each other, then settled, and are now friends.

⁴¹ TestMasters claims that the trial court “belittled” Singh and Vincent in front of the jury when they “testified on the crucial issue of how long it takes to create LSAT preparation materials.” The record does not support this claim. The trial court did ask both witnesses several times to slow down, as did counsel for TestMasters, and sustained

TestMasters also argues that Hampton’s opinion was inadmissible because it was a legal opinion on the issue of what kind of damages are recoverable for breach of loyalty and breach of oral contract. As noted above, however, Hampton did not give a legal opinion. He gave a damages opinion based on an assumption that, even if defendants had done something wrong, they would have entered the market anyway, four months later than they did. (See *Rappaport v. Gelfand*, *supra*, 197 Cal.App.4th at p. 1229 [accountant “was not providing a legal opinion” when he testified “as to the specific appraisal technique he used from an accounting perspective” to value a dissociating partner’s interest in the partnership under Corp. Code, § 16701, subd. (b)].) Hampton did not tell the jury that the law required this “head start” analysis.

Hampton, who usually works as an expert in trademark, copyright, and trade secrets cases, did state that his methodology was “a well established approach . . . used in trade secret cases and other misappropriation of information cases,” and that this “established approach for calculating the benefit of a trade secret” was the “head start, if you will, into the market.” And he said that “because of the alleged use of the confidential information . . . Blueprint benefited by \$133,655.” It is a reasonable inference from his testimony, however, that Hampton was trying to make a calculation of TestMasters’ lost profits, consistent with the jury instructions and based on the assumption that defendants could have entered the LSAT preparation market with four months of work, using Blueprint’s profits during the same time period as a measure of TestMasters’ lost profits. During Hampton’s testimony the trial court also removed any risk that the jury might think Hampton was opining on the law by instructing the jury when counsel for TestMasters objected that “one of the questions you’ll probably have to decide as a predicate to evaluating the opinion of the relative experts is whether or not

an objection to a question asking Singh to opine whether monetary damages would be a sufficient remedy. The trial court, however, did not belittle or disparage either witness in front of the jury. To the contrary, the trial court commented that Vincent had “shown some rhetorical skill,” seemed to have “an above average I.Q.” and “vocabulary skills associated therewith.”

based on all the evidence that's before you, including but not limited to the court's findings and instruction . . . on the peculiar facts of this case, Blueprint would or would not have lawfully been in position to commence business on or about the time they commenced business.”

City of Ripon v. Sweetin (2002) 100 Cal.App.4th 887, on which TestMasters places considerable reliance, involved a different issue. *City of Ripon* was a condemnation action in which the defendant landowner claimed “precondemnation damages” caused by the plaintiff city’s unreasonable conduct that negatively impacted the value of the property. (*Id.* at p. 891.) The court in *City of Ripon* referred to these damages as “*Klopping* damages,” which comes from the leading precondemnation damages case, *Klopping v. City of Whittier* (1972) 8 Cal.3d 39. (See *City of Ripon*, at p. 896.) Under *Klopping* “a public entity is liable for a diminution of market value caused by its precondemnation conduct only where it has acted *improperly and unreasonably*,” which is determined first by the court in a bifurcated trial. (*City of Ripon*, at p. 897.) The defendant in *City of Ripon*, however, disavowed any *Klopping* claim before trial, so that the trial court did not make a threshold determination prior to the jury trial that the city had acted improperly and unreasonably. Nevertheless, the defendant’s damages expert gave his opinion over the plaintiff’s objection of the value of the property taken by the city based in part on the city’s precondemnation conduct. The court held that the admission of this evidence was prejudicial error because it “allowed the jury to adjudicate a question that should have been adjudicated by the court—whether the City’s precondemnation conduct was unreasonable.” (*City of Ripon*, at p. 901.) In contrast, Hampton testified on a claim TestMasters had not withdrawn (TestMasters’ claim for lost profits), using a methodology that was proper for him to use (Blueprint’s profits over a certain time period), to the decisionmaker that was supposed to decide the issue (the jury).⁴²

⁴² TestMasters also cites *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 315, and *Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 579, as standing for a rule that “precludes an expert from

It is true, as TestMasters points out, that the jury not only awarded less than the full amount of TestMasters' past lost profits, but also apparently did not award any of the amounts Stepka testified TestMasters was entitled to recover for future lost profits, lost investment income, and mitigation and advertising, even though Hampton did not address these items of claimed damages in his testimony. The jury, however, was entitled to disbelieve Stepka's (and Singh's) opinions that defendants' conduct caused these damages. (See *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1322, fn. 19 ["[a]s long as it does not do so arbitrarily," other than in professional negligence cases "a jury may entirely reject the testimony of one party's expert witness even when the other party does not call any opposing expert and the expert testimony is not contradicted"]; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 633 ["[s]o long as it does not do so arbitrarily, a jury may entirely reject the testimony of a plaintiff's expert, even where the defendant does not call any opposing expert and the expert testimony is not contradicted"]; *Ortzman v. Van Der Waal* (1952) 114 Cal.App.2d 167, 170 ["[e]ven if several competent experts concur in their opinions, and no opposing opinion is offered, the jury are still bound to decide the issue upon their own judgment assisted by the statements of the experts"].) The jury's failure to award TestMasters all of the damages that Stepka described in his testimony does not mean that the jury's award was "unauthorized" and "prejudicial."

TestMasters complains that "Hampton's testimony let defense counsel urge the

opining—as Hampton did here—on the nature of the parties' rights and the available remedies for a given tort." Neither case says anything of the sort. In *Kajima/Ray Wilson* the Supreme Court held that under promissory estoppel a losing bidder on a public contract can seek reliance damages in the form of bid preparation costs, but not expectation damages in the form of lost profits. (*Kajima/Ray Wilson*, at pp. 315-316.) The case says nothing about expert witnesses or the admissibility of their testimony. In *Hurtado*, a wrongful death car accident case, the Supreme Court did state the facts in the case were undisputed and the "sole issue is a question of law as to which measure of damages should be applied," but the issue was whether California law or Mexico law (which limited the amount of recovery) applied. (*Hurtado, supra*, at p. 579.) Again, the case had nothing to do with whether an expert was giving a legal opinion.

jury to treat Blueprint's net profits as a barometer of TestMasters' damages."

TestMasters is correct: That's exactly what Hampton's opinion allowed counsel for defendants to argue to the jury. And it was entirely proper for counsel for defendants to make that argument.

b. *Misconduct*

TestMasters argues that it is entitled to a new trial on damages because counsel for defendants engaged in prejudicial misconduct that caused the jury to award low damages. TestMasters contends that counsel for defendants asked improper questions about physical altercations involving Singh and about Singh's wealth.

Prior to trial TestMasters moved in limine to exclude certain evidence, including evidence from a case TestMasters brought against another LSAT preparation company in Texas, and evidence that Singh had "engaged in any purported confrontation or dispute with any of the Defendants or their agents during this litigation," "engaged in certain behavior" at depositions, or "harassed any witnesses in connection with this matter." The trial court ruled: "Defendants can testify as to their awareness of Singh's prior litigation against other persons insofar as they were aware of this on or prior to the filing of this suit. Any witness who observed any alleged physical confrontation by Mr. Singh himself as against any litigants or witnesses in any litigation may be questioned as to the impact of such observations on the witness' attitude towards giving testimony in this trial. . . . The plaintiff's motion is otherwise granted in full without prejudice to defendants' making a good faith showing at trial that some evidence of this type is directly relevant to plaintiff's claim for damages or to Mr. Singh's credibility; any such attempt to use evidence of this type at trial must be pre-cleared and approved by the [c]ourt at sidebar without any hint of the existence of such evidence to the jury in advance."

Counsel for defendants asked three questions about Singh's alleged physical confrontations, one each to Martin, Riley, and Stepka, without making any attempt to

“pre-clear” the questions with, and obtain approval from, the trial court.⁴³ The trial court sustained objections to the second and third questions, but mistakenly overruled an objection to the first question and allowed Martin to answer “yes,” stating after the trial that, “through amnesia or otherwise,” its “ruling on the timely objection . . . was error.”

The trial court properly sustained the objections to the questions to Riley and Stepka, and admittedly should have sustained the objection to the question to Martin. The questions were improper, and it is undisputed that counsel for defendants never made any attempt to get court approval to ask the questions, in violation of the court’s pretrial order. The question to Stepka was particularly improper. While asking a long series of questions regarding whether Stepka had considered whether any harm suffered by TestMasters may have been “self-inflicted” by its conduct in the case it filed in Texas, counsel for defendants asked Stepka to “assume that in that case, Mr. Singh had assaulted in federal court one of the defense lawyers in that case.” The court immediately sustained an objection to this rather transparent attempt to get around the prior court order and told counsel for defendants to “move on.”

In the context of a three month trial, during which the jury had plenty of opportunity to observe Singh, Riley, and their attorneys in bitterly contested litigation, reversal for a new trial on damages for three improper questions, only one of which was

⁴³ Defendants wanted to present evidence that Singh had assaulted Riley at a deposition and was taken into custody, but the trial court did not allow the jury to hear this evidence. Incredibly, counsel for TestMasters introduced evidence that Singh had hired prostitutes, used drugs excessively, and gambled. In response to questioning by counsel for TestMasters, Triplett tried not to testify about these facts but felt that counsel for TestMasters pushed her to testify about them, and testified that she had personal knowledge of Singh’s involvement with drugs, gambling, and prostitutes. The trial court even warned counsel for TestMasters, “you are doing this with your eyes open,” and noted that it was odd that counsel for defendants was objecting and “resisting” this line of inquiry. Counsel for TestMasters apparently was trying to prove that Triplett and Teti conspired to put negative comments about Singh on the record, and there was some evidence that Teti had tried to do this, but the jury would not have heard this evidence about Singh had counsel for TestMasters not raised the issue at trial and questioned Triplett about it.

answered, is not warranted. (See *Cassim, supra*, 33 Cal.4th at p. 800 [judgment may be reversed only when, after considering the entire record, “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error”]; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [“trial error is usually deemed harmless in California unless there is a ‘reasonable probab[ility]’ that it affected the verdict,” and “probability” means “a *reasonable chance*, more than an *abstract possibility*”]; *Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 84-85 [to reverse judgment based on attorney misconduct, appellate court must conclude that there would have been a more favorable decision without the questions asked].) There is no more than an “abstract possibility,” if that, that had Martin not answered the single question about a physical altercation involving Singh the amount of damages the jury awarded TestMasters would have been greater. (*College Hospital Inc.*, at p. 715.) As the trial court stated in denying TestMasters’ motion for a new trial, a “very serious and attentive panel of fair and unbiased jurors gave this case their full attention for three months and rendered a reasoned verdict fully supported by the evidence,” and counsel for defendants’ transgressions were “not unduly prejudicial in the context of a three-month trial.”

Counsel for defendants did not actually ask a question about Singh’s wealth. TestMasters nevertheless complains that Riley, in explaining his belief that TestMasters was abusing the legal process (to which there was no objection), stated, “I think that Robin Singh believes that because he has more money than other people he can kind of make up his own rules.” TestMasters also points to Riley’s answer to a question about his relationship with Singh while he worked at TestMasters: “Robin did some nice things while I was there. He wrote me a very positive letter of recommendation when I was trying to go to law school. There were a few social occasions where I would see Robin. He let me drive his Ferrari, that was kind of cool.” To the extent these answers by Riley were part of a “premeditated campaign” by defendants to prejudice the jury by presenting evidence of Singh’s wealth to the jury, as TestMasters argues, it was not much of a campaign. Moreover, the trial court sustained objections to both comments, and even

specifically instructed the jury that “whether or not Mr. Singh owns a Ferrari is irrelevant in the grand scheme of things, ladies and gentlemen.”

In any event, whatever lingering, uncured juror memory of Singh’s finances there might have been was not prejudicial. There was abundant evidence at trial regarding TestMasters’ finances, and it was undisputed that Singh owned TestMasters. Singh testified that TestMasters’ gross revenue was \$10 million in 2004, \$10 to \$11 million in 2005, \$11 to \$12 million in 2006, and \$12 to \$14 million in 2008. Singh testified that overall TestMasters had “grossed around a hundred million dollars in revenue.”

Similarly, there was a lot of testimony about TestMasters’ use of legal resources against competitors, some of it elicited by counsel for TestMasters. For example, Riley testified in response to questioning by counsel for TestMasters (and over defendants’ objection) that he told “lots of people” that “TestMasters is abusing the system” and that “TestMasters was trying to quash legitimate competition.” Riley also testified, again in response to questioning by counsel for TestMasters, that TestMasters was depositing Blueprint’s students “to harass anyone who took Blueprint [classes] to try to run us out of business.” Capuano testified without objection that he knew Singh had sued at least four companies that had tried to start competing LSAT preparation companies. He also testified, again without objection, that he had no problem with TestMasters trying to compete with Blueprint, but he did have “a very big problem” with TestMasters “suing Blueprint out of existence,” which is what he felt TestMasters was trying to do with this lawsuit. Vincent even admitted that TestMasters was trying to put Blueprint out of business with this action. Triplett testified, under questioning by counsel for TestMasters, that TestMasters’ litigation strategy “was a search-and-destroy mission to find any bad facts about us and plaster it in the public” Teti testified, again in response to a question by counsel for TestMasters and without objection, that he had read an article describing how Singh spent \$20 million suing people in Texas federal court, where Teti believed the rules did not allow Singh to “do the kinds of things in discovery that he kind of likes to do.” Singh confirmed in his testimony that TestMasters had filed four lawsuits against former TestMasters instructors who tried to start their own LSAT

preparation businesses (including this action), two lawsuits against college students who posted negative comments about TestMasters in an Internet chatroom, the lawsuit against the LSAT preparation company in Texas, and a legal malpractice action against the law firm (Duane Morris) that represented TestMasters in the Texas litigation. TestMasters even created a website called duanemorriscommitsmalpractice.com.

TestMasters argues that counsel for defendants improperly referred to TestMasters' size and revenues in closing argument. TestMasters, however, did not object to this argument, and therefore has waived its right to raise the issue on appeal. (See *Sabella v. Southern Pacific Co.* (1969) 70 Cal.2d 311, 318; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1247; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 859-860.)

Moreover, even if TestMasters had preserved the issue on appeal, counsel for defendants did not engage in any misconduct that would warrant reversal. We will not reverse for attorney misconduct unless, after an examination of the entire cause, it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the alleged attorney misconduct. (See *Cassim, supra*, 33 Cal.4th at p. 800.) We consider the entire record, taking into account such factors as the nature and seriousness of the remarks and misconduct, the general atmosphere and the judge's control of the trial, the likelihood of prejudicing the jury, and the efficacy of any objection or admonition under the circumstances. (*Sabella v. Southern Pacific Co., supra*, 70 Cal.2d at pp. 320-321.) And in closing argument, attorneys have wide latitude to discuss the case, state their views on what the evidence at trial showed, and argue the conclusions that the jury may draw from the evidence. (See *Cassim*, at pp. 795-796.) Here, counsel for defendants' argument to the jury was that Singh acted "as if the rules don't apply to him" because Singh believed that it was proper for him to leave Kaplan to start TestMasters, but it was improper for defendants to leave TestMasters to start Blueprint, and that "when he's dealing with new startups, especially brand new businesses, he can make the rules." This was entirely proper argument, based on evidence in the record, some of it elicited by counsel for TestMasters and some of it

coming from Singh. And even if it were improper (and if the trial court had overruled an objection by counsel for TestMasters), there is no reasonable probability that, had counsel for defendants not made these comments, the result of the trial would have been any more favorable to TestMasters.

“[I]t rarely occurs in any case which is of moment and sharply contested that counsel on both sides in their zeal and partisan devotion to their clients do not indulge in arguments, remarks, insinuations, or suggestions which find neither support in, nor are referable or applicable to the testimony, or warranted by any fair theory upon which the case is being presented. If such impropriety of counsel always afforded ground for a new trial, there would be little prospect of any litigation becoming finally determined. It is only when the conduct of counsel consists of a willful or persistent effort to place before a jury clearly incompetent evidence, or the statements or remarks of counsel are of such a character as to manifest a design on his part to awake the resentment of the jury, to excite their prejudices or passions against the opposite party, or to enlist their sympathies in favor of his client or against the cause of his adversary, and the instructions of the court to the jury to disregard such offered evidence or objectionable remarks of counsel could not serve to remove the effect or cure the evil, that prejudicial error is committed. It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.” (*Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 210-211, italics omitted.) This is not one of those extreme cases.⁴⁴

⁴⁴ TestMasters requests, because of the trial court’s jury instruction that defendants breached their duty of loyalty and employment contracts “by conspiring with one another to cause damage to” TestMasters, that, “if the Court orders a retrial, it must be against all defendants, including those the jury attempted to exonerate.” Defendants respond that, although the trial court instructed the jury that defendants conspired to harm TestMasters, the trial court did not instruct the jury on the scope of the conspiracy, which left the jury free to determine which defendants were part of which part of the conspiracy. Because we are not ordering a new trial, we do not reach this issue.

C. *Posttrial Orders*

1. *Relevant Proceedings*

On March 2, 2009, exactly one month after the jury's verdict, TestMasters filed a third motion for discovery sanctions, again asking the trial court to impose terminating sanctions.⁴⁵ TestMasters argued that it was entitled to terminating sanctions based on newly discovered evidence from a session of Martin's deposition taken two weeks before trial that defendants "had deliberately concealed" Teti's 2004 laptop computer, and that defendants had "conspired to lie in their depositions about the timeline of the formation of their unlawful enterprise." Defendants opposed the motion, arguing that it was untimely, it was a defective motion for new trial, and the "newly discovered" evidence on which the motion was based was not so new. The trial court denied the motion, without prejudice to TestMasters' right to make the same arguments in its motion for new trial, on the grounds "that it is either a belated motion for reconsideration, an untimely discovery motion brought long after the cutoff for any such motion, or a premature and improperly labeled motion for new trial." The trial court also stated: "In view of the substantial evidentiary sanctions which had already been imposed in this case and which were available to plaintiff at trial, the court does not believe that anything more could or should have been done to assist plaintiff's prosecution of the case beyond what the court had already authorized. Plaintiff's specific arguments about the 2001/2004 Teti computer's disposal and the 'Timeline' amount to much ado about nothing in the larger context of the case." The trial court added that, even "assuming there was additional proof of disloyal behavior from September to December 2004, the proof relevant to the key issues of damages would not change"

2. *Standard of review*

As noted above, the trial court's ruling on TestMasters' third motion for discovery sanctions is reviewed for abuse of discretion. (See *Clement v. Alegre, supra*,

⁴⁵ This time TestMasters brought its motion pursuant to both section 2023.030 and the court's inherent authority.

177 Cal.App.4th at p. 1286; *Williams v. Russ*, *supra*, 167 Cal.App.4th at p. 1224; *Liberty Mutual Fire*, *supra*, 163 Cal.App.4th at p. 1102; *Miranda v. 21st Century Ins. Co.*, *supra*, 117 Cal.App.4th at p. 928.)

3. *The trial court did not abuse its discretion by denying TestMasters' third motion for discovery sanctions after trial*

TestMasters argues that its posttrial motion for discovery sanctions was not untimely under *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152 (*Sherman*), in which the plaintiffs moved for a new trial based on new evidence discovered a week after the jury's verdict. (*Id.* at p. 1159.) The court in *Sherman* stated that “[n]either the code nor any case law mandates that discovery sanctions must be imposed prior to the rendering of the verdict. And common sense dictates sanctions cannot be pursued before the affected party finds out about the alleged discovery dereliction of his or her opponent. The true facts may not emerge until the end of the trial, as is the case here.” (*Id.* at p. 1163.)

We agree with the trial court that TestMasters' third motion for discovery sanctions was untimely, not because TestMasters filed the motion after trial, but because TestMasters knew about the “newly discovered evidence” at least two weeks before the trial started, but decided to wait and see how the trial turned out before making the motion based on that evidence. In *Sherman*, and in *Doppes*, the plaintiffs and moving parties did not learn about the claimed additional discovery misconduct until during trial (*Doppes*) or after trial (*Sherman*). (See *Doppes*, *supra*, 174 Cal.App.4th at pp. 982-986; *Sherman*, *supra*, 67 Cal.App.4th at p. 1159.) Unlike the plaintiffs in *Sherman* and *Doppes*, TestMasters knew about the claimed new discovery abuse before the trial started and chose to speculate on the outcome of the trial by going forward and awaiting the results of the trial before making the motion based on Martin's deposition testimony.

Moreover, the merits of TestMasters' third motion for discovery sanctions, unlike the plaintiffs' motions in *Doppes* and *Sherman*, was not really based on new evidence of additional discovery abuse. TestMasters claimed in its third motion for discovery sanctions that defendants had concealed and lied about an important laptop, and lied in

their depositions about the timing of their departure from TestMasters and the creation of Blueprint. These were not new claims of additional misconduct. At best, the third discovery sanctions motion was based on more of the same kind of conduct that the two prior discovery motions and the trial court's prior orders addressed, for which the trial court had already sanctioned defendants extensively. The trial court had already ordered issue and jury instructions sanctions telling the jury that defendants had lied in discovery. The trial court had also already ordered issue and jury instruction sanctions telling the jury that defendants had concealed their computers, "either by destruction or rendering them unavailable," and had deleted files from their computers, "which tends to show liability for the causes of action against them." As the trial court recognized, it had already told the jury "to treat the defendants who went to trial as if they were lying intentionally about matters of this type," and the evidentiary bases of TestMasters' third motion for discovery sanctions really were, as the trial court concluded, "much ado about nothing in the larger context of the case."

D. *The Court Trial*

1. *Relevant proceedings*

On March 24-25, 2009 the trial court conducted the equitable phase of the trial on TestMasters' request for permanent injunctive relief. TestMasters asked the court to issue an injunction that would enjoin defendants from using, distributing, or selling "any course materials, instructional sessions, tutorials, podcasts, video broadcasts or any other test preparation materials that were used by Blueprint at any time prior to March 6, 2009 or any similar instructional or training materials."

Teti, Riley, Capuano, Triplett, Martin, and Singh testified at the court trial. Teti testified that he never shared the email or the attached TestMasters course materials he received from McCarthy with any of the other defendants or anyone else at Blueprint, and that "none of them knew I got the T.M. files." He stated that he was "absolutely positive that no one else from Blueprint could have used them because no one else from Blueprint knew." Similarly, Martin testified that while she was working at Blueprint she never knew that Teti had seen an electronic version of TestMasters' course materials,

never personally copied any TestMasters material, and never saw anyone else copy any TestMasters material. Triplett testified that she did not copy any TestMasters materials in creating the Blueprint course materials.

Singh testified about the measures TestMasters took to protect the confidentiality of its course materials, including by posting confidentiality notices on its books and requiring students to sign confidentiality agreements, which in fact Riley and Capuano had signed as students. Singh testified that students cannot attend a TestMasters class until they sign the enrollment agreement containing the confidentiality provision and that, if a student violates his or her enrollment agreement and attempts to re-sell TestMasters course books on line, TestMasters sends a cease and desist letter to the student.⁴⁶ Singh also testified that it was “absolutely absurd” that defendants could have created a course with hundreds of pages of allegedly original content as quickly as defendants claimed they did.

The trial court issued its statement of decision on June 16, 2009. The trial court concluded, based on the results of the jury trial and on its independent review of the evidence, that TestMasters was not entitled to injunctive relief. Reviewing the jury verdict, the trial court found it could not enjoin Capuano, Triplett, and Riley because the jury found that they did not engage in any disloyal misconduct, “and that Blueprint’s only misconduct was that conduct which allowed it to start four months earlier than if the competitive preparations had not commenced until after its founders or any one of them had severed all ties (and thus the duty of loyalty) to TestMasters.” The trial court also found that it could not enjoin Teti and Blueprint, even though the jury had found that Teti had “engaged in actual pre-termination disloyal conduct actually causing harm to plaintiff,” because the jury found that the only harm TestMasters suffered lasted four months. The trial court stated: “If the jury had believed plaintiff’s factual proof and argument thereon that Blueprint’s instructional material continued to improperly exploit a

⁴⁶ At the jury trial Sharon Naim, in-house counsel for TestMasters, testified that she sent over 100 cease and desist letters to TestMasters students, threatening to sue them if they sold their books on the Internet.

protectable legal interest of plaintiff, then some much larger amount of damages, presumably [the] \$18,731,000 [Stepka calculated], would have been awarded.”

Reviewing the evidence independently,⁴⁷ the trial court found that Singh and TestMasters’ other witnesses were not credible “on the issue of measures allegedly taken to preserve the confidentiality” of the logic symbols used in TestMasters’ course materials, and concluded that TestMasters “had no protectable legal right to the basic symbols themselves.” The trial court found:

“As a separate and independent basis for finding no factual basis for plaintiff’s claim, the Court also finds that Teti, Riley, Capuano and Triplett were credible when they testified as to the efforts made to create the Blueprint instructional materials post-separation in January 2005 and thereafter, even to the extent of checking in bookstores for comparable course material to see if various concepts and symbols (which are NOT protectable in published works apart from making out the elements of a valid copyright claim) were in general use. Defendants’ side by side analysis illustrates the originality of the Blueprint course in several areas. Blueprint focuses on more recent Law School Admission Test (“LSAT”) questions than TestMasters for each of the three sections of the exam, and an objective review of the questions show[s] there is essentially no overlap. [Citation.] The classification process for Blueprint materials for Logic Game[s] is different from TestMasters. [Citation.] Blueprint’s Logical Reasoning question types are all taught in ‘SuperPrep,’ a book released by the organization that writes the LSAT. [Citation.] Plaintiff fails to show that Blueprint materials are derivative, but instead relies on the Court’s findings to argue that a finding of liability necessarily means the materials are derivative. This is not the case, as liability for the breach of the duty of loyalty may attach to many acts, such as competing with one’s employer while still employed. [¶] Whether or not plaintiff took longer to prepare its materials than Blueprint, Blueprint offered sufficient proof to support the jury’s verdict—and this Court’s independent conclusion—that the Blueprint material was not a misuse of plaintiff’s material. One key reason the Court so finds is that the Law School Admission Council-licensed past actual Law School Admission Test questions were a permissible common

⁴⁷ The trial court believed that the jury’s verdict was binding and precluded the trial court from issuing an injunction, and that the evidence received at the equitable phase of the trial “was superfluous given that the prior [jury] verdict was controlling.” As we explain, we do not agree that the trial court was so bound. Nevertheless, the trial court evaluated the evidence independently “for purpose of appellate review.”

ground between plaintiff's instructional materials and defendant Blueprint's materials. This common purpose explains why so much of Blueprint's material can be seen to have some superficial correspondence to TestMasters' pre-existing material. If two instructors are trying to teach the Morse code or Excel, they are likely to have similar messages to convey to students and prospective students. That does not make the second entrant automatically an illegal plagiarizer of the concepts first expressed by the first instructor."

The trial court also found that TestMasters had not shown that its injury was irreparable or that the balance of the equities weighed in favor of an injunction.

2. *The parties' contentions*

TestMasters argues that, even if it is not entitled to a new trial on its damages claim, it is entitled to a permanent injunction as a matter of law or at least a new trial on its entitlement to an injunction because "of the jury's implicit finding that Blueprint's materials are derived from TestMasters' confidential materials." TestMasters argues that under the trial court's jury instructions the jury's general verdict against Blueprint and Teti includes implied findings that "TestMasters' methodologies were confidential" and "Blueprint's course was derivative of TestMasters' course," and that these implied findings required the trial court to issue a mandatory injunction against Blueprint and Teti. We disagree with TestMasters' interpretation of the jury instructions, TestMasters' premise that the jury made implied findings of confidentiality and derivation, and TestMasters' argument based on its (incorrect) interpretation of the jury instructions and its (incorrect) premise that the trial court disregarded binding jury findings in denying the requested permanent injunction.

3. *Standard of review*

"The grant or denial of a permanent injunction rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390; see *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912 ["to the extent the trial court had to review the evidence to resolve disputed

factual issues, and draw inferences from the presented facts, an appellate court will review such factual findings under a substantial evidence standard”].) We review the resolution of any disputed factual issues under the substantial evidence standard, and resolve “all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court’s order.” (*Horsford*, at p. 390.) We review the legal issues in connection with the trial court’s ruling on the request for a permanent injunction de novo. (*Classis of Central California v. Miraloma Community Church* (2009) 177 Cal.App.4th 750, 757.)

4. *The trial court did not abuse its discretion by denying TestMasters’ request for a permanent injunction*

TestMasters argues that the jury implicitly found that TestMasters’ course materials were confidential because the breach of loyalty jury instruction required a finding of confidentiality to impose liability, and the jury found against Blueprint and Teti on the breach of loyalty issue. TestMasters quotes the portion of the trial court’s jury instruction on breach of loyalty stating that the “only basis on which an idea or its expression can be protected based on the claim actually brought by Plaintiff is if the idea and/or its expression is confidential information” TestMasters’ quotation of the jury instruction, however, is incomplete.

The trial court instructed the jury on five duties an employee owes an employer: “(1) To act solely for the benefit of the employer in all matters connected with his employment during the time such employment relationship exists”; (2) “not to act on behalf of an adverse party in a transaction connected with his employment without the employer's knowledge during the time such employment relationship exists”; (3) “not to compete with the employer concerning the subject matter of the employment during the time such employment relationship exists”; (4) “not to act or to agree to act during the period of his employment for persons whose interests conflict with those of the employer in matters for which the employee is employed”; and (5) “not to use or to communicate protectable confidential information given him or her by the employer or acquired by him or her during the course of or on account of his employment or obtained by him or her in

violation of his or her duties as an employee, if such use or communication occurs in competition with such employer or to the injury of such employer,” and [t]his duty continues to exist even after the employment is terminated”

The trial court then instructed the jury that a “former employee has the right to compete with his or her former employer provided that such competition is fairly and legally conducted,” and that “[i]n the absence of a protectable confidential information, the right to compete fairly outweighs the employer’s right to protect its customer base from competitive solicitations by former employees if such competitive solicitations are first commenced after the employment relationship has terminated.” It was as part of this latter instruction that the trial court stated that there was no copyright claim in the case, and therefore “the only basis on which an idea or its expression can be protected based on the claim actually brought by Plaintiff is if the idea and/or its expression is confidential information, as that term is more fully described in these instructions.”⁴⁸

It is clear from the entire instruction on duty of loyalty that the trial court did not instruct the jury, as TestMasters contends, that it could only find for TestMasters on its breach of loyalty claim if it found that TestMasters’ material was confidential, nor is it true that “confidentiality was a prerequisite to the breach of loyalty liability findings against Blueprint and Teti.” The “claim actually brought by” TestMasters that involved a “protected idea or its expression” was the fifth of TestMasters’ five duty of loyalty claims. The first four breach of loyalty claims did not. As the trial court recognized in denying TestMasters’ posttrial motions, “an employee can breach his or her duty of loyalty by many different types of conduct, and misuse of confidential business information is only an example of actionable conduct.” The trial court even asked counsel for TestMasters during the court trial’s closing argument: “But if the start up occurred at a time when their duty of loyalty precluded them from engaging in full-on start up efforts, such as raising capital with Jerry Nelson or contemplating even independently how to have a business plan to compete, is that not still a breach of the

⁴⁸ TestMasters does not challenge the substance of any of these jury instructions.

duty of loyalty that is actionable even if it doesn't [involve] the use of their then-employer's intellectual property?" TestMasters' argument that the jury must have made an implied finding of confidentiality is based on a faulty reading of the jury instructions and an incomplete presentation of TestMasters' claims.

TestMasters also argues that the jury implicitly found that defendants used TestMasters' course materials to create Blueprint's course materials "because that is what defendants' damages expert Hampton—whose opinion the jury adopted—assumed as the foundation for his opinion." As our summary of Hampton's testimony above shows, Hampton assumed, because he was a damages expert, that the jury would find defendants liable and that defendants would have entered the LSAT preparation business anyway. It does not follow, however, that the jury made an implied finding that defendants used TestMasters' course materials to create Blueprint's. Pursuant to the jury instructions, the jury could have found that Blueprint and Teti committed several different kinds of misconduct, some involving the use of TestMasters' course materials, some not. Just because the jury found that the facts supported Hampton's four-month head start assumption does not mean that the jury found defendants used TestMasters' course materials. Moreover, contrary to TestMasters' assertion, Hampton did not assume for his opinion that defendants had used TestMasters' course material to create Blueprint's course material. When asked by counsel for TestMasters if he were assuming that Blueprint's "course materials had been wrongfully derived from TestMasters' course materials," Hampton answered: "Not entirely. I'm assuming that there was some confidential material that was taken. But, unfortunately, it hasn't been identified by Mr. Stepka, so there's some nebulous information that was taken. But I don't know that it was the basis for Blueprint."⁴⁹

⁴⁹ Hampton was asked as part of a hypothetical question by counsel for TestMasters to assume that Blueprint's course materials were wrongfully derived from TestMasters' course materials and that all of Blueprint's business was based on wrongfully derived course materials, and Hampton answered that it might affect how long it would take Blueprint to enter the LSAT preparation business "legally, if you will." But Hampton did

Citing *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146 (*Hoopes*), TestMasters argues that the trial court’s denial of a permanent injunction against Blueprint and Teti ignores the jury’s binding implicit finding that defendants used TestMasters’ confidential materials. As noted above, the jury did not make this implied finding. Moreover, *Hoopes* is distinguishable. *Hoopes* involved legal and equitable claims and defenses between two commercial tenants claiming exclusive rights to the same parking spaces. The jury “expressly found” that the plaintiff had the right to exclude the defendants and their customers from the parking spaces. (*Id.* at pp. 150, 154, 158.) In subsequently ruling on the parties’ requests for declaratory and injunctive relief, the trial court “rejected the jury’s factual findings and made its own independent evaluation of the evidence,” and then “found, contrary to the jury’s special verdict, that” the plaintiff did not have the right to exclude defendants and their customers from the parking spaces “and that parking was meant to be shared” in the lot. (*Id.* at pp. 154-155.) The Court of Appeal held that the “trial court erred in disregarding the jury’s verdict when ruling on equitable remedies that relied on common issues of fact previously adjudicated by the jury.” (*Id.* at p. 158, italics omitted.)

The jury in this case returned a general verdict, not a special verdict, and did not make any special findings.⁵⁰ Whereas the equitable ruling by the trial court in *Hoopes*

not assume for his opinion that Blueprint’s course material was wrongfully derived from TestMasters’ course materials.

⁵⁰ TestMasters objected to the general verdict form as inconsistent with the trial court’s factual findings and adverse jury instructions in its pretrial discovery sanctions orders. The trial court overruled this objection because its prior orders did not find that defendants had caused TestMasters’ damages, so that “one of the necessary elements of the claim for the breach of duty of loyalty and the claim for breach of contract has not been found by the court.” TestMasters requested a special interrogatory to the jury on whether defendants improperly used TestMasters’ course materials, but only to potentially assist the trial court in the injunction phase of the trial, which the trial court declined to add to the verdict form because the court did not need it. Defendants had requested a special verdict, which the trial court rejected as “way too prolix,” unduly burdensome on the jury, and “worse than the LSAT test.”

was “in direct contradiction of the jury’s special verdict” (*Hoopes, supra*, 168 Cal.App.4th at p. 159), here there were no jury findings with which the trial court’s ruling on TestMasters’ request for injunctive relief conflicted. In addition, the Court of Appeal in *Hoopes* emphasized that the trial court “made a wholly independent evaluation of the trial evidence and rejected the jury’s findings of fact.” (*Ibid.*) Here, after the jury trial, the trial court took an additional two days of evidence and received two additional rounds of briefing by the parties on the equitable issues. Indeed, TestMasters filed a brief specifically asking to present live testimony at the court trial, claiming that it had “a due process right to present evidence at the trial on the equitable issues.” As in *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, “additional evidence was presented during the equitable phase of the trial that contradicted evidence presented to the jury in an earlier phase of trial,” and “under those circumstances” the trial court “had an obligation to weigh evidence independently.” (*Hoopes*, at p. 160.) Indeed, *Hoopes* distinguished *Saks* for this very reason: “*Saks* does not present a situation, as here, where the judge and jury were presented with the exact same evidence, and reached contrary conclusions.” (*Hoopes, supra*, 168 Cal.App.4th at p. 160; see *id.* at p. 161 [distinguishing *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54 for the same reason that in *DRG* “the legal and equitable claims were founded on distinct facts, so the jury’s factual determinations on the legal claim were not binding”].) This case is *Saks*, not *Hoopes*.

Finally, the jury’s resolution of factual issues did not preclude the trial court from resolving the issues in the court trial because TestMasters’ request for an injunction presented questions of fact not before the jury, which the trial court had the obligation to resolve. To “qualify for a permanent injunction, the plaintiff must prove (1) the elements of a cause of action involving the wrongful act sought to be enjoined,” here breach of the duty of loyalty, “and (2) the grounds for equitable relief.” (*San Diego Unified Port District v. Gallagher* (1998) 62 Cal.App.4th 501, 503; see *Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1166-1167 [“[a] permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or

other wrongful act against a defendant and that equitable relief is appropriate”].) Grounds for equitable relief include an actual or threatened irreparable injury and a balancing of the equities or relative hardships that favors the injunction. (*Wright v. Best* (1942) 19 Cal.2d 368, 386; *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 722; *Cota v. County of Los Angeles* (1980) 105 Cal.App.3d 282, 292; *Tustin Community Hospital, Inc. v. Santa Ana Community Hospital Assn.* (1979) 89 Cal.App.3d 889, 903; *Pacific Gas & Electric Co. v. Minnette* (1953) 115 Cal.App.2d 698, 708; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 826, pp. 242-244.)

Thus, in denying TestMasters’ request for an injunction, the trial court had to address and resolve factual issues, including whether TestMasters had suffered irreparable injury and whether the balance of the equities weighed in favor of an injunction,⁵¹ that the jury did not address and resolve in reaching its verdict. For example, in balancing the equities the trial court found:

“[T]he harm to defendants is significant as a permanent injunction would destroy the Blueprint business entity. The Court's prior Temporary Restraining Order and Preliminary Injunction, which enjoined portions of Blueprint’s website, brought Blueprint’s enrollment figures down significantly. The loss of goodwill and growth would be great if Blueprint would be forced to refund approximately \$500,000 to those students if an injunction is issued, probably forcing them into bankruptcy. Blueprint would be in breach of contract to these students and Blueprint’s employees would suffer lay-offs. The jury verdict and its own fact finding turns on its head the argument that Blueprint is competing in the market with TestMasters’ materials for a significantly lower price. Therefore, the public would also suffer from the loss of a company such as Blueprint, which has provided significant originality to the LSAT teaching business. Such companies provide competition and growth in the market and cost-effective alternatives to other LSAT companies. In light of the fact that TestMasters has been fully compensated for the harm caused it by defendants, the balance of equities, including a balance of hardships and the public interest, supports denying a permanent injunction.”

⁵¹ The existence of irreparable injury is an issue of fact. (See *People v. Monterey Fish Products Co.* (1925) 195 Cal. 548, 564; *People v. Stafford Packing Co.* (1924) 193 Cal. 719, 728; *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1564; *Hicks v. Clayton* (1977) 67 Cal.App.3d 251, 264.)

The trial court also found that TestMasters had not suffered irreparable injury and that the jury's damage award fully compensated TestMasters for that harm: "[T]he evidence at trial and the jury verdict indicate that plaintiff was fully compensated for the tortious conduct of Teti and Blueprint, and therefore plaintiff's harm is fully capable of quantification. The jury verdict returned on February 2, 2009 reflects liability for the breach of the duty of loyalty against Teti and Blueprint, and awarded \$18,000 and \$165,000 respectively. The jury decided the total value of TestMasters' harm to be \$183,000 for breach of the duty of loyalty, and the Court will not impose further relief in the form of an equitable remedy." Thus, rather than contradicting the jury's verdict, the trial court's denial of a permanent injunction was consistent with the jury's verdict. (See Civ. Code, § 3426.2, subd. (a); *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451-1452 ["[a]n injunction against misappropriation of trade secrets should 'only last as long as is necessary to preserve the rights of the parties' and 'as long as is necessary to eliminate the commercial advantage that person would obtain through misappropriation.'"]; Comment, Uniform Trade Secrets Act, section 2 ["[t]he general principle of Section 2(a) and (b) is that an injunction should last for as long as is necessary, but no longer than is necessary, to eliminate the commercial advantage or 'lead time' with respect to good faith competitors that a person has obtained through misappropriation"].)

E. *The Cross Appeal*

1. *Relevant proceedings*

TestMasters accused defendants of writing defamatory statements on pre-law and law school discussion websites and Internet bulletin boards, including one called "lawschooldiscussion.org" or what the parties refer to as "LSD,"⁵² and making

⁵² "An Internet bulletin board is 'a computerized version of a cork and pin board on which users can post, read, and respond to messages.' (Weber, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech* (1995) 46 Case Western Reserve L.Rev. 235, 238, fns. omitted.) After logging in to an Internet bulletin board, a person may post messages, respond to

defamatory oral statements at college campus presentations. TestMasters proceeded to trial on statements by Teti, Triplett, Riley, and Capuano. The jury found that TestMasters proved its defamation claims against Triplett, Riley, and Blueprint, but not against Teti and Capuano. The jury awarded damages of \$10,000 against Triplett, \$10,000 against Riley, and \$25,000 against Blueprint. Triplett, Riley, and Blueprint appeal, asking that we reverse the “the defamation portion of the judgment.”

The jury also found that Teti engaged in malice, oppression, or fraud in connection with TestMasters’ claims against him, but that Capuano, Riley, Triplett, and Blueprint did not.⁵³ Therefore, the trial court conducted a punitive damages phase of the trial, after which the jury awarded punitive damages against Teti in the amount of \$10,000. Teti appeals.

2. *Substantial evidence does not support the jury’s defamation verdict against Triplett and Riley*

The defamation claim against Triplett was based on the following statement that she posted on February 11, 2005 on lawschooldiscussion.org, pretending to be a student who took a TestMasters class the previous summer:

“Be careful if taking TM. I took it last summer at UCLA and my instructor was awful, really boring and thick accent. Actually answered questions wrong in class and would try to talk his way out of it. Trent was teaching next door and he sounded awesome, his class looked much better but they wouldn’t let me switch, said it was full. I heard there are a couple other good instructors but i forgot their names. Probably taking the class over so Im gonna try to get in trents this time.”

messages already posted, or simply read the discussions without posting any messages. (*Id.* at p. 239.) Most Internet bulletin boards permit participants to use pseudonyms. (*Id.* at p. 241.)” (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 804, fn. 19.) In the Internet’s “earlier days,” Internet bulletin boards were compared to message boards at a grocery store. The more contemporary term for an Internet bulletin board is an Internet message board, discussion board, or forum. (*Too Much Media, LLC v. Hale* (N.J. 2011) 20 A.3d 364, 368.)

⁵³ The jury specifically found that Capuano did had not engage in malice, oppression, or fraud, even though the jury had previously found no liability against him.

Triplett testified that, although she did not take a TestMasters class the previous summer at UCLA, she had sat in on a TestMasters class from an instructor named Shelly Harrison who spoke with such a “very thick southern accent” that “it was difficult at times to hear what he was saying.” Triplett stated that Harrison incorrectly diagrammed a problem on the board, and then “instead of sort of stepping back he actually tried to explain why that was the correct way to diagram it.”

The defamation claim against Riley was based on a statement Riley posted on February 12, 2005, also on lawschooldiscussion.org. Riley was writing in response to “mimi323” who had posted an anonymous comment that she had taken Teti’s class at TestMasters and felt that Teti was “a f-ing jackingass” and “arrogant.” Riley, pretending to be a student who took a TestMasters class from Teti, wrote:

“Wow mimi323. I was in a TM UCLA class close to that time with Trent (I took him for the December test) and all I can say is that there’s no accounting for taste. No offense, and I’m sorry you got that vibe, but I had a really different experience.

“First off, my original teacher (whose name I wish I knew but blocked out) was terrible- and a lot of people thought he was just boring and shitty.

“In any case, we could hear people laughing in the room next door, and it was actually kind of annoying. So I got up to check it out and it was another TM class. As I listened from outside I could hear that they were talking about the same questions we were, but the teacher (who I later learned was Trent) sounded like a professional comic. Really- the LSAT had never been so funny.

“His class was about twice as large as the one I was in—at least 100 People—but I waded up through the line of people to talk to him at the break and asked him if I could transfer. He said ‘no’ because it was too full already.

“But my class sucked so I basically bribed/bullied TM office people to transfer me into his class.

“My score improved more than 20 points, but there are other people who might have been able to do that. The thing about Trent’s class is that it wasn’t like class. I literally looked forward to coming. I laughed through the whole class and found myself telling my friends about the jokes he told.

“Also, before you ask, I’m not one of those sluts who wore a tight Juicy sweat suit, came in late, sat in the front row, spent the entire class trying to flirt with him. I doubt he’d be able to pick me out of a police lineup.

“But honestly, I think he was the best teacher of any kind I have ever had.

“And judging from the fact that his class had more than 100 people in it for the last lesson when my original class had dwindled to about 10 people by that point, I’m not alone. I’ve actually had the experience of telling a friend ‘there’s someone you’ve got to take for TestMasters’ and she stopped me and said ‘Let me guess, someone named Trent? Yeah, I’ve heard that from about 5 people.’ This is not to say you’re wrong, but it’s a really different experience than mine.”

Riley testified that, although he did not have an original TestMasters class that “sucked” and was “boring and bad,” he did take a class from Teti, and his post actually referred to an experience that two of his friends at the time (whose last names he could not remember) told him they had in a TestMasters class at UCLA. Riley stated that the post was “a true experience of a lot of TestMasters students at that time period,” but it was not a true experience for him. Riley admitted that his statements that he switched into Teti’s class and that he took the test in December 2004 were also false.

TestMasters argues that Triplett’s “ostensible first-hand account [that] described her instructor’s incompetence [i.e., “awful” and “really boring”] and accent and lamented TestMasters’ refusal to allow her to switch into Teti’s class” are “provably false” factual statements that support the jury’s verdict. TestMasters argues that Riley’s statements that his original TestMasters class “dwindled to about 10 people” while Teti’s class had more than 100 people were also false factual statements that “amply support the jury’s defamation verdict. We do not believe that these statement support the jury’s verdict.

“Though mere opinions are generally not actionable, [citation] a statement of opinion that implies a false assertion of fact is” (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 289.) The “inquiry is not merely whether the statements are fact or opinion, but “whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.”” (*Ibid.*; see *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 696 [“where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation”]; *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385 [“the question is not strictly whether the published statement is fact or opinion,” but “[r]ather the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact”].) The court looks at the totality of the circumstances “to determine both whether (a) a statement is fact or opinion, and (b) a statement declares or implies a provably false factual assertion; that is, courts look to the words of the statement itself and the context in which the statement was made.” (*Hawran*, at p. 289.)

“Whether a statement declares or implies a provably false assertion of fact is a question of law for the court to decide [citations], unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood.” (*Franklin v. Dynamic Details, Inc.*, *supra*, 116 Cal.App.4th at p. 385; see *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260; *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1382.) “The ‘crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court.’” (*Summit Bank v. Rogers*, *supra*, 206 Cal.App.4th at p. 696; see *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1147 [“critical determination of whether the allegedly defamatory statements constitutes fact or opinion *is a question of law*”].) It is undisputed that the exception to this rule, when “the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood,” does not apply in this case. (See *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 113, 116, fn. 12; *Franklin*, at p. 385.)

We cannot see how, in the context and circumstances of the Internet law school discussion board the statements by Triplett and Riley that TestMasters instructors were “awful,” “really boring,” “terrible,” “boring,” “shitty,” and “bad,” and they “sucked” can be statements of fact, or how a reasonable fact finder could conclude that any of these statements declares or implies a provably false assertion of fact. To the contrary, these kinds of statements are classic statements of opinions that cannot be proven true or false. (See *Nygaard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1052 [former employee’s statement that her employment with the plaintiff was “horrible” and a “horror” and that she felt “used” were “nonactionable statements of opinion, rather than verifiable statements of fact”]; *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1019-1020 [statement that plaintiffs were “top-ranking ‘Dumb Asses’ cannot survive application of the rule that in order to support a defamation claim, the challenged statement must be found to convey ‘a provably false factual assertion’”]; *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 838 [statement by defendant that plaintiff was a “booby” could “be understood only as a vague expression of low esteem” and was constitutionally protected]; *Moyer v. Amador Valley Joint Union High School District* (1990) 225 Cal.App.3d 720, 725 [statement in student newspaper that teacher was “a babbler,” “annoying,” and “the worst teacher” at the school was not a “factual assertion capable of being proved true or false” and thus fell outside “the legal framework of actionable speech”]; see also *Lieberman v. Fieger* (9th Cir. 2003) 338 F.3d 1076, 1081 [statements that testifying psychiatrist was “terrible” as a witness was not an assertion of objective fact and not actionable]; *Curto v. Medial World Communications, Inc.* (E.D.N.Y. 2005) 388 F.Supp.2d 101, 111 [statement that plaintiff’s “customer service and follow up sucked” could not “be understood as conveying facts about” the plaintiff]; *Sagan v. Apple Computer, Inc.* (C.D. Cal. 1994) 874 F.Supp. 1072, 1075-1076 [use of phrase “Butt-Head” did not imply an assertion of fact about scientist]; *Conkle v. Jeong* (N.D. Cal. 1994) 853 F.Supp. 1160, 1168-1169 [statements that plaintiff “was too radical,” “was difficult as an employee,” and “more trouble than she is worth” did “not imply a provably false factual assertion”].)

Gill v. Hughes (1991) 227 Cal.App.3d 1299, and *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, both cited by TestMasters for the proposition that accusations of incompetence are susceptible to proof, are distinguishable because the statements occurred in different contexts. In *Gill* a medical review board, after an evidentiary hearing regarding a surgeon's skill, called the surgeon incompetent. (*Gill*, at pp. 1308-1309.) The special skill or knowledge of the medical board made it more likely that people would consider the comments based on factual knowledge. Similarly, in *Kahn* the director of a facility that provided psychological testing and counseling for children made comments about a social worker's incompetence. (*Kahn*, at p. 1604.) The court held that the statements were provably false statements because the person making the statement was an expert in the field and the statements conveyed facts that showed the plaintiff's inability to perform her duties. (*Id.* at p. 1609.) In contrast, neither Triplett nor Teti was an expert and, to the extent they had knowledge and experience in the LSAT preparation business, their online statements did not contain any information or facts that they had any special skills, knowledge, or expertise. Although Triplett had been involved in training and evaluating TestMasters instructors, and may have had more experience than others in determining that instructors were boring, a reader of her anonymous comment on lawschooldiscussion.org posting would not know these facts about her. And unlike surgical and counseling incompetence, the determination of whether a teacher is boring does not usually require any kind of expertise.

Triplett's statements that a TestMasters instructor answered questions incorrectly in class and tried to talk his way out of it and that TestMasters refused to allow her to transfer classes are statements that imply provably false assertions of fact; namely, that TestMasters had an instructor who taught problems incorrectly and TestMasters did not allow a student to transfer classes. Similarly, Riley's statement that his class shrunk in size over time from 100 to 10 students implies a provably false assertion of fact; namely, that one of TestMasters' classes was so bad that 90 percent of the students left. These statements, however, cannot constitute substantial evidence to uphold the jury's defamation verdict because TestMasters did not introduce evidence that

these statements were false.

The statements by Triplett and Riley, made on an Internet public discussion group about law school and the LSAT, involve matters of public concern to a large group of potential consumers of LSAT preparation services and of law schools. (See *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23-24 [statements on website by patient about plastic surgeon were of public interest under § 425.16 because they provided information that would be material to potential consumers “contemplating plastic surgery”]; *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898-899 [“[c]onsumer information” posted on the Internet “at least when it affects a large number of persons . . . generally is viewed as information concerning a matter of public interest”]; *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1363 [“the public has a well-recognized interest in knowing about the quality and contents of consumer goods”].) An Internet discussion group or bulletin board, like *lawschooldiscussion.org*, is a public forum for discussing issues of general public concern. (See *Chaker v. Mateo, supra*, 209 Cal.App.4th at p. 1146 [“[t]he Internet is a classic public forum which permits an exchange of views in public about everything from the great issues of war, peace, and economic development to the relative quality of the chicken pot pies served at competing family restaurants in a single small neighborhood”]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1006-1007 [Internet bulletin board is a public forum under section 425.16]; see also *Reno v. ACLU* (1997) 521 U.S. 844, 870 [117 S.Ct. 2329; 138 L.Ed.2d 874] [“[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox”]; *Wilbanks*, at p. 897 [“[i]n a sense, the Web, as a whole, can be analogized to a public bulletin board”].) Between 2001 and 2006 an average of 140,000 candidates took the LSAT each academic year.

When, as here, the statements involve matters of public concern, the plaintiff in a defamation action bears the burden of showing that the defendant’s statements were false. (*Melaleuca, Inc. v. Clark, supra*, 66 Cal.App.4th at p. 1355; see *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 344 [when statements involve “a matter of public concern,” the plaintiff “bears the burden of proving that the statements are false, even if he is not

considered a public figure”]; *Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 372 [private-figure plaintiff cannot recover for defamation without showing statements at issue are false]; *Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 202 [ruling that “allegedly defamatory speech involved matters of public concern . . . imposed on plaintiff the burden to prove falsity of the statements”].)

Thus, in order to prevail on its defamation claims against Triplett and Riley, TestMasters had to show that the statements by Triplett and Riley that implied provably false assertions of fact were, in fact, false. TestMasters, however, does not cite to any evidence in the record, nor can we find any, that Triplett’s statement that Harrison had a thick accent (to the extent that this is not an opinion) and taught problems in class incorrectly, or that her statement about TestMasters not transferring students, was false. TestMasters introduced evidence (from Triplett on cross-examination) that Harrison is an attorney, but not that he taught questions correctly in class, or even that he was a good teacher. TestMasters also did not introduce any evidence at trial, and does not cite to any evidence in the record on appeal, that Riley’s statement that a TestMasters class not taught by Teti “dwindled” from 100 to 10 students was false. To the contrary, Riley testified that he “was relaying the actual experiences of a lot of TestMasters students,” including two of his friends, even though he did not personally have those experiences at that time.⁵⁴ Capuano admitted that he posted a false statement about a TestMasters instructor, but the jury did not find Capuano liable for defamation. The only evidence in the record we can find is this statement by Martin in response to a question asking her if she and the other Blueprint principals made a lot of false statements: “I mean, there were certainly multiple false statements. I don’t know a lot—I don’t know how many—you

⁵⁴ TestMasters points to a question counsel asked Riley, “So that’s false then where you said that you had a [Testmasters] class that sucked, right?” Riley started his answer with the word “right,” but then explained in the rest of his answer that the statement about the class was true, and the only part that was not true was that he had taken the class. Of course, the statements by Triplett and Riley that they were TestMasters students were very provably and indeed admittedly false assertions of fact, but they are not defamatory.

know, I need to look at the posts.” This general statement, however, does not prove the falsity of the statements by Triplett and Riley that went to the jury. Martin even stated that she needed to see the particular post in order to say whether it was false. Martin’s testimony does not constitute substantial evidence that the statements by Triplett and Riley on which TestMasters based its defamation claim were false.

The statements on which the jury’s defamation verdict rests are either not actionable or not proven as false. The record confirms the trial court’s observation that “the defamation claim was given very limited attention by each side.” The portion of the judgment awarding damages of \$10,000 against Triplett, \$10,000 against Riley, and \$25,000 against Blueprint is reversed.

3. *The punitive damages award against Teti is proper and supported by substantial evidence*

Teti argues that the \$10,000 punitive damages award against him must be reversed because, although he argued to the jury in the punitive damages phase of the trial that his net worth was \$78,000 (TestMasters argued that it was \$160,000), if his liability for the approximately \$1.6 million in monetary sanctions imposed by the trial court in this action were included in the calculation, Teti’s net worth is actually approximately negative \$1.5 million. Thus recalculated, Teti argues, the punitive damages award is excessive as a matter of law. We review a punitive damages award challenged as excessive de novo. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172; *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197.)

The problem with Teti’s argument is that Teti made a tactical decision at the punitive damages phase of the trial to tell the jury that his net worth was \$78,000, not negative \$1.5 million including the discovery sanctions award. He submitted a balance sheet in support of his claim that showed his net assets amounted to \$78,501.78. This balance sheet, which Teti testified showed “the most current state of [his] assets” and was “very, very, very recent,” did not include liability for any amount of discovery sanctions imposed by the trial court prior to the trial. Under “debts and liabilities,” Teti listed the \$18,000 compensatory damages award that the jury had awarded in the first phase of the

trial, but not any amount for his share of the pre-trial discovery sanctions ordered by the court in December 2007 and August 2008. Based on this evidence, the jury awarded punitive damages against Teti in the relatively modest amount of \$10,000. Having made this choice and argued that his net worth was \$78,000, not negative \$1.5 million, Teti cannot now complain that the jury did not know he was subject to a discovery sanctions order he chose not to disclose to the jury.

“As a general rule, theories not raised in the trial court cannot be raised for the first time on appeal. This is a matter of fundamental fairness to both the trial court and opposing parties. [Citation.] There are exceptions to this rule, including where a new theory pertains only to questions of law based on undisputed facts. [Citation.] But even then, whether an appellate court will entertain a new theory raised for the first time on appeal is strictly a matter of discretion.” (*City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, 28-29; see *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1325 [““[a] party is not permitted to change his position and adopt a new and different theory on appeal””].) Moreover, “when a party bears some responsibility for the claimed error, [that party] is generally estopped from taking a different position on appeal or [is] deemed to have waived the error.” (*City of Scotts Valley*, at p. 29.)

Teti could have argued that he had a negative net worth because of the discovery sanctions award, but then the jury would have known how much he had been sanctioned, and at least some facts about why, and might have returned a much greater punitive damages award. Faced with this choice, Teti decided not to take the risk of having the details of the trial court’s orders sanctioning him for discovery abuse affect the jury’s verdict in the punitive damages phase of the trial. He is not entitled now to ask this court to give him a second chance to make a different choice.⁵⁵ (See *Mesecher v. County of*

⁵⁵ Actually, Teti is not even asking for an opportunity to make a different choice in a new punitive damages trial. Teti is asking this court “to either eliminate or reduce the punitive damages award.” Teti states that if “this court determines the remedy for the erroneous award of punitive damages is a new trial, Teti expressly waives any challenge

San Diego (1992) 9 Cal.App.4th 1677, 1686 [“where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error”].) Indeed, Teti did not even make the argument he is making now to the trial court in any of defendants’ posttrial motions. Whether under the theory of estoppel, waiver, or invited error,⁵⁶ it would be unfair to TestMasters and the trial court to allow Teti to raise this issue for the first time on appeal, and we decline to exercise any discretion we may have to consider Teti’s new theory. (See *City of Scotts Valley v. County of Santa Cruz*, *supra*, 201 Cal.App.4th at p. 29 [“we conclude [appellant] invited the error of which it now complains and thus is estopped to assert, or has waived, the contrary arguments it now advances on appeal”].)

Moreover, the trial court ordered Teti, in person and in open court, to produce and answer questions in a deposition about documents TestMasters had requested by subpoena (also a court order) showing his financial condition, and Teti produced a financial statement that showed he had a net worth of \$78,000. When a defendant does not comply with such an order and does not produce all information showing his financial condition, he or she cannot object to an award of punitive damages for lack of such evidence. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608-609.) Any “insufficiency in the record” regarding Teti’s financial condition is attributable to Teti’s failure to comply with the trial court’s order; and Teti’s production of a financial statement without listing a liability for discovery sanctions precludes Teti “from claiming on appeal that the record contains insufficient evidence of his financial condition.” (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 41; see *Green v. Laibco, LLC* (2011)

to the punitive damages award.” A more appropriate remedy for an excessive or improper award of punitive damages, however, is a new trial on the issue of punitive damages, the right to which Teti has expressly waived. (See *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 702.)

⁵⁶ The doctrine of invited error is an application of estoppel. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) “Under the doctrine of invited error, where a party, by his conduct, induces the commission of an error, he is estopped from asserting it as grounds for reversal.” (*Van Sickle v. Gilbert*, *supra*, 196 Cal.App.4th at p. 1528.)

192 Cal.App.4th 441, 452 [any deficiency in the record regarding the defendant's financial condition "may be laid at the door of defendant, whose chief financial officer purported to be both ignorant of his company's financial condition and unable to read its financial statements"].)

Net worth is one measure of a defendant's ability to pay, but not the only one. (See *Adams v. Murakami* (1991) 54 Cal.3d 105, 116, fn. 7; *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 74; *Green v. Laibco, LLC, supra*, 192 Cal.App.4th at p. 452; *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 621-622.) There was sufficient evidence, presented by TestMasters and Teti, of Teti's ability to pay a punitive damages award of \$10,000, including the balance statement Teti brought for the punitive damages phase and evidence about his interest in Blueprint. The judgment against Teti for \$10,000 in punitive damages is affirmed.

F. *The Motion To Strike*

As noted above, the trial court on August 28, 2008 issued a temporary restraining order and then on September 12, 2008 a preliminary injunction that would have required defendants to cease their LSAT preparation business by October 4, 2008. In Case No. B210775 this court first stayed the preliminary injunction as a mandatory injunction, and then dismissed the appeal from the preliminary injunction as moot because the trial court had vacated the preliminary injunction.

There were hearings in the trial court on both of these requests for preliminary injunctive relief. At these hearings the trial court made various comments, such as defendants were "no better than felons," "this record would support a referral for a felony," and defendants were "as dirty as a coal mine when it comes to the circumstances and the creation of material." TestMasters includes in its appellate briefs citations to these and other statements from the hearings on TestMasters' requests for a temporary restraining order and a preliminary injunction. Defendants move to strike these "offensive citations in TestMasters' appellate briefs" on the ground that the trial court made these statements in connection with orders that the trial court subsequently vacated

and an appeal that this court dismissed as moot. In the alternative, defendants ask this court to vacate its December 9, 2009 order dismissing Case No. B210775 as moot, recall the remittitur, reinstate the appeal, and set a briefing schedule on the merits of the appeal from the vacated preliminary injunction.

The motion to strike and alternative request to reinstate the appeal are denied. The statements by the trial court in the temporary restraining order and preliminary injunction proceedings are part of the record. TestMasters (and defendants) can cite to the statements; defendants (and TestMasters) can argue that the statements were made in a hearing that led to subsequently vacated orders. Each side can argue that the other side is misrepresenting the record or making assertions that are not supported by the record. We are able to determine from the record what matters were before the trial court in connection with which proceedings. We see no need to strike portions of the parties' briefs over this issue. (See *Central Concrete Supply Co., Inc. v. Bursak* (2010) 182 Cal.App.4th 1092, 1095, fn. 2 [denying "motion to strike portions of appellant's reply brief that refer to and rely on matters not before the trial court" when it ruled on a motion to strike, but "disregard[ing] any such matters not before the trial court" on that motion].)

DISPOSITION

The December 12, 2007 order imposing monetary and nonmonetary discovery sanctions is affirmed. The January 24, 2008 order awarding TestMasters \$592,260.45 in monetary sanctions is affirmed. The April 10, 2008 order awarding TestMasters \$154,952.85 in monetary sanctions is affirmed. The August 6, 2008 orders imposing monetary and nonmonetary discovery sanctions are affirmed. The September 29, 2008 order awarding TestMasters \$738,035.10 in discovery sanctions is affirmed. The September 29, 2008 order awarding TestMasters \$70,325.76 in discovery sanctions is affirmed. The portion of the June 15, 2009 judgment in favor of TestMasters and against Triplett, Riley, and Blueprint for defamation is reversed, and the trial court is directed to enter judgment in favor of Triplett, Riley, and Blueprint and against TestMasters on TestMasters' defamation claims. The judgment is otherwise affirmed in all respects.

Defendants' motion to strike portions of TestMasters' opening and reply briefs in Case No. B218775 is denied. Each party is to bear its costs on appeal.

SEGAL, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.