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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MONTEBELLO UNIFIED SCHOOL DISTRICT, Plaintiff, Cross-defendant and Respondent, v. FITNESS PROFILE, INC., et al., Defendants, Cross-complainants and Appellants.	B264341 (Los Angeles County Super. Ct. No. BC485485)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed in part, reversed in part, and affirmed as modified.

Musick, Peeler & Garrett, Cheryl A. Orr; Law Offices of James T. Duff and James T. Duff for Defendants, Cross-complainants and Appellants.

Baker, Keener & Nahra, Robert C. Baker; Kenney & Kopf and David K. Kenney for Plaintiff, Cross-defendant and Respondent.

Fitness Profile, Inc. (FPI), and Dennis D. Windscheffel[1] appeal from a judgment against them for breach of contract, conversion, and punitive damages and denying their cross-complaint for breach of contract against the Montebello Unified School District (the District). We affirm in part, reverse in part, and amend the judgment to reduce the damages on the District's claims for breach of contract to conform to the evidence.

The case arises from a series of contracts between Windscheffel and the District between 2007 and 2012 for the administration of after school programs funded through the federal No Child Left Behind Act of 2001. (Pub.L. No. 107-110 (Jan. 8, 2002) 115 Stat. 1425 (the Act).) The parties waived jury and the case was tried to the court. The trial court found in favor of Windscheffel on the District's fraud claim, but found that

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[1] The trial court found that FPI was the alter ego of Windscheffel and that FPI and Windscheffel are equally responsible for all damages. Appellants do not challenge this alter ego finding on appeal. We therefore refer to both appellants as "Windscheffel" and do not distinguish between FPI and Windscheffel except where the context requires.

Windscheffel failed to account for grant funds as required by the contracts. The court awarded breach of contract damages against Windscheffel in the amount of $1,369,609, consisting of all the grant money the District paid to Windscheffel that Windscheffel could not demonstrate went to after school program services. Of that amount, the trial court found that Windscheffel could not account at all for $401,379 and awarded that amount as damages on the District's conversion claim. The court further found that Windscheffel was untruthful and suppressed financial records to avoid the tracing of his expenditures, and on that basis awarded punitive damages on the District's conversion claim in the amount of $802,000. Finally, the trial court found that the District was justified in terminating its contracts with Windscheffel based on Windscheffel's conduct and therefore found against Windscheffel on his cross-claims for breach of contract.[2]

On appeal, Windscheffel claims that: (1) There was insufficient evidence to support the trial court's findings on the District's breach of contract claims and its damages award; (2) the District's conversion claim was legally flawed and unsupported by the evidence; and (3) the punitive damages award was improper and excessive. Windscheffel also claims that the trial court's rulings show that the court was biased and denied him a fair trial.

We conclude that there was ample evidence to support the trial court's finding that Windscheffel breached his contracts with the District by failing to account for the expenditure of grant

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[2] The trial court also awarded attorney fees to the District. That order is the subject of a separate appeal pending in this court (B267436).

funds and by taking more money for his personal use than was permissible under the contracts and the governing law. We therefore affirm the trial court's findings of breach on the District's claims against Windscheffel and its denial of Windscheffel's cross-claims against the District. However, Windscheffel's accounting failures do not support the full extent of damages that the trial court awarded, which would effectively deprive Windscheffel of *all* compensation under the contracts. We therefore reduce the damages award to conform to the evidence and to the trial court's findings concerning the nature of Windscheffel's breach.

We also conclude that the record does not support the trial court's finding on the District's conversion claim, as the District failed to identify a *specific* sum of money that Windscheffel converted. In the absence of a successful tort claim, the award of punitive damages cannot stand. We therefore affirm the trial court's findings of breach, reverse the court's rulings on conversion and punitive damages, and modify the judgment to include a damages award that is supported by the trial court's findings and by the evidence on Windscheffel's contract breaches.

BACKGROUND

1. *The District's Grant Proposal*[3]

In 2006, the District's coordinator of after school programs, Adolfo Herrera, met Windscheffel at a teachers' conference. At the time, Windscheffel was employed at the Long Beach Unified

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[3] Consistent with the deferential standard of review applicable to Windscheffel's sufficiency of the evidence arguments, we summarize the facts in the light most favorable to the District as the prevailing party.

School District. Windscheffel spoke with Herrera about the programs in Long Beach and his experience in writing grant applications.

Following that meeting, the District contacted Windscheffel and engaged him to write a grant application for the District to obtain funds for after school programs under the After School Safety and Enrichment for Teens program (ASSETs). ASSETs is a federally funded program for high school students under the Act. (Ed. Code,[4] §§ 8420–8428; Pub.L. No. 107-110, 115 Stat. 1425.)

Windscheffel worked with employees of the District to prepare the grant application. The application sought funds for three high schools: Montebello High School, Bell Gardens High School, and Vail High School. Windscheffel wrote the proposal narrative in support of the application using information that the District provided.

The application sought an annual grant of $625,000 for the three high schools. The application included a "Projected Grant Budget" with a detailed breakdown of projected expenditures. The projected budget stated that "[a]n official budget will be required when funds have been awarded."

The grant application was successful, but only in the amount of $500,000 for Montebello and Bell Gardens High Schools. Windscheffel subsequently worked with the District to prepare another application on behalf of Vail High School. That application resulted in another annual $135,000 award for five

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[4] Subsequent undesignated statutory references are to the Education Code.

years for after school programs at Vail High School beginning in the 2008-2009 school year.

2. *The High School ASSETs Contracts*

The District engaged Windscheffel, through FPI, to administer the after school programs that these grants funded. Windscheffel and the District entered into a series of written contracts governing the terms of this engagement. The first contract was for the 2007-2008 school year, covering the grant awarded for the programs at Montebello and Bell Gardens High Schools (the 2007-2008 ASSETs Contract). For the 2008-2009 school year, the parties executed three separate contracts, one for each of the three high schools covered by the grants (the 2008-2009 ASSETs Contracts). For the school years 2009-2010, 2010-2011, and 2011-2012, the parties entered into one contract covering all three high schools (the 2009-2012 ASSETs Contract).

Other than the compensation amount, each of these five contracts had essentially identical terms. The relevant provisions included the following, grouped by topic.

Scope

Each contract specified that Windscheffel "shall provide after school services in collaboration with the ASSETs program to DISTRICT students under the AFTER SCHOOL SAFETY ENRICHMENT for Teens (ASSETs) Program Grant" in accordance with an attached "Scope of Work."

Compensation

The contracts stated that the District was to pay compensation "not to exceed" a specified amount for each contract on a "Fixed Unit Rate" (which Windscheffel testified meant the "number of students served per day"). Payment was contingent on approval of Windscheffel's invoices, which were to "itemize

services, date(s), and payment rate(s) consistent with the terms" of the contract. The contracts also required that "final expenditures" be submitted to the District 20 days after the end of the contract period "or after the termination date," and stated that "[a]ny monies received by [Windscheffel] that has not been spent" by the end of the contract year "must be returned to the District."

Record Keeping and Reporting

Windscheffel was required to submit yearly budgets, a year-end "accounting reconciliation," and attendance track records. Windscheffel also agreed to provide "Quarterly Expenditure Reports documenting expenditures related to services provided," to maintain daily attendance records, and to submit a monthly attendance report. The contracts further obligated Windscheffel to maintain certain records for at least seven years after termination of the contract, including "daily service logs and notes and other documents used to record the provision of services; . . . statements of income and expenses; general journals; cash receipts and disbursements books; general ledgers and supporting documents; federal/state payroll quarterly reports; . . . and bank statements and cancelled checks."

Compliance with the Law

The contracts required Windscheffel to "comply with all applicable federal, state and local statutes, laws and ordinances, and rules, policies, and regulations."

Insurance

The contracts provided that Windscheffel was to purchase various types of insurance at "its sole cost and expense," including an errors and omissions policy.

Audits

Windscheffel agreed that the District "shall have the right to examine and audit all of the books, records, documents, accounting procedures and practices and other evidence that reflect all costs claimed to have been incurred or fees claimed to have been earned" under the contracts. The contracts specified the documents to which the District must be given access, which included the same daily service logs and financial records that Windscheffel was obligated to maintain for seven years. Windscheffel agreed to provide access to such documents within five days of a written request. The contracts provided that, if an audit determined that Windscheffel owed the District money "as a result of [Windscheffel's] over billing or failure to perform," unless otherwise agreed and upon written notice by the District, Windscheffel "shall pay to DISTRICT the full amount owed as result of [Windscheffel's] over billing and/or failure to perform."

Termination

The contracts stated that "District may by written notice to [FPI], terminate this Contract in whole or in part at any time because of the failure of [FPI] to fulfill its contractual obligations and following a reasonable opportunity to cure." Upon termination, Windscheffel was to "[d]eliver to DISTRICT all information and material as may have been involved in the provision of services whether provided by DISTRICT or generated by [Windscheffel] in the performance of the Contract."

Rights in Property

The contracts provided that "all deliverables, documents, products, data and/or other property" that Windscheffel developed "in connection with" its performance of the contracts were the property of the District. Windscheffel agreed to make

such property available upon request to the District "at any time at no additional cost" and to deliver such property to the District upon completion of the contract, "whether by contract termination or expiration."

3. *The Elementary and Middle Schools Evaluation Contracts*

In 2009, Windscheffel prepared grant applications for funds under the federal government's 21st Century Community Learning Centers Program (established under the Act) for various District elementary and middle schools. In return for preparing the grant applications, the District was to hire Windscheffel to perform evaluation services for the after school programs that were funded by the 21st Century grants as well as by the State of California's "After School Education and Safety" (ASES) program. Windscheffel's role was described in a memorandum of understanding included in each grant application (Evaluation Memoranda). Windscheffel was to prepare "state and federal evaluation reports and provide local program assessments as well as providing technical assistance and program monitoring."

The grant applications resulted in five awards. The grant period on each award was for five years. The District hired Windscheffel to perform evaluation services for the 2009-2010 and 2010-2011 school years, but terminated the relationship in 2011 when it terminated the final ASSETs contract. Windscheffel received partial payment on its contract with the District for the 2010-2011 school year (2010-2011 Evaluation Contract), but the District withheld the final payment of $39,616.

The 2010-2011 Evaluation Contract contained the same provisions as the ASSETs contracts discussed above, including

the obligations relating to record keeping, insurance, compliance with the law, and audits.

4. *Contract Performance and Termination*

Windscheffel prepared a detailed budget for the 2007-2008 ASSETs Contract in collaboration with the District. However, for the three 2008-2009 ASSETs Contracts, Windscheffel provided only a four-line budget with one undifferentiated line item in the amount of $582,100 for "Contractual Services." That was the total amount included as compensation for Windscheffel in the three 2008-2009 ASSETs Contracts. Windscheffel did not provide a budget for the three-year period covered by the 2009-2012 ASSETs Contract.

In July 2010, Alice Jacquez replaced Herrera as the District's extended learning opportunity coordinator. She quickly became dissatisfied with the after school programs that Windscheffel was supervising and the records that Windscheffel provided. Windscheffel provided invoices without backup. Windscheffel provided only summary attendance figures and did not deliver attendance sign-in sheets until the end of the year. When delivered, the attendance records were disorganized, incomplete, and duplicative. Jacquez also concluded that Windscheffel was improperly counting students who were attending already existing after school programs as participants in the grant-funded ASSETs programs. Information that Windscheffel compiled for periodic accountability reports that the District needed to file was also incomplete and duplicative, requiring a great deal of work by the District to sort out. It was a "constant battle" to get accurate and useful information.

Jacquez compared the statement of work in the ASSETs Contracts with the programs that Windscheffel was delivering

and identified numerous areas in which the programs were deficient. She concluded that only 11 of the 22 items listed on Windscheffel's scope of work were actually being performed. In addition, Windscheffel was not providing required enrichment classes. Rather, Windscheffel was using enrichment activities that already existed and identifying them as part of the ASSETs program.

From September to December 2011, Jacquez had discussions with District administration about the deficiencies in Windscheffel's performance. She recommended that Windscheffel's services be terminated. The District decided at that time to terminate Windscheffel from administering the after school programs in the Montebello and Bell Gardens High Schools, but to retain his services at Vail High School through December 2012.

Jacquez spoke with Windscheffel on October 26, 2011, about the decision. With respect to the reason for the termination, she told him that the District intended to go in "a different direction" with its after school programs.

District counsel wrote to Windscheffel on December 1, 2011, confirming that he was terminated from the programs at Bell Gardens and Montebello High Schools as of January 31, 2012, and referring to an "amendment and modification" of the contract. The modification included an agreement to "waive any reasonable opportunity to cure." A subsequent letter to Windscheffel dated January 17, 2012, also referred to an agreement to "waive any reasonable opportunity to cure" and also identified a "balance that may be earned for program services in the amount of $95,610.24 while servicing the Vail Continuation

High School Collaborative." Windscheffel refused to sign the letter.

"[A]fter interviewing District personnel," District counsel subsequently sent a letter to Windscheffel dated February 8, 2012. Among other things, the letter stated that Windscheffel "apparently failed to provide all of the program services at Bell Gardens High School and Montebello High School." The letter identified 13 items on Windscheffel's contractual scope of work that were not provided "either in whole or in part." The District terminated Windscheffel's engagement at those two high schools nine days later, on February 17, 2012.

Windscheffel continued to run the after school programs at Vail High School. On April 17, 2012, Windscheffel's counsel sent a formal claim to the District, seeking compensation that he claimed was owing under the 2009-2012 ASSETs Contract for the school years 2010-2011 and 2011-2012. He also demanded money for past evaluation services and for alleged lost revenues from future evaluation services for the District middle and elementary schools that Windscheffel claimed he had the contractual right to provide under the Evaluation Memoranda.

On April 30, 2012, the District sent a letter to Windscheffel identifying various expenses in the budget included in the ASSETs grant application and requesting information about Windscheffel's costs, expenses, and services provided under the ASSETs programs. The letter also requested that Windscheffel provide "cash receipts and disbursement books, the general ledger and supporting documents, transportation and other related service subcontracts, including general ledger and other supporting documents" for "audit and inspection."

Windscheffel's counsel sent a responsive letter on May 3, 2012. The response purported to "welcome the District's decision to audit the District's ASSETs program," but it raised questions about some of the information that the District requested and claimed that other information was in the District's possession. In particular, the response questioned the District's reference to the budget in the grant application, claiming that "FPI's contract with the District provides for a flat fee of $600,000 per year." The response suggested that "once the District has produced the ledgers for the school years the District wishes to audit and FPI has been given a reasonable period of time to review such ledgers, a knowledgeable representative of the District sit down with Mr. Windscheffel" to "work out a sensible arrangement for the sharing of information."

No audit occurred. On May 25, 2012, the District filed its complaint in this action.

5. *Proceedings in the Trial Court*

The District filed an amended complaint on October 25, 2012, alleging claims against Windscheffel for negligence, breach of the ASSETs contracts, fraud, and conversion. Windscheffel filed a cross-complaint on December 7, 2012. Following a partially successful demurrer and motion to strike, Windscheffel filed an amended cross-complaint on March 22, 2013.

The amended cross-complaint alleged four different breach of contract theories. First, Windscheffel sought the $39,616 that he claimed was due on his 2010-2011 Evaluation Contract. Second, Windscheffel sought damages for the District's alleged breach of a contract for Windscheffel to perform ASES program evaluation services through the 2014-2015 school year as reflected in the Evaluation Memoranda. Third, Windscheffel

claimed damages under the 2009-2012 ASSETs Contract consisting of unpaid revenues in the amount of $60,000 for the 2010-2011 school year and $450,000 for the 2011-2012 school year. Fourth, Windscheffel claimed breach of an oral agreement to administer the ASSETs program at Vail High School through 2012.

A court trial on the claims in the District's amended complaint and Windscheffel's amended cross-complaint proceeded on 25 days between May 7, 2014, and December 5, 2014. At the conclusion of testimony and argument, and after receiving posttrial briefs, the trial court provided a lengthy oral ruling on November 19, 2014. The court explained that it was finding in favor of the District on its contract and conversion claims, but that the District did not prove its fraud claim as pleaded. The court then proceeded to hear evidence on the District's punitive damages demand based upon the conversion claim.

The trial court issued a written statement of decision on March 9, 2015. The statement of decision found that Windscheffel had breached the ASSETs Contracts in numerous ways, including by failing to provide itemized invoices and annual budgets, failing to maintain the financial and attendance records required under the contracts, and failing to obtain insurance. The trial court awarded damages for breach in the amount of $1,369,609, consisting of the grant funds that Windscheffel received less the amounts that he paid for direct program services for students. On the District's conversion claim, the court found that Windscheffel had "failed to account for $401,379 in public funds," and awarded that amount as "non-additional" damages for conversion. The court found against Windscheffel on his cross-claims.

The trial court also awarded the District $802,000 in punitive damages predicated on its successful conversion claim. Among other things, the court found that Windscheffel "suppressed corporate and personal financial records" and provided testimony that was "replete with misrepresentations and misstatements." The court also concluded that Windscheffel misappropriated grant money. The court found that the "cumulative evidence demonstrates that millions of dollars in federal funds to educate disadvantaged children were channeled through FPI and re-routed at the direction of WINDSCHEFFEL for WINDSCHEFFEL and his wife's benefit."

DISCUSSION

1. *Contract Interpretation*

The parties present starkly different interpretations of the ASSETs Contracts. Windscheffel characterizes the contracts as "arms length commercial contracts" for payment of compensation in return for services provided. Windscheffel argues that, as a "service provider," FPI had no obligation "to account to [the District] for the use of its compensation under the contracts" once that compensation was paid. Windscheffel claims that his compensation "belonged *wholly to* [*him*]" and not to the District.

In contrast, the District argues that Windscheffel "hijacked public funds" by taking money for himself that he was obligated by contract and the law to spend on student programs. The District argues that section 8426 required that no more than 15 percent of grant funding be spent on administrative costs, which include salaries of program administrators. Along with that requirement, the District cites the budget in the grant application as the guide for how Windscheffel was obligated to

spend the compensation that he was paid under the ASSETs contracts.

It is "solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 (*Parsons*).) "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) If possible, intent should be determined from the language of the agreement. However, if a contract is ambiguous on its face, or if parol evidence shows that it is subject to two or more interpretations, extrinsic evidence may be considered. (*Bill Signs Trucking, LLC v. Signs Family Limited Partnership* (2007) 157 Cal.App.4th 1515, 1521 (*Bill Signs Trucking*).) Such evidence must be "relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.)

Consistent with these principles, an appellate court independently interprets the meaning of a written agreement when the interpretation does not depend upon consideration of conflicting evidence. (*Parsons, supra,* 62 Cal.2d at pp. 865–866.) Similarly, an appellate court independently reviews the meaning of an agreement if relevant extrinsic evidence is not in conflict, even if the parties draw different inferences from that evidence. (*Bill Signs Trucking, supra,* 157 Cal.App.4th at p. 1521.) However, if the extrinsic evidence conflicts, any reasonable construction by the trial court that is supported by substantial evidence will be upheld on appeal. (*Ibid.*)

The parties' competing interpretations of Windscheffel's obligations under the ASSETs Contracts suggest two separate but related questions. First, were there any restrictions on Windscheffel's use of his compensation under the ASSETs Contracts, or is Windscheffel correct in claiming that the compensation was simply payment for services rendered? Second, if there were such restrictions, where are they found?

For answers to these questions, we independently consider the language of the contracts. We also consider relevant extrinsic evidence under the contract interpretation principles discussed above.

Neither the parties' briefs nor the trial court's statement of decision analyze systematically how the extrinsic evidence might affect interpretation of the contract language relevant to these questions. However, the parties do make various evidentiary arguments on appeal that could bear upon their contemporaneous understanding of the meaning of contract terms. "In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties' intent." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242.) We therefore discuss such evidence where appropriate along with the trial court's express or implied findings.

a. *Windscheffel owed a contractual duty to the District to account for the compensation Windscheffel received*

The answer to the first question is clear. The plain language of the ASSETs Contracts shows that Windscheffel had a

duty to account for the funds that he received and did not have sole discretion to use them as he pleased.

Numerous contractual provisions contradict Windscheffel's interpretation of the ASSETs contracts as simple agreements to pay for services rendered. The contracts imposed detailed reporting requirements, including not only budgets but also a "year-end accounting reconciliation" and "Quarterly Expenditure Reports documenting expenditures related to services provided under the Master Contract." The contracts also required detailed record keeping, including "statements of income and expenses; general journals; cash receipts and disbursement books; general ledgers and supporting documents; federal/state payroll quarterly reports (Form94/DE3DP); ad [*sic*] bank statements and cancelled checks."

The District had the right to audit "all of the books, records, documents accounting procedures and practices and other evidence that reflect all costs claimed to have been incurred or fees claimed to have been earned under this Master Contract." If the results of such an audit showed that Windscheffel had overbilled or failed to perform, Windscheffel could be required to pay the District "the full amount owed." The contracts also provided that "[a]ny monies received by the CONTRACTOR that has not been spent" by the end of the contract period "must be returned to DISTRICT."

Such detailed cost accounting requirements and the obligation to *return* money to the District would make no sense if Windscheffel were entitled to use his compensation under the contracts however he chose so long as he provided after school services to a sufficient number of students. Windscheffel's claim that FPI "had no legal duty to account to [the District] for the use

of its compensation under the contracts" is directly contradicted by the language of the contracts that explicitly imposed such a duty.

Windscheffel cites a provision of the ASSETs Contracts stating that Windscheffel was an "independent contractor" and that the contracts did not create a partnership or employment or other principal-agent relationship. But the absence of such a legal relationship does not mean that there was no *contractual* duty. The contractual provisions cited above clearly did create a duty to account for the funds that Windscheffel was paid.

The extrinsic evidence does not point to any other reasonable interpretation of this contract language. Windscheffel argues that the contract amount approved by the District School Board (the Board) was the only budget necessary for payment and that Windscheffel was compensated on a "daily student basis." Windscheffel cites testimony by former District Superintendent Edward Velasquez that he claims shows that "the contract amount approved by [the] Board is the approved budget," and that "providers did <u>not</u> have to submit a budget for [the District's] approval." Windscheffel infers from this evidence that Windscheffel was compensated simply as a service provider.

However, Velasquez's testimony did not establish that no budget was necessary. He testified that the initial step of obtaining Board approval was followed by the negotiation of a contract. Board approval was just the first step leading to negotiations "based on the limits the Board set." Thus, his testimony did not address the contractual limits on how Windscheffel could use the money it was paid under the ASSETs Contracts.

Nor does the fact that Windscheffel was paid on a per-student basis mean that he had no obligation to the District with respect to how to use the funds that he was paid. The criteria for determining a *right* to payment is not the same as the criteria for how money may be spent once it is received. Costs can vary by the number of students served. An attendance-based compensation methodology is therefore consistent with restrictions on how the compensation may be used.

Because the extrinsic evidence does not demonstrate any ambiguity in the relevant contract language on this issue, it is not necessary to consider how the trial court resolved any conflicts in the evidence. (See *Bill Signs Trucking, supra,* 157 Cal.App.4th at p. 1521 [threshold finding of ambiguity is a question of law that is subject to independent review on appeal].) However, it is clear from the trial court's statement of decision that the court rejected Windscheffel's argument that he was simply a service provider that could use the compensation he was paid under the ASSETs Contracts as he pleased. The trial court found that Windscheffel "failed to follow generally accepted accounting principles to conceal and obfuscate the receipt and expenditure of millions in *public funds*." (Italics added.) The trial court's conversion finding was also predicated on the conclusion that Windscheffel received *public* funds and was obligated to use that money for specified public purposes: "The evidence is clear and convincing and demonstrates that FPI and WINDSCHEFFEL exercised control over *public* funds, and that they applied these funds to their own use." (Italics added.)

The trial court's oral statements are consistent. (See *CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Transportation Authority* (2003) 108 Cal.App.4th 382, 393–394

[trial court's oral explanation of its analysis during oral argument can aid in interpreting a statement of decision].) The court explained that "when you contract with a government agency, and especially like this for an after-school program and having read what it is that's been presented to me . . . there is a duty. Okay. [¶] There's always a duty that goes along with a contract to be accountable for that with which you are entrusted and to provide programs for the benefit of the children and those who attended the program."

Thus, the trial court correctly rejected Windscheffel's argument that there were no contractual limits on how he could spend the funds he was paid. The more difficult contract interpretation question is the source of those limits.

b. ***Windscheffel was subject to limits on program expenditures imposed by contractually mandated budgets and by the law***

(i) ***Budgets***

The ASSETs Contracts do not expressly state what specific standard is to govern the "costs claimed to have been incurred or fees claimed to have been earned" or what measure determines the "full amount owed" to the District as a result of Windscheffel's "over billing or failure to perform." However, the language and the structure of the contracts suggest that the parties intended that program budgets would control the expenditure of funds.

Paragraph 8 of the ASSETs Contracts describes Windscheffel's "reporting requirements" and states that the "minimum" reports that Windscheffel agreed to provide were a "program budget for the term of this agreement, to be submitted within 30 days of the commencement of services; year-end

accounting reconciliation, to be submitted by September 1st of each program year; State and Federal evaluation templates; and attendance track records." It is reasonable to infer from this provision that the purpose of the "year end accounting reconciliation" was to compare actual expenditures against the "program budget." In addition, the "inspection and audit" provision (paragraph 42) requires that, in addition to financial records such as "statements of income and expenses" and "general ledgers," Windscheffel must give the District access to "all budgetary information including operating budgets submitted by CONTRACTOR to DISTRICT for the relevant contract period being audited." Again, the logical inference is that the purpose of the audit was to compare the receipts and expenditures recorded in Windscheffel's financial records with the requirements of the operating budgets.

Because Windscheffel prepared a detailed operating budget for only the first year of the grant funds (i.e., the time period covered by the 2007-2008 ASSETs Contract), this raises the question whether the ASSETs Contracts imposed any other contractual restraints on spending. The District argued below that Windscheffel was required to comply with the budget submitted to the Department of Education in connection with the District's grant application (the Grant Budget). Although the District's argument is less clear on appeal, it continues to rely upon the Grant Budget as the source for determining the permissible expenditure of funds. Repeating the trial court's findings, the District claims that the "District intended to follow the plan set forth in the Grant Application," and that the "Grant Application provided the framework and provided the structure

for the ASSETs program to be implemented" at the three high schools.

We do not read the ASSETs Contracts as incorporating the Grant Budget. The ASSETs Contracts do not say that they intend to do so. They say that Windscheffel is to provide after school services "under" the grant and "as outlined in the [California Department of Education] approved [District] ASSETs grant proposal." But the statement that *services* are to be provided as described in the grant proposal is very different from a statement that the budget submitted with the grant proposal is to control the expenditures made to provide those services. In contrast, the ASSETs Contracts specifically required the preparation of a program budget at the beginning of the contract term.

The Grant Budget itself indicates that the District did not intend it to be controlling. Rather, the grant application referred to the budget as "projected," and stated that "[a]n official budget will be required when funds have been awarded."

Finally, the uncontroverted extrinsic evidence is inconsistent with the claim that the parties intended the Grant Budget to be incorporated into the ASSETs Contracts. Testimony from District employees confirmed that, although the final contract budget was to be based upon the projected grant budget, the Grant Budget was not final and was subject to change. And the parties did not simply rely upon the Grant Budget. Rather, in cooperation with the District (and as the 2007-2008 ASSETs Contract required), Windscheffel prepared a written budget for the first year of the ASSETs program.

Thus, the Grant Budget was not the measure of permissible expenditures. However, as discussed below, the ASSETs

Contracts did include other constraints on spending derived from the legal requirements applicable to grant funds.

(ii) *Legal requirements*

Paragraph 5 of each of the ASSETs Contracts provides that Windscheffel "shall comply with all applicable federal, state and local statutes, laws and ordinances, and rules, policies and regulations."[5] Section 8426, subdivision (c)(1) provides that "[n]ot more than 15 percent of each annual grant amount may be used by *a grantee* for administrative costs." (Italics added.) Section 8426, subdivision (c)(2) additionally provides that "up to 15 percent of the first year's annual grant award for each after school grant recipient may be used for startup costs." And section 8426, subdivision (g)(2) provides that, "[i]n addition to

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[5] Windscheffel argues that this provision is irrelevant to the ASSETs Contracts governing the first four years of the ASSETs program because those contracts were "fully performed." Windscheffel cites paragraph 12 of the ASSETs Contracts, which identifies some paragraphs of the contract that "survive the expiration of the Term . . . or termination of this Master Contract." Windscheffel points out that paragraph 5 is not included in this list. Windscheffel's argument is illogical, as it confuses the obligation to follow the law with the consequences of failing to do so. A contractual obligation to follow applicable laws while performing the contract might be moot once performance is completed, but that does not mean there can be no liability for breach of that obligation after the contract is fully performed. Indeed, paragraph 5 itself assumes that there could be subsequent liability, as it includes the requirement that Windscheffel indemnify the District "for all liability, loss, damage and expense (including reasonable attorney's fees) resulting from or arising out of CONTRACTOR'S failure to comply with District policies."

administrative costs, a program participant may expend up to the greater of 6 percent of its state funding or seven thousand five hundred dollars ($7,500) to collect outcome data for evaluation and for reports to the department." Finally, section 8426, subdivision (g)(3) requires that "[a]ll state funding awarded to a program pursuant to this article that remains after subtracting the administrative costs, startup costs, and outcome data costs authorized by subdivisions (c) and (d) shall be allocated to the program site for direct services to pupils."

Windscheffel argues that the 15 percent spending limitation in section 8426, subdivision (c)(1) did not apply to him because he was not the "grantee." However, subdivision (g)(3) is not limited by its terms to "grantees," but applies to "[a]ll state funding awarded to a program pursuant to this article." In any event, whether or not the 15 percent limitation in section 8426 would apply to Windscheffel apart from the ASSETs Contracts, we conclude that the parties' intent in executing the contracts was to make Windscheffel subject to the same legal requirements as the District in administering the ASSETs program.[6]

Both the language and the structure of the contracts support this conclusion. Paragraph 5 requires Windscheffel to comply broadly with "all applicable" federal, state and local

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[6] The parties' briefs did not analyze this contract interpretation issue. We therefore invited the parties to submit supplemental briefs addressing whether: (1) the ASSETs Contracts should be interpreted to make FPI subject to the same legal requirements that are applicable to the District concerning the use of grant money, and (2) if so, whether the record and the trial court's statement of decision support a finding that FPI breached the legal requirements for the expenditure of grant funds and a calculation of damages from such a breach.

statutes. The most logical understanding of the word "applicable" in this context is that Windscheffel made a commitment to comply with all the laws that are "applicable" to the program that he agreed to run, not just to those laws that would otherwise already apply by their terms to Windscheffel. That is consistent with the tasks that Windscheffel undertook under the ASSETs Contracts. Windscheffel agreed to provide "placement supervision, and management of necessary sub-contractual staff to provide academic support and enrichment program service components as outlined in the [California Department of Education] approved [District] ASSETs grant proposal." The services it agreed to provide included "covering the costs for program staff, sub-contracted services, and other program related expenses as stated in this proposal." The parties agreed that, "[u]nless otherwise agreed to in writing . . . [FPI] shall be responsible for the provision of all appropriate personnel, supplies or equipment to provide all after-school services described in [the] Scope of Work."

In essence, Windscheffel agreed to run the ASSETs program on behalf of the District. Having delegated responsibility to Windscheffel for the appropriate expenditure of program funds, it makes sense that the District also wanted Windscheffel to comply with the legal requirements for handling those funds. It also makes sense that Windscheffel would agree to do so.

Windscheffel's testimony supports this conclusion. He testified that he was aware of the "85 percent, 15 percent rule regarding direct services and administrative costs in after school programs," and admitted that "[b]oth [he] and the District" were to charge, at most, 15 percent administrative costs. Rather than

denying that the restriction applied to him, he claimed that he never did charge more than 15 percent administrative expenses.

Despite this testimony, Windscheffel argues in his supplemental brief that the Education Code "does not preclude the grantee from using additional funds, including its own funds, to pay for after school programs funded with ASSETs grants." His argument apparently is that the ASSETs Contracts should not be interpreted to apply the 15 percent limitation to Windscheffel because the District did not intend its payments to Windscheffel to be limited to grant funds.

The argument is inconsistent with the language of the ASSETs Contracts. Paragraph 3 of the contracts states that Windscheffel is to provide after school services "under" the program grants. The contracts also expressly provided that payments to Windscheffel were contingent on the District's receipt of grant funds. Paragraph 45 of the ASSETs Contracts stated that the District's "payments to CONTRACTOR are specifically conditioned upon the DISTRICT'S receipt of funding from the After School Safety Enrichment Teens (ASSETs) Program Grant." If grant funding were terminated, "the DISTRICT has no obligation to continue payments, other than for completed work, to CONTRACTOR and the term of this Master Contract terminates immediately." This provision is inconsistent with the claim that the District intended to pay Windscheffel from any source other than grant money.

Thus, we conclude that the ASSETs Contracts required Windscheffel to comply with the spending requirements set forth in section 8426.

2. *The District's Breach of Contract Claims*

Windscheffel asserts a variety of challenges to the different categories of contractual obligations that the trial court found he breached. In some cases, Windscheffel argues that he did meet his contractual obligations, or would have done so if the District had made an appropriate request. In others, Windscheffel argues that any breach that occurred did not cause any damage. Windscheffel also makes the global argument that the District acquiesced in, or never objected to, Windscheffel's performance. It argues that the District therefore failed to satisfy a contractual requirement for notice and an opportunity to cure and waived the right to claim a breach.

These arguments all challenge the trial court's factual findings, and we therefore apply the substantial evidence standard of review. (See *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460 (*Brandon & Tibbs*).) In applying that standard, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, superseded by statute on other grounds as stated in *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1439.) We discuss the issues of breach, damages, and waiver below.

a. *Substantial evidence supports the trial court's findings that Windscheffel breached the ASSETs Contracts*

(i) *Failure to maintain financial records*

The trial court's finding that Windscheffel failed to maintain financial records recording his handling of grant funds lies at the heart of the court's conclusion that Windscheffel "failed

to follow generally accepted accounting principles to conceal and obfuscate the receipt and expenditure of millions in public funds." It also provides the predicate for the court's damages award.

Substantial evidence supports the court's finding that Windscheffel failed to prepare and maintain the accounting documents that the ASSETs Contracts required. The trial court noted that Windscheffel admitted that he "never kept a general ledger with supporting documents and never prepared year-end account reconciliation." The record supports that conclusion. Windscheffel admitted that he did not maintain a general ledger for his contracts with the District showing income and disbursements. He claimed that he had a "larger general ledger" that contained information for more than one school district.[7] But Windscheffel points to no evidence in the record that he ever produced such a document.

When Windscheffel was asked whether he maintained "statements of income and expenses" as required by the ASSETs Contracts, he could identify only bank statements and canceled checks. He professed not to know what a check register is. He did not even produce checkbooks prior to trial. He disclosed for the first time while testifying during trial that he had check stubs that he had not produced. When ordered to provide them, he produced them in a disorganized fashion, leading the trial court to observe that "[i]t actually looks like they have been shuffled. It's actually unbelievable."

As the trial court also found, the deficiencies in Windscheffel's financial records were apparent in his inconsistent

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[7] Windscheffel testified that he kept only one account into which he deposited grant money for three different school districts to which he was providing services.

and haphazard efforts to reconstruct his expenditures for purposes of the litigation. Windscheffel produced several spreadsheets, prepared within days of each other, with large variations in the amount of particular payments that were allocated to the ASSETs program. There was no evident system or formula for the allocations. The expenditures included several $135,000 "bonuses" that Windscheffel paid to himself that were allocated differently in the spreadsheets that he produced. The spreadsheets included numerous payments for Windscheffel's life and health insurance, retirement funds, auto expenses, cable, and similar personal items.

According to the District's accounting expert, John Reith, Windscheffel produced no accounting of his *revenues* at all. Reith testified that he would not even characterize the records that Windscheffel produced as an accounting.

(ii) *Failure to prepare budgets*

Windscheffel prepared a detailed budget for the 2007-2008 school year in cooperation with the district. The four-line budget that Windscheffel provided for the following year contained only a single entry for "contractual services." Windscheffel admitted that he provided no budget for the next three years.

(iii) *Failure to prepare itemized invoices*

According to Jacquez, Windscheffel never provided any backup for his invoices, despite her request to do so. Invoices after 2008 introduced as exhibits at trial were not itemized by services provided, dates or payment rates as required by the ASSETs Contracts.

(iv) ***Failure to maintain adequate attendance logs***

The District introduced evidence attesting to the disorganized and unreliable attendance records that Windscheffel maintained. He provided attendance sign-in sheets once a year in a box without organization. The sheets contained signatures that were illegible and duplicative. The records were not sorted by teacher, school, day, or class and were missing information. There was also evidence that Windscheffel instructed FPI personnel to recreate missing records and that he counted students for the ASSETs program that were already attending pre-existing after school programs.

(v) ***Failure to obtain insurance***

Windscheffel admitted that he did not obtain the insurance required under the ASSETs Contracts.

(vi) ***Violation of spending restrictions***

Substantial evidence shows that Windscheffel spent money on himself that he was contractually and legally obligated to spend on students. The conclusion that he did so is readily reached by comparing the amount of grant funds that Windscheffel could permissibly keep with what the evidence showed he actually paid to himself.

Permissible Payments

The amount of money that Windscheffel could permissibly keep is a function of the contract requirements that we interpreted above. As discussed, the ASSETs Contracts contemplated that program budgets were to control the expenditure of contract funds. The evidence was undisputed that Windscheffel did prepare such a budget for 2007-2008, the first year of the grant. We therefore use that budget as the measure

of the money that Windscheffel was contractually entitled to receive for 2007-2008.

Under that budget, Windscheffel was to receive a total of $119,177. This sum included $60,000 for serving as the "ASSETs Enrichment Program Activity Coordinator/Technical Assistance Coordinator"; $30,000 for evaluation services (i.e., 6 percent of the grant funds of $500,000 for that year); and $29,177 for "administrative costs."[8]

Because no detailed budgets were prepared for subsequent years, we must consider the other contractual limit on the money that Windscheffel could permissibly receive. As discussed, after the first year the ASSETs Contracts and the law required Windscheffel to spend *all* grant funds on direct services to pupils except for 6 percent for evaluation services and 15 percent for administrative expenses.

Windscheffel's compensation was an administrative expense. The California Department of Education "Request for Applications" applicable to the 2007-2008 grant award explained that "any cost, direct or indirect, that supports management of the ASSETs program is considered administrative in nature."

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[8] The budgeted amount for Windscheffel was within the limits set by section 8426 in light of the percentage permitted under the statute for first year start-up costs. Fifteen percent of grant funds for the first year of a grant may be used for start-up expenses. (§ 8426, subd. (c)(2).) Including 15 percent for start-up costs and 10 percent for administrative expenses (which, as explained below, was Windscheffel's share of such expenses), Windscheffel could lawfully receive $155,000 in grant funds for 2007-2008 ([$500,000 x 10% administrative] plus [$500,000 x 15% start-up costs] plus [$500,000 x 6% evaluation services] equals $155,000).

Under paragraph 5 of the ASSETs Contracts Windscheffel was required to follow such administrative "policies and regulations" as well as all applicable statutes. Moreover, as discussed below, the trial court found that the money Windscheffel paid to himself was not spent on District "program services."

The evidence at trial established that the District used 5 percent of each year's grant funds for its own indirect costs.[9] Thus, the only contract funds that Windscheffel could permissibly pay to himself were 6 percent of the annual grant amount for evaluation services and 10 percent for his own compensation as the program administrator.[10]

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[9] Windscheffel argues in his supplemental brief that the District "could not establish a violation of the 15% limitation by FPI without evidence of the actual amounts expended by [District] for indirect expenses for all ASSETs grant years." That is inconsistent with his trial testimony. When Windscheffel was asked at trial whether he agreed with testimony by Mr. Velasquez that the District "took 5 percent" in administrative expenses, Windscheffel testified, "I agree that they at least took 5 percent and more." The argument is also inconsistent with Windscheffel's position in the trial court. In his supplemental posttrial brief filed on November 17, 2014, Windscheffel argued that 15 percent of the $3,040,000 of total grant money "was available for administration costs"; that District "has claimed 5% of these costs"; and that FPI "would be entitled to 10% of these costs or $304,000."

[10] Windscheffel argued to the trial court that he was also entitled to receive start-up costs for the first year of the Vail grant. However, because he did not meet his contractual obligation to prepare a detailed budget for 2008-2009, there is no evidence that the District agreed to allocate start-up costs to him for that year. Thus, there is no evidentiary basis to include start-up expenses for Vail in calculating the grant amounts that

The annual grant amount for 2008 to 2012 was $635,000 (including the $135,000 annual grant award for Vail High School beginning in the 2008-2009 school year). Of that annual amount, Windscheffel could legally receive a maximum of $101,600.[11] However, Windscheffel provided after school services for Montebello and Bell Gardens High Schools for only half of the school year 2011-2012 before the District terminated the contract for those two schools. Windscheffel therefore could legitimately receive payment for only a half-year of administrative expenses for those two high schools (i.e., 5 percent of the grant amount of $500,000 for Montebello and Bell Gardens High Schools rather than 10 percent). And Windscheffel did not perform evaluations for that year, so he was not entitled to the 6 percent evaluation fee. This means that Windscheffel could legitimately pay himself only $38,500 for 2011-2012.[12] Adding these annual sums

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Windscheffel could lawfully pay to himself. In contrast, each of the "Scope of Work" attachments to the contracts for 2008-2012 included descriptions of evaluation work. Moreover, the District did not dispute that Windscheffel's contractual responsibilities for those years included preparing evaluations. Thus, the record shows that the statutorily permitted 6 percent annual payment for evaluations should be allocated to Windscheffel.

[11] ($635,000 x 10% overhead) plus ($635,000 x 6% evaluation services) equals $101,600.

[12] $101,600 minus $38,100 (i.e., annual evaluation expense) minus $25,000 (i.e., $500,000 grant amount for Montebello and Bell Gardens High Schools x 5%) equals $38,500.

together, Windscheffel could have permissibly paid himself only $462,477 under the ASSETs Contracts.[13]

This calculation of the money that Windscheffel could legitimately receive under the ASSETs Contracts is identical to the calculation that the District presented to the trial court as part of an alternative damages analysis, with one exception. The District derived Windscheffel's permissible compensation for 2007-2008 from its view of Windscheffel's maximum legally permissible compensation for that year rather than from the negotiated budget. Using the District's approach results in the conclusion that Windscheffel could permissibly receive $423,300 for his compensation under the ASSETs Contracts.

In its oral ruling, the trial court stated that it considered using this measure of what Windscheffel could permissibly have earned in its damages calculation. The court noted that the $423,300 represented what Windscheffel "should have made" and was "the combination of all of the 10 percents, and 6 percents and everything up [to] and including half of the year of 2012."

Because a negotiated budget was prepared for the first year of program services, we conclude that is the appropriate measure of Windscheffel's permissible compensation for that year. Using the budgeted amount where available is consistent with our interpretation of the ASSETs Contracts discussed above. We therefore use the budgeted sum for 2007-2008 in calculating what Windscheffel could permissibly receive. In all other respects, our calculation is the same as what the District proposed and what

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[13] $119,177 (for 2007-2008) plus $101,600 (for 2008-2009) plus $101,600 (for 2009-2010) plus $101,600 (for 2010-2011) plus $38,500 (for 2011-2012) equals $462,477.

the trial court indicated was an acceptable measure of what Windscheffel "should have made."

Actual Payments

In calculating damages, the trial court relied on an analysis done by the District's accounting expert, Reith, to determine how much grant money Windscheffel spent on program services and how much he paid to himself. Reith identified $784,593 that Windscheffel spent on himself or his wife from payments that he received under the ASSETs Contracts. These expenditures included categories such as "payroll"; auto repair, license and insurance; retirement contributions; utilities; and "cable."

The trial court noted that Reith "spent extensive time attempting to reconcile FPI and WINDSCHEFFEL's absent and shoddy accounting records." Reith's figure of $784,593 for the amount that Windscheffel spent for his own purposes is based on Windscheffel's own records. That sum is substantially greater than the $462,477 Windscheffel could permissibly have paid himself. We therefore have no difficulty concluding that the evidence supports the finding that Windscheffel used grant funds for himself that he was legally and contractually obligated to spend on program services.[14] That impermissible use of funds was itself a breach of the ASSETs Contracts.

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[14] Reith based the $784,593 figure on his review of the actual amounts of the checks that Windscheffel produced relating to the ASSETs Contracts. The amounts per check that Windscheffel attributed to the ASSETs Contracts in the spreadsheets that he produced were sometimes less than the amounts reflected on the actual checks. The reductions were inconsistent and, as the trial court found, unreliable. Nevertheless, according to Reith's analysis, the total amount of the difference between the actual amounts on the checks and the

The Trial Court's Findings

Although the trial court did not identify Windscheffel's misuse of public funds as a separate element of breach, the court expressly found that such misuse had occurred. The court found that Windscheffel "exercised control over public funds" and "applied these funds to [his] own use." According to the trial court, Windscheffel "re-routed" public funds for his own benefit.

In its statement of decision, the trial court discussed the Education Code requirements for grant funds and noted that "[a]fter administrative costs, start-up costs for the first year, and outcome data costs, California Education Code, Section 8426(g)(3), requires that the balance of funds **'shall be allocated to the program site for direct services to pupils.'** " Then, in discussing damages, the court concluded that all funds that Windscheffel could not show were spent on program services actually went to him. The court found that Windscheffel "made expenditures of $1,003,083 on [District] program services" and that the remainder of the grant funds Windscheffel received "went to FPI and Windscheffel."

The record shows that the trial court intended its calculation of expenditures for District "program services" to reflect the amount that the law requires be spent on direct services to students. On November 17, 2014, two days before the

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amounts attributed to the ASSETs Contracts in Windscheffel's spreadsheet was $139,458.50. Even if that entire amount is deducted from the $784,593 that Reith calculated from checks that were paid out for personal uses by Windscheffel and his wife, the remaining amount of $645,134.50 would still be far above what Windscheffel was permitted to receive under the ASSETs Contracts.

trial court issued its oral findings, Windscheffel filed a supplemental posttrial brief in response to the court's request to examine various trial exhibits "with the focus on what was spent to benefit the students." Windscheffel argued that it was "impossible to determine what costs were directly related to students" from the District's evidence at trial. Windscheffel also attached to this filing a document from the California Department of Education entitled, "Direct Services and Administrative Cost Guidance," which Windscheffel stated "provides definitions for direct services to students and administrative costs."

The trial court's comments in issuing its oral ruling on November 19, 2014, show that the court rejected Windscheffel's argument. In explaining its damages calculation, the court described its analysis as the "direct services approach." The court expressed gratitude for the "guideline from the government website which talks about the direct cost of services." The court then went through a listing of expenditures "that really benefited the site" and subtracted those expenditures from "the total amount of money that FPI received for the program," leaving $1,369,609 for the amount "that it looks like that went to Mr. Windscheffel." That is the amount that the court ultimately awarded in damages.

Thus, the record shows that the trial court found that Windscheffel spent only $1,003,083 of the grant money he received on direct student services and paid $1,369,609 to himself. The amount that the trial court found Windscheffel paid to himself is far more than permitted by the contract or by law.

In his supplemental brief in response to this court's request for further briefing, Windscheffel argues that the trial court

"declined to find a violation of the Education Code in its Statement of Decision" because the District's "presentation of the evidence did not actually demonstrate what expenses were incurred for administrative services versus direct services." For the reasons discussed above, this argument is contradicted by the trial court's statement of decision and its oral findings. Moreover, to the extent the trial court's statement of decision is ambiguous on this issue, we interpret it in favor of the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134 (*Arceneaux*).)[15]

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[15] If a statement of decision "does not resolve a controverted issue" or is ambiguous, a party must bring the ambiguity or omission to the attention of the trial court to avoid implied findings on appeal favorable to the judgment. (Code Civ. Proc., § 634; *Arceneaux, supra,* 51 Cal.3d at p. 1134.) Windscheffel did not do so here. Windscheffel did file objections to the District's *proposed* statement of decision. However, even if we assume that such objections were procedurally sufficient, the objections did not point out ambiguities or request clarification of any of the proposed findings. Rather, they simply repeated Windscheffel's theory of the case in arguing that the evidence did not support the proposed findings. Such objections do not satisfy the requirement in Code of Civil Procedure section 634 that an objecting party bring any omission or ambiguity " 'to the attention of the trial court.' " (See *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 560 (*Yield Dynamics*) [objections that simply challenged legal premises for findings and claimed that they were unsupported by the evidence did not comply with Code Civ. Proc., § 634]; *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Com.* (2015) 239 Cal.App.4th 1000, 1012 [Code Civ. Proc., § 634 "applies only when there is an omission or ambiguity in the trial court's decision, not when the party attacks the legal premises or claims

b. *The trial court erred in calculating damages*

Windscheffel argues that the District did not prove any damages from a violation of the legal restrictions on Windscheffel's expenditure of grant funds because the District "was never required to return any ASSETs grant funds to the Department of Education." We disagree. Whether and when the District was required to return grant funds to the state is irrelevant to Windscheffel's responsibility for his breach. Nothing in the ASSETs Contracts requires that the District first be compelled to return grant funds to the state before it can enforce its contractual rights to obtain funds that Windscheffel misappropriated.

While we agree with the trial court that the District proved compensable damages from Windscheffel's breaches of the ASSETs Contracts, we find error in the amount of damages that the court awarded. The trial court calculated damages by: (1) determining the amounts that the District paid Windscheffel; (2) identifying the amount that Windscheffel actually spent on program services; and (3) awarding the difference in damages to the District. While the trial court's general approach to the damages calculation was reasonable, the trial court erred in two important respects. First, the court used the wrong number to calculate the amount that Windscheffel actually received under the ASSETs Contracts. Second, the court erred in ordering Windscheffel to return to the District *all* the amounts that he received that he did not spend on direct services to students, without permitting Windscheffel any compensation for four and a

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the trial court's findings are irrelevant or unsupported by evidence"].)

half years of his services provided under the ASSETs Contracts. The evidence underlying the breach of contract that the District proved does not support such a forfeiture.

(i) *ASSETs grant funds that the District paid to Windscheffel*

The trial court found that the District paid Windscheffel a total of $2,372,792. The court obtained that number from a schedule prepared by Reith based upon his review of the financial records that Windscheffel produced. However, that sum included money that Reith's analysis showed was paid to Windscheffel for the *ASES* program, not the ASSETs program. Reith's analysis showed that Windscheffel actually received $2,178,770 pursuant to the *ASSETs* Contracts.

The District did not pursue any claims against Windscheffel for his performance of evaluation services for elementary and middle schools under the ASES program. On cross-examination, Reith agreed that the District made no claim against the money that Reith categorized as payment to Windscheffel under the ASES program rather than the ASSETs program. Amounts that Windscheffel received for the ASES program therefore cannot properly be considered in determining the amount that Windscheffel paid to himself under the ASSETs Contracts.

Apart from this discrepancy, there is ample evidence to support the trial court's reliance on Reith's calculations. Reith's figure of $2,178,770 for actual payments to Windscheffel under the ASSETs Contracts was based upon the same invoices that, with minor exceptions, Windscheffel agrees were submitted and

paid in connection with the ASSETs Contracts.[16] Moreover, on cross-examination Windscheffel agreed that he was paid in the "range" of $2,172,000 under the five ASSETs Contracts. Windscheffel's calculations on appeal are also in that range.[17]

Any uncertainty in the precise amount of money that Windscheffel received under the ASSETs Contracts is fairly attributable to Windscheffel's breach of his contractual obligation to maintain financial records. As Reith testified, Windscheffel did not produce any *revenue* information at all. We therefore conclude that the trial court reasonably relied on the accounting

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[16] There are three discrepancies. First, Reith identified Windscheffel's invoice No. 109 dated May 1, 2009, for $39,906 as an invoice for the ASES program, whereas Windscheffel identifies the invoice as an ASSETs program invoice. Thus, this discrepancy actually benefited Windscheffel. Second, Reith included invoice No. 153 dated December 2, 2010, in the amount of $24,328 as an ASSETs invoice. Windscheffel does not include that invoice in his calculation and suggested on cross-examination of Reith that it was actually for ASES compensation. Third, Reith included invoice No. 100 dated October 2, 2007, as an ASSETs Contract invoice based upon the description in the invoice. Again, Windscheffel suggested on cross-examination that this invoice was actually for work on ASES evaluations. However, Windscheffel did not offer evidence in support of that interpretation. Moreover, the first five invoices on Reith's schedule, including the October 2, 2007 invoice, add up to exactly $381,022. That is precisely the amount of the 2007-2008 ASSETs Contract, which Windscheffel includes in the amount that he asserts the District "contracted to pay FPI . . . for services under the five ASSETs Contracts."

[17] Windscheffel states in his opening brief that he was paid $2,101,924 on the ASSETs Contracts.

summary prepared by the District's expert, adjusted to exclude the sums that the expert determined Windscheffel received as compensation under the ASES program. (See *Stephan v. Maloof* (1969) 274 Cal.App.2d 843, 850–851 ["one whose wrongful conduct has made difficult ascertainment of damages cannot complain because the court must make estimate of damages and not exact computation, provided that estimate is reasonable"].)

(ii) *ASSETs grant funds that Windscheffel paid to himself*

The trial court also relied on Reith's analysis in finding that Windscheffel spent a total of $1,003,083 on direct program services for the nearly five years he administered the ASSETs after school programs. The trial court derived that amount from a schedule that Reith prepared from Windscheffel's records summarizing Windscheffel's expenditures by category. The trial court identified the categories in Reith's schedule that corresponded to direct services to students (i.e., stipends, transportation, security, and supplies). Excluded categories consisted of those that Reith identified as relating to Windscheffel's personal expenses, as well as other unexplained categories (such as "auto," "payroll taxes," "legal," and "phone.") This analysis was reasonable based upon the evidence. As the finder of fact, the trial court could permissibly resolve doubts about the purposes of Windscheffel's expenditures against Windscheffel, especially in view of his failure to maintain accurate financial records as the ASSETs Contracts required.[18]

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[18] It does appear that the trial court's math was wrong. Based upon the trial court's oral findings, it appears that the court intended to add Reith's categories for field trip ($400), security ($2,440), stipends ($877,833), transportation ($73,320),

Finally, the trial court concluded that Windscheffel used for his own purposes *all* contract money that he received other than the $1,003,083 that the court found he actually spent on direct program services. The court could reasonably make that inference from the evidence.

The trial court found that Windscheffel willfully made false statements, suppressed financial records, and intentionally failed to account for funds to conceal the expenditure of public funds for his own use. The court rejected Windscheffel's testimony as "incredible and unreliable."[19] We defer to these factual judgments and credibility findings by the trial court. Citing Evidence Code section 413 and *Breland v. Traylor Eng. etc., Co.* (1942) 52 Cal.App.2d 415, 426, the court also relied on the principle that a fact finder is entitled to infer that missing evidence would be adverse to a party who "fails to produce

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supplies ($13,410), and an additional amount for the purchase of bus tokens for students ($9,000). Those amounts add up to $976,403, not $1,003,083. However, the District has not raised this apparent discrepancy on appeal, and it included the amount of $1,003,083 for program expenditures in the proposed statement of decision that it submitted to the trial court. We therefore do not consider it.

[19] Although not directly relevant to issues on this appeal, one example of deceptive conduct is particularly egregious. The District introduced an expert analysis of Windscheffel's computers, which the court had ordered produced because of Windscheffel's "recalcitrance during discovery." The expert determined that Windscheffel had created 30 years' worth of corporate minutes in under 10 minutes during the litigation, contradicting his deposition testimony that the minutes were created and placed in the corporate book after each annual board meeting.

evidence that would naturally have been produced."[20] Such an inference from missing accounting records was particularly appropriate here in light of Windscheffel's contractual obligation to maintain financial records and to make them available to the District. (See also *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1224–1226.) The trial court therefore reasonably concluded that Windscheffel diverted for his own use any funds for which he did not provide an accounting.

Subtracting the amount that the trial court found Windscheffel actually spent on program services ($1,003,083) from the amount that the evidence showed Windscheffel received under the ASSETs Contracts ($2,178,770) leaves the amount of $1,175,687 that the trial court could reasonably conclude went to Windscheffel and his wife.

(iii) *Calculation of damages for breach*

Windscheffel argues that awarding *all* the money that Windscheffel received under the ASSETs Contracts to the District as damages would amount to an impermissible windfall. We agree.

The contract breaches that the trial court found concerned Windscheffel's failure to maintain records and his misuse of funds. Although the District introduced some evidence that the actual after school services that Windscheffel provided were inadequate, the District did not show—and the trial court did not

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[20] Evidence Code section 413 states: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto."

find—that Windscheffel breached the ASSETs Contracts by failing to meet the contractual requirements for providing such services. Moreover, the District accepted Windscheffel's services for over four years without complaint, and apparently without any meaningful oversight, until Jacquez began to raise questions in 2011. As the trial court noted, the District was "quite asleep at the switch."

Damages awarded for breach of contract "should, insofar as possible, place the injured party in the same position it would have held had the contract properly been performed, but such damages may not exceed the benefit which it would have received had the promisor performed." (*Brandon & Tibbs*, *supra*, 226 Cal.App.3d at p. 468; Civ. Code, § 3358 ["Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides"].)

Here, the ASSETs Contracts provided for the return by Windscheffel to the District of "the full amount owed as a result of [Windscheffel's] over billing and/or failure to perform, in whole or in part, any of its obligations" as determined by an "inspection, review, or audit." The District proved that Windscheffel breached his contractual obligations to maintain records and to spend all grant money on direct services to students other than his own statutorily permitted compensation. The District is therefore reasonably entitled to the return of money that Windscheffel spent on himself that he was not permitted to spend. (Cf. *Brooks v. Shemaria* (2006) 144 Cal.App.4th 434, 441 [client in a criminal case could maintain a breach of contract claim against his former lawyer for return of unused portions of retainer fee].) But the District did not prove that Windscheffel

failed to provide the after school services that he agreed to provide. Thus, there is no evidentiary basis to require Windscheffel to return money that he was contractually entitled to receive for the after school services that he supervised.

As discussed above, there is a reasonable basis in the evidence to conclude that Windscheffel spent $1,175,687 on himself and his wife from the ASSETs funds. He was contractually entitled to receive only $462,477. Thus, the record will reasonably support a damages award of $713,210. Because we have sufficient evidence in the record to calculate this sum, we will modify the judgment to reduce the damages for breach of contract to this amount rather than remand to the trial court for a recalculation of damages. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 533 ["When the evidence is sufficient to sustain some but not all alleged damages, we will reduce the judgment to the amount supported by the evidence"].)

c. *The trial court's finding that an opportunity to cure would have been fruitless is supported by the evidence*

The ASSETs Contracts provided that the District "may by written notice to CONTRACTOR, terminate this Contract in whole or in part at any time because of the failure of CONTRACTOR to fulfill its contractual obligations and following a reasonable opportunity to cure." Windscheffel argues that the District never provided such an opportunity to cure.

The trial court found that "Alice Jacquez provided repeated notices of breach to Windscheffel and FPI orally throughout the 2010-2011 school year." The court also found that Jacquez "requested and demanded supporting documentation."

There is evidence to support the conclusion that Jacquez complained to Windscheffel about the quality of the documentation he was providing. Jacquez testified that, when she first received an invoice from Windscheffel, she asked her secretary to ask him for backup documentation. Windscheffel responded that "this is how he bills and that he was awaiting the payment." During a group meeting of site providers that included Windscheffel, Jacquez said that she wanted a "new procedure" of providing quarterly billing documentation and attendance records. She also asked Windscheffel to use electronic attendance tracking, but he refused, saying he "wasn't going to pay for it." And she testified about meetings in January 2011 in which the IT department complained to Windscheffel about the spreadsheets he was providing, asking him if there was information they could provide to help, but "it still was—it was duplicate names, duplicate ID numbers, no intake date. It was a constant battle."

The trial court could have concluded from such testimony that Windscheffel was given notice of deficiencies and had an opportunity to cure his documentation problems. There was also a sufficient evidentiary basis to conclude that such notice was adequate under the ASSETs Contracts. The relevant contract provision states that the "DISTRICT may by written notice to CONTRACTOR, terminate this Contract in whole or in part at any time because of the failure of CONTRACTOR to fulfill its contractual obligations and following a reasonable opportunity to cure." Thus, the language of the provision requires *written* notice to *terminate*, but does not specify any particular procedure for providing an opportunity to cure, other than that it be

"reasonable." The trial court could have concluded that Jacquez's complaints provided a reasonable opportunity.

In addition, the trial court found that an opportunity to cure was pointless under the circumstances. The trial court stated that "perhaps an opportunity to cure would be available if there were something which could be cured, but you can't cure prolonged fraud." The finding is also supported by the evidence.[21]

The core contract breaches leading to the District's damages resulted from Windscheffel's failure to keep accurate financial records and his payment to himself of program funds that he was not entitled to keep. These were not technical failings or performance issues that he could have cured by changing the quality or content of after school services. Indeed, as the trial court found, Windscheffel could not, or would not, cure the lack of adequate financial records even at trial.

"California law allows for equitable excusal of contractual conditions causing forfeiture in certain circumstances, including circumstances making performance futile." (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1186 [arbitrator acted within his power in concluding that providing contractual notice of breach and an opportunity to cure to a franchisor would have been futile]; see also Civ. Code, § 3532 ["The law neither does nor

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[21] Windscheffel argues that this finding is inconsistent with the trial court's ruling against the District on its fraud claim. However, fairly interpreted in light of the entire statement of decision, the trial court's finding simply reflected the conclusion that Windscheffel's record keeping failure was intentional conduct designed to facilitate the misappropriation of money, and that such conduct could not be undone.

requires idle acts"].) The trial court reasonably found that notice and an opportunity to cure was futile here.

Windscheffel also argues that the District's conduct in accepting his performance and failing to give notice of any breach amounted to a waiver of the claimed contract breaches. "Waiver is a question of fact for the trial court." (*Gould v. Corinthian Colleges, Inc.* (2011) 192 Cal.App.4th 1176, 1179.)

While the trial court did not address the issue of waiver separately from the contractual "opportunity to cure" requirement, it impliedly rejected Windscheffel's waiver argument in finding for the District on its breach of contract claims. As discussed above, because Windscheffel did not request any clarification of the trial court's findings in its statement of decision, we infer that the trial court made the findings necessary to support the judgment in favor of the District on these claims.

There is sufficient evidence to support the finding that the District did not waive compliance with the contractual provisions that Windscheffel breached. As mentioned, the trial court found that Jacquez requested Windscheffel to provide supporting documentation and provided oral notice of deficiencies. Moreover, while one might reasonably expect the District to object to deficiencies that it observed—such as incomplete invoices and the failure to prepare budgets—the lack of complaint by the District provides no reason to conclude that it accepted conduct that it did not know was occurring. (See *Banducci v. Frank T. Hickey, Inc.* (1949) 93 Cal.App.2d 658, 662 [waiver could not apply to latent defects in construction work that the accepting party had no reason to know existed].) Without conducting an audit, the District had no reason to know that Windscheffel was failing to keep accurate records of his receipts

and disbursements and was paying himself more than he was due.

3. *The District's Conversion Claim*

The trial court found for the District on its conversion claim based upon Windscheffel's failure to "account for $401,379 in public funds." Windscheffel argues that this finding must be reversed because there was "never any certain amount capable of identification" that Windscheffel allegedly converted. We agree.

"Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491 (*McKell*).) That is because the "tort of conversion is derived from the common law action of trover," which concerned "the defendant's hostile act of dominion or control over a specific chattel to which the plaintiff has the right of immediate possession." (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 (*PCO*).) Thus, a " 'generalized claim' " for stolen money that does not identify any specific stolen funds is not actionable as conversion. (*Id.* at pp. 396–397; *Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 235 (*Vu*).)

For example, in *PCO* the court upheld summary adjudication on a conversion claim based on an alleged theft of bags of cash where the plaintiff failed to provide evidence of a specific amount of cash that the bags contained. (*PCO*, *supra,* 150 Cal.App.4th at p. 397.) Similarly, in *Vu*, the court upheld summary judgment on a conversion claim for approximate losses due to cheating at a card club where the plaintiffs failed to

"identify any specific, identifiable sums that the club took from them." (*Vu, supra,* 58 Cal.App.4th at p. 235.)

The District did not show, and the trial court did not find, that Windscheffel misappropriated any *specific* sum of money. The $401,379 that the trial court identified was actually an estimate that was amalgamated from several different sources. That estimate included money that Windscheffel received from the ASES program, and that could not be used to calculate money that Windscheffel appropriated from ASSETs program funds.

The District calculated that number from various exhibits prepared by its expert, Reith. It is the remainder of the sum that Reith calculated for Windscheffel's revenues from the ASSETs *and* the ASES program ($2,372,792), less Windscheffel's expenditures that Reith obtained from the spreadsheets that Windscheffel produced ($1,971,413). Moreover, Reith calculated a different number for Windscheffel's expenditures from the actual checks that Windscheffel produced ($2,110,872). Thus, the $401,379 figure is far from a specific sum representing misappropriated money.

The $401,379 is of course also different from the damages amount of $1,369,609 that the trial court awarded on the District's breach of contract claim, which purportedly represented the money that went to Windscheffel from the ASSETs program funds. That number was a result of estimation from the available information. The record shows that the District and the trial court struggled to arrive at an appropriate calculation of money that Windscheffel took without contractual authorization.[22] Such an estimate involves judgments about the

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[22] For example, in discussing the calculation of the "$400,000 [that] has never been accounted for" based upon what

total amount of money that Windscheffel received, the money that he was contractually and legally entitled to take as compensation, and the amounts that he actually spent on direct program services. This is amply illustrated by our discussion above concerning the calculation of contract damages. Such approximate judgments are appropriate for arriving at a reasonable estimate of damages for breach. (See *Stephan v. Maloof, supra,* 274 Cal.App.2d at pp. 850–851.) However, they do not identify a *specific* sum of money belonging to the District that Windscheffel converted.

The trial court also noted that the District "owns virtually all of the ASSETs records" and found that Windscheffel "committed wrongful acts . . . resulting in the wrongful disposition of [District] property."[23] However, the trial court did not attribute any damages to Windscheffel's wrongful retention of any records. The only damages that the trial court awarded on the District's conversion claim was the $401,379 attributable to Windscheffel's alleged conversion of *money*.[24]

Windscheffel "took in and what [exhibit] 302 shows he spent," the District's counsel admitted, "I'm not by this vouching [exhibit] 302 is even close to being accurate. But I don't have anything else."

[23] The ASSETs Contracts provided that "all deliverables, documents, products, data and/or other property (collectively 'Property') developed by CONTRACTOR (and its subcontractors) in connection with the performance of this Master Contract shall be the Property of and belong solely to the DISTRICT . . . and shall be made available upon request to the DISTRICT at any time at no additional cost."

[24] Because the trial court made express findings on all the elements of the District's conversion claim, there is no reason to

The District also did not provide any evidence of damages due to Windscheffel's wrongful retention of any particular item of property belonging to the District. The District asserts that it expended "hundreds of hours" trying to create a "reasonable measure" accounting for the expenditure of grant funds. "[C]ompensation for the time and money properly expended in pursuit" of converted property is a proper element of damages. (Civ. Code, § 3336.) However, the District does not cite any evidence supporting its assertion. The only testimony that the District cites for this claimed expenditure of time did not concern Windscheffel's *refusal* to provide particular documents. Rather, it concerned the time that District employees spent in attempting to decipher confusing spreadsheets that Windscheffel actually provided to the District during the performance of the contracts.

There was ample evidence that Windscheffel failed to maintain an adequate accounting of attendance and program funds. While Windscheffel's failure to maintain accurate accounts breached the ASSETs Contracts, the failure to *create* records is not conversion. Conversion involves a "wrongful act

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infer that the court made any additional finding of damage from Windscheffel's wrongful retention of records. Code of Civil Procedure section 634 applies only when a statement of decision "does not resolve a controverted issue," or if the statement is ambiguous. (Code Civ. Proc., § 634; *Yield Dynamics, supra,* 154 Cal.App.4th at p. 559 ["Since the statement adequately disclosed the court's determination on these ultimate facts, it was sufficient as to that cause of action and the rule against inferences favorable to the judgment cannot come into play"].) In any event, as discussed below, the evidence did not support any finding of damage on that element of the District's conversion claim.

toward or disposition of" some property which interferes with the plaintiff's possession. (*McKell, supra,* 142 Cal.App.4th at p. 1491.) The District failed to provide any evidence of damages specifically resulting from Windscheffel's refusal to provide particular records that actually existed and belonged to the District.

Damage is an essential element of the tort of conversion. (*McKell, supra,* 142 Cal.App.4th at p. 1491; *Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 411–412 [demurrer properly sustained where plaintiff failed to allege damages from an alleged conversion].) In the absence of any evidence of damages, Windscheffel's wrongful retention of District property is not sufficient to sustain the District's conversion claim.

4. *The Punitive Damages Award Must Be Reversed*

Punitive damages may not be awarded for breach of contract. (Civ. Code, § 3294, subd. (a); *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516.) The trial court found against the District on its fraud claim, and we have concluded that the District failed to prove its claim for conversion. Thus, no basis remains for the punitive damages that the trial court awarded, and that element of the judgment must be reversed.

5. *Windscheffel's Breach of Contract Claims*

The trial court found generally that Windscheffel "did not fully perform several material provisions of each of the contracts" without excuse or justification, and that "[i]n light of the fact that [Windscheffel] was in breach of its contract repeatedly over many years, [the District] was totally justified in not paying him and terminating his contract." With respect to Windscheffel's cross-

complaint specifically, the court stated that it "does not find by a preponderance of the evidence that [the District] has breached its contract with Windscheffel and FPI based on the analysis already made and the incredible and unbelievable testimony of the defendant."

While these statements do not fully explain the reasons why the court found against Windscheffel on his breach of contract claims, they suggest that the trial court ruled that the District was permitted to withhold payments and terminate *all* its contractual relationships with Windscheffel based upon the contract breaches that the court found. We conclude that the evidence supports this finding.[25] The trial court's findings that Windscheffel committed material breaches of contract provided a sufficient basis to conclude that Windscheffel failed to prove his own breach of contract claims against the District.

a. *The 2010-2011 Evaluation Contract*

Windscheffel claims that the District owed $39,616 on this contract for the provision of evaluation services to District elementary and middle schools under the ASES program. However, this contract contained the same detailed invoicing and record keeping requirements as the ASSETs Contracts, including maintaining "statements of income and expenses," "cash receipts and disbursement books," and "bank statements and cancelled checks." It also required Windscheffel to purchase insurance. Like the ASSETs Contracts, this contract also included a provision (paragraph 40) authorizing the District to withhold

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[25] As mentioned above, because Windscheffel did not request any clarification of the trial court's findings, we interpret any ambiguity in the trial court's statement of decision on this issue in favor of the District as the prevailing party.

payment when Windscheffel "has failed to perform" under the terms of the contract or "was overpaid by DISTRICT as determined by inspection, review and/or audit of its program, work and/or records."

The trial court could reasonably find that Windscheffel breached his record keeping obligations under this contract for the ASES program and that the District was therefore contractually entitled to withhold payment. The evidence showed that Windscheffel's records did not distinguish between revenues and payments under the different programs, and he used the same accounts even for programs with different school districts. Windscheffel's records included large checks made out to himself, only portions of which he attributed (inconsistently and unsystematically) to the ASSETs program. His invoices did not distinguish clearly between the ASES and ASSETs programs, leading to confusion and disagreement at trial concerning the programs for which he received money.

Moreover, to prevail on his claim for damages for breach, Windscheffel was required to prove that he complied with the contract. "A party complaining of the breach of a contract is not entitled to recover therefor unless he has fulfilled his obligations. [Citations.] He who seeks to enforce a contract must show that he has complied with the conditions and agreements of the contract on his part to be performed." (*Pry Corp. of America v. Leach* (1960) 177 Cal.App.2d 632, 639 (*Pry*); see also *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1154 ["a contract which has been materially breached may not be enforced"].)

The trial court found material breaches of Windscheffel's record keeping obligations. Accurate records were material to the ASES program as well. The 2010-2011 Evaluation Contract

contained a provision for payment on a "Fixed Unit Rate basis." Windscheffel testified that term meant the "number of students served per day." The contract also contemplated "covering the costs for program staff, sub-contracted services, and other program related expenses." Accurate records would logically be important for monitoring such costs and evaluating Windscheffel's claimed entitlement to payments.[26]

b. *Alleged contract for future ASES evaluation services*

The second cause of action in Windscheffel's cross-complaint alleged that the District agreed in the Evaluation Memoranda that FPI "would be retained" to perform evaluation services under the ASES program. Windscheffel alleged that the District "in fact retained FPI" to perform evaluation services for the 2009-2010 and 2010-2011 school years, "but failed to retain FPI to perform these functions for the 2011-2012, 2012-2013, and 2013-2014 school years." Windscheffel claimed the fees that he would have received for those subsequent years as damages. Thus, Windscheffel's theory was apparently that the District agreed to enter into *future* contracts with him and breached that agreement by declining to enter into evaluation contracts with

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[26] Windscheffel argues that the District did not raise these record keeping breaches in the trial court as a defense to the cross-claim. However, the District did argue that Windscheffel should "be awarded $0" on his cross-complaint because Windscheffel has "never provided" general ledgers, expense journals, cash receipts and disbursement books, and never purchased insurance. That argument was sufficient to raise the issue for the trial court's consideration.

him after the 2010-2011 school year. This theory is consistent with the one-year term of the 2010-2011 Evaluation Contract.

The District argues that Windscheffel's record keeping and other contract breaches provided "just cause" for "termination" of these other contracts. We agree that Windscheffel's material breaches provided sufficient reason for the District not to retain him for future evaluation work, whether that conduct is viewed as the "termination" of an existing contract or a decision not to negotiate new contracts.

An " 'agreement to agree' " does not establish a contract if "any of the essential elements of a promise are reserved for the future agreement of both parties." (*Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1253 (*Copeland*); *id.* at p. 1256.) However, parties can enter into an enforceable agreement to *negotiate* a contract. A party is liable under such an agreement "only if a failure to reach ultimate agreement resulted from a breach of that party's obligation to negotiate or to negotiate in good faith." (*Id.* at p. 1257.)

Windscheffel's breaches of the 2010-2011 Evaluation Contract precluded his claim for damages under his second cause of action whether the contract for future evaluation work is viewed as a single contract for evaluation services over multiple years or as an agreement to negotiate separate annual contracts for evaluation services. If the former, his material breaches of his obligations excused the District's future performance and precluded Windscheffel from asserting a claim under the contract. If the latter, Windscheffel's breaches violated the covenant of good faith and fair dealing inherent in the agreement to negotiate, which excused the District from further negotiations and also precluded Windscheffel from asserting a claim for

breach. (See *Copeland, supra*, 96 Cal.App.4th at p. 1260 ["Only when the parties are under a contractual compulsion to negotiate does the covenant of good faith and fair dealing attach, as it does in every contract"].)

c. *The District's alleged breach of the 2009-2012 ASSETs Contract*

Windscheffel claims that the District owes him $60,000 as a "final payment" for the 2010-2011 school year under the 2009-2012 ASSETs Contract. He also claims damages in the form of the compensation that he would have received for the remainder of the 2011-2012 school year if the District had not terminated the 2009-2012 ASSETs Contract. Both claims are precluded by the contract breaches that the trial court found.

As discussed above, Windscheffel's breaches of the 2009-2012 ASSETs Contract preclude him from claiming damages under it. (*Pry, supra,* 177 Cal.App.2d at p. 639.) Moreover, the trial court reasonably found that Windscheffel's breaches permitted the District to terminate the contract and to withhold payment.

Finally, Windscheffel's claim for the past due payment for the 2010-2011 school year is moot in light of our disposition of the District's breach of contract claim against Windscheffel. Windscheffel was to entitled to compensation of only $462,477 for his work under all the ASSETs Contracts, which we have ordered subtracted from the damages he owes to the District. Windscheffel is not entitled to another $60,000 for his work on that contract.

d. *Alleged contract for future after school services at Vail High School*

Windscheffel claims in his fourth cause of action that, in return for Windscheffel's assistance in preparing the grant application for Vail High School, the District orally agreed to retain him to run the ASSETs after school program at that high school "throughout the term of any grant that was received." Because there was one year remaining on that grant after the 2011-2012 school year, Windscheffel claims that he is entitled to damages in the form of compensation that he would have received for running the after school program for that final year.[27]

The analysis concerning this claim is similar to the analysis discussed above concerning Windscheffel's second cause of action for compensation for future ASES evaluation contracts. Windscheffel's breaches of his obligations under the ASSETs Contracts excused the District from retaining him for future after school services at Vail, whether the alleged oral agreement is viewed as a single contract to provide evaluation services or an agreement to negotiate future contracts for such services.

6. *The trial court did not deny Windscheffel a fair trial*

Windscheffel argues that the trial court "sided with" the District early in the trial and showed bias in its findings on Windscheffel's claims. Windscheffel also claims that the trial court was unfair in its evidentiary rulings, improperly sustaining objections by the District and failing to permit Windscheffel to

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[27] The claim applies only to Vail High School because the ASSETs after school program at Vail was funded through a separate grant that was awarded a year after the five-year grants for Montebello and Bell Gardens High Schools.

introduce admissible evidence. Windscheffel claims that this bias amounted to a due process violation.

We reject the claim. Windscheffel does not point to any evidence of a personal conflict of interest and does not claim that the trial judge was biased against Windscheffel because of some personal characteristic (e.g., race or gender). Rather, Windscheffel simply complains that the trial judge's decisions were so unfair as to exhibit bias.

The fact that the trial court ruled against Windscheffel completely on the merits does not undermine the integrity of the trial. "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." (*Labor Board v. Pittsburg S. S. Co.* (1949) 337 U.S. 656, 659.)

Nor do the trial court's evidentiary rulings provide a basis for reversal. Windscheffel complains that the court invited objections and ruled against Windscheffel on the admissibility of evidence. But the trial court also suggested objections in response to questions by the District, made evidentiary rulings adverse to the District, and admonished District counsel for making speaking objections. The trial court has discretion in ruling on the admissibility of evidence, and, even when erroneous rulings are made, a judgment will be reversed "only if ' "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ' " (*Rappaport v. Gelfand* (2011) 197 Cal.App.4th 1213, 1229, quoting *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

Here, Windscheffel does not even raise the admission or exclusion of particular evidence as an independent ground for reversal. An allegation of bias is not a substitute for an appellate challenge to the rulings that an appellant considers erroneous.

(*People v. Guerra* (2006) 37 Cal.4th 1067, 1112 ["a trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review"].)

The trial court's statements about Windscheffel's record keeping and handling of program funds, while sometimes critical, also do not show bias. The parties stipulated to a bench trial, and the trial judge therefore had to decide the case. The court's statements about the evidence and its view of Windscheffel's credibility were within the scope of that function and do not point to any violation of due process. (*People v. Lucas* (2014) 60 Cal.4th 153, 304, disapproved on other grounds in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19 [" 'expressions of opinion by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice' "], quoting *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 310–311.)

DISPOSITION

The trial court's ruling in favor of the District on its eighth cause of action for conversion and the award of punitive damages to the District are reversed. The trial court's ruling in favor of the District on its claims for breach of contract against Windscheffel is affirmed, and the damages award on those claims is modified as set forth below. The trial court's ruling in favor of the District on Windscheffel's cross-claims for breach of contract is affirmed.

Accordingly, the amended judgment dated March 30, 2015, is ordered modified in the following respects:

1. The finding in favor of the District on its eighth cause of action for conversion and the award of punitive damages to the District are stricken.

2. Damages on the District's second, third, fourth, fifth, and sixth causes of action for breach of contract are reduced to $713,210.

As modified, the judgment is affirmed.

The parties shall each bear their own costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.