

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DELTA M. COLLINS, as Trustee, etc.,
Plaintiff and Appellant,

v.

MANUFACTURED STRUCTURES
INTERNATIONAL, INC. et al,
Defendants and Respondents;

KENNETH NOORIGIAN,
Defendant and Appellant.

D056865

(Super. Ct. No. GIC880706)

DELTA M. COLLINS, as Trustee, etc.,
Plaintiff and Respondent,

v.

MANUFACTURED STRUCTURES
INTERNATIONAL, INC. et al,
Defendants and Appellants.

D057757

(Super. Ct. No. GIC880706)

CONSOLIDATED APPEALS from a judgment and postjudgment order of the Superior Court of San Diego County, Yuri Hoffman, Judge. Judgment reversed in part with directions, affirmed in part. Post-judgment order reversed in part; affirmed in part.

Plaintiff Delta M. Collins as Trustee of the Delta M. Collins Living Trust (Collins) brought an action defendants Manufactured Structures International, Inc. (MSI) and MSI officers Kenneth Noorigian and Irwin Mandel arising out of MSI's default on a \$100,000 loan that Collins made to MSI. According to Collins's operative third amended complaint, MSI purported to be an importer and distributor of precast concrete materials made in Mexico by its affiliate, Manufactured Structures International SA de CV (MSI-MX), a Mexican firm. Collins alleged that certain false representations by Noorigian induced her to make the loan, including the representation that the subject loan would be fully secured by a cement mixer (the mixer) that had never been used and would not be used during the term of the loan. Collins alleged that the security interest in the mixer was unenforceable and worthless because MSI-MX owned the mixer, the mixer was located in Mexico, and under Mexican law Collins could not enforce a security interest against property owned by a Mexican company and located in Mexico to satisfy a debt owed by a United States debtor like MSI. The third amended complaint included causes of action for (1) intentional misrepresentation; (2) negligent misrepresentation; (3) breach of contract; (4) money had and received; and (5) declaratory relief. The fifth cause of action for declaratory relief sought a declaration that that MSI was the alter ego of Noorigian and Mandel.

The first four causes of action were tried to a jury and the fifth cause of action raising the alter ego issue was tried to the court. The court found Noorigian "personally liable to Collins under the doctrine of alter-ego for the sum that MSI will owe to Collins under the final judgment issued in this case." The court found there was insufficient

evidence to support an alter ego finding against Mandel. Based on the jury's verdict, the court entered judgment awarding Collins damages against MSI and Noorigian in the amount of \$121,435.45. Although the jury found that Collins had sustained damages of \$30,000 for "noneconomic loss, including physical pain and mental suffering," the court ruled, on defendants' motion for judgment notwithstanding the verdict, that Collins could not recover emotional distress damages in her capacity as trustee. The court entered judgment in favor of Mandel, having previously sustained his demurrer to the third amended complaint without leave to amend. On postjudgment motions, the court ruled that Collins was the prevailing party under Code of Civil Procedure¹ section 998 as to MSI and awarded her attorney fees, expert fees, and other costs. The court ruled that MSI and Mandel were not prevailing parties under section 998.² However, the court awarded Mandel attorney fees.

Noorigian and Collins both appeal the judgment. In Case No. D056865 Noorigian contends the trial court erred in (1) overruling his demurrer to the fraud causes of action in the third amended complaint; (2) instructing the jury on the elements of fraud; (3) failing to properly instruct the jury on the law regarding a security interest; (4) admitting evidence that was contrary to a judicial admission in Collins's original and first and second amended complaints; (5) allowing Collins's former attorney to give legal opinion

¹ All subsequent statutory references are to the Code of Civil Procedure unless otherwise noted.

² The court ruled that Mandel's offer to compromise under section 998 was not in good faith.

testimony; (6) finding alter ego liability and awarding contractual attorney fees against Noorigian on that basis; (7) awarding fees and costs to Collins rather than MSI under section 998; (8) not requiring Collins to make an election of remedies; and (9) awarding attorney fees on Collins's alter ego and fraud claims. Noorigian also contends that the jury's finding of fraud is inconsistent with its finding that Noorigian made a promise with the intent to perform it. In Case No. D057757, Noorigian and MSI together appeal the postjudgment order awarding fees and costs, contending that the court erred in awarding Collins attorney fees, expert fees, and costs under section 998.

In Case No. D056865, Collins contends that the trial court erred in (1) sustaining Mandel's demurrer to the fraud causes of action in the third amended complaint without leave to amend; and (2) ruling that Collins cannot recover damages for emotional distress because she sued in her capacity as trustee and not in her individual capacity.

We reverse the order sustaining Mandel's demurrer to the third amended complaint without leave to amend, the portions of the judgment ruling in Mandel's favor and awarding him costs, and the portion of the postjudgment order regarding attorney fees and costs that awards Mandel attorney fees. We otherwise affirm the judgment and the postjudgment order on fees and costs.

FACTUAL AND PROCEDURAL BACKGROUND

Noorigian, an attorney, established MSI and MSI-MX³, and was the president of both companies. The objective in forming the companies was to manufacture panelized construction products in Mexico with materials shipped from the United States and to sell the products in the United States for use in housing construction.

Collins learned about MSI in 2005 from Rosen Hristov, who was working as a consultant for MSI. Hristov and his wife were close friends of Collins, who described Hristov's wife as being like a daughter to her and Hristov as being like a son-in-law. Collins testified that Hristov was a "subsequent trustee" and a minor beneficiary of her trust. Hristov told Collins that MSI needed more money and asked if she would be interested in investing in or making a loan to the company. Collins told Hristov that she would be willing to loan MSI money if it was a short-term loan with a good interest rate and there was "excellent security" for the loan.

Hristov communicated Collins's interest and concerns to Noorigian and reported back to Collins that Noorigian said he could arrange a short-term loan from Collins to MSI with a high interest rate and that the loan would be secured by what Collins understood would be "something like a mortgage on their cement mixer." Through Hristov, Noorigian provided Collins an invoice for the mixer that showed MSI had

³ Noorigian testified that his office did the work to form MSI, and that MSI-MX was formed with the help of a Mexican attorney.

purchased it for \$158,475 Collins's understanding was that the mixer was brand new, that MSI no longer needed it and would agree not to use it, and that MSI would sell the mixer and repay the loan from the proceeds if MSI was otherwise unable to repay the loan. Hristov told her that Noorigian would prepare the necessary documents for the loan and security interest. Collins testified she was "kind of thrilled" that an attorney would be handling that matter.

Noorigian or his law firm prepared a promissory note dated September 12, 2005, evidencing Collins's loan of \$100,000 to MSI. The note stated that the annual interest rate was 10 percent and that monthly interest payments of \$833.33 were due on the first of each month.⁴ The note provided that MSI would repay the \$100,000 loan plus any accrued and unpaid interest on March 1, 2006, but granted MSI the option to extend the maturity date of the note six months to September 1, 2006. Regarding security, the note stated: "All amounts due under this Note are secured by collateral set forth in a Security Agreement of even date between the parties." The note provided that it was governed by California law and that the parties consented to the jurisdiction of the courts of California in the event of any dispute arising under the note.

⁴ The parties actually agreed to interest of 12 percent per annum or \$1000.00 per month, but out of concern that 12 percent would be usurious, they agreed that the additional 2 percent or \$166.67 per month would be designated a fee to Collins for consulting services rather than interest. Collins represents that she waived the extra 2 percent interest and applied all of MSI's payments to the debt it owed under the promissory note, as alleged in the third amended complaint and reflected in the damages calculations she submitted to the trial court.

The security agreement accompanying and purportedly securing the note identified "Delta M. Collins Living Trust" as the secured party, MSI as the debtor, and the mixer as the collateral for the loan. The security agreement stated that the mixer was purchased by MSI and MSI-MX and provided that MSI agreed not to use the mixer while Collins held a security interest in it unless MSI paid down the principal amount due under the note to \$50,000. Noorigian and Mandel signed the security agreement as president and secretary for MSI, respectively. Noorigian signed the agreement a second time as president of MSI-MX under the words: "ACKNOWLEDGED AND AGREED TO BY [MSI-MX]."

In addition to the promissory note and security agreement, Noorigian provided Collins, through Hristov, a Uniform Commercial Code (UC-15) financing statement that identified MSI as the debtor, Collins as the secured party⁵, and the mixer as the collateral. There was no reference on the financing statement to MSI-MX.

Noorigian also provided Collins a resolution of the board of directors of MSI, signed by both Mandel as secretary of MSI and by Noorigian as president of MSI, stating that MSI was "authorized to obtain financing up to \$100,000 from the Delta M. Collins Living Trust, securing same with Mixer Systems Equipment held at the Mexicali Plant operations[.]" and that "[d]uring the pendency of the loan obligation herein approved, [MSI would] seek to market unused equipment." The corporate resolution was

⁵ The initial financing statement identified the secured party as Delta M. Collins individually. An amended financing statement changed that designation to "Delta M. Collins Living Trust."

accompanied by a document entitled "Memorandum Re: Sept. 3, 2005 Special Board Meeting," which confirmed that MSI would "pursue the sale of the [mixer] to obtain the best price for the equipment over the term of the Promissory Note held by [Collins]." The memorandum stated that MSI intended "to accept any offer for the subject equipment . . . if the net proceeds for the [mixer] securing the Promissory Note held by [Collins] are equal to at least \$120,000." Collins testified that these two documents "kind of cinched the deal."

After reviewing the promissory note and related documents that Noorigian provided, in September 2005, Collins made the \$100,000 loan of trust funds to MSI. MSI made interest payments as required under the note for six months and then exercised its option to extend the maturity date of the note to September 1, 2006.

In April 2006, Noorigian sent Collins a letter in which he referred to MSI-MX as the owner of the mixer that secured the \$100,000 note and stated that MSI-MX wanted to put the mixer into production. Noorigian proposed that MSI pay Collins \$25,000 to reduce the principal balance of the note to \$75,000 and that the maturity date of the note be extended to April 1, 2007. Collins testified that the letter was "a real bombshell" because it was the first time Noorigian communicated to her that MSI did not own the mixer.

In early July 2006, Hristov returned from a visit to MSI-MX's plant in Mexicali and told Collins that MSI-MX was using the mixer. On July 5, Collins sent Noorigian a "Notice of Default on Promissory Note," declaring that the note "and its accompanying agreements [were] in default" based on information that the mixer was being used in

violation of the provision in the security agreement that MSI would not use the mixer while Collins held a security interest in it unless MSI paid down the principal amount due under the note to \$50,000. Collins became worried about the security for her loan and consulted two attorneys about enforcing the security agreement before retaining her present counsel. The attorneys told her it would be difficult or impossible to collect on the security because it was owned by a Mexican company.

MSI did not pay the principal balance of the note when it became due on September 1, 2006. In February 2007, Collins filed her original complaint in this action. In March 2007 she filed a first amended complaint, in both her individual capacity and her capacity as trustee of Delta M. Collins Living Trust. The first amended complaint included causes of action for intentional misrepresentation, negligent misrepresentation, breach of contract, money had and received, and declaratory relief. The misrepresentation causes of action alleged misrepresentations by Noorigian, and the causes of action for breach of contract cause of action and the common count (money had and received) were against MSI. The cause of action for declaratory relief sought a determination that "Noorigian and Mandel should be deemed personally responsible under a theory of alter-ego for any debt that [MSI] is adjudicated in this case to owe to [Collins] under the [breach of contract cause of action], the common count, or the two causes of action for misrepresentation."

Noorigian and MSI filed a demurrer to the first amended complaint as to each cause of action on the grounds (1) there was a misjoinder of parties because Collins lacked standing to sue in her individual capacity; (2) each cause of action was uncertain

because the first amended complaint failed to specify which preceding allegations, if any, were incorporated by reference into the cause of action; and (3) the first amended complaint failed to state sufficient facts to constitute any of the specified causes of action. The court sustained the demurrer in part with leave to amend and overruled it in part. The court ruled that each cause of action was rendered uncertain by the allegation incorporating "each of the preceding allegations, save those, if any, that she chooses to omit so as to plead a matter in the alternative form." The court also ruled that the first amended complaint failed to state a cause of action in favor of Collins in her *individual* capacity. However, the court ruled that the first amended complaint sufficiently stated causes of action for intentional and negligent misrepresentation and breach of contract in favor of the plaintiff trust.

In her trustee capacity only, Collins filed a second amended complaint that included the same causes of action as those alleged in the first amended complaint. MSI and Noorigian specially demurred on the ground of uncertainty to the two misrepresentation causes of action and the cause of action for declaratory relief, arguing that in all three causes of action, Collins failed to allege which of the three named defendants were liable. The court overruled the demurrer as to all three causes of action, stating: "It is clear from the wording of all three causes of action that [Collins] is alleging specific representations made by Defendant Noorigian and that he made those representations on behalf of Defendant [MSI]."

In March 2009, MSI, Noorigian, and Mandel filed a motion for summary adjudication that the first and second causes of action of the second amended complaint

for intentional and negligent misrepresentation, respectively, were without merit. The trial court treated the motion as a motion for judgment on the pleadings and ruled that Collins had failed to state facts sufficient to constitute a cause of action for intentional misrepresentation or negligent misrepresentation because the alleged misrepresentations were statements about MSI's future business plans that did not "rise to the level of fraud." The court gave Collins leave to amend to attempt to plead a fraud cause of action based on Noorigian's representations regarding the mixer.

Collins filed the operative third amended complaint, and MSI, Noorigian, and Mandel demurred to its first and second causes of action for intentional and negligent misrepresentation. The court sustained the demurrer without leave to amend as to Mandel. Regarding the general allegations in the third amended complaint that all of the defendants conspired in the alleged fraudulent conduct and were the alter egos of each other, the court stated "there are neither facts alleged to support either of these vague generalizations, nor is there any indication Defendant Mandel was even aware of Noorigian's actions." The court overruled the demurrer as to Noorigian.

As noted, the causes of action for intentional and negligent misrepresentation, breach of contract, and money had and received were tried to a jury, and the fifth cause of action claiming Noorigian and Mandel were liable for any award against MSI on an alter ego theory was tried to the court, which found MSI was the alter ego of Noorigian but not the alter ego of Mandel. The court entered a judgment awarding Collins damages against MSI and Noorigian in the amount of \$121,435.45. The court disallowed damages of \$30,000 that the jury found Collins had sustained for "noneconomic loss, including

physical pain and mental suffering," because Collins did not prosecute the action in her individual capacity. The court entered judgment in favor of Mandel. The court awarded Collins attorney fees in the amount of \$178,696.25, expert fees in the amount of \$30,429.30, and other costs in the amount of \$6,429.20. The court awarded Mandel attorney fees in the amount of \$34,841.66.

DISCUSSION

NOORIGIAN'S APPEAL

I. Sufficiency of the Fraud Causes of Action

Noorigian contends the court erred in overruling his demurrer to the causes of action for intentional and negligent misrepresentation in the third amended complaint. "The standard of review for an order overruling a demurrer is de novo. The reviewing court accepts as true all facts properly pleaded in the complaint in order to determine whether the demurrer should be overruled. [Citation.] [Citation.] We must also consider matters that are properly the subject of judicial notice. [Citation.] It is well settled that evidentiary matters outside the complaint may not be considered upon such a review." (*Big Valley of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1190.) A court ruling on or reviewing an order on a motion for judgment on the pleadings performs essentially the same task as a court undertakes in ruling on or reviewing an order sustaining or overruling a demurrer. (See *Smiley v. Citibank* (1995) 11 Cal.4th 138, 145-146.)

"The elements of fraud, which give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's

reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage.

[Citation.] The tort of negligent misrepresentation, a species of the tort of deceit [citation], does not require intent to defraud but only the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.)

We conclude the third amended complaint sufficiently states causes of action against Noorigian for deceit (i.e., fraud) by intentional and negligent misrepresentation. In the third amended complaint, Collins alleged that Noorigian, through Hristov, represented to Collins that the loan she made to MSI would be fully and properly secured by the mixer, and that Noorigian's conversations with Hristov concerning the security for the loan were for the purpose of persuading her to make the loan — i.e., that Noorigian intended to induce her reliance on his representations about the security for the loan. Collins alleged that she justifiably relied on Noorigian's representations in agreeing to make the loan to MSI, and that she made the loan with the specific understanding that the loan would be fully and properly secured by the mixer.

Collins further alleged that Noorigian made the representations about the security for the loan on behalf of himself and MSI, and that he knew the representations were materially false when he made them. Elaborating on the latter allegation, Collins alleged: "Noorigian specifically understood that [MSI] would appear to convey to the Trust a security interest in the mixer and otherwise appear to ensure that the mixer would serve as proper security, but that in fact [MSI] would convey no such interest. Rather, [MSI] would convey an ineffectual security interest that the Trust could not enforce. Rather

than have [MSI] provide to the Trust the security agreement and collateral that he had represented it would provide, Noorigian arranged to have [MSI] provide the Trust with a worthless, unenforceable security interest. . . . Noorigian privately understood that this security interest was unenforceable and worthless because (1) the mixer was not even owned by [MSI], but rather is owned by [MSI-MX]; (2) the mixer was located in Mexico; and (3) under Mexican law, a US creditor (the Trust) could not enforce a security interest against property owned by a Mexican firm and kept in Mexico in order to satisfy a debt owed by a US debtor ([MSI])." Noorigian allegedly "understood from the start that the purported collateral for the loan would be inaccessible and unavailable for attachment or levy under United States law." Regarding damages, Collins alleged that MSI stopped making payments on the loan in October 2006, and that it never repaid any part of the principal amount.

In short, Collins sufficiently pleaded each of the elements of a cause of action for fraud by intentional misrepresentation by alleging that Noorigian made a misrepresentation about the subject loan being properly and fully secured, that he made the misrepresentation with knowledge of its falsity and with the intent to induce Collins to rely on it, and that Collins justifiably relied on the misrepresentation and was damaged as a result.

Collins also sufficiently stated a cause of action for negligent misrepresentation. She alleged, in her second cause of action, that when Noorigian made the alleged representations, he "was recklessly indifferent as to whether they were true or false." In light of the preceding allegations about Noorigian's intentional misrepresentations that

were incorporated into the second cause of action, this allegation satisfies the negligent misrepresentation element that Noorigian made the representation with no reasonable ground for believing it to be true.⁶

In his reply brief, Noorigian argues that Collins failed to adequately plead the "normative or evaluative element" of proximate causation in her misrepresentation causes of action, which element he defines as a defendant's conduct being closely related enough to the plaintiff's loss that the defendant should be held liable, as a matter of policy.⁷

⁶ To the extent Collins's cause of action for negligent misrepresentation is defective because reckless indifference as to truth or falsity satisfies the scienter element of *intentional* rather than negligent misrepresentation (see *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 [false representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of intentional misrepresentations]), allowing the cause of action for negligent misrepresentation to proceed was harmless error because the special verdict form given to the jury correctly presented, and asked the jury to make separate findings on, the elements of both intentional and negligent misrepresentation. As to intentional misrepresentation, the jury found, in the language of the verdict form, that Noorigian made "a false representation of an important fact" with knowledge "that the representation was false" or made it "recklessly and without regard for its truth." As to negligent misrepresentation, the jury found that Noorigian made "a false representation of an important fact" without "reasonable grounds for believing the representation was true when he made it[.]"

⁷ Noorigian cites *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830 (*Jackson*), in which the Court of Appeal discussed the element of proximate causation in negligence cases. The *Jackson* court applied the balancing test for determining whether a defendant owed a duty of care that the California Supreme Court set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*), superseded by statute on another point as stated in as stated in *Calvillo–Silva v. Home Grocery* (1998) 19 Cal.4th 714, 722, disapproved on a different issue in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853. Under that balancing test, a court considers "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, *the closeness of the connection between the defendant's conduct and the injury suffered*, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of

Noorigian cites the principle that "proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.'" (*PPG Industries v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 316.)

Regarding fraud, Noorigian contends Collins was required to plead both "transactional causation" and "loss causation."⁸ Noorigian argues that loss causation is cut off by paragraph 4.2 of security agreement, in which MSI promised "[t]o execute and deliver to Secured Party all financing statements and other documents that Secured Party requests, in order to maintain a perfected security interest in the Collateral." Noorigian reasons that since Collins could have invoked that provision to have MSI correct any deficiencies regarding the security, Noorigian's alleged misrepresentations were not the proximate cause of Collins's loss.

Noorigian improperly raises this argument for the first in the reply brief and we may disregard it for that reason. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10.) In any event, we decline Noorigian's invitation to overcomplicate the causation

the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland* at p. 113, italics added.)

⁸ In the context of securities litigation, "[t]ransaction causation has been defined as meaning that 'the investor would not have engaged in the transaction had the other party made truthful statements at the time required.' [Citation.] Loss causation, on the other hand, has been defined as meaning 'that the investor would not have suffered a loss if the facts were what he believed them to be.'" (*Martin v. Heinold Commodities, Inc.* (Ill. 1994) 643 N.E.2d 734, 747.

element of Collins's fraud claims. Noorigian's argument that Collins failed to adequately plead the "normative element" of proximate causation in her misrepresentation causes of action is essentially a convoluted argument that she failed to sufficiently plead the element of justifiable reliance — i.e., that she did not plead that she justifiably relied on the alleged misrepresentations in deciding to make the loan to MSI.

"In a fraud case, justifiable reliance is the same as causation, thus '[a]ctual reliance occurs when a misrepresentation is "'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,' " and when, absent such representation,' [the plaintiff] "' would not, in all reasonable probability, have entered into the contract or other transaction.' " " " (Hall v. Time, Inc. (2008) 158 Cal.App.4th 847, 855, fn. 2.) " *'It is not . . . necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing [the plaintiff's] decision.'* " (Engalla v. Permanente Medical Group, Inc., supra, 15 Cal.4th at pp. 976-977, italics added.)

Collins sufficiently pleaded that Noorigian's misrepresentation about the security for Collins's loan was a substantial factor in her decision to make the loan. The court did not err overruling Noorigian's demurrer to the fraud causes of action in the third amended complaint.

II. Jury Instructions

Noorigian contends the court erroneously instructed the jury on the elements of fraud and failed to properly instruct the jury on the law regarding a security interest. The record on appeal is inadequate for review of these contentions.

"An appellant arguing instructional error must ensure that the appellate record includes the instructions given and refused and the court's rulings on proposed instructions. [Citations.] If the record does not show which party requested an erroneous instruction, the reviewing court must presume that the appellant requested the instruction and therefore cannot complain of error. [Citation.] Similarly, if the record does not show whether an instruction was refused or 'withdrawn, abandoned, or lost in the shuffle,' the reviewing court must presume that the appellant withdrew the instruction. [Citation.] '[I]t is incumbent upon . . . appellant . . . to make certain that the trial court has ruled [on a requested instruction] and that the record on appeal discloses that ruling before the alleged ruling may be assigned as error.' " (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678-679, fn. omitted.) "[I]n making up the record on appeal '[e]ach instruction should be identified by a number and should indicate by whom it was requested or that it was given by the court of its own motion; on each requested instruction the trial judge should endorse the fact as to whether it was given or refused or given as modified, with the modification, if any, clearly indicated.' " (*Lynch v. Birdwell* (1955) 44 Cal.2d 839, 846-847.)

Although the appellant's appendix contains copies of written jury instructions, none of those instructions indicates who requested the instruction; whether the instruction was given as requested, given as modified, or given on the court's own motion; or

whether the instruction was refused or withdrawn.⁹ Furthermore, the parties stipulated at trial that the court's reading of the predeliberation jury instructions would not be reported. Consequently, we are unable to meaningfully review Noorigian's claims of instructional error.¹⁰

III. *Admission of Evidence Contrary to Allegation in Prior Complaints*

Noorigian contends that the trial court erroneously admitted evidence that was contrary to a judicial admission in Collins's original and first and second amended complaints that Noorigian represented to her, through Hristov, that her loan to MSI "would be secured by a UC-15-1 filing that listed the equipment that would in turn be owned by [MSI-MX] and kept abroad at its plant in Mexicali, Baja California, Mexico."

⁹ The table of contents for the appellant's appendix refers to the written instructions as "Jury instructions offered or rejected."

¹⁰ Noorigian claims that none of the fraud instructions given to the jury included a "present intent" standard applicable to fraud. Although we cannot meaningfully review that claim, we note that each of the fraud instructions in the appellant's appendix includes the element that the defendant acted with the intent to induce reliance. The intentional misrepresentation instruction states that Collins was required to prove Noorigian made a false representation that he knew to be false or that he made recklessly without regard for its truth, and that he intended that Collins rely on the representation. The concealment instruction requires proof that Noorigian intentionally failed to disclose an important fact and that he intended to deceive Collins by concealing the fact. The false promise instruction requires proof that Noorigian made a promise that was important to the transaction, that he did not intend to perform the promise when he made it, and that he intended that Collins rely on the promise. Finally, the negligent misrepresentation instruction requires proof that Noorigian intended that Collins rely on a false representation that Noorigian made with no reasonable grounds to believe it was true when he made it.

Noorigian argues this was an admission of knowledge of a material fact that provided a defense to Collins's fraud claims.

Noorigian filed a motion in limine to exclude evidence offered to controvert Collins's admission that before she made the loan to MSI, she was told that the mixer was owned by MSI-MX and was located in Mexico. Collins argued that an allegation in a superseded pleading can never constitute a judicial admission and, at most, can be treated as a prior inconsistent statement. The court agreed with Collins, ruling that the allegation in question was not a judicial admission, noting that "any statement in a superseded pleading may be used under certain circumstances . . . as an inconsistent statement or not, but it does not become a judicial admission."¹¹

Although as a general rule, a party is not allowed to file an amended pleading that contradicts an admission in the party's original pleading, a trial court has discretion to relieve a party from the effect of a admission by allowing amendment of the pleading in which the admission was made where it appears that the admission was the result of mistake or inadvertence. (*Meyer v. State Bd. of Equalization* (1954) 42 Cal.2d 376, 386; *Freidberg v. Freidberg* (1970) 9 Cal.App.3d 754, 761; *Parker v. Manchester Hotel Co.* (1938) 29 Cal.App.2d 446, 458; 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 454, p. 587.) Accordingly, we review a trial court's decision whether to relieve a party from

¹¹ As a general rule, an allegation in a pleading superseded by an amended pleading is not a judicial admission but may be treated as an "evidentiary admission," as any other prior statement of a party, unless the allegation is shown to be the result of mistake, inadvertence, or inadequate knowledge. (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 97, p. 799; *Walker v. Dorn* (1966) 240 Cal.App.2d 118, 120.)

the effect of a judicial admission for abuse of discretion. (*Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 870-871; *Parker v. Manchester Hotel Co.*, at p. 458 [trial court has discretion to allow a judicial admission to be withdrawn, explained or modified if it appears to have been made by improvidence or mistake].) We also review any ruling by the trial court on the admissibility of evidence for abuse of discretion. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.) A trial court abuses its discretion only when its ruling exceeds the bounds of reason, all circumstances being considered. (*Ibid.*)

We find no abuse of discretion in the trial court's decision to allow Collins to present evidence contrary to the allegation in her original complaint that she was told the mixer was owned by MSI-MX and was located in Mexico. In her opposition to Noorigian's motion in limine to exclude such evidence, Collins counsel represented that he drafted the allegation in question by mistake, and that admissible evidence that existed before this action was filed directly contradicted the mistaken allegation. Collins's counsel filed a declaration stating that he filed the second amended complaint on behalf of Collins before any deposition had been taken and before defendants had provided substantive answers to written discovery, and that he mistakenly alleged that defendants had represented that the mixer was owned and kept by MSI-MX. When he became more familiar with the case, he was "able to allege the matter more accurately" in the operative third amended complaint. He pointed out that the trial court, in ruling on defendants' motion for summary adjudication, ordered Collins to prepare a third amended complaint

and "specifically ordered [Collins] to restate her fraud claims as to the pledging of the mixer as security."¹²

In his opposition brief, counsel showed that the mistaken allegation is contradicted by the statement in the security agreement that "[MSI] grants to [Collins] a security interest in the [mixer] to secure payment of the Promissory Note[,]" and the fact that the financing statement Noorigian provided to Collins identified MSI as the debtor and the mixer as the collateral. Counsel also pointed out that MSI's company documents provided assurance that MSI was authorized to pledge the mixer as security for the loan and seek to market the mixer during the pendency of the loan. Counsel submitted correspondence between Noorigian and Hristov in which Noorigian stated that MSI-MX owned the mixer and Hristov responded: "First, a technical correction — according to the documents presented to Collins, MSI, Inc. is the owner of the [mixer] and [MSI-MX] is the user." Collins's opposition papers also included Hristov's deposition testimony that Noorigian told him MSI owned the mixer.¹³

The showing in Collins's opposition papers was sufficient for the court to reasonably conclude that the claimed judicial admission was the result of mistake and to reasonably exercise its discretion to relieve Collins from the effect of the admission. The

¹² In its order on defendants' motion for summary adjudication, the court granted Collins "leave to amend her complaint to attempt to plead a cause of action relating to Defendant Noorigian's representations regarding the cement mixer."

¹³ Hristov was asked: "Who owned the mixer? Was it MSI, Inc. or was it the Mexican company, the MSI Mexican company?" He answered: "Ken Noorigian told me it was a U.S. corporation."

court did not abuse its discretion in denying defendants' motion in limine to exclude evidence contrary to the allegation in Collins's earlier pleadings that before she made the loan to MSI, she was told the mixer was owned by MSI-MX and was located in Mexico.

IV. *Testimony of Collins's Former Attorney*

Noorigian contends the trial court erred by admitting legal opinion testimony from Collins's former attorney, Nicholas King. The jury watched a videotape of King's deposition testimony because he was unavailable to testify at trial. In his opening brief, Noorigian cites six pages of King's deposition transcript, in which he contends King "gave detailed legal opinions to the jury."¹⁴

Before trial, Noorigian filed a motion in limine in which he sought to exclude legal opinion testimony by King and other attorney witnesses. The motion sought to preclude these witnesses' anticipated trial testimony; it was not aimed at King's deposition. The record does not include the court's ruling on the motion in limine. However, before King's videotaped deposition was presented to the jury, the court stated to counsel: "Well, I have in mind [defendants'] motion in limine to exclude improper opinions from Mr. King's testimony. I will keep those objections in mind when I go

¹⁴ In his reply brief, Noorigian cites the following specific testimony by King: "My conclusions were that while the promissory note, the security agreement, the UC-15 statements at first glance seemed to set up . . . an arrangement where the Delta Collins Living Trust loaned \$100,000 to [MSI], and that that was secured by an asset, the cement mixer, that would be able to be collected upon should [MSI] default on the note, through the California courts, and under California law.

"When I read them closely and I looked at the other correspondence, it turned out that, at least it appeared to me, it was much more difficult than that for a number of reasons"

through [King's deposition transcript] and also rule specifically on the objections that are stated [in the deposition transcript]." The record does not show that defense counsel raised any additional objections to King's testimony at trial; it shows that the court ruled only on the objections that were made during King's deposition.

We conclude that Noorigian waived review of any objection to King's deposition testimony on the ground it constituted inadmissible legal opinion because he did not object to any specific testimony on that ground at trial. Evidence Code section 353 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." "In light of [Evidence Code section 353], questions relating to the admissibility of evidence will not be reviewed in this appeal in the absence of a specific and timely objection." (*Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 584; *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595 "An objection specifying the wrong grounds, or a general objection, amounts to a waiver of all grounds not urged." (*Rupp v. Summerfield* (1958) 161 Cal.App.2d 657, 662.)

When an objection is to deposition testimony presented at trial, "[t]he form and sufficiency of the objection are governed by the rules applicable to testimony at a trial;

i.e., the objection must be specific and directed to the particular testimony." (3 Witkin, Cal. Evid. 4th (2000) Presentation, § 162, pp. 226-227, citing *Lucy v. Davis* (1912) 163 Cal. 611, 615; *Estate of Doyle* (1932) 126 Cal.App. 446, 453; *Chavez v. Zapata Ocean Resources* (1984) 155 Cal.App.3d 115, 121 [plaintiff's deposition testimony was improperly excluded because the objection to it was not sufficiently specific].) "A mere general objection to the deposition does not reach the defects, as [the deposition testimony] may be good in part and bad in part; and the objection should be limited to the part which is objectionable." (*Estate of Doyle*, at p. 454.)

As noted, Noorigian's motion in limine to exclude King's improper legal opinion testimony was general and was not aimed at his deposition testimony; it sought to exclude his anticipated trial testimony that defendants believed would constitute expert testimony on legal matters. At trial, the court ruled only on the specific objections raised during King's deposition. None of those objections were on the specific ground that the testimony was improper expert or legal opinion testimony. The only ground for the objections to the portion of King's testimony cited by Noorigian on appeal was that the testimony was nonresponsive to the question King was asked. Consequently, Noorigian has waived the right to challenge King's testimony as improper legal opinion testimony on appeal.

Even if we were to determine that the trial court erred by admitting the specific testimony that Noorigian challenges on appeal, the error would not require reversal of the judgment unless it resulted in a miscarriage of justice. (*Saxena v. Goffney*, *supra*, 159 Cal.App.4th at p. 332; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853-854;

Evid. Code § 353, subd. (a).) The appellant bears the burden of showing prejudice — i.e., that it is reasonably probable that a result more favorable to the appellant would have been reached absent the error. (*Saxena v. Goffney, supra*, 159 Cal.App.4th at p. 332.) In light of the other evidence presented at trial that Collins's security interest in the mixer was unenforceable because MSI-MX owned the mixer and the mixer was located in Mexico, including Noorigian's own pre-litigation statements to that effect,¹⁵ it is not reasonably probable that the exclusion of King's testimony that it would be "extremely difficult to execute on the security and collect on the debt" would have resulted in a more favorable outcome for Noorigian.

V. *Alter Ego Liability*

Noorigian contends the court erred in finding him "personally liable to Collins under the doctrine of alter-ego for the sum that MSI will owe to Collins under the final judgment issued in this case." He argues that there was insufficient evidence to support the alter ego finding and that the court erred in ruling that if he "were not held personally liable for MSI's adjudicated debt to Collins in this case, the result would be unfair, unjust, and inequitable to Collins."

¹⁵ Noorigian stated in an internal MSI email message: "I don't think any California Court would believe it has any jurisdiction over [MSI-MX] — it is a foreign corporation not doing business in California. I don't see how she can repossess the collateral located in Mexico — she can't use 'self help' and getting an order which is valid in Mexico is one step away from an impossible task — it certainly is not going to happen before September 1[, 2006] (if ever)."

Preliminarily, we need not review Noorigian's challenge to the alter ego finding with respect to the fraud damages awarded to Collins because he was found directly liable for those damages. (*Filet Menu, Inc. v. C.C.L. & G., Inc.* (2000) 79 Cal.App.4th 852, 865-866.) We review Noorigian's challenge to the alter ego finding because it renders Noorigian personally liable for the attorney fees and costs awarded to Collins based on the attorney fee and cost provision in the promissory note evidencing Collins's loan to MSI.¹⁶

"In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538. (*Sonora Diamond*).) The second prong may be satisfied by a showing that applying the alter ego doctrine is necessary to prevent *either fraud or injustice.* (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285, fn. 13; *Meadows v. Emett & Chandler* (1950) 99 Cal.App.2d 496, 499.)

¹⁶ The promissory note broadly obligated MSI "to pay all costs of collection, all costs of suit, foreclosure or other enforcement of this Promissory Note and/or the Security Agreement and all costs in the event Holder is made a party to any litigation . . . because of the existence of this Promissory Note and/or the Security Agreement. For the purposes of this provision, 'costs' shall include all reasonable attorneys' fees and costs, constants' fees, experts' fees and the like."

"The courts consider numerous factors, including inadequate capitalization, commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, use of one as a mere conduit for the affairs of the other, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citation.] No single factor is determinative, and instead a court must examine all the circumstances to determine whether to apply the doctrine." (*Virtualmagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 Cal.App.4th 228, 245.)

On appeal, the trial court's factual findings on the issue of alter ego liability are reviewed under the substantial evidence test. (*Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1017; *McClellan v. Northridge Park Townhome Owners Assn.* (2001) 89 Cal.App.4th 746, 751-752.) The trial court's ruling is presumed correct, and the appellate court indulges all intendments and presumptions to support the ruling on matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The appellant has the burden of overcoming the presumption of correctness by affirmatively showing error on an adequate record. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125.)

We conclude substantial evidence supports the court's alter ego finding against Noorigian. The court based its alter ego finding on factual findings that (1) Noorigian manipulated his ownership and control of MSI and MSI-MX to defraud Collins; (2) he manipulated his ownership and control of the various MSI entities to serve his purposes without proper regard for the separate corporate existences of the various entities; (3)

MSI and MSI-MX commingled assets; (4) substantial sums of money that MSI deposited into and withdrew from its corporate bank account were not used to fund its purported business efforts regarding the import and distribution of building materials made in Mexico, including substantial sums deposited and withdrawn in 2004 and 2005, during which period MSI "did not make any sales, or otherwise generate revenues that plausibly explain these deposits and withdrawals, so that it appears that Noorigian or the MSI companies were using these accounts for matters not strictly related to MSI's purported business operations[;]" (5) during that same period, MSI "was usually and generally undercapitalized for its purported business purposes;" (7) MSI was undercapitalized for its purported business purposes when Collins made the loan to MSI and remained so until it became defunct; (8) Noorigian and accountant Steven Martinez gave conflicting testimony on the material facts of whether Martinez had acted as the accountant for MSI and an affiliated company and "whether Martinez or any entity in which Martinez held any interest had directly or indirectly extended loans or investments to any of the MSI companies;" (9) MSI failed to provide documentation explaining how it could have properly pledged the mixer as security or authorized MSI-MX to hold, own, and use the cement mixer despite MSI's obligation to not use the mixer and to pledge it as security for [Collins's] loan; (10) Noorigian or MSI did not follow proper procedures "to authorize, justify, or give notice that [MSI-MX] had begun to use the mixer in contravention of MSI's obligation not to use the mixer[;]" (11) Noorigian gave inconsistent and contradictory testimony about whether and when MSI-MX began to use

the mixer; and (12) MSI did not make the efforts it would be expected to make if it genuinely intended to pursue its purported business operations.

These findings underlying the court's alter ego determination essentially concern either the case-law factors for a finding of unity of interest between Noorigian and MSI — inadequate capitalization and commingling of funds in particular — or the overall course of conduct relating to the jury's finding that Noorigian fraudulently induced Collins to make the subject loan to MSI. Noorigian does not specifically address the court's findings underlying its ultimate alter ego finding, much less argue that they are not sufficiently supported by the evidence. Noorigian mainly challenges the court's determination that in light of its findings, "it would be inequitable and unjust to decline to impose alter-ego liability against Noorigian for the debt that MSI shall owe to Collins under the final judgment issued in this case."¹⁷ Regarding that determination, Noorigian mainly argues that his unsuccessful application to deposit funds with the court to satisfy the amount of the damages awarded by the jury precluded any ruling that Collins would be prejudiced absent an alter ego finding. In his reply brief, Noorigian notes that he and MSI paid the judgment amount to Collins two days after entry of judgment. However, Noorigian paid only the damages portion of the final judgment and challenges the judgment's award of costs and attorney fees on appeal. Because we are reviewing the trial court's alter ego finding only with respect to the judgment's fee and cost award, it is

¹⁷ The court orally stated that if Noorigian "were not held personally liable for [the judgment against MSI], the result would be unfair, it would be unjust and it would be inequitable to Ms. Collins."

immaterial whether the alter ego finding was unnecessary to avoid prejudice to Collins with respect to the judgment's award of damages.

With respect to the award of attorney fees and costs, Noorigian has not met his burden on appeal of showing that there was insufficient evidence to support the court's alter ego findings concerning to unity of interest. Regarding the court's finding that there would be an inequitable result if Noorigian's acts in question were treated as those of MSI alone, we reiterate that the inequitable-result prong of an alter ego determination may be satisfied by a showing that applying the alter ego doctrine is necessary to prevent *either* fraud *or* injustice. (*Tomaselli v. Transamerica Ins. Co.*, *supra*, 25 Cal.App.4th at p. 1285, fn. 13; *Meadows v. Emett & Chandler*, *supra*, 99 Cal.App.2d at p. 499.) Because Collins incurred the attorney fees and costs she was awarded in successfully pursuing her judicial remedies for the fraud Noorigian was found to have perpetrated against her, the trial court appropriately ruled, with respect to the fee and cost award, that it would be inequitable and unjust not to impose alter-ego liability against Noorigian for MSI's judgment debt owed to Collins. The court did not err in applying the alter ego doctrine to award Collins contractual attorney fees and costs against Noorigian.

VI. *Fees and Costs Awarded Under Section 998*

In Case No. D057757, Noorigian and MSI appeal the postjudgment order awarding fees and costs, contending that the court erred in awarding fees and costs to Collins under section 998.¹⁸

¹⁸ Noorigian alone raises the same issue in Case No. D056865.

The interpretation and application of section 998 to undisputed facts is a question of law subject to our de novo review. (*Bodell Const. Co. v. Trustees of California State University* (1998) 62 Cal.App.4th 1508, 1515.) Section 998, subdivision (c), provides, in relevant part: "(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment . . . , the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. . . . [(2)(A) In determining whether the plaintiff obtains a more favorable judgment, the court . . . shall exclude the postoffer costs."

MSI served an offer to compromise under section 998 on Collins in the amount of \$125,000.¹⁹ Because the judgment's award of damages in the amount of \$121,434.45 is less than the amount of MSI's offer, MSI and Noorigian argue that the court should have deemed MSI the prevailing party under section 998 and, accordingly, awarded MSI its postoffer costs. They contend that the trial court erred in ruling that because the sum of the judgment amount plus Collins's preoffer costs of \$66,096.19 was greater than the amount of MSI's offer²⁰, Collins was the prevailing party under section 998 — i.e., that she obtained a judgment more favorable than MSI's section 998 offer. We conclude that

¹⁹ The record indicates that Noorigian served an offer to compromise in the amount of \$5,000, but a copy of his offer is not included in the record. Mandel also served an offer to compromise in the amount of \$5,000. Noorigian criticizes the trial court's ruling that Mandel's offer was not in good faith. However, we do not review that ruling because Mandel did not appeal.

²⁰ The sum of Collins's recovery under the judgment (\$121,435.45) plus her preoffer costs (\$66,096.19) is \$187,531.64.

the court correctly applied section 998 and determined that Collins was the prevailing under the statute.

The necessary corollary of the provision in section 998 that "in determining whether the plaintiff obtains a more favorable judgment, the court . . . shall exclude the [plaintiff's] postoffer costs" is that in determining whether the plaintiff obtains a more favorable judgment, the court shall *include* the plaintiff's *preoffer* costs *in the judgment* — i.e., the court must add the plaintiff's preoffer costs to the judgment's monetary award on the plaintiff's substantive claims. (*Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 725, fn. 3 ["It is well settled . . . that 'to determine whether the plaintiff obtained a judgment more favorable than defendant's offer, preoffer costs[, including statutory attorney fees,] are added *to the award of damages.*' " (Italics added.)].)

Ignoring this well-settled and unambiguous rule, Noorigian and MSI would have the court add the preoffer costs to the wrong side of the equation. They cite *Engle v. Copenbarger and Copenbarger* (2007) 157 Cal.App.4th 165 (*Engle*) for the proposition that if a section 998 offer to compromise is silent regarding attorney fees and costs, the offer includes attorney fees and costs.²¹ However, they appear to view this proposition as meaning that fees and costs *in addition to the amount of the offer*, are deemed to be part of the offer — i.e., that the offer includes the stated amount of the offer plus the yet

²¹ *Engle* supports the proposition that "a section 998 offer to compromise excludes fees only if it says so expressly. It is a bright-line rule: The only question is does the offer address fees or not?" (*Engle, supra*, 157 Cal.App.4th at p. 169.) *Engle* also supports the point that a plaintiff who accepts the offer is entitled to costs and fees (if authorized by contract or statute) in addition to the offer amount. (*Ibid.*)

to be determined amount of costs and recoverable attorney fees incurred by the plaintiff as of the time of the offer.

As case law makes clear, however, to say that a defendant's offer includes costs and fees (unless it expressly excludes them) means that the plaintiff's preoffer costs and fees are deemed to be included *in the stated amount of the offer*. Accordingly, when a plaintiff rejects a defendant's section 998 offer, "to determine whether the plaintiff obtained a judgment more favorable than defendant's offer, preoffer costs are added to *the award of damages*." (*Stallman v. Bell* (1991) 235 Cal.App.3d 740, 747-748, italics added; *Heritage Engineering Const., Inc. v. City of Industry* (1998) 65 Cal.App.4th 1435, 1441 ["[W]hen the defendant's offer includes costs, it is to be compared with the plaintiff's judgment plus preoffer costs including attorney's fees."]; *Kelly v. Yee* (1989) 213 Cal.App.3d 336, 342; *Shain v. City of Albany* (1980) 106 Cal.App.3d 294, 299; *Bennett v. Brown* (1963) 212 Cal.App.2d 685, 688.) The trial court correctly ruled that Collins was the prevailing party under section 998 because the sum of her award of damages under the judgment plus her preoffer costs was greater than the amount of MSI's offer to compromise.

VII. *Election of Remedies*

Noorigian contends the remedies for fraud are inconsistent with the remedies for breach of contract and, therefore, the court erred by not requiring Collins to make an

election between the remedy for MSI's breach of contract and the remedy for fraud of voiding the contract.²²

Under the doctrine of election of remedies, a plaintiff must choose between two concurrent remedies for relief when they are based on the *same set of facts* and are *inconsistent*, such that " 'the assertion of one [is] necessarily repugnant to or a repudiation of the other.' " (*Denevi v. LGCC* (2004) 121 Cal.App.4th 1211, 1218 (*Denevi*)). "The doctrine is based on estoppel and, when applicable, operates only if the party asserting it has been injured." (*Pac. Coast Cheese, Inc. v. Sec.-First Nat. Bank* (1955) 45 Cal.2d 75, 80.)

We conclude the election doctrine does not apply here because Collin's fraud and contract remedies were not inconsistent. A person who is induced by fraud to enter into a contract is not required to rescind the contract; he or she has the right to either rescind the contract or affirm the contract and sue for damages for the fraud. (*Denevi, supra*, 121 Cal.App.4th at p. 1220.) Here, Collins sought and was awarded damages for fraud and breach of contract; she did not seek to rescind her contract with MSI. Her remedy of damages for fraud against Noorigian was not necessarily repugnant to or a repudiation of her remedy of damages for breach of contract against MSI — the two remedies were merely duplicative. Thus, the remedies were not inconsistent so as to give rise to an

²² Collins points out that defendants raised this issue in their trial brief and Collins filed a brief in which she argued she was not required to make an election of remedies between her contract and fraud claims. However, the record does not expressly reveal the trial court's ruling on the election issue.

estoppel, and the fact that they were duplicative did not prejudice Noorigian because Collins did not seek and was not awarded a double recovery.

Moreover, Collins's fraud claims were not based on the same set of facts as her breach of contract claim. Her breach of contract cause of action was based on MSI's failure to pay the principal amount the subject loan as agreed in the promissory note, whereas her fraud claims were based on Noorigian's misrepresentations about the collateral that induced her to make the loan. The court did not err in not requiring Collins to elect between her fraud remedy against Noorigian and her contract remedy against MSI.

VIII. *Award of Attorney Fees on Fraud and Alter Ego Claims*

Noorigian contends that the court should not have awarded attorney fees for Collins's prosecution of her fraud and alter ego claims because the attorney fee provision in the promissory note does not authorize an award of fees for tort claims or claims for equitable relief. We disagree with Noorigian's construction of the attorney fee provision in the promissory note.

Section 1021 provides: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties" Section 1021 does not limit its application to contract actions alone; it authorizes the parties to a contract to "validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract." (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1341. "If a contractual attorney

fee provision is phrased broadly enough, . . . it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims[.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

As noted, the attorney fee provision in question here provided: "[MSI] agrees to pay all costs of collection, all costs of suit, foreclosure or other enforcement of this Promissory Note and/or the Security Agreement and all costs in the event Holder is made a party to *any litigation* . . . because of the existence of this Promissory Note and/or the Security Agreement. For the purposes of this provision, 'costs' shall include all reasonable attorneys' fees and costs, constants' fees, experts' fees and the like." (Italics added.) This provision on its face, applies to *any litigation* brought because of the existence of the promissory note or security agreement; it is not limited to contract litigation. We construe the term "any litigation" to mean the litigation of *any claim* brought because of the existence of the promissory note or security agreement, whether such claim sounds in contract, tort, or equity. Accordingly, we conclude that, as a matter of law, the provision is broad enough to encompass Collins's fraud and alter ego claims.

IX. *Consistency of Verdicts*

One of the questions presented to the jury on the special verdict form was whether Noorigian made a promise without the intent to perform it. The jury found that Noorigian made a promise to Collins that was "important to the transaction[.]" but that he intended to perform the promise when he made it. Noorigian contends this finding is inconsistent with the jury's finding of intentional misrepresentation.

A trier of fact may not make inconsistent factual determinations based on the same evidence. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682.) We determine the correctness of a special verdict as a matter of law. (*Id.* at p. 678.)

We reject Noorigian's contention that the verdict here is inconsistent. The jury could reasonably find that Noorigian intended to fulfill his promise to repay the loan from Collins to MSI when the loan was made, but that he intentionally misrepresented (and concealed) material facts about the mixer serving as proper collateral for the loan to induce Collins to make the loan. Thus, the jury's special findings on the promissory fraud claim are not fatally inconsistent or irreconcilable with its special findings on the intentional misrepresentation claim.

COLLINS'S APPEAL

X. Fraud Causes of Action Against Mandel

We agree with Collins's contention that the court erred in sustaining Mandel's demurrer to the fraud causes of action in the third amended complaint.

On appeal from a dismissal following an order sustaining a demurrer without leave to amend, "[w]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility

that the defect can be cured by amendment; if it can be, the trial court has abused its discretion and we reverse." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) We review the complaint de novo to determine whether its allegations sufficiently state a cause of action under any legal theory. (*Betancourt v. Storke Housing Investors* (2003) 31 Cal.4th 1157, 1162–1163.) "Whether the plaintiff will be able to prove these allegations is not relevant." (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 122, citing *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.)

In the third amended complaint, Collins alleged that each of the defendants, including Mandel, had conspired with the other defendants "to commit legal wrongs against Collins and the Trust and also to obtain an unjust, fraudulent enrichment at their expense." Collins further alleged that each defendant knew of the alleged conspiracy, had committed at least one act in furtherance of the conspiracy and otherwise participated in it, and had "received a share of the illicit profits generated by the conspiracy." Because fraud was the object of the alleged conspiracy, Collins's conspiracy claim against Mandel must be pleaded with specificity. (*Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 211; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216 [every element of the fraud must be alleged factually and specifically], superseded by statute on another point as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.)

Collins alleged that she requested "formal company papers by which [MSI] agreed to (1) pledge the mixer, (2) refrain from using the mixer while it served as security, and

(3) arrange to sell the mixer, so that it would generate sales proceeds that [MSI] could use to pay the Trust in the event that it otherwise failed to pay the Trust." She alleged that in response to that request, "Noorigian, Mandel and [MSI] obliged her" by providing (1) the above-mentioned "Memorandum Re: Sept. 3, 2005, Special Board Meeting" that confirmed MSI's decision to offer the mixer for sale for the purpose of raising at least \$120,000 to be used to repay Collins's loan to MSI; and (2) the resolution of the board of directors of MSI, "signed both Noorigian and Mandel," by which MSI purportedly resolved to pledge the mixer as security for the loan and to refrain from using it while it served as security. Collins attached both of these documents as exhibits to the third amended complaint.

Collins further alleged that by the wording of these two documents, "Noorigian, *Mandel*, and [MSI] intended to reassure Collins . . . that the [r]epresentations were true, that the mixer would serve as security for the loan, that the mixer would not be used during the term of the loan, and that [MSI] would arrange to sell the mixer so that if for any reason it did not pay the loan according to plan it would be able to pay any arrears still owed from the sales proceeds earned from the sale of the mixer. Collins . . . [was] reasonably reassured and further induced by these documents into . . . making the loan to [MSI]." (Italics added.)

We conclude that these factual allegations and exhibits showing Mandel's direct participation in the alleged misrepresentations about the mixer serving as valid security for Collins's loan to MSI satisfy the requirement that his participation in the alleged conspiracy to defraud Collins be factually and specifically pleaded. The third amended

complaint states sufficient facts to constitute causes of action for intentional and negligent misrepresentation against Mandel based on his participation in a conspiracy with Noorigian to induce Collins' to make the subject loan by misrepresenting the adequacy of the security for the loan. Accordingly, the court erred in sustaining Mandel's demurrer to the third amended complaint.

XI. *Denial of Damages for Emotional Distress*

Collins contends the court erred in ruling that she cannot recover damages for emotional distress because she sued in her capacity as trustee. We conclude that a person prosecuting a fraud action in the capacity of trustee of his or her personal trust may not recover damages for emotional distress. Although we have found no California authority directly on point, there is case law that supports our conclusion.

The federal district court for the Eastern District of California stated that "a legal entity such as a trust cannot suffer emotional distress." (*Caso v. Hartford Cas. Ins. Co.*, (E.D. Cal. May 2, 2008, No. CIV. S-07-101 FCD DAD, 2008 WL 1970024, fn. 9 (*Caso*)).) The *Caso* court cited, as analogous authority, *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1260, which cited *Tenants Assn. of Park Santa Anita v. Southers* (1990) 222 Cal.App.3d 1293, 1304 (*Southers*), for the proposition that a business entity lacks standing to pursue a cause of action for intentional infliction of emotional distress. The appellate court in *Southers* held that an association of mobilehome park tenants did not have standing to sue park owners and managers for damages for emotional distress. (*Southers, supra*, at p. 1304.)

We agree with the *Caso* court that a trust cannot suffer emotional distress. A trust estate is simply a collection of assets and liabilities. (*Smith v. Cimmet* (2011) 199 Cal.App.4th 1381, 1390.) As such, it cannot be emotionally harmed; it can only be economically harmed. Probate Code 16249 provides that "[t]he trustee has the power to prosecute or defend actions, claims, or proceedings *for the protection of trust property* and of the trustee in the performance of the trustee's duties." (Italics added.) Thus, a trustee is statutorily authorized to sue only on behalf of the trust, an individual trustee does not have the authority to prosecute claims in the capacity of trustee for his her own personal harm, including emotional harm. (See *Pensacola Elec. Co. v. Soderlind* (Fla. 1910) 53 So. 722, 723-724 [the right to recover damages for mental pain and suffering due to the loss of child is personal to the parent and may not be exercised in a representative capacity as administrator of another's estate].)

Moreover, because the *trust*, rather than Collins personally, was the legal entity that was economically harmed by the fraud for which the jury found Noorigian liable, awarding Collins damages for her emotional distress would contravene the rule that such damages generally are not available in a fraud action absent accompanying pecuniary loss. (*Crisci v. Security Ins. Co. on New Haven, Conn.* (1967) 66 Cal.2d 425, 433-434 ["[A] plaintiff who as a result of a defendant's tortious conduct loses his property and suffers mental distress may recover not only for the pecuniary loss but also for his mental distress."]; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1031 [once threshold requirement of economic loss was satisfied by defendants' fraudulently terminating insurance benefits, plaintiff was entitled to recover damages for mental suffering caused

by the termination of benefits]; *Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1269 [damages for emotional distress alone are not recoverable in a fraud action but are allowed only as an aggravation of other damages]; accord, *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 134, fn. 12.)

Collins contends that the court should have allowed her to sue in her individual capacity and recover emotional distress damages on that basis. We conclude that the trial court correctly ruled on demurrer to the first amended complaint that Collins failed to state a cause of action in her individual capacity because, in the court's words, the first amended complaint pleaded "only that representations were made to the Trust, the Trust relied on the representations, the Trust was induced to loan money to Defendants, and the Trust suffered losses and harm. Further, there [were] no allegations that [Collins], as an individual, was a party to the contract or that she was a third party beneficiary of the contract. The documents attached to the complaint show that the two parties to the Promissory Note were MSI and the Trust and the 'secured party' to the Security Agreement was the trust."

Generally, an action must be prosecuted by the real party in interest. (§ 367; *IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1302.) As the trial court correctly noted, the trustee is the real party in interest when a cause of action is prosecuted on behalf of an express trust (*Wolf v. Mitchell, Silberberg, & Knupp* (1999) 76 Cal.App.4th 1030, 1036.) The trial court did not err in denying Collins recovery of emotional distress damages or in ruling that she failed to state a cause of action in her individual capacity.

DISPOSITION

The order sustaining defendants' demurrer to the third amended complaint without leave to amend as to defendant Mandel is reversed and the court is directed to enter a new order overruling the demurrer as to Mandel. The portions of the judgment ruling in favor of Mandel and against Collins and awarding Mandel costs and disbursements are reversed. In all other respects, the judgment is affirmed. The portion of the postjudgment order on attorney fees and costs granting Mandel's motion for attorney fees and awarding him fees is reversed. The postjudgment order on fees and costs is otherwise affirmed. Collins is awarded her costs on appeal.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.