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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RICHARD VAN LOON et al.,	
Plaintiffs and Appellants,	E049942
v.	(Super.Ct.No. RIC427504)
DAVID THORNTON et al.,	OPINION
Defendants and Appellants;	
WINCHESTER-WESSELINK, LLC et al.,	
Defendants and Respondents.	

APPEAL from the Superior Court of Riverside County. Lillian Y. Lim (retired judge of the San Diego Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Judge. Affirmed.

Robert H. Reeder and W. Derek May for Defendants and Respondents Winchester-Wesselink, LLC, Betty Wesselink, Cornelia Wesselink and Pauline Thornton, and for Defendants and Appellants David Thornton, Leo Wesselink and Jules Wesselink, Sr.

Covington & Crowe, Frank J. Lizarraga, Jr., and Jesse T. Morrison for Plaintiffs and Appellants Richard Van Loon and Dianne Van Loon.

This case involves a disagreement over the operation of a family business. Plaintiffs and appellants, Richard Van Loon (Richard)[1] and Dianne Van Loon (Dianne) (collectively referred to as Plaintiffs) brought suit against Winchester-Wesselink, LLC (LLC) and its majority members, David Thornton (David), Pauline Thornton (Pauline), Leo Wesselink (Leo), Betty Wesselink (Betty), Jules Wesselink, Sr. (Jules),[2] and his wife, Cornelia Wesselink (Cornelia) (collectively, Defendants), contending that Defendants unilaterally controlled the LLC to their own benefit and gain, and to the detriment and damage of Plaintiffs. Plaintiffs alleged causes of action for fraud, intentional and negligent misrepresentation, breach of contract, breach of fiduciary duty, and declaratory relief. Following a jury trial, judgment was entered in favor of Plaintiffs and against Defendants Jules, David, and Leo, solely on Plaintiffs' claim of breach of fiduciary duty. Plaintiffs were awarded damages in the amount of $150,000, for which each of the specified Defendants—Jules, David and Leo—was responsible in the amount of $50,000.

Defendants and appellants (Defendants/appellants) Jules, David, and Leo appeal the judgment, and Plaintiffs also appeal. Defendants/appellants raise the primary issue of

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[1] We utilize first names of parties for purposes of clarity and convenience; no disrespect is intended.

[2] On February 2, 2010, Jules died. On September 23, 2010, the court granted Cornelia's request to substitute as defendant and appellant in place of Jules.

"whether the controlling members of a limited liability company owe a fiduciary duty to a minority member of such [company] to cause a vote of the members to change the authorized business purpose of the [company]." Plaintiffs, via their appeal, contend that actual notice, not inquiry notice, is the correct standard to commence the running of the statute of limitations period in actions involving fiduciary relationships, and substantial evidence demonstrates that Plaintiffs had actual or inquiry notice of their claims prior to the close of the statute of limitations period.

I. PROCEDURAL BACKGROUND AND FACTS

Jules began dairy operations on 80 acres of real property located in Winchester, California, (the Property) in the early 1980s. By the late 1980s, Jules sold the Property to Pete Van Loon (Pete), his childhood friend and brother-in-law.[3] In connection with the sale, Pete leased back the Property to Jules and gave him an option to repurchase for an established amount. By the mid 1990s, Jules began to make cheese.

In 1997, Jules increased his cheese-making business, which became known as Winchester Cheese Company (Winchester). His children joined him in the business. They are: Jules's daughter, Pauline, and her husband, David; Jules's son; and Leo and his wife, Betty. The LLC was formed; however, the revenue and expenses of the company continued to be accounted and taxed through Jules, d/b/a Winchester Cheese Company, until 2001. The LLC was not funded with any assets until 2001. Before 2001, the LLC was owned by Jules, David and Leo.

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[3] Richard Van Loon's father, Pete, is married to Jules's sister, Cornelia.

Prior to investing money in the LLC, Richard, Jules's nephew, installed some of the equipment used by the LLC in the ordinary course of his dairy equipment and installation services business. In 2000 the possibility of new investors in the LLC was discussed. When a potential investment from a group of people referred to as "BPQ," failed to materialize, Jules sought capital from other sources, including Richard. Prior to obtaining new investors, Jules had an accountant, Gary Genske, calculate the beginning capital contributions of each member of the LLC. Genske then arranged with an attorney to prepare an Operating Agreement for the LLC reflecting the initial membership interests, determined by members' capital contributions.[4] As of spring 2001, the initial members of the LLC included Jules and Cornelia, the Thorntons, the Wesselinks, Jules's daughter, Valerie Thomas, and her husband, David Thomas.

In April 2001, Pete and Gertrude Van Loon, individually and as Trustees of the Van Loon Family Trust dated June 11, 1986, (collectively referred to as Optioners) and the LLC entered into an Option Agreement in which the Optioners agreed to lease the Property and provide the LLC with the opportunity to purchase the Property for $2.5 million. By May 2001, Joe and Maria Legler invested in the LLC. Joe Legler had been a sales representative for the company. The Leglers contributed $100,000 in exchange for

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[4] According to the Operating Agreement, capital contributions were defined as follows: "Each Member shall make a contribution to the capital of the [LLC] as shown opposite the Member's name on Schedule A attached hereto. All contributions shall be paid into the capital of the [LLC] by May 1, 2001. Unless otherwise agreed to in writing by a majority vote of the Membership Interest, no Member shall be required to make additional capital contributions. Except as provided in this Agreement, no Member may withdraw his or her capital contribution."

a membership interest of 10.68 percent. This capital contribution was used to pay various debts the LLC had assumed.

After the Leglers' investment, Jules invited Richard to invest in the LLC. At that time, both Winchester and the LLC owed Richard for dairy equipment installation that had been performed, in the amount of approximately $21,000. Jules and Richard discussed converting the outstanding debt, coupled with a cash contribution, into a membership interest; however, Richard preferred being paid the outstanding amount. By October 2001, they agreed to a $100,000 investment, subject to the LLC simultaneously paying the outstanding debt owed to Richard. In exchange, Richard and Dianne received a membership interest of 8.74 percent. In May 2002, the Operating Agreement was modified to reflect Plaintiffs' payments, as well as additional capital contributions by other members.

In late 2003 or early 2004, a real estate company expressed interest in purchasing the Property. This prompted some members of the LLC to initiate discussions about exercising their rights under the Option Agreement to purchase the Property. A series of discussions with Pete, and meetings among the members, were held, which led to a series of proposals and counter-proposals. One proposal was to cancel the option, allow Pete to sell the Property, allow Pete to take the first $2.5 million, and then the remaining profits would be divided equally between Optioners, on the one hand, and members of the LLC, on the other. This proposal would have required no financial outlay by the LLC or its members, and would have allowed all to partake in any profit generated. Because the profits would have to be divided with Optioners, the majority members did not agree to this proposal, and instead sought to exercise the option to keep the majority of the anticipated profits to themselves. The members continued to disagree as to whether the LLC should exercise the option, how the LLC might involve Pete in the anticipated windfall, and where, and if, the cheese making operations would continue if the Property was sold. Also, because $400,000 in back rent was owed to Pete, he challenged the LLC's right to exercise the option.

On or about April 26, 2004, a majority of the members voted to exercise the option without involving Pete in the anticipated resale of the Property to a residential real estate developer; Plaintiffs voted against the resolution. There was no resolution or motion to alter the business of the LLC to include land speculation. Also, no resolution or motion was brought to obligate the LLC and its members to a $500,000 promissory note. Nonetheless, in July 2004 the LLC formally acquired the Property for $2.25 million. In conjunction with the purchase, the LLC gave Pete a $500,000 promissory note in resolution of several issues involving past due rent and compensation for services in building the cheese plant. Around the same time, Jules offered to sell, and did sell, portions of his membership interest in the LLC.

As a result of the purchase of the Property, the LLC became obligated to pay a monthly mortgage in the amount of $17,501.22; however, it did not have the income to satisfy this monthly obligation. Thus, all of the members paid monthly capital calls to make up the shortfall of funds needed to pay the mortgage. Due to the cost of this monthly capital call, in December 2004, Jules sold some of his interest in the LLC to the

Wesselinks and to the Thorntons. These transfers were the genesis of Plaintiffs' original complaint.

Later, the LLC entered into a contract to sell the Property to Richland Homes for $20 million. All of the members, with the exception of Plaintiffs, voted in favor of the sale. Although an escrow was opened to provide Richland Homes with the time to determine the feasibility of the development, by September 2006, escrow was cancelled because Richland Homes determined that the development was not feasible. The financial burden of the monthly capital calls needed to pay the mortgage caused the Leglers to place their 8.68 percent interest up for sale for $300,000. Plaintiffs purchased the Leglers' interest to assist them. Today, the LLC owns the Property and is subject to large mortgage payments.

In their amended complaint, Plaintiffs alleged fraud, intentional and negligent misrepresentation, breach of contract, breach of fiduciary duty, and declaratory relief. Following a jury trial, Plaintiffs were awarded damages solely on their claim of breach of fiduciary duty. On appeal, Defendants/appellants challenge the verdict in favor of Plaintiffs. In their appeal, Plaintiffs raise two issues: (1) "[w]hether actual notice, as opposed to inquiry notice, is the correct standard to commence the running of the statute of limitations period in actions involving fiduciary relationships and fraud"; and (2) "[w]hether substantial evidence was presented at trial to demonstrate that [Plaintiffs] had actual or inquiry notice of their causes of action prior to the statute of limitations period."

II. APPEAL OF DEFENDANTS/APPELLANTS

According to Defendants/appellants, (1) pursuant to *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93 (*Ahmanson*),[5] Plaintiffs have no claim for breach of fiduciary duty; (2) there is no evidence to support the award of damages; (3) the applicable statute of limitations is three years; (4) the claim for "breach of fiduciary duty against a controlling shareholder is *equitable* in nature and thus is not triable by jury"; (5) the trial court erred in instructing the jury on the duty owed by majority owners of a company to minority owners; and (6) the trial court erred in entering judgment upon the special verdict where its findings are not expressly or impliedly adopted by the court.

A. Claim for Breach of Fiduciary Duty

Defendants/appellants contend that because their actions did not disproportionately benefit themselves, i.e., the "consequence of the subject purchase and the subject sale was . . . proportionately realized by each of [the Company's] members," Plaintiffs may only bring a claim for breach of fiduciary duty on behalf of the Company. Defendants/appellants identify four fact patterns, namely, (1) purchasing 80 acres of land, (2) altering the authorized business of the LLC, (3) approving the promissory note in the amount of $500,000 payable to Pete, and (4) entering into an agreement to sell the 80 acres of land, and argue that all of the four fact patterns that support the judgment for

[5] In *Ahmanson*, minority shareholders sued majority shareholders for improving themselves economically at the expense of the minority shareholders. There was no claim of damage to the corporate entity. Our Supreme Court held that minority stockholders may bring a nonderivative suit against the majority stockholders for breach of fiduciary duty to them when the corporation itself is not damaged. (*Ahmanson*, *supra*, 1 Cal.3d at p. 107.)

breach of fiduciary duty demonstrate proportional treatment of Plaintiffs such that they have no cause of action.[6]

California courts "have often recognized that majority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority." (*Ahmanson*, *supra*, 1 Cal.3d at p. 108.)

"Under California law, 'a shareholder *cannot* bring a direct action for damages against management on the theory their alleged wrongdoing decreased the value of his or her stock (e.g., by reducing corporate assets and net worth). The corporation itself must bring such an action, or a derivative suit may be brought on the corporation's behalf.' [Citations.] A different rule would 'authorize multitudinous litigation and ignore the corporate entity.' [Citation.]

"An action is derivative if '"the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets."' [Citation.] Shareholders may bring a derivative

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[6] Plaintiffs alleged seven fact patterns, the four already identified, and another three that were found to be time barred, namely, (5) relegating Plaintiffs to a minority position in the LLC when they made capital contributions that constituted a majority of the capital contributed, (6) failing to make capital contributions set forth in the May 1, 2002, Schedule A, and (7) compelling the members of the LLC to make additional capital calls to pay for the mortgage on the 80 acres.

suit to, for example, enjoin or recover damages for breaches of fiduciary duty directors and officers owe the corporation. [Citation.] An individual cause of action exists only if damages to the shareholders were not *incidental* to damages to the corporation. [Citation.] Examples of direct shareholder actions include suits brought to compel the declaration of a dividend, or the payment of lawfully declared or mandatory dividends, or to enjoin a threatened ultra vires act or enforce shareholder voting rights. [Citation.]" (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 312-313.)

For each of the fact patterns identified by Defendants/appellants, they argue that a claim for breach of fiduciary duty "belongs to the [LLC], not [Plaintiffs]." In response, Plaintiffs contend that regardless of those four fact patterns, the crucial issue is whether or not they were in a minority position that established a fiduciary duty on the part of Defendants/appellants. We agree. Defendants/appellants' majority position, coupled with their misrepresentation of each member's capital contributions to the LLC, harmed Plaintiffs individually. Thus, the jury awarded damages to Plaintiffs and the trial court ruled that "the holding in *Ahmanson* [is]inapplicable where substantial evidence was presented supporting the jury's finding that the ownership interests were misrepresented."[7]

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[7] Defendants/appellants challenge the finding that they misrepresented their initial ownership interests. They argue that "neither the jury nor the court was actually asked to make a finding about misrepresentation of ownership interests. And, there is no such specific finding in the Judgment." Although the trial court used the term ownership interest, it was referring to the representation of the initial capital contributions that determined each member's percentage of "ownership interest" in the LLC.

We reject Defendants/appellants' argument that none of the four fact patterns supports a finding that Plaintiffs suffered damages that were more than incidental to the damages suffered by the LLC. The purchase of the Property, which altered the business of the LLC to include land speculation, required unanimous consent. As Plaintiffs point out, Section 1.4 of the Operating Agreement specifically provides that the LLC "shall not engage in any business other than" processing cheese and "other activities directly related to" processing cheese, "without the consent of all the [m]embers." According to the testimony, Defendants/appellants decided to purchase the Property because they believed they could quickly turn around and sell it for a substantial profit. Thus, without unanimous consent of all members (Plaintiff's voted against the resolution to exercise the option to purchase the Property) Defendants/appellants voted to exercise the option to purchase the Property, thereby obligating the LLC (and all members) to pay the mortgage loan. While it is true that all members are obligated to contribute towards payment of the loan, the fact that Defendants/appellants disregarded Plaintiffs' votes when a unanimous vote was required resulted in a direct harm to Plaintiffs via a total disregard of their voting rights under the Operating Agreement.

Defendants/appellants raise several challenges to the use of their misrepresentation of capital contributions to the LLC to support a finding of breach of fiduciary duty. However, we, like the trial court, reject their challenges. The evidence introduced at trial showed that Plaintiffs were assessed a minority interest in the LLC based on capital contributions. The evidence further showed that the amounts identified as "capital contributions" were misleading. Although the Operating Agreement defined capital contributions as being "paid" into the capital of the LLC, in reality, the amounts representing each member's contribution represented "the value that the partners agreed upon with respect to the equipment and other assets that were contributed to [the LLC]." Thus, for example, while Plaintiffs contributed $100,000 in cash, Defendants/appellants did not. Rather, the values assessed to Defendants'/appellants' capital contributions were determined by Defendants/appellants themselves. Given Plaintiffs' minority position in the LLC, Defendants/appellants owed them a duty of not only disclosing the actual cash value of their capital contributions, but also complying with the requirement of obtaining a unanimous vote to alter the authorized business of the LLC. Because Plaintiffs' damages resulting from the breach of Defendants/appellants' fiduciary duties, including misrepresentation of members' capital contributions and the validity of their votes, were not incidental to damages to the corporation, Plaintiffs were entitled to bring a claim for breach of fiduciary duty.

B. Evidence of Damages Relating to the Four Fact Patterns

Defendants/appellants contend the evidence is insufficient to support the jury's award of damages in the total amount of $150,000. Specifically, they argue there was no evidence that (1) purchasing 80 acres of land, (2) altering the authorized business of the LLC, (3) approving the promissory note in the amount of $500,000 payable to Pete Van Loon, or (4) entering into an agreement to sell the 80 acres of land, caused any particular damage to Plaintiffs. We disagree. Although the damages awarded under the breach of the fiduciary duty claim did not-specify under which fact pattern the jury based its award, the failure of Defendants/appellants to access any weight to Plaintiffs' vote against altering the business of the LLC by purchasing the Property supports the award.

Regarding damages resulting from Defendants'/appellants' breach of fiduciary duty, the jury was instructed as follows: "The amount of damages must include an award for all harm that Defendants were a substantial factor in causing, even if the particular harm could not have been anticipated. Plaintiffs must prove the amount of their damages; however, Plaintiffs do not have to prove the exact amount of damages that would provide reasonable compensation for the harm. [¶] You must not speculate or guess in awarding damages. To decide the amount of damages, you must determine the value of what Plaintiffs gave, and subtract from that amount the value of what they received. [¶] Plaintiffs may also recover amounts that they reasonably spent in reliance on Defendants' false representation."

Plaintiffs point out, that they contributed cash in excess of $400,000, which constituted the majority of the capital contributions, as defined by the Operating Agreement. However, plaintiffs state they were subjugated to a minority position and to the will of the "purported" majority members. Defendants/appellants, constituting a majority, purchased land, executed a promissory note of $500,000 for monies past due, and changed the authorized business of the LLC, despite Plaintiffs' vote to the contrary. Thus, Plaintiffs note they suffered harm out of proportion to that of Defendants/appellants, because Defendants/appellants contributed less capital than Plaintiffs, yet assumed majority control of the LLC, while Plaintiffs were denied the correct ownership percentage and subjugated to a minority position. This is particularly apparent in the Defendants/appellants' refusal to recognize Plaintiffs' vote against altering the business of the LLC by engaging in land speculation.

Here, the jury awarded $150,000 in damages to Plaintiffs. Clearly, this amount is less than the amount requested by Plaintiffs, i.e., "at the very least the amount of $288,350." However, the jury was not obligated to award the entire amount that Plaintiffs sought. Instead, it was instructed to "determine the value of what Plaintiffs gave, and subtract from that amount the value of what they received." After applying that formula, the jury determined that Plaintiffs' damages amounted to $150,000. There is sufficient evidence to support this determination.

C. Statute of Limitations

The trial court applied a four-year statute of limitations on Plaintiffs' claim for breach of fiduciary duty. Defendants/appellants contend this is error because the applicable statute of limitations should be three years.

"'"To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action. . . . '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' . . ."' [Citations.] 'What is significant for statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct.' [Citation.]" (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1153.) Applying these principles, courts have held that the four-year statute of limitations under Code of Civil Procedure section 343 governs claims for breach of fiduciary duty against those members of the company entrusted with management and use of company assets. (*In re Brocade Communications Systems, Inc.* (2009) 615 F.Supp.2d 1018, 1036-1037 [four-year statute of limitations applies to corporation's derivative claims against former employees for breach of duty of undivided loyalty to employer and aiding and abetting breach of fiduciary duty, based on alleged stock options backdating scheme]; *Davis & Cox v. Summa Corp.* (1985) 751 F.2d 1507, 1520 [four-year statute of limitations governs corporation's claim against attorney for corporate waste, mismanagement, and breach of fiduciary duties in using corporate aircraft for personal reasons where main claim was attorney's breach of fiduciary duties as director]; *Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1111 (*Hatch*) [Code of Civil Procedure section 343 applies where property is acquired by breach of fiduciary duty not amounting to actual fraud]; *Schneider v. Union Oil Co.* (1970) 6 Cal.App.3d 987, 993 (*Schneider*) ["[the] [p]laintiff's cause of action is based on [the] defendant's breach of its fiduciary duty to recognize her rights and status as one of its shareholders. Accordingly, the four-year period of Code of Civil Procedure section 343 would appear to apply."].) Such is the case before this court.

Although Defendants/appellants cite to *Hatch, supra*, 225 Cal.App.3d 1104, and argue that it involved a similar situation to this case, we find the case readily distinguishable. In *Hatch*, the plaintiffs sued the beneficiaries under the deed of trust, the purchasers at the foreclosure sale, the sale trustee and its agent, to set aside the trustee's sale on the grounds of breach of fiduciary duty. (*Id*. at pp. 1108-1109.) The plaintiffs claimed the sale was improperly held because defendants "had 'collusively agreed' to allow [a buyer] to withdraw a full credit bid on only one parcel, 'in violation of the trustee's duty to conduct an open sale.'" (*Ibid*.) The court held that "while a breach of the trustee's duty to conduct an open, fair and honest sale may give rise to a cause of action for professional negligence, breach of an obligation created by statute, or fraud, it cannot be called a breach of any fiduciary relation." (*Id*. at pp. 1112-1113, fn. omitted.) Unlike in *Hatch*, the facts in this case support a finding that a fiduciary relationship exists between Plaintiffs and Defendants/appellants.

For the above reasons, the trial court correctly applied the four-year statute of limitations.

D. Is a Breach of Fiduciary Duty Claim Determined by Court or Jury?

Defendants/appellants contend that "[a] breach of fiduciary duty claim against a controlling shareholder is *equitable* in nature and thus is not triable by jury." However, Defendants/appellants raise this issue after the matter was submitted to, and decided, by a jury. Nonetheless, they fault the judgment for failing "to demonstrate the court's findings on 'disproportionally,' and proximately causing damages . . . ."

In response, Plaintiffs point out that breach of fiduciary duty claims may be tried before a jury as evidenced by Judicial Council of California Civil Jury Instructions (2011) CACI Nos. 4101 and 4102, which instruct the jury on the failure to use reasonable care and the duty of undivided loyalty. (CACI Nos. 4101 and 4102.) In this case, Plaintiffs note that the trial court left the legal question of breach of fiduciary duty to the jury's discretion, based on the evidence presented. The court reserved judgment on the equitable issue of reallocation of the members' interests. Thus, Plaintiffs argue the trial court correctly allowed the jury to decide the factual issue of whether or not there was a breach of fiduciary duty. We agree with Plaintiffs.

Moreover, because this case presented both legal and equitable issues, Plaintiffs were entitled to a jury trial on their legal issues.[8] (*Mortimer v. Loynes* (1946) 74 Cal.App.2d 160, 167.) "'The fact that equitable principles are applied in the action does not necessarily identify the resultant relief as equitable. [Citations.] Equitable principles are a guide to courts of law as well as of equity. [Citations.]' [Citations.]" (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 909.) After the jury determined that Defendants/appellants had breached their fiduciary duties and assessed a monetary damages figure, the trial court considered whether or not to "reallocate the members' interest in [the LLC] to conform to their proportional cash capital contributions." The court acknowledged that the "jury's factual findings do not bind" it. Considering this equitable issue, the court determined it was barred by the applicable statute of limitations, while also finding that "a fiduciary relationship existed among the parties once [P]laintiffs became members of the LLC." Given the nature of the action, we conclude the trial court properly segregated the legal issues from the equitable issues involved in

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[8] Defendants/appellants cite *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 122 (*Nelson*), and argue that "[a] breach of fiduciary duty claim against a controlling shareholder is *equitable* in nature and thus is not triable by jury." However, although the jury in *Nelson* "did not appear to be advisory," the *Nelson* court recognized "there may be an advisory jury in an equitable action." (*Nelson*, *supra*, at p. 123.) Here, Plaintiffs note the jury's verdict here identified seven duties that the jury found had been breached. The jury further found that some of the claims of breach of those specific duties were barred by the applicable statute of limitations.

Plaintiffs' breach of fiduciary duty claim and then expressly adopted the jury's verdict as its own.

E. Jury Instructions on Fiduciary Duty

While discussing jury instructions, Defendants/appellants objected to the standard instructions relating to breach of fiduciary duty, and the trial court invited them to draft new instructions that would address their concerns. Defendants/appellants submitted a proposed instruction; however, they claim that the court failed to utilize it to modify several general statements made with respect to the fiduciary duty owed by Defendants/appellants to Plaintiffs.[9]

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9 The jury was instructed as follows:

"A majority member of an LLC owes what is known as a fiduciary duty to the minority members. A fiduciary duty imposes on the majority members a duty to act with the utmost good faith in the best interest of the minority members. A fiduciary relationship arises in a commercial context when a business entity has a majority member.

"A majority member may consist of more than one person if they act in concert to accomplish a joint purpose to benefit themselves or in a manner detrimental to the minority.

"Plaintiffs claim that they were harmed by Defendants' breach of the fiduciary duty to use reasonable care. To establish this claim, Plaintiffs must prove all of the following:

"1) That Defendants were majority members of [the LLC];

"2) That Defendants acting as majority members did the following:

"(a) Failed to disclose the nature of their capital contributions, if any, when Plaintiffs became members of [the LLC]; or

"(b) Failed to make capital contributions, as set forth in the May 1, 2002 Schedule 'A,' in breach of Section 2.1 of the Operating Agreement; or

"(c) Relegated the Plaintiffs to a minority position in [the LLC] when Plaintiffs had made capital contributions, which constituted a majority of the capital contributed to [the LLC], in breach of the Operating Agreement . . . and the May 1, 2001, and May 2, 2002 Schedule 'A'; or

[footnote continued on next page]

"(d) Purchased the 80 acres without the consent of all members of [the LLC] . . . ; or

"(e) Compelled the members of [the LLC] to make additional capital calls to pay for the mortgage on the 80 acres; or

"(f) Failed to have a vote of the members of [the LLC] [ap]proving the alteration of the authorized business of the company . . . ; or

"(g) Failed to have a vote of the members of [the LLC], approving the promissory note in the amount of $500,000, payable to Pete . . . ; or

"(h) Sold the 80 acres without the consent of all members of [the LLC] . . . .

"3) That Defendants failed to act as a reasonably careful majority member or members of an LLC would have acted under the same or similar circumstances;

"4) That Plaintiffs were harmed; and

"5) That Defendants' conduct was a substantial factor in causing Plaintiffs' harm.

"Plaintiffs claim that they were harmed by Defendants' breach of the fiduciary duty of loyalty; the majority members of a limited liability company, or the minority members of a limited liability company's undivided loyalty. To establish this claim, Plaintiffs must prove all of the following:

"1) That Defendants were or believed they were majority members or owners of the [LLC];

"2) That Defendants acting as majority members did the following:

"(a) Failed to disclose the nature of their capital contributions, if any, when Plaintiffs became . . . member[s] of [the LLC]; or

"(b) Failed to make capital contributions, as set forth in the May 1, 2002, Schedule 'A,' in breach of Section 2.1 of the Operating Agreement; or

"(c) Relegated the Plaintiffs to a minority position in [the LLC] when Plaintiffs had made capital contributions which constituted a majority of the capital contributed to [the LLC], in breach of the Operating Agreement . . . and the May 1, 2001, and May 2, 2002, Schedule 'A'; or

"(d) Purchased the 80 acres without the consent of all members of [the LLC] . . . ; or

"(e) Compel[led] the members of [the LLC] to make additional capital calls, pay for the mortgage on the 80 acres; or

"(f) Failed to have a vote of the members of [the LLC], approving the alteration of the authorized business of the company . . . ; or

"(g) Failed to have a vote of the members of [the LLC], approving the promissory note in the amount of $500,000, payable to Pete . . . ; or

"(h) Sold the 80 acres without the consent of all members of [the LLC] . . . .

"3) That Plaintiffs were harmed; and

[footnote continued on next page]

On appeal, Defendants/appellants contend the trial court "clouded the meaning of [the] 'disproportionality' instruction by further instructing the jury that [it was] merely to find whether the [Defendants/appellants] were the majority members, and as majority members 'did' the Four Fact Patterns." Furthermore, Defendants/appellants fault the court for (1) instructing the jury that the "fiduciary duty at issue was to act with reasonable care, as though the case were actually derivative," and (2) instructing the jury that the "fiduciary duty at issue was loyalty, as though the case was derivative and somehow [Defendants/appellants] were individual participants in the purchase or sale of the Land." Because of these alleged errors in instructing the jury, Defendants/appellants contend that the jury was "likely . . . disposed to forget the necessary element of 'disproportionality' which was first raised by the court." We reject Defendants'/appellants' challenges to the instructions for the following reasons.

To begin with, we note that Defendants/appellants have failed to provide sufficient legal analysis to guide this court. While they cite to three cases, each deals with general principles of law regarding instructional error. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 ["Erroneous civil instructional omissions . . . may be more or less likely to cause actual prejudice depending on their nature and context."]; *Green v. State of California* (2007) 42 Cal.4th 254, 266 ["Instructional error in a civil case is prejudicial '"where it seems probable" that the error "prejudicially affected the verdict."'];

"4) That Defendants' conduct was a substantial factor in causing Plaintiffs['] harm."

Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 983 [Instruction error requires reversal only if it is probable that the error prejudicially affected the verdict.].) None of the cases discuss the specific issue of instructing the jury regarding a majority shareholder's breach of fiduciary duty.

Second, Defendants'/appellants' argument that the jury was misinstructed primarily focuses on the four fact patterns. We reject their claim that the jury was "likely . . . disposed to forget the necessary element of 'disproportionality' which was first raised by the court." According to the verdict, the jury found that Defendants/appellants misrepresented each member's capital contributions to the LLC, and in doing so, Plaintiffs were led to believe their votes counted less than Defendants/appellants, and in fact, Plaintiffs' votes did count less than Defendants/appellants. Thus, the jury awarded damages to Plaintiffs because of the resulting effects of this misrepresentation. This conclusion by the jury is based on consideration of the necessary element of "disproportionality."

Finally, while Defendants/appellants fault the trial court for failing to accept their "proposed additional instruction based upon *Ahmanson*, [which]was in effect an alternative to CACI [Nos.] 4101 and 4102 . . . ." they fail to provide this court with their proposed instruction, or point to that portion in the record where it can be found. When counsel asserts a point but fails to support it with reasoned argument and citations to authority, the court may deem it to be waived and pass it without consideration. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [contentions waived when there is failure to support them with reasoned argument and citations to authority]; *People v.*

Dougherty (1982) 138 Cal.App.3d 278, 282-283 [argument of counsel is insufficient; briefs must contain factual underpinning, record references, argument, and authority].) In this case, the jury was instructed with the standard instructions, CACI Nos. 4101 and 4102, which we conclude are correct statements of law. Majority shareholders "have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner." (*Ahmanson*, *supra*, 1 Cal.3d at p. 108.)

F. Entry of Judgment

Defendants/appellants contend the trial court erred in entering judgment which "recites the jury's special verdict verbatim." They argue that "[b]ecause the Judgment does not disclose any findings of the court separate from the special verdict in respect to breach of fiduciary duty by controlling members, it fails to find elements necessary to breach of fiduciary duty owing by a controlling member of the Company."

In response, Plaintiffs fault Defendants/appellants for failing to offer "any citations to the record, evidence, or legal authority to substantiate their argument . . . ." Plaintiffs further point out that the "December 23, 2009, Minute Order denying [Defendants'/appellants'] Motion for New Trial and JNOV <u>**expressly states**</u> that the court did in fact adopt the jury's verdict as its own." (Boldface and underlining in original.) The court stated: "The Defendants assert that the breach of fiduciary duty claim could only be determined by the Court and not by the jury, which in this case chose to award money damages for the breach. The Court disagrees. In any event, substantial evidence supports the jury's decision and the Court in not disturbing the verdict adopts the same as its own decision as well as the damage award." Arguing that the trial court was duty-bound to "conform the judgment to the verdict," Plaintiffs contend the clearest way of doing this was simply to incorporate the special verdict verbatim into the final judgment, which is what the trial court did. We agree.

III. PLAINTIFFS' APPEAL

Plaintiffs contend they "were denied several claims and causes of action pursuant to the incorrect inquiry notice standard as set forth in the jury instructions and special verdict." They argue that (1) actual notice, not inquiry notice, is the correct legal standard for commencing the statute of limitations, i.e., their claims did not accrue until they actually discovered Defendants'/appellants' wrongful acts; and (2) substantial evidence showed that the actual accrual date for the statute of limitations was February 2007.

A. Application of the Delayed Discovery Rule

"An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 807.) "'Two common themes run through the cases applying the discovery rule of accrual. First, the rule is applied to types of actions in which it will generally be difficult for plaintiffs to immediately detect or comprehend the breach or the resulting injuries. In some instances, the cause or injuries are actually hidden, as in the case of a subterranean trespass [citation], the erasure of video tapes held in the sole custody of the defendant [citation], or foreign objects left in a patient's body after surgery [citation].

Even when the breach and damage are not physically hidden, they may be beyond what the plaintiff could reasonably be expected to comprehend. . . . [¶] Second, courts have relied on the nature of the relationship between defendant and plaintiff to explain application of the delayed accrual rule. The rule is generally applicable to confidential or fiduciary relationships. [Citations.] The fiduciary relationship carries a duty of full disclosure, and application of the discovery rule "prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure." [Citation.]

"'The court in *April Enterprises, Inc. v. KTTV* [(1983) 147 Cal.App.3d 805], also noted the importance of the relationship between defendant and plaintiff: "In most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury. And in many, the defendant had reason to believe the plaintiff remained ignorant [s]he had been wronged. Thus, there is an underlying notion that Plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed. And often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's ignorance." [Citation.]' [Citation.]" (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1526.)

Plaintiffs argue the discovery rule does not apply under the facts of this case because of the existence of a fiduciary relationship between Plaintiffs and Defendants/appellants. In support of their argument, they cite *Schneider, supra*, 6 Cal.App.3d 987, and *Hobbs v. Bateman Eichler, Hill Richards, Inc*. (1985) 164 Cal.App.3d 174 (*Hobbs*). In relevant part, *Hobbs* states as follows: "Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion [citation] and do not give rise to a duty of inquiry [citation]. Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist. [Citation]. [¶] Thus, a plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she is under a duty to inquire and the circumstances are such that failure to inquire would be negligent. [Citations.] Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she *actually* discovers the facts constituting the cause of action, even though the means for obtaining the information are available. [Citation.]" (*Hobbs*, *supra*, at pp. 201-202.)

In *Hobbs*, a widow inherited a portfolio of stocks that her husband had self managed. (*Hobbs*, *supra*, 164 Cal.App.3d at p. 181.) Because she had "absolutely no experience or knowledge regarding securities transactions or the stock market," she agreed to allow a stockbroker to manage the portfolio. (*Ibid*.) Over the course of the next six years, the stockbroker "churned" the investment account, made unsuitable investments and unauthorized transactions, and neglected to inform the widow of losses in the account. (*Id*. at pp. 180-189.) Eventually, there was little to nothing left in the account. Upon discovering her losses, the widow sued the stockbroker and the brokerage firm. (*Id*. at p. 180.)

In *Schneider*, plaintiff and her father owned, as joint tenants, stock in Union Oil Company. (*Schneider*, *supra*, 6 Cal.App.3d at pp. 990-991.) The father, without plaintiff's knowledge, forged plaintiff's signature on the stock certificate and transferred it to a third party. (*Id*. at p. 991.) Years later, after the father passed away, plaintiff learned of her loss, she contacted Union Oil seeking recognition and confirmation of her stock ownership; however, Union Oil refused. (*Ibid*.) Thus, plaintiff sued.

Although Plaintiffs rely on *Hobbs*, *Schneider*, and other similar cases,[10] we find those cases readily distinguishable. While this case involves circumstances where Defendants/appellants had a fiduciary responsibility to Plaintiffs, as minority shareholders, and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner, it did not establish the existence of a fiduciary or confidential relationship which would justify the application of a more relaxed standard of discovery. "'A fiduciary [or confidential] relationship is created where a person reposes trust and confidence in another and the person in whom such confidence is reposed obtains control over the other person's affairs.'" (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 586, quoting *Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 809.) The typical case involves a significant disparity in position and knowledge in

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[10] (*Eisenbaum v. Western Energy Resources, Inc.* (1990) 218 Cal.App.3d 314, 324-325 [the plaintiff purchased a limited partnership interest in an out-of-state partnership]; *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189, 194 ["[A] cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action."]; *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921 [a plaintiff is under a relaxed duty of diligence to discover alleged fraud since escrow holder is a fiduciary]; *April Enterprises, Inc. v. KTTV*, *supra*, 147 Cal.App.3d at p. 831 [delayed discovery rule applied in breach of contract suit where a plaintiff could not reasonably discover that tapes, in exclusive possession of a defendant, were erased by the defendant]; *Evans v. Eckelman* (1990) 216 Cal.App.3d 1609, 1612, 1614-1615 [limitations period does not commence running in cases arising out of child abuse until the victim recognizes the "wrongfulness" of the abusive acts as well as knowing the acts occurred].)

addition to the relationship of trust and confidence. (See, e.g., *Hobbs*, *supra*, 164 Cal.App.3d at pp. 201-204.)

Here, the facts indicate that Plaintiffs and Defendants/appellants, as shareholders of the LLC, occupied positions of relative equality to one another. Unless otherwise provided in the Operating Agreement, they were by statute equally responsible for controlling the corporation. The actions of Defendants/appellants about which Plaintiffs complain involved a misrepresentation of how the initial capital contributions were calculated. While Plaintiffs argue that Defendants/appellants misrepresented the amount of cash they initially contributed to the LLC, there is no evidence Defendants/appellants purposely sought to keep Plaintiffs from finding out the true value of their initial cash contributions. Rather, it appears Defendants/appellants valued their own contributions based on items other than cash. However, Plaintiffs were business owners with business knowledge who, at any point, could have requested an accounting of the business assets. They chose not to. In contrast to the facts before this court, the cases relied upon by Plaintiffs involved a significant disparity in position and knowledge in addition to the relationship of trust and confidence.

Likewise, regarding Plaintiffs' fraud claim, we note the jury found there was no fraud. Regarding intentional misrepresentation, while the jury found that Defendants/appellants did make a false representation of an important fact to Plaintiffs, it also found that a reasonable and diligent investigation prior to February 14, 2005, would have disclosed the harm resulting from such misrepresentation. As we observed above, we agree. Requesting a simple accounting or independent audit of the LLC would have shown the disparity in initial cash contributions. The fact that Plaintiffs chose to sit back and do nothing was not the result of any intentional misrepresentation on the part of Defendants/appellants.

For the above reasons, we conclude that the trial court properly instructed the jury on the appropriate notice standard for commencement of the statute of limitations.

B. Substantial Evidence of Accrual Date of February 2007

According to Plaintiffs, they did not discover until February 2007 that Defendants/appellants did not pay the initial capital contributions as set forth in Schedule A to the Operating Agreement. Thus, Plaintiffs argue that the accrual date of their claims was delayed until February 2007. We disagree.

To begin with, as we stated above, the jury was properly instructed on the appropriate notice standard for commencement of the statute of limitations. Next, according to the evidence, Plaintiffs were put on notice prior to February 2007 that the LLC was cash poor, having a difficult time meeting its financial obligations. In fact, that was the primary reason for asking Plaintiffs to invest in the LLC. However, at no point did Plaintiffs seek an accounting or audit to the LLC's records. Rather, they allowed other shareholders, primarily Jules, to run the business without any "checks and balances," so to speak.

For these reasons, we reject Plaintiffs' claim that the evidence shows they did not learn of the true facts regarding the initial capital contributions until February 2007.

IV. DISPOSITION

The judgment is affirmed. Plaintiffs to recover costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MILLER
J.