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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TAMARA BAILEY, Cross-complainant and Appellant, v. CREMACH TECH, INC., Cross-defendant and Respondent, BAILEY and ASSOCIATES MANUFACTURER'S REPS INCORPORATED, Cross-defendant and Appellant.	G054026 consol. w/ G054474 (Super. Ct. No. 30-2009-00315225) O P I N I O N

Appeals from a judgment and postjudgment orders of the Superior Court of Orange County, Mary Fingal Shulte, Judge. Judgment affirmed; Postjudgment orders reversed.

Humphrey + Law, J. Scott Humphrey, and James T. Grant for Cross-complainant and Appellant.

The Morten Law Group, Aaron B. Fairchild and Warren D. Morten for Cross-defendant and Appellant.

Gordon & Rees, Charles S. Custer and Don Willenburg for Cross-defendant and Respondent.

* * *

These two appeals follow the conclusion of Phase 1 of a complex business dispute. The court accepted the parties' stipulation to hold a limited bench trial, deciding five causes of action. These five claims were part of a shareholder derivative lawsuit filed by Tamara Bailey (Bailey) on behalf of Bailey and Associates Manufacturer's Reps Incorporated (BAMRI), against Cremach Tech, Inc. (Cremach).[1] After the court found in Cremach's favor, Bailey (on behalf of BAMRI) filed an appeal asserting she was entitled to a new trial on the following issues: (1) whether the Independent Wholesale Sales Representatives Contractual Relations Act of 1990 (the Act) applies (Civ. Code, § 1738.10 et seq.);[2] (2) whether Cremach breached its agreement with BAMRI; (3) whether Cremach owed BAMRI additional commissions; and (4) whether BAMRI was entitled to an accounting.

After the trial court made several postjudgment orders, awarding attorney fees and costs against BAMRI, it separately filed an appeal challenging those rulings. BAMRI asserts it could not be held liable in a shareholder derivative lawsuit for statutory

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[1] Cremach also does business as Creative Machining Technology. In the briefing, some of the parties refer to Cremach as "Creative." For the sake of clarity, and to avoid confusion, we will refer to the company as Cremach in this opinion.

[2] All further statutory references are to the Civil Code, unless otherwise indicated.

fees and costs awarded pursuant to section 1717, or Code of Civil Procedure sections 1032 and 1034. We consolidated Bailey's appeal and BAMRI's appeal.

We conclude Bailey's contentions lack merit and the judgment must be affirmed. However, we reverse the court's postjudgment orders because BAMRI cannot be held liable for section 1717 attorney fees and costs incurred in a lawsuit it did not initiate. We remand the matter with instruction for the trial court to enter new orders reflecting the award of attorney fees and costs applies only against Bailey, the shareholder who filed the meritless derivative lawsuit.

FACTS AND PROCEDURAL BACKGROUND

I. *The Parties and Contracts*

BAMRI is in the business of representing electronics manufacturers as their sales agent. In exchange for representation, BAMRI's clients paid commissions on any sales BAMRI arranged for them. BAMRI and the manufacturers agreed on commission rates and other duties and obligations by executing Sales Representation Agreements (SRAs).

BAMRI had two 50 percent shareholders, Bailey and Steve Howard (Howard). They worked as BAMRI's sales agents, equally dividing the commission revenue. Their arrangement was memorialized in the "Bailey and Associates Manufacturer's Reps Incorporated Buy-Sell Agreement."

One of BAMRI's clients, Cremach, was in the business of machining metal parts and components. Cremach was owned by Mike McNeely (McNeely) and Jaewan Choi (Choi). The only SRA relevant to this appeal is the agreement between BAMRI and Cremach, executed in September 2006 (the Agreement). Cremach agreed to pay BAMRI a commission of seven percent "base rate of the 'net invoice price' for all turnkey shipments and invoices collected by [Cremach] from the Customers pursuant to this Agreement." The Agreement provided Cremach appointed BAMRI "as its exclusive sales representative solely for the customers (the 'Customers') described in [e]xhibit 'A'

attached hereto and updated monthly." Exhibit A, attached to the Agreement, was titled "THE CUSTOMERS of Cremach" and listed one name, i.e., Celerity, Inc. (Celerity).

Cremach agreed to provide manufacturing services to Celerity, pursuant to the terms of a Manufacturing Service Agreement executed in August 2006 (the Cremach/Celerity MSA). Thus, Celerity paid Cremach for manufacturing services, and in turn, Cremach paid BAMRI a commission on each invoice Celerity paid.

Three years later, Celerity fell on hard times and stopped paying Cremach for its services. Cremach sued Celerity and their case settled in 2009 for $600,000.

Around the same time, Howard and Bailey's relationship deteriorated. Howard left BAMRI and formed the company F&L Industries, Inc., working with Kelly Butts, Howard, and Joseph Butts (collectively referred to in the singular as F&L unless the context requires otherwise).

Brooks Instruments (Brooks) purchased some of Celerity's assets and hired some of its employees. Thereafter, Brooks paid for manufacturing services from Cremach. A dispute arose between Cremach and BAMRI about whether it owed BAMRI commissions on these invoices. After several disturbing interactions with Bailey, Brooks told Cremach it would no longer do business with Cremach if Bailey continued to act as the sales representative. Due to growing animosity between Cremach and Bailey, Cremach terminated its business relationship with Bailey/BAMRI and much litigation ensued.

II. *The Lawsuits*

Howard filed two complaints. The first one was against Bailey as an individual. He alleged causes of action for libel, defamation, and declaratory relief asking the court to dissolve Howard and Bailey's business relationship (Individual Action).

The second complaint was against Bailey, alleging various shareholder derivative claims on behalf of BAMRI (Derivative Action). Although BAMRI was also

named as a defendant in the Derivative Action, none of the allegations related to its conduct. The Derivative Action alleged causes of action for breach of fiduciary duty, constructive fraud, conversion, unfair business practices, accounting, and unjust enrichment.

Bailey answered and filed a cross-complaint in the Individual Action. She and BAMRI filed a joint cross-complaint in the Derivative Action, naming as defendants Howard, F&L, Cremach, and BAMRI. The cross-complaint[3] in the Derivative Action alleged 19 causes of action (Derivative Cross-Complaint). However, we need only summarize those litigated in the Phase 1 bench trial. In causes of action 15 through 19, Bailey alleged Cremach was liable to BAMRI for breach of contract, quantum meruit, accounting, violation of the Act, and violation of the Texas Sales Representatives Act (Texas SRA; Tex. Bus. & Com. Code, § 54.001 et seq.). The Derivative Cross-Complaint alleged BAMRI, not Bailey in her individual capacity, was making these allegations.

With respect to the breach of contract claim, the Derivative Cross-Complaint described the terms of the Agreement between BAMRI and Cremach. It alleged that although the Agreement required written modification, the parties' course of conduct changed a few terms in the following ways: (1) the commission rate was lowered to five percent to permit Cremach to offer Celerity lower pricing; and (2) the parties orally added three commissionable customers who were never added to exhibit A. The new additions to the "exclusive customer base" were "Raytheon," "Arnold," and Brooks. The complaint noted the first two customers (Raytheon and Arnold) were interested in purchasing Cremach's products. It alleged Howard solicited business from Brooks, who had "assum[ed] the business from Celerity, formally BAMRI's exclusive customer."

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[3] The cross-complaint in the Derivative Action was amended several times. The operative version is the fifth amended cross-complaint.

The Derivative Cross-Complaint asserted Cremach breached the SRA by failing to pay sales commissions (beginning in November 2009), failing to conduct the required semi-annual profit performance used to calculate BAMRI's profit performance bonus, and by trying to terminate the agreement without providing proper notice. It estimated damages in lost commissions and bonuses would total between $1.3 million and $2.8 million.

In the 18th cause of action, for violation of the Act, it was alleged BAMRI qualified as a wholesale sales representative, and Cremach was a manufacturer, as defined in the Act. The Derivative Cross-Complaint alleged Cremach's failure to pay commissions triggered penalty provisions (treble damages, attorney fees, and costs) described in section 1738.15. Similarly, the 19th cause of action referred to similar legislation in Texas, enacted to protect sales agents (Texas SRA), and called for an award of attorney fees and costs to the prevailing party.

The trial court consolidated Howard's Individual Action and Derivative Action, and designated the Individual Action case number as the lead case. Thereafter, the court accepted the parties' stipulation and entered a nunc pro tunc order striking out BAMRI from the Derivative Cross-Complaint. In its place, the court substituted Bailey in her capacity as a shareholder representative of BAMRI, to pursue those claims derivatively on behalf of BAMRI and against Cremach. This meant Howard and Bailey each individually brought shareholder derivative actions on behalf of BAMRI, making BAMRI both a defendant and cross-defendant.[4]

In November 2015, the court accepted the parties' stipulation for a bench trial on five causes of action in the Derivative Cross-Complaint relating to Cremach. The parties filed trial briefs and exhibit lists. The bench trial lasted four days, during which

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[4] "When a derivative suit is brought to litigate the rights of the corporation, the corporation is an indispensable party and must be joined as a nominal defendant. [Citations.]" (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108 (*Grosset*).)

the court heard testimony from several witnesses. The court took the matter under submission, filed a minute order finding in favor of Cremach, and provided the parties' with a copy of its tentative statement of decision.

III. *Statement of Decision*

The trial court began its statement of decision by explaining the limited scope of issues and time allotted for trial. It stated the parties stipulated the bench trial would address the 15th through 19th causes of action of the Derivative Cross-Complaint concerning "only" Cremach. The court noted Cremach's answer, "[l]eaving no stone unturned," asserted 63 affirmative defenses.

The court explained the parties stipulated to the bench trial after the court expressed "misgivings" that a 61-page, 19-cause of action cross-complaint, together with Howard's two complaints, could be tried in the time available (10-15 days). In addition, the court recognized there was a 2011 case assigned to a different courtroom for an involuntary dissolution, trailing this much older 2009 case. For these reasons, the court informed the parties the case should be referred to the complex civil panel. The parties indicated they would rather not be moved and they agreed to limit the scope of issues to be decided. They stipulated the court would consider only the five claims against Cremach (Phase 1) and a different judge could preside over the remainder of the case (Phase 2). The court noted the parties argued the five claims would be a "'straightforward breach of contract action'" taking just a few days, in contrast to the claims involving Howard, which would take much longer to litigate. The court stated that due to these assurances, it accepted the stipulation and interrupted an ongoing trial to conduct a four-day bench trial (which was "all the time the [c]ourt had available").

In the statement of decision, the court noted the parties agreed to strict time limits. It explained a four-day trial is "roughly 22 hours" of courtroom time, plus time needed to review exhibits in chambers and to write the decision. The court allotted 11

hours to each side. The trial was held on four days scattered throughout November and December when the court had time available.

After giving a short summary of the procedural history of the case, the court turned its attention to the "Controverted Issues." The court stated it appreciated the trial briefs, but the statements of counsel were not evidence. Consequently, the court would not consider any exhibits attached to the briefing, unless the exhibits were later received into evidence. The court added it would only review the issues contained in numbers 18 through 38 of the joint list of controverted issues. "It is the pleadings and causes of action that frame the 'chief controverted issues.'" The court answered those questions, and stated it would not give advisory opinions on questions not applicable or moot.

Next, the court discussed BAMRI's opening statement. The court stated counsel described the case as a simple breach of contract based on the theory Brooks was the same entity as Celerity for purposes of commissions owed under the Agreement. The court concluded, "This [was] not borne out by the evidence." It added, "The second part of the [Derivative Cross-Complaint], per his opening statement is violation of a non-solicitation agreement. But that is not plead, nor was it established by the evidence. As noted above, there are three different violations of the contract alleged in paragraphs 162-166."

The next section of the statement of decision contained a ruling on the request for judicial notice BAMRI filed the afternoon of the first day of trial. The court stated it deferred ruling to give Cremach an opportunity to file an opposition. Because nothing was filed, the court granted the request "as to the fact of the filings, not the truth of the matters stated therein, particularly with regard to a 'Notice of Ruling' which does not match what was documented in the Minute Order." Referring to several trial exhibits, the court added the case between Cremach and Celerity settled for $600,000 and Brooks was not a party to that action. Our appellate record does not contain the request for

judicial notice or the documents referenced above. It is unclear if the judicially noticed documents refer to a ruling made in the settled case, or some other matter.

The trial court's statement of decision discussed only a handful of the numerous exhibits admitted into evidence. However, the court noted it reviewed and considered all the exhibits. It ruled exhibit 1237, containing expert Glen Balzer's report, was full of inadmissible opinions regarding the applicability of the law. It described the contents of other exhibits it found relevant (exhibits Nos. 9, 13, 585, and 1142.)

The next three pages of the statement of decision were devoted to discussing the testimony and evidence relating to Cremach's argument Celerity did not assign the Cremach/Celerity MSA to Brooks, and there was no other contract obligating the commission payments for Brooks's book of business with Cremach. The court discussed the terms of the Agreement and the Cremach/Celerity MSA, and concluded there was no evidence to support the theory "the relationship between Celerity and Brooks 'was just a change of name.'" The court discussed the testimony of two percipient witnesses who worked for BAMRI (John Gaiser and Diane Eisner). The court described the reasons why it gave little weight to their testimony and the exhibits received into evidence during their testimony. It added, "Bailey was recalled to the stand in an unsuccessful effort to bolster the aforementioned charts and figures [contained in those exhibits]."

On the other hand, the court found persuasive the expert opinion of Henry Kahrs. The court found significant Kahrs's testimony that Brooks's purchase of Celerity's assets was not like a stock purchase where one company is acquired by another. He opined Brooks was a completely different entity from Celerity. The court agreed with Kahrs's assessment BAMRI's spreadsheets (prepared by Eisner) were not verifiable or reliable.

The court briefly discussed the testimony relevant to the cause of action for violating the Act. It referred to Howard's testimony Cremach did not sell a product. "[I]t provided manufacturing services for fabricating parts per customer's plans and specifications. BAMRI did not buy parts at wholesale and then resell them. [Cremach] had no catalog for the parts they were machining. Celerity paid [Cremach] for its services, and [Cremach] paid commissions to BAMRI. [Cremach] could not manufacture the Celerity parts for anyone else. Nothing was shipped to Celerity. Brooks was understood to be a new entity which did not have to accept [Cremach] as it[s] supplier. Indeed Brooks asked for and received pricing concessions. It took almost a year for [Cremach] and Brooks to negotiate an MSA."

The last section of the statement of decision contained separate rulings on the 15th through 19th causes of action. The court determined there was insufficient evidence to support the alleged three breach of contract violations. It also determined there was insufficient evidence to support the quantum meruit claim. As for the accounting request, the court ruled an accounting was not needed because the substantive claims failed. The court determined the Act's provision for treble damages was not supported by the evidence. Similarly, the court ruled the Texas SRA was inapplicable.

Bailey filed objections to the statement of decision, which the court overruled and ordered the tentative would become the final statement of decision without any modifications. Thereafter, the court entered a final judgment in Cremach's favor.

IV. *Postjudgment Motions*

Bailey filed a motion for a new trial and a motion to strike/tax Cremach's memorandum of costs. Cremach filed a motion requesting $1,361,410.25 in attorney fees. The trial court denied the motion for new trial. After adjusting several costs, the court awarded Cremach $34,358.90 in costs and $1,357,410 in attorney fees against BAMRI. The court rejected Cremach's argument that Bailey should be held liable for attorney fees and costs.

DISCUSSION

PART 1: APPEAL FROM JUDGMENT ON DERIVATIVE CROSS-COMPLAINT

I. *Breach of Contract—Non-Solicitation Provision*

BAMRI's argument[5] on this issue is as follows: "Despite multiple attempts to elicit a ruling on the derivatively pled claim that Cremach breached the [Agreement] by entering into a secret side deal . . . to employ Howard's services in direct violation of the non-solicitation/non-employment clause ([p]aragraph 7.5) of the [Agreement], the [court] *attempted to skirt the issue* by claiming this theory of breach of contract had not been pled." (Italics added.)

This is a bold assertion in light of BAMRI's failure to provide record references to support the claim it made "multiple attempts" to elicit a ruling that were ignored. BAMRI does not explain what part of the record supports its theory Cremach's alleged violation of paragraph 7.5 was a "derivatively pled claim." As explained in more detail below, the record shows the court ruled on all the claims agreed upon for Phase 1, which included a decision regarding the alleged violation of paragraph 7.5. Consequently, the record shows that rather than "skirt" the issue, the court made a ruling BAMRI simply does not agree with.

The parties reached an agreement with the trial court to avoid moving the case to a complex litigation courtroom. They agreed the scope of issues to be decided in the Phase 1 bench trial would be narrowly defined due to the significant time constraints. Based on the parties' assurances regarding the minimal complexity of the contract

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[5] For the sake of clarity, we have framed the issues in this appeal from the judgment entered on the Derivative Cross-Complaint as being raised by BAMRI. We recognize Bailey (in her role as shareholder), not BAMRI, was the party who appealed from the judgment. However, because Bailey's arguments on appeal are made on behalf of BAMRI, and concern only BAMRI's rights and interests, we concluded it would be more straightforward and make for easier reading to refer to the appellant as BAMRI in Part 1 of this opinion.

dispute, the court agreed to a four-day trial, allotting each side 11 hours. The court determined 22 hours would be sufficient based on the issues raised in the pleadings, which included only three distinct breaches of the contract (violations of paragraphs 4.2, 4.3, and 6.2). These three claims all related to the same factual dispute of whether Cremach owed money for sales representative services involving Celerity and Brooks.

The record shows the court had no warning that BAMRI intended to litigate a new theory of recovery, based on a completely different set of disputed facts, i.e., whether Cremach secretly hired BAMRI's employee in violation of paragraph 7.5 of the Agreement.[6] The parties' joint list of controverted issues filed a month before trial did not mention the new allegation.

BAMRI introduced this new theory of recovery the first day of the bench trial in its 10-minute opening statement and its trial brief (which the court did not have an opportunity to read before the trial started). The record shows BAMRI did not ask the court for leave to amend the cross-complaint to conform to the proof it intended to present at trial. Moreover, it did not seek to amend the pleadings after introducing evidence at trial relating to its new theory of recovery. In closing argument, BAMRI's counsel argued Cremach was liable for breaching paragraph 7.5 of the Agreement in addition to provisions relating to the issue of owed commissions.

Cremach's counsel briefly addressed the new theory in his closing argument. He argued a violation of paragraph 7.5 was not one of issues the parties agreed would be decided in Phase 1. Counsel stated BAMRI was improperly attempting to resurrect a claim it dropped five years ago. He asserted Cremach relied on BAMRI's

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[6] Paragraph 7.5, provided, "[BAMRI and Cremach] agree that, during the term of this Agreement and for a period of two [2] year[s] thereafter, neither will solicit the employment or services of, nor negotiate employment with, nor retain the independent contractor services of persons either presently employed or who within the past year have been employed by the other, without the other party's prior written consent."

decision to give up on this theory of recovery when conducting discovery, taking depositions, and preparing pretrial motions. Counsel concluded, "This surprise tactic is unfair, impermissible, and ignores prior court rulings. It may or may not be part of the second phase of trial, but the concept [that Cremach breached paragraph 7.5 was] not at issue in this phase of trial." Alternatively, Cremach maintained there was insufficient evidence of a breach because Cremach entered into a consulting agreement with F&L, and there was no evidence Howard had the authority at F&L to sign the agreement (because this was an issue to be decided in Phase 2).

In light of our review of what transpired in this truncated bench trial, we conclude the court did not "skirt" the issue by ruling the new issue had not been pled, rather than considering the merits of the argument. In the statement of decision, the court plainly stated it would not render an advisory opinion on matters not framed by the pleadings. As promised, the court considered only the five claims raised in the pleadings. In this context, the court's statement the new claim was "not pled" was in fact a dispositive ruling on the issue.[7] Its later reference to the three contract violations raised in the pleadings confirmed those were the only contract-related claims that fell within the scope of the bench trial, and a violation of paragraph 7.5 was not one of them.

We reject BAMRI's contention that the trial court was obligated to make a ruling on the merits "on this pivotal breach" because it was a "fundamental part of Bailey's derivative claim for breach of contract against Cremach." Noticeably absent from this argument are any supporting record references or supporting legal authority. First, without record references we have no reason to conclude the breach was particularly obvious or a "fundamental part" of the case. Based on our review of the

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[7] BAMRI filed objections to the statement of decision and brought a motion for a new trial based on its belief the court erroneously failed to consider the alleged breach of paragraph 7.5. Perhaps these efforts to obtain a *different* ruling are what BAMRI was referring to when it stated it made "multiple attempts to elicit a ruling."

record, neither the trial court nor Cremach knew it was part of the case until the first day of trial.[8]

Moreover, BAMRI provides no legal authority to support its argument that a new theory of recovery based on different facts, not pled in the operative complaint, but announced the first day of trial, must be considered. Instead, BAMRI cites many cases holding a trial court has great discretion to grant a party's motion to *amend* the complaint to conform to proof before or during a trial. (See, e.g., *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 736 (*Faigin*); Code Civ. Proc., §§ 576, 473, subd. (a)(1).) We agree that if a complaint is properly amended, the new claim becomes one of the issues that must be adjudicated during the trial. While the option of amending the complaint may have been available to BAMRI (and the parties in their briefing dispute whether the court could have granted such a motion), we need not decide this issue because there is nothing in the record suggesting BAMRI asked the court for this remedy. The record reflects the trial court did not consider or rule on a request to amend the pleadings, and therefore, case law regarding the review of such a decision is inapt. The court's statement of decision expressly recognized the issue was never added to the pleadings, and therefore, it need not be decided.

Alternatively, BAMRI suggests there was no need to amend the complaint because its new theory of recovery was encompassed in the existing breach of contract action. It notes "fact-specific pleading" is never required except for fraud causes of action. (Citing *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46-47 (*Quelimane*).) BAMRI claims this case supports its theory that for a breach of contract claim there was no need to specify the nature of the alleged breach because the pleadings

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[8] BAMRI makes much of the fact it included the new claim in its trial brief. This fact is hardly relevant given the trial court's comment it did not have the opportunity to read BAMRI's trial brief before the Monday morning trial because it was filed on the previous Friday evening.

need not be fact-specific. BAMRI's reliance on *Quelimane* is misplaced, and its argument misstates the law.

In the *Quelimane* case, the court considered the issue of whether "particularized fact pleading" should be required for unfair competition law (UCL) claims to survive a demurrer challenge. (*Quelimane, supra,* 19 Cal.4th at p. 46.) The court stated that the rule for a "nonfraud pleading" is a plaintiff "cannot merely restate the elements" of the cause of action. (*Id.* at p. 48.) "'Rather, in order to sufficiently state a cause of action, the plaintiff must allege in its complaint certain facts in addition to the elements of the alleged unlawful act so that the defendant can understand the nature of the alleged wrong and discovery is not merely a blind "fishing expedition" for some unknown wrongful acts.' [Citation.]" (*Ibid.*) In that case, the court determined the complaint was sufficiently pled because plaintiff alleged there was a conspiracy to deny title insurance, and defendant "necessarily has knowledge of its existence and of all the facts relevant thereto." (*Ibid.*)

Applying this rule to a breach of contract action, a plaintiff's complaint cannot merely restate the legal elements of the claim. A plaintiff must allege sufficient facts for a defendant to understand the nature of the alleged wrong, i.e., how was the contract breached. BAMRI clearly understood this rule when it filed the Derivative Cross-Complaint because it alleged Cremach breached three distinct paragraphs of the Agreement and paragraph 7.5 was not listed or otherwise incorporated by reference. It appears BAMRI's own pleading also refutes its outlandish argument a plaintiff need not plead facts in addition to the elements of the alleged unlawful act.

The parties' 15-page Agreement contained numerous separable obligations; each one could be individually breached based on different factual circumstances. Specifically, the failure to pay commissions certainly violated paragraph 4.2, but would not be considered a breach of paragraph 7.5, providing a separable obligation not to steal away employees. BAMRI's breach of contract cause of action did not automatically

encompass every conceivable kind of breach and the complaint needed to be amended to conform to proof there was a separate violation of paragraph 7.5. To hold otherwise would contradict the body of case law discussed above, limiting the circumstances in which parties may amend complaints to conform to proof during trial to avoid prejudicing the adverse party. There is no guarantee the pleadings can be amended on the eve of trial. A party cannot amend the complaint "if the proposed amendment raises new issues that the defendant has had no opportunity to defend [citation] or the material facts are undisputed and the proposed amendment would not establish a basis for liability as a matter of law [citation]." (*Faigin, supra*, 211 Cal.App.4th at p. 736.)

II. *Breach of Contract for Failure to Pay Commissions—15th Cause of Action*

BAMRI asserts the trial court erroneously concluded the Agreement with Cremach covered sales to a single customer, Celerity, and refused to recognize the Agreement also covered sales to Brooks. It recognizes the trial court made several factual findings supporting the above legal conclusion and argues "those findings are based on a fundamental misunderstanding of the facts and referenced documents, and do not support, as a matter of law, the trial court's erroneous conclusion Cremach had no obligation to pay commissions to BAMRI for Cremach sales to Brooks." It adds, the court committed reversible error by "failing to address, much less rebut, the several independent reasons explained herein as to why Cremach owes commissions."

Specifically, BAMRI maintains the following reasons should have been, but were not addressed, by the court: (1) Cremach owes commissions because Brooks *is the assignee* of the Cremach/Celerity MSA; (2) Cremach owes commissions due to the terms of the Agreement and the parties' performance of the contract; (3) application of the Act requires the addition of Brooks as a customer to the Agreement; (4) Cremach owes commissions because BAMRI was a procuring cause of Cremach's sales to Brooks; and (5) there was insufficient evidence Cremach's brief payment of commissions was based on a purchase order relationship with Brooks rather than the assigned

Cremach/Celerity MSA. While BAMRI's briefing on these "issues" alludes to the court's factual findings as being based on a misunderstanding of the evidence, BAMRI devotes most all of its efforts to rearguing the same facts and legal theories presented at trial and rejected by the court. It appears to be a one-sided attack on the sufficiency of the evidence supporting the judgment.

BAMRI cannot use this appeal to get a second bite at the apple. This court is not a second trier of fact. """'In general, in reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]" [Citation.] In a substantial evidence challenge to a judgment, the appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]" [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment.'"" [Citations.]" (*Barickman v. Mercury Casualty Co*. (2016) 2 Cal.App.5th 508, 516.) With these legal principles in mind, we turn to BAMRI's five arguments.

A. *Assignment*

BAMRI recognizes the court found the Agreement provided for commissions related to sales to one customer, i.e., Celerity. It was undisputed Celerity, under the terms of the Cremach/Celerity MSA, was permitted to assign its rights in certain circumstances. BAMRI asserts the court *failed to consider* its argument and the documents showing Celerity assigned its rights to Brooks when it sold other assets to Brooks. This contention is belied by the record. The court considered and offered several specific reasons why it rejected the "assignment" theory of recovery.

On page five of the statement of decision, the court stated it agreed with Cremach's position the Cremach/Celerity MSA "was not assigned to Brooks." It

explained that when Cremach terminated the MSA and sued Celerity for unpaid invoices, "Celerity represented that it had not assigned" the Cremach/Celerity MSA. The court concluded, "There was never a contract, oral or express, for commissions for Brooks; at most, there was an implied contract to pay a [five percent] commission. Per [California Uniform Commercial Code section] 2309, with no fixed term, the implied contract was terminable at will." The court noted the Cremach/Celerity MSA was terminated after Celerity went out of business as part of the Celerity and Cremach 2009 settlement agreement, and it was never assigned to Brooks as part of the asset purchase agreement. The court found persuasive expert testimony Brooks did not purchase Celerity's liabilities as part of the asset purchase.

BAMRI argues this ruling is erroneous because the terms of the asset purchase agreement between Celerity and Brooks stated the Cremach/Celerity MSA and related pricing agreements were assigned to Brooks. However, the record references provided do not support this claim. BAMRI cites generally to the entire Cremach/Celerity MSA, an addendum to the Cremach/Celerity MSA, and a memorandum of understanding (MOU) between those parties. BAMRI provided no specific page reference to an assignment, only to one provision generally stating Celerity "may" assign the Cremach/Celerity MSA. It would be mere speculation to say an *option* to assign should or must always be acted upon or was actually acted upon.

In a footnote, BAMRI lists various provisions of the asset purchase agreement (APA) between Celerity and Brooks. None of the cited provisions specified Celerity agreed to assign the Cremach/Celerity MSA to Brooks. BAMRI focuses on a provision stating Celerity's "contracts" are part of the many items that must be timely disclosed to the buyer (Brooks). However, BAMRI does not explain how the duty to disclose the Cremach/Celerity MSA means it was also assigned as part of the APA.

Evidence Celerity *separately agreed to assign* its patents to Brooks, suggests the parties preferred using agreements separate from the APA with respect to

assignments. Contrary to BAMRI's contention, there is no reason to infer the assignment of patents meant the parties also intended to assign rights under the Cremach/Celerity MSA. Finally, BAMRI does not offer any reason why the court was required to reject Celerity's representation it did not assign the Cremach/Celerity MSA, or why the court must disregard the expert's testimony it found credible and persuasive on this issue.

B. *Terms of Agreement*

BAMRI argues the express terms of the Agreement provided Cremach must pay commissions to BAMRI for Cremach's sales to Brooks. It states the court erroneously determined the Agreement was "a 'single-customer' agreement that only applied to Celerity" because there is language referring to "'customers'" not just one customer. Moreover, the Agreement called for the list of customers on exhibit A to be updated monthly, indicating the parties contemplated the Agreement applied to more customers than just Celerity. BAMRI has misread the statement of decision. Nowhere did the court hold it was a "single-customer" agreement. Rather, the court concluded, "There never was a contract, oral or express, for commissions for [Cremach's sales to] Brooks." We have no reason to doubt that the court understood the parties' contract had the potential to become a multi-customer agreement. It recognized the Agreement's terms permitted the addition of customers, but based on the evidence, it ruled Brooks was not one of them.

C. *The Parties' Performance*

BAMRI asserts, "Cremach's 'single-customer' theory also contradicts the parties' performance under the [Agreement] in which Cremach paid commissions to BAMRI for Cremach's sales to customers other than Celerity." BAMRI cites to evidence Cremach paid commissions for sales to Raytheon and Arnold, although these customers were not listed on exhibit A of the Agreement. It notes that for several months in 2009, Cremach paid certain commissions to BAMRI for Cremach's sales to Brooks, who also

was not included on exhibit A. It concludes Brooks, Raytheon, and Arnold were all covered by the Agreement even though they were not listed on exhibit A.

As noted above, it is a misstatement to say the court interpreted the Agreement to concern a single customer. It simply did not. Moreover, the customer status of Raytheon and Arnold was not an issue the court needed to decide in this limited bench trial, and it correctly did not offer an advisory opinion. BAMRI offers no case authority or evidence to support its theory the payment of commissions to other customers necessarily meant Brooks was added to the Agreement. Indeed, BAMRI makes no effort to refute the logic or reasoning supporting trial court's conclusion to the contrary.

In the statement of decision, the court provided the following explanation: "Celerity's last order was May 18, 2009. Brooks and [Cremach] thereafter began a 'tentative purchase order relationship.' Even in the absence of a legal obligation, [Cremach] paid BAMRI commissions on orders received from Brooks from [June 15, 2009 to October 29, 2009], hoping to 'incentivize' BAMRI to facilitate a Brooks/[Cremach] MSA. Brooks informed [Cremach] it wanted nothing to do with Bailey. The MSA was never modified and there is no written waiver of the non-modification clause. The [August 13, 2009], settlement agreement terminated the contractual relationship between Celerity and [Cremach]."

In short, the court determined the evidence supported the conclusion that the payment of commissions was not because Brooks was added to the list of "Customers" in the Agreement. It was undisputed that in June 2009 Brooks (a separate entity from Celerity) had not yet entered into an MSA with Cremach, despite Cremach's best efforts to solidify their relationship. At the time the commissions were paid, Brooks was merely a potential customer. Howard testified that from July to October 2009, Brooks ordered services from Cremach by using purchase orders, and was under no obligation to continue using Cremach's manufacturing services. During this time,

BAMRI could not ask Cremach to add Brooks to the list of customers in the Agreement. Howard explained, "It was not something that we could do as a sales rep[resentative] because there wasn't a [MSA] in place that delineated the call settlements, the profitability of the job, and what commission levels . . . were reasonable against those." Howard added that all efforts to put an MSA in place were thwarted by Bailey's "unprofessional and threatening" demeanor towards Brooks, and eventually caused Cremach to terminate its Agreement with BAMRI. There is ample evidence supporting the court's rejection of BAMRI's "performance" theory.

BAMRI also asserts Cremach's termination letter, and follow-up e-mail contain "admission[s] that Brooks was a customer under the Agreement." We have reviewed these documents and neither the termination letter nor the e-mail mentions Brooks. Rather, Cremach terminated the Agreement on the following grounds: "Cause for the termination includes, but is not limited to, [Bailey] having sent, on behalf of [BAMRI an] explicitly profane text message to me as the co-owner of Cremach . . . [and she] has threatened the clients of Cremach . . . with bodily harm and has published comments which are libelous per se in accusing me of misappropriating Cremach['s] . . . corporate funds." The follow up e-mail expressed the same sentiment. This evidence does not serve to contradict the court's conclusion commissions were paid pursuant to a temporary purchase order relationship and not because Brooks was added to the Agreement as a customer.

Finally, we find BAMRI's reliance on *Taylor v. Sanford* (1962) 203 Cal.App.2d 330 (*Taylor*), to be misplaced. The holding does not support BAMRI's theory Cremach's commission payment for a short time was a "course of performance" or "course of dealing" that proved Brooks was a customer under the terms of the Agreement. *Taylor* concerned an action to recover royalties due under a contract. (*Id.* pp. 332-333.) Defendant licensed the use of his chemical compound and agreed to share royalties with plaintiff, another chemist, who then assigned a portion of his royalties to

two other men. After defendant refused to pay royalties, plaintiff sued for an accounting and one-half the royalties received by defendant. (*Id.* at pp. 345-346.) The court rejected defendant's assertion the licensees were no longer using the chemical compound and were using a "'new' extract." (*Id.* at pp. 332-333.) It held there was evidence the licensed compound and the new extract were the same product, and therefore, subject to the royalty agreement. (*Id.* at pp. 344-345.)

BAMRI focuses on the *Taylor* court's discussion of defendant's decision to pay royalties for 10 months when the licensees were allegedly not using the compound subject to royalty payments. (*Taylor, supra,* 203 Cal.App.2d at pp. 343-344.) The *Taylor* court ruled payment "under the circumstances constituted an admission against interest by defendant and positive evidence tending to prove the truth of the fact to be inferred therefrom. [Citations.]" (*Id.* at p. 344.) In other words, defendant's additional payments could be considered an admission the new extract was the same chemical compound as the one requiring royalty payments. This case would perhaps be applicable if Celerity and Brooks, like the two chemical compounds in *Taylor*, were identical. As discussed, there was ample evidence supporting the court's conclusion the relationship between Celerity and Brooks was not "'just a change of name.'" They were completely separate entities.

D. *The Act*

Operating under the assumption the Act applied in this case, BAMRI argued section 1738.13, subdivision (b)(4), required that its written contract with Cremach identify "[a]ll exceptions to . . . customers" and this rule cannot be waived. (Citing § 1738.13, subd. (e).) BAMRI does not explain how this statutory mandate relates to the issue at hand. Moreover, BAMRI misquoted the statute. The Act requires the written contract to list "[a]ll exceptions to the assigned territory and the customers *therein*." (Italics added.) BAMRI's commissions in this case were not limited to customers located in a particular assigned territory. The Agreement stated BAMRI was

the *exclusive* sales representative, eliminating the need to designate territories because the parties agreed there would not be multiple competing sales agents. BAMRI does not suggest what contract language should have been included on the topic of territories or how the statute required a commission payment for sales to a non-customer. Due to the lack of meaningful legal analysis and pertinent authority, we deem this argument waived. (Cal. Rules of Court, rule 8.204; *Utility Consumers' Action Network v. Public Utilities Com.* (2010) 187 Cal.App.4th 688, 697.)

E. *Procuring Cause of Sales*

BAMRI maintains it is entitled to commissions because its sales representative efforts were the "'effective cause' or 'procuring cause'" of Cremach's sales to Brooks. BAMRI refers to 1940s agency cases that do not support this contention. Both cited cases hold that when a "'contract contemplates that the agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency,' . . . ." (*Zinn v. Ex-Cell-O Corp.* (1944) 24 Cal.2d 290, 296; see also *Chamberlain v. Abeles* (1948) 88 Cal.App.2d 291, 295 (*Chamberlain*).) These cases also acknowledge, "Plaintiff's right to a commission is dependent entirely upon the terms of the agreement between the parties and the nature of the services required to be rendered by him." (*Chamberlain, supra*, 88 Cal.App.2d at p. 295.)

The terms of the Agreement in this case did not offer seven percent commissions for all sales in which BAMRI's agents were the procuring cause. The Agreement plainly stated the seven percent commission was conditional, dependent on sales related to "all turnkey shipments and invoices collected . . . from the Customers pursuant to this Agreement." The Agreement defined "Customers" as being described in exhibit A, and that the list would be updated monthly. Overlooking for the moment the factual dispute whether BAMRI was the procuring cause of Cremach's sales to Brooks,

the commission payment depended on Brooks being included on exhibit A. As discussed above, Cremach terminated the Agreement with BAMRI before entering into a MSA with Brooks. Consequently, Brooks's name never appeared on the exhibit A list.

F. *Sufficiency of Evidence of "Purchase Order Relationship"*

In the statement of decision, the court determined Cremach paid commissions for several months in 2009, not because Brooks was a customer, but due to their "'tentative purchase order relationship'" and Cremach's desire to incentivize BAMRI's help in facilitating formation of a Brooks/Cremach MSA. BAMRI argues the court's path of logic was "based in fiction" because the Celerity/Cremach MSA was not terminated but *assigned* to Brooks.

This argument is essentially a different approach to the same assignment contention we rejected earlier in this opinion. In the prior argument, BAMRI maintained there were documents proving the assignment, and now it maintains we must infer there was an assignment due to *the absence* of a document, i.e., there was no evidence of a Cremach/Brooks MSA. It argues Cremach provided a document showing it entered into a "pricing agreement" with Brooks, which strongly suggests there was no need to create a new MSA. BAMRI adds the pricing agreement looks a lot like the Cremach/Celerity MOU and 2009 addendum.

This argument ignores the overwhelming evidence discussed earlier that supports the court's conclusion the MSA was not assigned to Brooks. In summary, Brooks refused to do business with Cremach if it continued to use BAMRI's services. The court found credible and persuasive Kahrs's expert testimony, who opined BAMRI suffered no damages because Celerity and Brooks were different companies and "[t]here was a *renegotiated contract* that involved sales to Brooks." (Italics added.) Kahrs stated the following: "Bailey and BAMRI had their opportunity to get that contract. But from their own actions, they did not. [¶] Brooks was very clear, . . . Becker was very clear that they would not do business with . . . Bailey."

BAMRI also argues the assignment is shown by evidence Brooks's purchase orders between June and October 2009 exceeded $5.2 million. It admits it did not have evidence of these figures until Phase 2 of the trial. BAMRI claims sales increased thereafter, exceeding $20 million from October 2009 to December 2010. This evidence merely supports the conclusion Brooks became one of Cremach's customers and submitted many purchase orders before entering into a contract (in June 2010) having set pricing for the products. We refuse to speculate the business relationship was due to an assignment rather than from the use of purchase orders or a new MSA.

III. *Violation of the Act—18th Cause of Action*

The Act "was created to protect sales representatives who receive commissions from, but are not employed by, a manufacturer. [Citation.] The Act requires manufacturers to enter into written contracts with their sales representatives to provide 'security and clarify the contractual relations' between the parties. (§ 1738.10.)" (*Reilly v. Inquest Technology, Inc*. (2013) 218 Cal.App.4th 536, 540 (*Reilly*).)

"To ensure the necessary clarity in contractual relations, the statutory scheme provides that whenever a manufacturer is engaged in a business deal with a wholesale sales representative who is not an employee, there is a duty to enter a written contract containing information relating to how commissions will be calculated and details regarding the assigned territory. (§ 1738.13, subd. (b)(1)-(5).) In addition, the manufacturer has a duty to provide documentation when it makes commission payments, such as an accounting of the orders and how the commission was calculated. (*Ibid*.)" (*Reilly, supra,* 218 Cal.App.4th at p. 545.)

The Act specifies remedies (including treble damages and attorney fees) for a willful failure to enter a written commission contract as required by the Act or a willful failure to pay commissions *as provided in the written contract*. (§§ 1738.15-1738.16.) At the bench trial, the parties disputed whether the Act applied to their business relationship. The court ruled the Act did not apply, and BAMRI devotes much of its

briefing to explaining why the court erroneously determined Cremach was not a "manufacturer" as defined by the Act. Noticeably missing from its argument is why this alleged mistake matters if the court correctly determined the contract was not breached and commissions were not owed.

If we assume for the sake of argument, without deciding the issue, that the Act governs the parties' relationship, BAMRI cannot recover damages. The complaint alleged the Act was violated by Cremach's willful failure to pay commissions *as required by the contract*. As discussed in the previous section, we have determined the contract did not require Cremach to pay commissions for sales to Brooks. The legal determination commissions were not owed eliminates application of the Act and its special remedies.[9]

IV. *Accounting—17th Cause of Action*

The court ruled that because "the substantive claims fail, there is no basis to order an accounting." On appeal, BAMRI recognizes failure of the 15th cause of action meant there was no need for an accounting regarding sales to Brooks. It asserts the same is not true with respect to sales to Celerity before termination of the Cremach/Celerity MSA. It concludes the 17th cause of action also requested an accounting of Cremach's commissions payments for its sales *to Celerity* "from 2006 to the present." BAMRI maintains it presented "unrebutted evidence" showing Cremach received several substantial payments from Celerity but did not pay BAMRI the commission owed for the payments. It provides record references to several spreadsheets the court received into evidence at the trial (exhibits 1294-1296). The spreadsheets purport to calculate commissions payable from Cremach sales to Celerity. BAMRI argues the introduction of

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[9] Because BAMRI does not address the court's ruling on the 16th (quantum meruit) or 19th (violation of Texas SRA) causes of action, we need not address the merits of those claims. "Issues not raised in an appellant's brief are deemed waived or abandoned. [Citation.]" (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

this evidence "shifted the burden" to Cremach to prove it paid the appropriate amount of commissions. We conclude this argument lacks merit for several reasons.

First, while "burden shifting" is necessary to prevail in a summary judgment motion, it is not a standard applicable to trials. A party can introduce unrebutted evidence and still lose if it is found to lack relevance.

Second, BAMRI's argument fails to acknowledge the court's statement of decision in which it discussed the weight of BAMRI's evidence. The court ruled it gave very little weight to the spreadsheet exhibits "due to [their] questionable foundation." The court explained BAMRI's witness, Diane Eisner, prepared the spreadsheets. It stated, Eisner "was described as [BAMRI's] bookkeeper . . . yet she called herself an 'independent contractor' who was paid for her work and time on the litigation." The court noted "exhibits 1294 *et seq*." were "created after trial started, and thus these exhibits were not available to the defense until mid-trial" despite the fact the case was initiated six years earlier. The court found troubling that Eisner claimed her task was simply to correlate invoices and compile data, yet her spreadsheets "clearly involved 'explaining,' or attempting to explain, the data, such as describing 'what BAMRI was entitled to receive.'"

The court also found relevant that Eisner worked on the spreadsheets with BAMRI's former counsel, who had Eisner insert "'[h]eadings and commentary,'" which the court disregarded entirely. The court stated it did not find credible BAMRI's assertion Eisner's preparation of exhibit 1295 contained merely mathematical calculations, not an expert report or opinion. The court explained Eisner admitted the exhibits were "compiled within 30 days of trial" and it did not find credible BAMRI's suggestion the delay was somehow Cremach's fault. It noted that for the past two years, the court had not been asked to rule on any discovery orders.

The court concluded, "Doing this kind of work, prepared at the request of trial counsel, with 75 [percent] of the data received from prior counsel, who did not testify, was clearly not part of [Eisner's] duties as bookkeeper, and the exhibits were clearly prepared specifically for litigation. Furthermore, at [Eisner's] deposition [taken during trial, she] was instructed not to answer any questions regarding any conversations she had with [BAMRI's counsel] based on work product privilege."

The trial court determined Bailey's testimony regarding these exhibits was not credible because it contradicted a statement she made in a declaration before trial. The court explained that after Eisner's testimony, "Bailey was recalled to the stand in an unsuccessful effort to bolster the aforementioned charts and figures." In December 2011, in a declaration prepared to support BAMRI's opposition to a motion for summary judgment, Bailey stated Celerity paid Cremach for "'Machined Block Products.'" From February 2006 through mid-August 2006, Cremach paid BAMRI commission on the sale of the machined block products to Celerity without any formalized contract. The Agreement was executed in September 2006. Bailey conceded, "It was [Cremach's] obligation to pay commissions to BAMRI *and it did so* until October 2009." (Italics added.) It was undisputed that in October 2009, Cremach terminated the Agreement. On recross-examination, Bailey admitted she did not prepare the spreadsheets (created six years later in December 2015) that purportedly calculated commissions still owed.

Moreover, the court's statement of decision referred to the credible testimony of Cremach's expert (Kahrs). It wrote, "Kahrs, who had very little time to review the spreadsheets newly identified at trial, nevertheless said they were not reliable or verifiable, a conclusion the [c]ourt also reached. The [c]ourt found this witness's testimony to be credible and persuasive."

Kahrs testified he read the deposition and trial transcript relating to Eisner's testimony. When asked if he knew a disbarred attorney helped Eisner prepare the spreadsheets, Kahrs opined it did not matter who assisted with the preparation because the information in the spreadsheets was "unreliable on its face because it's not verifiable or auditable. . . . It just . . . not worth anything." He explained, "[T]he problem is there's no source documents available to look at. [¶] There's no reconciliation of Cremach's records back to Bailey to see if there's any payments missing. There's no reconciliation of the bank statements. There's no analysis of the financial statements. There's no analysis or any discounts or returns or allowances or credits that were issued. It's just payment to payment without knowing that you've got all the payments." He stated, "[W]hen I first received the document, the first thing I said was . . . this [is] just a bunch of spreadsheets. I couldn't do anything with it at all. As a [certified public accountant,] I need to look at the backup documents, the foundation, and try to walk my way through and say is there any evidence that this . . . series of spreadsheets is correct. And [Eisner] didn't do it, and I didn't do it."

Based on all of the above, it was a misstatement for BAMRI to say its spreadsheet evidence was "unrebutted." It was found unreliable by Cremach's cross-examination, impeachment evidence, and expert testimony. We find no reason to disturb the trial court's ruling "there is no basis to order an accounting."

V. *New Trial on Commissions for Sales to MPD Racing Issue*

BAMRI's final one-paragraph argument is as follows: "Just as the trial court ignored Cremach's breach of the non-solicitation provision in the [Agreement] in June 2009, the trial court also ignored evidence that Cremach failed to pay commissions to BAMRI for Cremach sales to MPD Racing . . . because Howard and McNeely were secretly pursuing such business on the side so that Howard would receive all the commissions from such sales." BAMRI complains that on the second day of trial, the court sustained Cremach's relevancy objections to cross-examination questions directed

towards McNeely about the MPD Racing. When ruling, the court commented, "Sustained. [¶] I don't care about [MPD] Racing. I stopped taking notes a while ago." BAMRI concludes this evidence proves the court refused to "even consider Bailey's derivative cross-claims against Cremach concerning MPD Racing" which is grounds for a new trial. This is the full extent of BAMRI's argument on this issue.

For the same reasons we held the court properly ignored unpled allegations regarding breach of the non-solicitation provision, we conclude the court correctly disregarded the evidence concerning MPD Racing. This theory of recovery was not pled in the operative Derivative Cross-Complaint nor was the claim included in the parties' joint list of stipulated controverted issues. The nature of the cause of action is unclear because BAMRI does not explain the relationship between the parties and MPD Racing, or describe the nature of its business dealings with Cremach. BAMRI does not say where the allegation fit within any of the five claims asserted against Cremach. More importantly, BAMRI does not suggest why the evidence would be relevant to the limited scope of claims the court agreed to consider in the four-day bench trial. BAMRI cannot be entitled to a new trial on a claim that was never pled nor intended to be part of the case.

VI. *New Argument in Reply Brief*

In its reply brief, BAMRI asserts the court should have granted a new trial on the ground of newly discovered evidence. It alleges that despite "diligent efforts to obtain discovery from Cremach and . . . Howard" these parties "deliberately concealed" critical evidence until after Phase 1 of the trial ended and entry of the statement of decision. Specifically, BAMRI complains it was "unduly prejudiced" by not having exhibit 210 for trial. BAMRI complains this exhibit conclusively shows Cremach owed commissions for sales made to Celerity before termination of the Agreement. It asserts the evidence would also prove additional evidence supporting the claim Cremach qualified as a manufacturer as defined by the Act.

"We do not entertain new points raised for the first time in a reply brief absent good cause. [Citation.] There is absolutely no sound reason this issue could not have been raised in the . . . opening brief." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542.) Cremach had no opportunity to address the issue. We deem it waived.

PART II: APPEAL FROM POSTJUDGMENT ORDERS

I. *Attorney Fees and Costs*

Before addressing the attorney fee award, we will review several basic principles relating to shareholder litigation. "It is fundamental that a corporation is a legal entity that is distinct from its shareholders. [Citation.] The authority to manage the business and affairs of a corporation is vested in its board of directors, not in its shareholders. [Citation.] This includes the authority to commence, defend, and control actions on behalf of the corporation. [Citations.]" (*Grosset, supra*, 42 Cal.4th at p. 1108.)

"Because a corporation exists as a separate legal entity, the shareholders have no direct cause of action or right of recovery against those who have harmed it. The shareholders may, however, bring a derivative suit to enforce the corporation's rights and redress its injuries when the board of directors fails or refuses to do so. When a derivative suit is brought to litigate the rights of the corporation, the corporation is an indispensable party and must be joined as a nominal defendant. [Citations.] [¶] An action is deemed 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.] When a derivative action is successful, the corporation is the only party that benefits from any recovery; the shareholders derive no benefit '"except the indirect benefit resulting from a realization upon the corporation's assets."' [Citation.]" (*Grosset, supra*, 42 Cal.4th at p. 1108.)

A corporation cannot oppose a derivative suit. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1004.) This is because "[t]he complaint in a derivative action is filed on the corporation's behalf; not against it. [Citations.]" (*Ibid.*) "The only reason the corporation is named a nominal defendant is its refusal to join the action as a plaintiff. [Citation.] 'The corporation has traditionally been aligned as a defendant because it is in conflict with its stockholder over the advisability of bringing suit . . . .' [Citation.] In a real sense, the only claim a shareholder plaintiff asserts against the nominal defendant corporation in a derivative action is the claim the corporation has failed to pursue the litigation." (*Ibid.*)

Applying this same logic, a corporation refusing to bring the litigation will not be held responsible for attorney fees owed under section 1717 after the shareholder loses his or her derivative lawsuit. (*Brusso v. Running Springs Country Club, Inc.* (1991) 228 Cal.App.3d 92, 107-108.) In the *Brusso* case, minority shareholders sued derivatively on behalf of a corporation, alleging breach of contract against the majority shareholders and a third party. (*Id.* at pp. 97-98.) Defendants prevailed. The appellate court upheld the trial court's decision to apply section 1717 and award attorney fees to defendants *against the individual shareholders*, even though they did not personally sign the contract at issue in the case. (*Id.* at pp. 99-102.) The appellate court rejected the shareholder's contention Corporations Code section 800 was the exclusive remedy for the recovery of attorney fees in a derivative lawsuit. (*Id.* at p. 102 [(Corp. Code, § 800 is a discretionary procedural statute allowing defense attorney fees recoverable from plaintiff's posted bond and may include corporate payments to indemnify officers/directors under Corp. Code, § 317].)

The *Brusso* court upheld the decision that the individual shareholder plaintiffs, and not the corporation, are liable for attorney fees to the prevailing defendants under section 1717. (*Brusso, supra,* 228 Cal.App.3d at pp. 107-108.) In making this ruling, the appellate court impliedly agreed with the trial court's conclusion it would be

inappropriate to make the corporation bear the burden of costs and attorney fees because "[a]fter all, plaintiffs undertook the action because the corporation failed to act, and, as it turned out, for good reason." (*Id.* at p. 99.) We agree with legal analysis concluding the derivative shareholder takes the risk he or she may have to pay if the lawsuit is unsuccessful, "[o]therwise, they could prosecute frivolous lawsuits on the corporation's behalf without fear if only the corporation were liable." (*Id.* at p. 100.)[10]

In light of the above, we must reverse the trial court's postjudment order ruling BAMRI, and not Bailey, was liable for Cremach's attorney fees. On remand, there need not be a new hearing on the issue of the amount of attorney fees and costs because those challenges were raised by Bailey and her counsel, considered, and rejected by the trial court. The matter must be remanded for the trial court to enter a new order stating the motion for attorney fees is granted as against Bailey in the sum of $1,357,410.

We will not disturb the court's ruling on the motion to strike or tax costs, awarding Cremach a reduced total of $34,358.90. Those issues need not be re-litigated below. However, the court's minute order is unclear as to which party is liable to pay those costs, perhaps because the court anticipated the awards of costs and attorney fees would be added to an amended judgment. Accordingly, we order the trial court to enter an amended judgment, incorporating its orders that clarify attorney fees and costs are awarded against Bailey, not BAMRI.

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[10] Cremach does not discuss this portion of the *Brusso* case, and says the opinion confirms prevailing defendants in a derivative action are entitled to recover attorney fees. We agree, except that the case also says liability falls on the individual shareholder(s) bringing the derivative suit, not the corporation. (*Brusso, supra,* 228 Cal.App.3d at pp. 107-108.) No one disputes in this appeal that Cremach was the prevailing party entitled to recover attorney fees under section 1717.

DISPOSITION

The judgment is affirmed. The postjudgment attorney fee award is reversed and remanded with orders for the trial court to amend the judgment awarding attorney fees and costs against Bailey, not BAMRI. In the interests of justice, no party shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.