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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LAWRENCE MELVIN et al., Plaintiffs and Respondents, v. DAN J. HARKEY, Defendant and Appellant.	G049674 (Super. Ct. No. 30-2008-00114401) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Law Offices of Jeffrey S. Benice and Jeffrey S. Benice for Defendant and Appellant.

Grant, Genovese & Baratta, David C. Grant, Ronald V. Larson and Aaron A. Kupchella for Plaintiffs and Respondents.

* * *

Dan J. Harkey appeals from the judgment entered after a jury found he breached his fiduciary duties, committed financial elder abuse, and breached his alter ego investment company's operating agreement with plaintiff Lawrence Melvin and dozens of other plaintiffs who committed their funds to the safe, "Conservative," "Fixed Monthly Income," mortgage-backed loan opportunity Harkey pitched several years before the 2008 financial crisis. Harkey used the plaintiffs' pooled funds to make commercial real estate loans for borrowers that generally did not qualify for conventional bank financing. Harkey raises a host of issues on appeal, most of which amount to challenges to the sufficiency of the evidence to support the jury's verdict and the trial court's conclusion Harkey was the alter ego of the investment companies he used to operate a Ponzi scheme bilking his investors. As we explain—and despite Harkey's failure to fulfill his burden as the appellant to disclose the full record in the light most favorable to the judgment—substantial evidence supports the jury's and the trial court's conclusions. We therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The evidence at trial showed Harkey and his alter-ego investment firm, Point Center Financial, Inc. (PCF), employed an array of alluring statements in investment publications and seminars aimed at the plaintiffs and respondents to induce them to invest in an enterprise that would lend money to borrowers on large real estate projects. Harkey and PCF pitched the investment as particularly safe because the loans would be backed by mortgages on which the borrowers would make monthly payments. To make the loans, the investors pooled their funds in an entity known as National Financial Lending LLC (NFL), which proved to be another of Harkey's alter egos.

Video evidence showed Harkey and PCF representatives promoting NFL as a safe and attractive investment opportunity, including by using visual aids and oral pitches expressly stating: "No Management Fees," "Fixed Monthly Income,"

"Conservative Investments," "Security of Invested Capital," "Investment Diversification," and "Low Loan-to-Value Ratios," none of which proved to be true. For example, Harkey and PCF charged the NFL investors millions of dollars in management fees, contrary to the exhibits introduced at trial stating, "No Management Fees."

Similarly, Harkey authored a PCF promotional publication advising investors "What to Look for in Evaluating a Potential Trust Deed Investment," counseling against those involving raw, rather than developed, land. The same publication highlighted as advantages in investing with PCF: "Point Center Financial Does *Not* Offer [trust deed investments in] Rural Property, *including raw land*," and the fact that trust deed investing required "minimal management." (Italics added.) But as shown at trial, PCF used the NFL investor funds to amass numerous trust deeds in raw, undeveloped land, on which PCF collected substantial management fees from the pooled NFL funds.

A 2002 "NFL Offering and LLC Agreement" illustrated terms of the investment agreement that the evidence at trial showed Harkey breached, including that: "No loans will be made to the Manager or its affiliates"; "No LLC loan will exceed Five Million Dollars"; the "Asset Management Fee to Manager [would be] NONE"; and NFL's members could withdraw at any time, after which NFL would redeem their shares, with priority for those who held shares for two years. The same offer and agreement repeatedly promised that loan origination fees, servicing fees, and brokerage commissions for the loans that NFL made would be paid by the borrowers utilizing NFL loans, not by the plaintiffs investing in NFL.

These promises, reduced to writing in NFL's operating agreement, proved illusory. PCF ran NFL's day-to-day operations as the limited liability company's managing member, and Harkey, as PCF's sole shareholder, exercised sole control over PCF. Despite the clause in NFL's operating agreement prohibiting loans to the "Manager or its affiliates," Harkey approved a loan from NFL investor funds to Venture Argonaut

LLC, an entity jointly owned by Harkey and his wife. Despite the diversification clause capping NFL loans at $5 million, Harkey as PCF's alter ego caused NFL to make numerous loans from two to seven times that amount, and Harkey admitted he did not notify the plaintiff investors when he unilaterally increased the loan cap from $5 million to 10 percent of NFL's total assets as the cap on any single loan.

Most notably, the evidence at trial showed Harkey charged the investors a plethora of fees on behalf of PCF as NFL's managing member, contrary to the terms of the agreement specifying no management fees. For example, despite loan terms on loans made with NFL funds specifying the borrowers would pay loan origination fees and brokerage commissions, Harkey admitted the plaintiffs' funds were used to pay those fees. Additionally, when borrowers defaulted on as much as 90 percent of NFL's loan portfolio, resulting in a risky REO (real estate owned) portfolio of properties, PCF continued to charge the plaintiffs asset management fees that Harkey characterized as "loan servicing fees," though no loan remained. And the evidence at trial also showed risky "rollover" loans made to borrowers who could not make their payments, only to have PCF and Harkey charge the plaintiffs a new round of fees on the new loan. For example, on a loan where the borrower ultimately paid back only about six percent of the principal before defaulting, PCF collected $1 million in fees on the initial loan and another $1.3 million on a rollover loan only six months later.

Plaintiffs' accounting expert explained at trial how the rollover loans funded a classic Ponzi scheme in which new investor funds dedicated to fund the new loans were also used to pay off or make distributions on the original loans funded by earlier investors. Similarly, in another example of recirculating investor cash in a typical Ponzi fashion, PCF and Harkey raided the purportedly secure escrow "reserves" set up with investor funds to make *borrower* payments on the loans, distributing those payments to the plaintiffs as "income" on their investments.

Other examples demonstrated PCF and Harkey's breach of fiduciary duty to the plaintiffs as fellow NFL members, including authorizing rollover loans—and hence taking the opportunity to charge further fees—even when the borrower requested an extension rather than a new loan. Similarly, PCF and Harkey charged their management fees on the full amount of "stage-funded" loans though they had not secured funding for the total loan sum, a practice PCF's chief financial officer admitted increased the loan's risk factor. Harkey similarly admitted at trial the unfunded loans were "doomed without additional money," but neither PCF nor Harkey disclosed to the plaintiffs the unfunded nature of the staged loans. A senior loan underwriter at PCF from 1999 to 2008, testified he discussed his concerns with Harkey about market conditions, including that PCF invested 80 percent of NFL funds in raw land, but underwrote loans at Harkey's request even if he believed they were "too risky." The evidence showed PCF and Harkey as a rule never pursued the borrowers' loan guarantors, leaving the plaintiffs to bear the losses upon default.

PCF and Harkey also made loans with exceedingly high loan-to-value ratios using plaintiffs' funds, while charging plaintiffs fees on the inflated loan amount. Contrary to the terms of the NFL Offering Circular promising low loan-to-value ratios based on "current" appraisals, the plaintiffs later learned PCF and Harkey extended major loans based on "as finished" appraisals for contemplated development, instead of "as is" appraisals for the raw land securing the loan. For example, PCF and Harkey made a $41 million loan using plaintiffs' pooled funds on property worth only $49 million if appraised at the time of the loan, based on a contemplated value of $65 million on completion. In other instances, PCF and Harkey made loans exceeding the current value of the property.

Plaintiffs learned of problems at PCF in 2006 and early 2007 when PCF denied requests to return investor funds, stopped sending checks to the plaintiff investors, and blocked their access to loan information, including online access.

Plaintiffs filed their complaint in November 2008, and the trial court bifurcated the trial into four different phases according to different issues alleged. In Phase I, tried in April and May 2013, the jury heard evidence over 30 days. Phase I was limited to plaintiffs' claims against PCF and Harkey for "misrepresentations, and nondisclosures and false pretenses" inducing plaintiffs to invest in NFL and, once they invested, for PCF and Harkey's "misuse" of their funds, "including the extraction of millions of dollars in fees," which plaintiffs alleged as breaches of fiduciary duty and the NFL operating agreement, as well as financial elder abuse for some plaintiffs.

In special verdicts in Phase I of the trial, the jury rejected plaintiffs' claims for intentional or negligent misrepresentation in preinvestment statements PCF and Harkey made to the plaintiffs, but unanimously found in the plaintiffs' favor on their breach of fiduciary duty, breach of contract, and elder abuse causes of action. The plaintiffs had requested damages in the amount they invested in the scheme, less any returns they received, and the jury awarded those sums as requested, resulting in individual damage awards ranging from several thousands of dollars to hundreds of thousands, and totaling over $8.5 million. The jury's financial elder abuse award totaled $297,242.85. The jury unanimously found clear and convincing evidence that Harkey and PCF acted with malice, oppression, or fraud with respect to their fiduciary breaches, and awarded plaintiffs just over $1 million in punitive damages.

In bifurcated proceedings before the trial court, the court found PCF was Harkey's alter ego and that PCF, Harkey, and NFL constituted a single enterprise. The court also denied defendants' nonsuit motion arguing plaintiffs' claims were only derivative of NFL's entity interests, precluding individual damage claims, and this court summarily denied the defendants' writ petition challenging the nonsuit ruling.

In August 2013, new counsel appointed by PCF's Chapter 11 bankruptcy trustee substituted in on PCF's behalf, and PCF stipulated to judgment in plaintiffs' favor on the Phase II claims, which neither party has described in briefing on this appeal.

Harkey did not stipulate to any Phase II claims, which the trial court heard in a bench trial in September 2013, ruling in Harkey's favor. The plaintiffs in October 2013 dismissed their Phase III and Phase IV claims (relating respectively, according to plaintiffs, to their asserted fractional trust deed interests and interests in Point Center Mortgage Fund I, LLC), and the trial court subsequently entered judgment, including judgment on the Phase I claims, which are the only issues on which Harkey appeals.[1] We now turn to Harkey's claims.

II

DISCUSSION

A. *Derivative vs. Individual Claims*

Harkey contends we must reverse the judgment because the plaintiffs "chose the '*wrong vehicle*' to pursue monetary damages." (Harkey's italics and internal quotation marks.) He asserts "[p]laintiffs' action is a derivative action not an individual action, and [therefore] should have been brought as a derivative action on behalf of NFL." (Italics and quotation marks omitted.) According to Harkey, "[t]his fatal mistake now precludes Plaintiffs, as a matter of law, from *individually* recovering monetary damages because they cannot establish . . . a necessary element of their [claims] — namely[,] *individual* damages." (Bold and quotation marks omitted.)

Central to Harkey's claim is NFL's entity status as a limited liability company. "'A limited liability company is a hybrid business entity formed under the Corporations Code and consisting of at least two "members" [citation] who own membership interests [citation]. The company has a legal existence separate from its members. Its form provides members with limited liability to the same extent enjoyed by corporate shareholders [citation], but permits the members to actively participate in the management and control of the company [citation].' [Citation.]" (*PacLink*

[1] PCF initially appealed as well, but counsel appointed by the bankruptcy trustee declined to pursue its appeal, which we therefore dismissed.

Communications Internat., Inc. v. Superior Court (2001) 90 Cal.App.4th 958, 963 (*PacLink*).)

Derivative actions redress harm to a corporation as a whole. Because a corporation has a separate legal existence from its shareholders, the shareholders have no direct cause of action or right of recovery against anyone who has harmed the corporation. Instead, the shareholders must bring a derivative action to enforce the corporation's rights and redress its injuries if the corporation's board of directors fails or refuses to do so. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108 (*Grosset*).) Limited liability companies similarly have a legal existence separate from their members, and therefore the principles governing shareholder derivative actions apply equally to actions brought by members on behalf of their limited liability companies.[2] (*PacLink*, *supra*, 90 Cal.App.4th at pp. 963-964 [derivative action by limited liability company member].)

"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, fn. omitted.)

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[2] As we explain in Part B below, the trial court found NFL and PCF both operated as mere alter egos for Harkey, and Harkey's appellate challenge to that finding has no merit. Accordingly, Harkey's contention here that plaintiffs should have filed a derivative action on behalf of NFL instead of a direct action against Harkey makes little sense where the trial court pierced NFL's corporate veil to find Harkey behind it. Nevertheless, as an alternate ground to uphold the judgment, we address the parties' contentions concerning traditional distinctions between derivative and individual actions, and explain that Harkey's claim only a derivative lawsuit was proper fails under that analysis.

"A personal claim, in contrast, asserts a right against the corporation which the shareholder possesses as an individual apart from the corporate entity: 'If the injury is not incidental to an injury to the corporation, an individual cause of action exists.' [Citation.]" (*Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1222 (*Denevi*.) Nevertheless, it is also "settled that one who has suffered injury both as an owner of a corporate entity," e.g., as a stockholder or an LLC member, "*and* in an individual capacity is entitled to pursue remedies in both capacities." (*Id.* at p. 1221, italics added.)

The leading case distinguishing between derivative and individual direct causes of action is *Jones v. H. F. Ahmanson & Co*. (1969) 1 Cal.3d 93 (*Jones*). *Jones* clarified that "[t]he individual wrong necessary to support a suit by a shareholder need not be unique to that plaintiff. The same injury may affect a substantial number of shareholders. If the injury is not incidental to an injury to the corporation, an individual cause of action exists." (*Jones*, 1 Cal.3d at p. 107.) In *Jones*, a shareholder filed an individual action against the corporation and several majority shareholders, alleging that "the value of her stock [had] been diminished" by their actions. (*Ibid.*) The lower court found the claim derivative in nature for diminution of the aggregate value of the corporation, which Harkey asserts was the case here for his actions allegedly harming NFL's value for all its LLC members.

But the Supreme Court in *Jones* explained that the plaintiff there, a minority shareholder, had standing to file a direct action. She alleged the corporation's majority shareholders breached their fiduciary duty by creating an independent holding company to which they transferred their control block of shares, making their own interests more marketable and destroying the market value of the shares held by the minority. (*Jones*, *supra*, 1 Cal.3d at pp. 102-105.) Under these circumstances, as stated in *Jones*, the plaintiff "does not seek to recover on behalf of the corporation for injury done to the corporation by defendants. Although she does allege that the value of her stock has been diminished by defendants' actions, she does not contend that the

diminished value reflects an injury to the corporation and resultant depreciation in the value of the stock. Thus the gravamen of her cause of action is injury to herself and the other minority stockholders." (*Id.* at p. 107; see *Smith v. Tele-Communication, Inc.* (1982) 134 Cal.App.3d 338, 341-343 [minority shareholder's suit to share in tax savings payment to majority shareholder was properly brought as individual action].)

As *Jones* explains, majority shareholders have a fiduciary duty not only to the corporation but also directly to the minority shareholders. "[M]ajority 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. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business. [Citations.]" (*Jones*, *supra*, 1 Cal.3d at p. 108.) Simply stated, individually actionable injury may result when controlling stockholders breach their fiduciary duty to minority stockholders.

The same is true here for PCF's control of NFL as NFL's managing member and, in turn, Harkey's control of PCF and NFL as his alter egos. Thus, where "a corporation is used by an individual or individuals, or by another corporation, to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the corporation's acts as if they were done by the persons actually controlling the corporation." (*Webber v. Inland Empire Investments, Inc.* (1999) 74 Cal.App.4th 884, 900, citations omitted.) In particular, a limited liability company (LLC) is no shield for a Ponzi scheme. "Where an LLC is being used simply as a vehicle through which investments are made . . . , the investors have [individual] standing because there is a direct correlation between the

investment and their membership interests." (*Carton v. B & B Equities Group, LLC* (D.Nev. 2011) 827 F.Supp.2d 1235, 1250.)

A federal decision from the Central District (Judge Carter) illustrates the point.[3] (*Burnett v. Rowzee* (C.D.Cal. 2007) No. SA CV 07-641 (*Burnett*).) There, the court held the plaintiffs had "standing to assert their individual claims" because "although Plaintiffs invested via Harvest Income [LLC], all of their money went into the Ponzi scheme." (*Id.* at p. 28.) *Burnett* explained, "Plaintiffs have standing to assert their individual claims for the money they invested in the PIPES Ponzi scheme via Harvest Income. Harvest Income was not a legitimate LLC, but simply a vehicle through which Harvey solicited investments in the PIPES Ponzi scheme." (*Ibid.*) Accordingly, the court held the plaintiffs were "asserting their individual fraudulent transfer claims to recover the money they lost in the scam and not derivative claims on behalf of the LLC." (*Ibid.*)

The same is true here for plaintiffs' claims against PCF and Harkey. The duo operated PCF's rollover loans as a Ponzi scheme, extending "refinance" loans to borrowers in default on sums borrowed from the NFL investors' pooled funds, but these new loans were made with new investor funds to pay off the older loans from earlier investors. As plaintiffs' expert James Holmes testified, a typical Ponzi scheme consists of an "investment" scheme with a long history of unusually consistent returns and distributions of new investment capital (rather than income) made to old investors. Ample evidence showed the new loans were not underwritten to ensure repayment, but instead were a sham component of the Ponzi scheme. For example, a senior PCF underwriter testified he approved loans on Harkey's orders even if he believed they were "too risky," and he admitted PCF made no effort "as a matter of practice" to pursue loan guarantors, instead leaving the plaintiff investors to bear the full risk of default.

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[3] Analogous federal case law, although nonbinding whether published or unpublished, may be cited as persuasive authority. (Cal. Rules of Court, rule 8.1115; e.g., *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18.)

Further damaging the plaintiffs, PCF and Harkey took a second round of fees on the new rollover loans, contrary to NFL's "no management fee" operating agreement. While the distinction between derivative and individual investor harms can be a fine one, sometimes overlapping (*Denevi*, *supra*, 121 Cal.App.4th at p. 1221), claims that managing majority shareholders paid themselves excessive compensation are direct claims. *Jara v. Suprema Meats, Inc.* (2004) 11 Cal.App.4th 1238 is instructive. There, a minority shareholder sued to recover excess compensation from the two majority shareholders. (*Id.* at p. 1242.) The plaintiff claimed the defendants used their control of the corporation to increase their salaries as corporate officers beyond the amount agreed to by all three shareholders, with the objective of reducing the amount of profit they had to share with plaintiff. (*Id.* at p. 1258.) In permitting plaintiff to sue directly, the court noted plaintiff was not alleging the extra compensation injured the corporation "but rather maintain[ed] that the payment of generous executive compensation was a device to distribute a disproportionate share of the profits to the two officer shareholders during a period of business success." (*Id.* at p. 1258.)

The same analysis applies here where PCF as NFL's managing member, and Harkey, through PCF as his alter ego, arrogated to themselves excess compensation in the form of fees they shared with none of NFL's other members. Instead, PCF and Harvey took those fees for themselves from the plaintiff investors' pooled funds, supporting the individual plaintiffs' claims to recoup the funds they invested.

B. *Alter Ego*

Harkey challenges the sufficiency of the evidence to support the trial court's ruling that PCF and NFL were his alter egos. The doctrine of implied findings applies to the trial court's alter ego findings because Harkey did not request a statement of decision. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.) The doctrine of implied findings is "a natural and logical corollary" to (1) the presumption of

the correctness of the judgment; (2) the fact that all intendments and presumptions are made in favor of that correctness; and (3) the appellant's burden of demonstrating error with an adequate record. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.)

An alter ego determination is an equitable finding that rests in the trial court's discretion as a question of fact. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248; see generally *Stark v. Coker* (1942) 20 Cal.2d 839, 846 ["the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court"].) The doctrine pierces a corporation's ordinary status as a legal entity distinct from its shareholders, officers, and directors "where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 (*Sonora Diamond*).) "Under the alter ego doctrine, . . . when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners." (*Ibid.*)

A plaintiff must establish two elements to pierce the corporate veil and hold the equitable owners responsible for the corporation's conduct: (1) "there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist" and (2) "there must be an inequitable result if the acts in question are treated as those of the corporation alone." (*Sonora Diamond*, *supra*, 83 Cal.App.4th at p. 538.) Courts have identified a host of factors that may be considered in applying the alter ego doctrine, including (1) failing to adequately capitalize the corporation; (2) vesting ownership and control in a single individual; (3) concealing the identity of the responsible ownership,

management, and financial interests; (4) commingling personal and corporate funds and assets; (5) failing to maintain proper corporate records or follow other corporate formalities; and (6) using the corporation as a mere shell or conduit for the affairs of the owner. (*Id.* at pp. 538-539; *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811.) "No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied." (*Sonora Diamond*, at p. 539.)

While recounting only evidence favorable to his position, Harkey contends "no evidence was presented to support an alter ego finding" against him. Alternately, Harkey asserts, "California law is clear that the alter ego doctrine should ***not apply*** when a plaintiff dealt with a corporation with full knowledge of the facts and there existed fair dealings between the parties based upon contract." (Citing *G.E.J. Corp. v. Uranium Aire, Inc.* (9th Cir. 1962) 311 F.2d 749, 757 (*G.E.J. Corp.*); *Cascade Energy & Metals Corp. v. Banks* (10th Cir. 1990) 896 F.2d 1557, 1577.)

These cases do not aid Harkey because, as the reviewing court observed in *G.E.J. Corp.* upholding the lower court's alter ego finding: where the plaintiff has been induced to enter a business relationship with a corporation based on the defendants' "tend[ency] to picture the corporation's finances in a better light than the facts warranted," the plaintiff is not held "'bound to accept as facts the illusions the defendants created.'" (*G.E.J. Corp.*, *supra*, 311 F.2d at p. 757.)

Similarly, the trial court could find ample basis to pierce the legal fiction separating Harkey from PCF and NFL as his alter egos where Harkey ran the two entities at his whim, without regard to important provisions in their operating agreements or the promises he made to induce the plaintiffs' investments. Specifically, the court reasonably could ground its alter ego finding in the jury's findings Harkey and PCF breached the companies' operating agreements and breached their respective duties of good faith and full disclosure to the plaintiffs. These findings were amply supported in—among many other examples— Harkey's disregard for NFL's investment diversification clause and

$5 million loan cap, and Harkey's indifference to operating agreement provisions barring management fees and loan terms specifying borrower fees would be paid by the borrowers, not by the plaintiffs.

While Harkey did not request, and the trial court did not sua sponte issue, a statement of decision on its alter ego finding, Harkey ignores that the court provided several express reasons for its ruling. Harkey's failure to address or rebut the trial court's specific findings forfeits his claim of error. "'The rule is well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. . . . It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings.'" (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887; (*Boeken v. Philip Morris, Inc*. (2005) 127 Cal.App.4th 1640, 1658 [appellant's "burden to provide a fair summary of the evidence 'grows with the complexity of the record'"].)

Specifically, the trial court made the following express observations in support of its alter ego ruling: "The court finds that . . . Mr. Dan Harkey, is the alter ego of Point Center. The Court makes that finding based upon, one, the treatment of the corporate assets as individual assets of Mr. Harkey. That's based on the testimony of Gwen Melanson saying that she received directions from Mr. Harkey, not frequently but periodically, where Mr. Harkey would direct her to make payments for what were personal debts or obligations from Point Center—from the Point Center account. Number two, used the business location and the same employees and treatment of the corporate assets. It's kind of a diversion of assets also at the same time. I also find that Point Center—I should ultimately indicate that I think that, from what I saw, I think that Point Center was undercapitalized in that there was no—there was no establishment of reserve accounts. And when you look at the exposure, the amount of money that Point

Center was handling in relation to the reserves or the risk that it had, I just—I mean, I didn't hear anything that indicated that the corporation P.C.[F.] made any alternative plans in that respect. Also, Mr. Harkey was the sole shareholder of Point Center. I find that Point Center is also the alter ego of N.F.L. Basically, the same individuals worked for N.F.L. and Point Center. It's the same staff. They worked out of the same office location. They're involved in essentially a single enterprise between N.F.L. and P.C.[F.] as to the function that N.F.L. was to perform, which was investment in trust deeds. And that, essentially, was controlled by Point Center."

Harkey's failure to address the evidence that supports the trial court's findings forfeits his challenge to the sufficiency of the evidence. Even if Harkey had not forfeited the issue, our review of the record shows ample evidence supported the court's findings. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 ["an attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent"].)

C. *Managing Member's Exculpation Clause*

Harkey acknowledges that under the statutes governing limited liability companies at the time, PCF as NFL's managing member owed a fiduciary duty to the LLC and to its members "to the same extent as a partner would owe to a partnership and to the partners of the partnership." (Citing former Corp. Code, § 17153.) Under that standard, """every partner is bound to act in the highest good faith to his copartner and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.""" (*Leff v. Gunter* (1983) 33 Cal.3d 508, 514.)

Harkey also correctly notes that the governing statutes permitted modification of the managing member's fiduciary duties in a written operating agreement, with the members' informed consent. (Former Corp. Code, § 17005,

subd. (d).) Quoting a portion of NFL's operating agreement, Harkey observes that it expressly altered PCF's fiduciary duties as the entity's managing member, limiting PCF's liability to "'an act or omission [that] constitutes gross negligence, intentional misconduct or a knowing violation of law.'" Relying on that standard, Harkey argues that plaintiffs "failed to present any evidence at trial that Defendants [PCF and Harkey] engaged in 'gross negligence, intentional misconduct or a knowing violation of law.'" (Italics omitted.)

The flaw in Harkey's argument, however, is that he omits the operating agreement's full statement of the managing member's standard of care. While the clause in the operating agreement is entitled "Exculpation," it expressly defines the manager's "Standard of Care" to require the manager to act "in good faith to promote the Company's best interests." In full, the clause provides: "The Manager will not be liable to the Company or any Member for an act or omission *done in good faith to promote the Company's best interests*, unless the act or omission constitutes gross negligence, intentional misconduct or a knowing violation of law." (Italics added.) By the plain terms of this clause, the exculpatory standard requiring gross negligence or similar conduct before liability may attach is *not* available *unless* the manager has acted in good faith to promote the company's best interests, rather than his own.

Contrary to Harkey's claim that the plaintiffs' expert misstated the standard of care and offered only a speculative opinion as to PCF's breach of its fiduciary duty, the trial court properly instructed the jury (Special Instruction No. 2) on the full terms of the standard of care reflected in the operating agreement, and we presume the jury adhered to the court's directions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Because the court correctly instructed the jury on the applicable standard of care, Harkey's reliance on *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 is misplaced. Under the proper standard as instructed by the court, the jury reasonably could conclude that, controlled by Harkey, PCF did *not* act in good faith

towards NFL or its members, and consequently were not entitled to the exculpatory clause's higher standard for misfeasance. Instead, Harkey and PCF looted the plaintiffs' investment funds by running a Ponzi scheme to amass fees in their own interest on loans with only a pretense of underwriting and sham rollover loans violating the operating agreement. Those violations included approving loans exceeding the loan caps, contrary to diversification requirements, and with borrower costs effectively paid by the plaintiffs rather than the borrowers. Ample evidence supports the jury's conclusion the exculpation clause provided no safe harbor for Harkey's self-dealing fee scam perpetrated through his alter ego control of PCF.

D. *Elder Abuse*

Harkey argues no evidence supports the jury's elder abuse verdict because plaintiffs failed "to present any evidence of Defendants [PCF and Harkey's] *misappropriation* of . . . funds . . . ." (Original italics.) As applicable here, financial elder abuse occurs "when a person or entity does any of the following," including: "Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code, § 15610.30, subd. (a)(1).)

There is no merit in Harkey's challenge; as courts have recognized, "'[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent' to defraud." (*Donell v. Kowell* (9th Cir. 2008) 533 F.3d 762, 770.) Harkey seizes on the plaintiffs' financial accounting expert's admission on cross-examination that he did not discover on the accounting statements sent to NFL members any "misstatement or fraudulent omission," which Harkey insists means no misappropriation occurred. But as the expert explained, while there were no express misstatements, expert examination of the accounting documents showed a Ponzi scheme at work where PCF's loans out of the NFL investors' loan pool generated insufficient returns to make distributions to the

investors, and therefore they were paid from funds contributed by new investors, creating the illusion of a safe investment. Harkey also repeats his argument that once the investors contributed their funds and became NFL members, those funds belonged to NFL and any remedy could only be derivative on NFL's behalf. But as discussed, incorporation as an LLC provides no shelter for a Ponzi scheme against individual actions.

E. *Statute of Limitations*

The trial court allowed Harkey at trial to amend his answer to assert a statute of limitations defense. Harkey asserts that because the plaintiffs "a[s] NFL members received monthly accountings and reports detailing the value of their NFL interests," the respective limitations periods for breach of fiduciary duty, breaches of the operating agreement, and elder abuse precluded the claims of those plaintiffs who invested with NFL four or more years before filing suit in November 2008. (Code Civ. Proc., § 338; Welf. & Inst. Code, § 15657.7.) According to Harkey, the monthly statements "identif[ied] all loans funded by NFL by project name; the amount funded; the loan terms; and interest rate," and therefore the plaintiffs "knew or should have known of their claims—if any—within the applicable limitations period."

Harkey does not provide on appeal the exhibits he relies on, thereby forfeiting his claims. (*Rhue v. Superior Court* (2017) 17 Cal.App.5th 892, 897.) Moreover, the discovery rule applied to preclude his statute of limitations defense. A breach of fiduciary duty claim is based on concealment of facts, and the limitations period therefore begins to run when the plaintiff discovers, or in the exercise of reasonable diligence could have discovered, the relevant facts. (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230.) The trust relationship between fiduciaries limits the duty of inquiry. (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 101.) The discovery rule also applies to elder abuse claims and breach of contract claims.

(Welf. & Inst. Code, § 15657.7; *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 5-6.) Here, nothing in the record suggests the plaintiffs had any reason to know of the Ponzi scheme in which, for lack of payments by borrowers, Harkey and PCF used new investor income to make distributions to old investors, nor that any of the investors knew they were paying borrowers' fees and costs or that the loan caps and diversification requirements had been changed without their consent. Harkey's statute of limitations defense fails under the discovery rule.

F. *Proximate Cause*

Harkey contends the trial court's findings in a separate, subsequent phase of the litigation, Phase II, require the conclusion that no proximate cause supports the jury's verdicts in Phase I concerning Harkey's and PCF's breach of fiduciary duty and violation of the NFL operating agreement. But Harkey does not identify the causes of action litigated in the second phase of the trial, which were tried to the court and apparently resulted in one or more defense verdicts. Harkey simply seizes on the court's observations that, as to one or more of those causes of action, Harkey and PCF "were as much a victim of the financial meltdown as the other parties in this case" and "[t]his whole thing, this whole case is set in the economic atmosphere and climate that existed in the 2000's, culminating with the collapse — basically, the almost complete collapse of [the] financial system in 2007 to 2009. Roughly, a fact that could not have been foreseen."

As noted, however, the court made these observations in Phase II of the trial, and Harkey fails to explain how they have any bearing on the jury's findings regarding the causes of action tried in Phase I. Without knowing what the Phase II causes of action were, the specific facts alleged and the evidence presented at trial in support of those causes of action, or how they may relate or be distinguishable from the matters litigated in Phase I, there is no basis to believe they undermine the jury's verdicts

in Phase I. "Issues do not have a life of their own," nor is it the appellate court's responsibility to develop an appellant's argument or ferret out supporting facts in the record. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.) Instead, the lack of analysis or reasoned argument forfeits the challenge. (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830, fn. 4.)

G. *Double Damages*

Harkey claims the jury in returning its special verdicts erroneously entered duplicative damage awards on count 3 for breach of fiduciary duty and count 6 for breach of the operating agreement, inadvertently doubling the damage award. For example, the jury in "Special Verdict Form No. 3" awarded plaintiff Edward Gomberg $27,557.29 in damages for breach of fiduciary duty, and in "Form No. 6" the same amount for breach of contract/operating agreement.[4] In decrying the asserted double damages for the same harm, Harkey relies on the principle that: "'Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence.'" (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 702.) On appeal, Harkey insists [t]he jury's identical damage awards on the breach of fiduciary duty and breach of contract/operating agreement special verdicts are accordingly improper and constitute a double recovery."

Harkey omits in his appellate argument the fact that the jury and the trial court both expressly addressed the jury's damages calculation. In "Note #20," which the jury provided after the trial court read the verdicts, the jury explained: "We would like to

[4] The jury in the third special verdict form actually entered separate awards against PCF and Harkey for breach of fiduciary duty, each in the same $27,557.29 amount. But Harkey does not claim that these two figures, together with the same amount awarded in "Form No. 6," amounted to inadvertent triple damages. Instead, Harkey apparently recognizes that the separate fiduciary duty damages awards as to PCF and Harkey, respectively, essentially amounted to joint and several liability, as reflected in a jury note we discuss below.

clarify our award(s) for damages. Pursuant to our understanding of the jury instructions, we were to determine a total amount of damages, then decide what portion (percentage) of those damages were to be awarded to each applicable special verdict. Hence, we divided the amount of damages by 2, and gave ½ the total to Special Verdict #3 and ½ the total to Special Verdict #6. We then understood that we were not to determine the amount each defendant would pay as to Special Verdict #3 [i.e., PCF's and Harkey's respective share under joint and several liability]; th[e] Court would make that determination. As an example, if we determined damages to be $100,000[,] we awarded $50,000 to Special Verdict #3 and $50,000 to Special Verdict #6. Therefore, total damages would be the total amount of adding Special Verdict #3 plus the amount of Special Verdict #6 = $100,000 as in the example. Special Verdict #5 would be an additional amount for those who were designated as receiving damages as an elder. We intend the total amount of damages to be considered their full redemption of shares in NFL. We would like this clarification made prior to recessing today."

Harkey also fails to inform us that the trial court and the parties expressly discussed the jury's note, with the court recognizing, "If you take $100,00, they put half on Count 3 and half on Count [6]. So we would go back through the verdicts and just add Count 3 and Count [6]." Addressing Harkey's counsel, the court inquired, "Okay Mr. Benice?" and counsel responded affirmatively, stating, "I would accept the note and utilize that rather than have them go back [to the jury room] on the verdicts." In light of the jury's express explanation it was not awarding duplicative damages, and with counsel's concession below to accept the jury's explanation, there is no merit to Harkey's double damages claim.

H. *Punitive Damages*

Harkey contends the jury could not reasonably award punitive damages for breach of fiduciary duty based on a finding of "oppression, fraud or malice" when the

jury also entered a defense verdict on the plaintiffs' misrepresentation claims. In other words, Harkey claims that because the jury found his investment pitches were not intentionally fraudulent at the time he made them, the jury could not find a breach of fiduciary duty based on fraud. Harkey's challenge fails for two reasons. First, the jury based its punitive damages finding on Harkey and PCF's breach of fiduciary duties under the NFL operating agreement, *not* on any preinvestment misrepresentation claims. Second, by its terms, the standard for punitive damages does not require oppression, malice, *and* fraud, but instead any one of the three suffices. (Civ. Code, § 3294, subd. (a); *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 961 [based on disjunctive phrasing, "the jury could have found only oppression or malice"].)

Harkey asserts the plaintiffs "wholly failed to present any evidence of 'malice' or 'oppression, [and] certainly made no 'clear and convincing' evidentiary presentation." (Italics omitted.) The record belies Harkey's claims.

Punitive damages require clear and convincing evidence the defendant acted with oppression, fraud, or malice. (Civ. Code, § 3294, subd. (a).) Malice includes "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (*Id.*, subd. (c)(1).) Oppression is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (*Id.*, subd. (c)(2).)

"'Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.'" (*Tomaselli v. Transamerica Ins. Co*. (1994) 25 Cal.App.4th 1269, 1287.) "Evidence . . . is clear and convincing so long as there is a 'high probability' that the charge is true." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090.) Nevertheless, the clear and convincing standard at trial does not alter the substantial evidence rule governing appellate review. The Legislature adopted

burdens of proof "'for the edification and guidance of the trial court [or the jury as trier of fact],' not as a standard for appellate review. If there is substantial evidence to support the [jury's] finding, it cannot be disturbed." (*In re Marriage of Saslow* (1985) 40 Cal.3d 848, 863.) This deferential review reflects the fact that the decision to award punitive damages rests in the jury's sound discretion. (*West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, 867.)

Reviving his strawman refuge in the 2008 financial crisis, Harkey argues "utterly no evidence was presented that Defendants attempted to better their investment position in NFL during the catastrophic worldwide real estate depression after 2007 in a preferential fashion to the detriment of other NFL investors; for example, they did not attempt to cause NFL to redeem their shares." To the contrary, however, the jury reasonably could find Harkey—through his control of PCF and NFL—acted with conscious and oppressive or malicious disregard of minority investors' rights in a multitude of ways, any combination of which supported the jury's verdict. Harkey's breach of fiduciary duties to his investors included: (1) insider loans to family businesses; (2) arrogating to PCF as his surrogate millions of dollars in fees contrary to the operating agreement with his investors; (3) admittedly exceeding without notice the investors' agreed-upon $5 million lending diversification cap—and by multipliers of twice to seven times the cap, thereby reaping increased personal profits through fees; (4) charging his investors and fiduciaries fees on the full amount of risky stage-funded loans; (5) making unwarranted and even unasked-for rollover refinance loans to struggling borrowers, on which he profited from further fees; (6) leaving his investors and fiduciaries exposed to losses by a policy of not pursuing borrow loan guarantors; (7) engaging in a Ponzi scheme that included funding supposed investor returns with funds from new investors; and (8) by cutting off investor access to company information, including online access, when they attempted to redeem their shares as promised in the

operating agreement. Substantial evidence supports the jury's decision to award punitive damages.

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to their appellate costs.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.