NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ADAM KIDRON et al., Plaintiffs and Respondents, v. JEFFREY FRANKLIN et al., Defendants and Appellants.	B087729, B087767, B087799, B088259 and B088265 (Super. Ct. No. BC066993)

APPEALS from a judgment of the Superior Court of Los Angeles, David A. Workman, Judge. Affirmed in part, reversed in part and remanded.

Quinn, Kully & Morrow, Margaret M. Morrow, Lawrence A. Cox and Sharon L. Douglass for Defendants and Appellants Franklin/Waterman Entertainment, Inc., Jeffrey Franklin, Stephen Waterman, ATI Equities, Inc.,, Seabrook Productions III and Stallion International, Inc.

Kaye, Scholer Fiennan, Hays & Handler for Defendants and Appellants Lewis B. Chesler and LBC Productions, Inc.

Law Offices of Leonard D. Lemer, Leonard D. Lemer and Michael 1. Weiss for Defendants and Appellants Wendy Grean, Cat Run Productions, Inc. and King Street Entertainment, Inc.

Hill Wynne Troop & Meisinger, Louis M. Meisinger and Ronald D. Reynolds for Defendants and Appellants Viacom Inc., Viacom International Inc. and MTV Networks.

Horvitz & Levy, Ellis J. Horvitz and S. Thomas Todd for Defendants and Appellants Sony Pictures Entertairunent Inc., Columbia Pictures Television, Inc., CAT Holdings, Inc. and a joint venture called Franklin/Waterman 2.

Hillel Chodos and Michael A. Chodos for Plaintiffs and Respondents.

Five sets of defendants separately appeal a single judgment for compensatory and punitive damages following' a jury verdict for plaintiffs Adam Kidron and his companies, Marvellous Pictures, Ltd. ("Marvellous"), a United Kingdom corporation, and Marvelous Pictures, Inc., a California corporation (occasionally collectively "Kidron").[1/] Kidron claimed the defendants conspired to defraud him out of his rights to *Catwalk,* a concept Kidron created to be produced as a television series. Defendants Jeffrey Franklin, Stephen Waterman and their companies, Franklin/Waterman Entertainment, Inc., ATI Equities, Inc. ("ATI"), Stallion International, Inc. ("Stallion") and Seabrook Productions III, Inc. ("Seabrook Productions") (occasionally collectively "F/W defendants") filed the first appeal. Defendant Lewis Chesler and his company, defendant LBC Productions, Inc., (occasionally collectively "Chesler") filed the second appeal. The third group of appellants are defendants Wendy Grean and her two companies, defendants King Street Entertainment, Inc. ("King Street") and Cat Run Productions, Inc. ("Cat Run") (occasionally collectively "Grean"). Defendants Viacom Inc., Viacom International Inc. and its division, defendant MTV Networks, (occasionally collectively "Viacom/MTV") filed the fourth appeal. The fifth group of appellants are defendant Sony Pictures Entertainment Inc., its wholly owned subsidiary, defendant Columbia Pictures Television, Inc., defendant CAT Holdings, Inc., Columbia's wholly owned subsidiary (occasionally

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1/ This case involves a lengthy trial resulting in 16 volumes of reporter's transcripts totaling 4378 pages and 53 volumes of clerk's transcripts. Given the fact-based nature of the issues, we discuss many facts in the discussion section of our opinion.

collectively "Columbia defendants"), and defendant Franklin/Waterman 2, a joint venture between Franklin/Waterman Entertainment and CAT Holdings.

FACTUAL BACKGROUND

In 1982, Kidron, a music record producer in England, came up with an idea for a television show he called *Catwalk*.[2/] He wanted to make a drama series comprised of characters from different cultural, ethnic and racial backgrounds.

Having no experience working in television, Kidron joined with Piers Ashworth, who had some experience, to work on the format for *Catwalk*. When Ashworth and Kidron split up in 1983, Kidron agreed to give Ashworth some credit to acknowledge his efforts.

Kidron then associated with a Simon Oakes. The two were introduced to Frank Biondi, who at the time worked for Coca-Cola-owned Columbia. Coca-Cola agreed to finance a pilot on *Catwalk*.

A 22-minute pilot was made in 1987. Pursuant to Kidron's agreement with Ashworth, the pilot credited Kidron and Ashworth with having created *Catwalk*. Columbia insisted on some changes in the pilot, and by the time these changes were made, Coca-Cola sold Columbia to Sony. With the subsequent change in Columbia's management, the financing from Columbia fell through.

In early 1988, Kidron and Oakes then contacted Biondi, who became the chief executive officer of Viacom, the parent company of MTV. Kidron and Oakes unsuccessfully tried to promote the showing of *Catwalk* on MTV. Afterward, Kidron and Oakes ended their business relationship.

Thereafter, in late 1989 or early 1990, Kidron and Telso, the distribution division of a big television broadcaster in the United Kingdom, entered into an agreement whereby Telso gave Kidron 35,000 in English pounds as development

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2/ In the United Kingdom, the term "catwalk" refers to a fashion show runway.

funds for *Catwalk*. Kidron used the money to make a brochure, and re-edited the Columbia-financed pilot.

Meanwhile, Franklin and Waterman became partners in 1989 or 1990. They created the Franklin/Waterman Entertainment production company.

On September 21, 1990, Franklin, through his company ATI,[3/] entered into an agreement with Fairground Entertainment, a large chain of young people's clothing stores and a subsidiary of the Merry-Go-Round group of companies headed by Michael Sullivan. Under the agreement, as understood by Waterman, Fairground gave Waterman and Franklin $500,000 in seed money to make a television show about a music group whose members would wear Fairground clothes. The agreement required ATI to identify and acquire the music group by November 31, 1990.

In October 1990 Kidron, Franklin and Waterman orally agreed to share the project's profits and decision-making. They subsequently worked together in Franklin and Waterman's offices in Los Angeles.

To help put the oral agreement into writing, Franklin and Waterman used transactional attorney Chuck Scott in Los Angeles, and Kidron used solicitor Kaz Gill in London.

On January 29, 1991, Franklin and Waterman formed Stallion.[4/]

In April 1991, attorney Burton "Buddy" Epstein began working for Franklin/Waterman Entertainment. He was responsible for drafting, negotiating and reading agreements for Franklin/Waterman Entertainment.

In August 199 1, a draft contract was prepared to have Chesler produce *Catwalk*.

3/ ATI was formerly a concert-booking agency called Action Talents.

4/ The name "Stallion" came from *Black Stallion,* a television series produced by Franklin and Waterman.

On September 4, 1991, on behalf of Stallion, a "Statement of Domestic Corporation" signed by Waterman was filed with the California Secretary of State. The statement named Waterman as chief executive officer, Franklin as secretary and chief financial officer, and Franklin and Waterman as directors. This document stated there are no vacancies on Stallion's board of directors.

On October 9, 199 1, ATI and Marvellous entered into an 11-page written joint venture agreement. Franklin signed and initialed the contract on ATI's behalf Kidron executed the contract for Marvellous,

Under this contract, the parties agreed "to form a new California Corporation which shall be owned and controlled by ATI and Marvellous equally. This new Corporation shall be known as Catwalk Limited or such other name as the parties may designate." Instead of using a new jointly-owned corporation, the parties used Stallion. Despite repeated requests, Kidron received no shares in the company. Nor was he made an officer or director of the company.

The agreement stated ATI obtained approval from Fairground to assign its September 21, 1990 agreement to the joint venture company, and this assignment "is of the essence of this Agreement." However, the Fairground agreement was never assigned to anyone. Moreover, Franklin and Waterman arranged to be paid back, out of the first season's production budget, the $500,000 from Fairground, before there were any net profits. Franklin and Waterman then may have used the Fairground money on *Boogie's Diner,* a different project not involving Kidron.

Clause 2 of the joint venture agreement required ATI to pay Marvellous's expenses. Although Kidron received $15,000 soon after the agreement was signed, he was not paid the remaining $38,000 in prior expenses.

Requiring the parties to try to get appearances on television programs, clause 9 of the agreement provided, "If it is feasible to do so the parties shall act jointly as the executive producers of any such television programme and shall divide equally between them any executive producer fees. If the parties are granted creative or budgetary approvals in connection with any such television programme they shall exercise such approval jointly provided however that once the budget has been approved if either party (with the written consent of the other) bears the risk of completion of the programme such party shall have the sole right to exercise business controls over the production and distribution of the programme. If (with the written consent of the other) either party acts as a production company for any such programme such party shall be entitled to retain its customary production fees." Despite this clause, Kidron received no executive producer fees, and he never approved the project's June and July 1992 budgets.

Clause 12 required the parties' joint venture company to enter into all *Catwalk* related agreements, except agreements "in relation to Merchandising Rights shall be jointly negotiated by ATI and Marvellous (if both parties are available for such negotiations) and shall be jointly approved by ATI and Marvellous."

Clause 13 provided the joint venture company receive all income from *Catwalk,* and for the equal division of net profits "between ATI and Marvellous PROVIDED THAT sufficient reserves shall be retained to pay all taxes and in order to finance the continued operation of this project." However, the only money deposited into Stallion was $5,000 brought in by Franklin and Waterman and later $35,000 from MCA Records in September 1992.

According to Clause 14, Kidron's, Franklin's and Waterman's individual services '&are of the essence of this agreement and neither of the parties shall substitute another individual in place of the named individual without the consent of the other party." Pursuant to the agreement, Kidron was to supervise the *Catwalk* group "in connection with phonograph recordings." However, Waterman never notified Kidron of negotiations with Atlantic Records, which produced a compact disc. Waterman did not even send Kidron a copy of the record.

The last clause of the agreement, Clause 16, provided this agreement "may be modified only by an instrument in writing duly executed by both parties."

Notwithstanding the joint venture agreement, *Catwalk* was registered as a trademark belonging to Franklin/Waterman Entertainment.

At the end of 1991, a promotional videotape was completed, When taken to a television trade convention in January 1992, the tape stated at the end, "Coming this fall from Franklin/Waterinan Entertainment." Knowing the tape did not credit Kidron or his company, Marvellous, Waterman nevertheless did not correct the tape, even though it was to be shown at the convention.

Based on the tape seen at the convention, John Claster of Claster Television, Inc. agreed to syndicate[5/] the not-yet-made *Catwalk* television series. Claster arranged to sell the show for the prime time slots of 7 p.m. and 8 p.m. in about 88 percent of the United States. Franklin and Waterman arranged for Camelot Entertaiiunent to sell the national advertising time for *Catwalk.*

Waterman arranged for Taurus Film GmbH & Co. and Beta Strasse 1 ("BetaTaurus") to distribute *Catwalk* in continental Europe. On August 15, 1992, Beta-Taurus and F/W company Seabrook Productions entered into a written license agreement. BetaTaurus previously did business with Franklin and Waterman in connection with two television shows, *Black Stallion and African Skies* (formerly known as *Freedom Ranch).*

In February 1992, Kidron met with Christopher Cary, a consultant for Movie Acquisition Corporation ("MAC"), for the purpose of having MAC distribute *Catwalk* in countries not covered by Beta-Taurus. Kidron told Cary MAC would have to negotiate with Franklin and Waterman. Eventually MAC entered into a license agreement to distribute *Catwalk.*

5/ A syndicator sells programming to individual television stations.

Franklin and Waterman tried unsuccessfully to get banks to finance production of *Catwalk*. They could not get the Mercantile National and Imperial banks to loan money because foreign distributor Beta-Taurus refused to provide financial statements. In addition, Mercantile National Bank denied Franklin and Waterman's loan application as too risky because Camelot Entertainment conditioned its $6 million guarantee on *Catwalk* playing in a certain time frame and in most of the independent stations in the United States.

To try to take advantage of Canada's financial incentives, Franklin and Waterman decided to produce *Catwalk* in Canada. With this goal in mind, in 1992 they arranged for Chesler to be executive producer. Chesler, in turn, brought in Canadians Grean and Thomas or "Tab" Baird to produce the show in Canada. Grean, Baird and their company, King Street, formed Cat Run to be the production company for all 24 episodes of the first year of *Catwalk*.[6/] In April 1992, Kidron went to Toronto and auditioned young people to be cast in the *Catwalk* show. Pursuant to a deal outlined in June 1992 and not involving Kidron, only Franklin, Waterman and Chesler were to receive executive producer fees.

Chesler, who knew Kidron was involved in developing the *Catwalk* concept, recommended American Alan Levy as writer of the show, and Franklin and Waterman agreed to use him. Kidron worked to some degree with Levy. Chesler, his staff, Levy, Grean and Baird joined Franklin, Waterman and Kidron in the office complex where Waterman and Franklin were based.

Franklin and Waterman estimated it would cost about $15 million in U.S. dollars to make *Catwalk*. An audited report of Cat Run's production costs confirmed this estimate.

Although Franklir4 Waterman and Chesler told Levy at some point Kidron created the concept for *Catwalk,* Levy ultimately received credit for

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6/ At the end of the first season of *Catwalk,* Baird left King Street.

creating the concept for the television series. The Writer's Guild of America arbitrated this credit because Levy belonged to the Writer's Guild.

Unbeknownst to Kidron, on April 10, 1992, Stallion's interests were purportedly assigned to Franklin/Watennan Entertainment pursuant to a document entitled "Short Form Assignment" and marked "CONFIDENTIAL." This document referred to ATI and Marvellous's October 9, 1991 joint venture agreement, and stated for "one dollar and other good and valuable consideration," Stallion assigned all interests in *Catwalk* 4 4 necessary to ... exploit the Property in any and all media in all languages worldwide." Franklin signed on behalf of Stallion, and Waterman signed on behalf of Franklin/Waterman Entertairunent. Neither Kidron nor his company, Marvellous, ever had shares in Franklin/Waterman Entertainment.

Waterman then assigned rights in *Catwalk* to Chesier and Cat Run. Franklin/Waterman Entertainment collected $18 million in Canadian dollars[7/] from the companies to be involved in the show, and gave it to Cat Run to make the show. Cat Run subsequently paid FranklinAVaterinan Entertainment for "story rights."

On April 14, 1992, the *Hollywood Reporter and Daily Variety* trade newspapers published two articles announcing the production of *Catwalk* and naming persons involved in the show except for Kidron and Marvellous.

That same day, Franklin told Kidron he was upset about Kidron giving NIAC information about how Franklin and Waterman's companies were set up and what their deals were with other companies. Oakes and Cary had told Franklin that Kidron had divulged confidential infomation. At the time, Franklin and Waterman had not completed their negotiations to give MAC a license to distribute *Catwalk* in Great Britain.

7/ Eighteen million Canadian dollars amounts to about fifteen million American dollars.

In April 1992, Franklin told Kidron about negotiations with Columbia in an attempt to have Columbia lend money to finance *Catwalk*. Sony executive Andrew Kaplan told Gregory Boone, chief attorney for Columbia Pictures Television, Inc., a unit" or indirect subsidiary of Sony Pictures Entertainment, about the negotiations.

On April 22, 1992, Kidron and Franklin argued. When Kidron demanded his shares in Stallion, Franklin replied he could have them but they would be valueless.

Franklin told Kidron he no longer wanted to be Kidron's partner and wanted to change the deal.

On May 8, 1992, Kaplan wrote to Franklin and Waterman's attorney David Weil regarding the basic terms of a "first look/distribution deal" with Franklin/Waterman Entertainment. The purpose of the $9.5 million deal was for Columbia to provide financing for *Catwalk*. Kaplan followed up with a letter dated May 15, 1992 restating the terms of their agreement over this deal. Kaplan wrote, "After a due diligence review, we are going to enter into our agreements."[8/] Franklin and Waterman never showed Kidron these letters.

On May 12, 1992, litigation attorney Richard Leher wrote to Franklin and Waterman on Kidron's behalf. He threatened a lawsuit for breach of the October 9, 1991 joint venture agreement.

On May 14, 1992, Kidron and Franklin argued again. Franklin was upset because Leher's letter came when Franklin's mother had a car accident Kidron was unaware of when the letter was sent. Franklin told Kidron to get out of his office and the *Catwalk* project. Waterman then asked Kidron to leave the office, and Kidron left the show.

8/ Boone defined the phrase "due diligence" as "rather than simply negotiating, drafting a contract and eventually signing it, you want to go and do a little . . . underlying research."

The next fews days Kidron tried to continue to work in Franklin and Waterman's offices. Waterman then told Kidron he should leave until their dispute is resolved.

In response to Leher's May 12, 1992 letter, Weil wrote to Leher on May 19, 1992. Weil mentioned neither Stallion's assignment of all *Catwalk* rights to Franklin/Waterman Entertainment, nor the F/W defendants' distribution deal with Columbia. Weil stated Fairground refused to assign its agreement without Franklin's and Waterman's personal guarantees.

About a week after the May 14, 1992 argument between Franklin and Kidron, Epstein arranged for Kidron to meet Waterman, who asked Kidron to return to the show. Waterman did not discuss the deal with Columbia.

On August 13, 1992, Boone wrote Weil a letter stating, "In performing our due diligence, a number of questions, concerns and problems have arisen." Boone wrote, "There is a threat of litigation from Adam Kidron and a draft complaint in the file alleging that FWE[9/] cut him out of the project and breached the October 9, 1991 agreement. The complaint asks for $1,000,000 and an injunction against exploitation of the series. Please explain to me why this should not put Columbia into a state of panic. Maybe we should get an opinion letter from your counsel."

Boone subsequently relied on what Epstein and Weil told him. They explained Kidron's suit concerned a dispute over money, not a failure of rights, Kidron claimed to be wrongfully excluded from the project, and they believed his claims lacked merit. Epstein told Boone he would try to settle the litigation.

On August 20, 1992, Epstein told Boone he was unable to settle Kidron's litigation. After talking to Kaplan, Boone requested indemnity from Kidron's action. Boone understood Kaplan wanted Boone to close the deal even though Kaplan knew of the dispute between the F/W defendants and Kidron.

9/ "FWE" is the acronym for Franklin/Waterman Entertainment.

The next day, on August 21, 1992, a joint venture between CAT[10] Holdings, a subsidiary of Columbia, and Franklin/Waterman Entertainment was set up. The joint venture was called Franklin/Waterman 2. According to the F/W defendants, this joint venture acted as a banking entity, not a production company. However, Boone, who drafted this document, stated the Joint venture was intended to produce *Catwalk, Stunt Dogs, African Skies* and whatever the F/W defendants might produce over the next three to five years. Kidron was not a partner to Franklin/Waterman 2.

Through a written assignment agreement also executed on August 21, 1992, the F/W defendants assigned their *Catwalk* rights to Franklin/Waterman 2, which was referred to as "CAT" in the agreement. This agreement stated Franklin/Waterman 2 "shall assume, on the Effective Date, on a going-forward basis only, the executory obligations of FWE Group[[11]] specifically set forth in those certain agreements listed on Exhibit 'C' attached thereto to the extent such obligations relate to the Existing Series ('Assumed FWE Group Obligations'); provided however, that the assumption by CAT of the Assumed FWE Group Obligations shall not, in any manner, affect, impair or otherwise vitiate the representations and warranties of FWE Group hereunder (or the survival or enforceability thereof after the Effective Date.)" Exhibit "C" listed the October 9, 1991 contract with Kidron's company as one of the contracts Franklin/Waterman 2 agreed to assume.

Starting in September 1992, the Chris-Craft group of television stations in the United States aired the first season of *Catwalk.*

Catwalk advertisements, placed by Beta-Taurus and U.S. syndicator Claster and published in anticipation of an annual convention scheduled for October 1992, did not credit Kidron or Marvellous. An advertisment entitled

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10/ "CAT" is an acronym for "Columbia Act III Television."

11/ "FWE Group" refers to Franklin and Waterman's companies.

"Remote Possibilities," placed by Waterman in a trade publication, depicted a television clicker and listed the *Catwalk, African Skies, Stunt Dogs, Black Stallion and Night Flight* television shows. The bottom of the advertisment stated "Franklin/Waterman."

In the first season of *Catwalk,* some actors were paid through a Canadian company, Way North Productions ("Way North"). Franklin and Waterman created this company to sign for certain Canadian expenses and as "a holding vehicle . . . to keep things in Canada." Franklin and Waterman owned 49 percent of the company, and Canadian lawyer John Perkins, a friend of Franklin's, owned 51 percent of the company.

Franklin and Waterman also used Way North to buy, at the end of the first season of the *Catwalk* show, editing-computer equipment owned by Grean and Baird. Although the equipment cost between $250,000 and $300,000, Grean sold the equipment to Franklin and Waterman for $2.

In the second year of production of the series, Franklin and Waterman had Way North lease the equipment to Magnetic North, a post-production company owned by McLaine Hunter, for $12,500 per episode. However, Magnetic North did not pay Way North.

On behalf of Way North, Epstein signed a contract with Cat Run II Productions, which produced the second season of the *Catwalk* show. Even though Way North had no employees and no one capable of providing music services other than Franklin, the contract stated Way North agreed to consult on music, coordinate musical material and supervise recording and dubbing.

A compact disc on music from *Catwalk* was made. The box containing the disc thanked multiple persons, including Kaplan and Boone, but did not mention Kidron.

On May 25, 1993, Boone wrote Kaplan a memorandum expressing his belief Franklin and Waterman were trying to spend the money they got from

Fairground on their *Boogie's Diner* and charge this amount to the *Catwalk* show to have Columbia cover the cost.

In June 1993, Waterman wrote Kidron a letter stating Waterman and Franklin were negotiating with MTV for the second year of *Catwalk* and asking if Kidron wanted to return to the show. Waterman dealt with Doug Herzog, Vice-President of Programming at MTV. Epstein was also involved in the negotiations.

Before any deal was made, plaintiffs' trial counsel threatened in writing to sue MTV if it ran the second season of *Cat-walk*.

In a letter to Epstein dated August 10, 1993, MTV attorney Tanya Heidelberg expressed concern about Kidron's claim. To close the deal with MTV, the F/W defendants and Columbia provided guarantees and indemnitees.

Through a written contract, MTV agreed to pay a license fee of $50,000 per episode for the first 13 episodes of the second year. Attached to the agreement was a guarantee of indemnity obligations for up to $750,000 signed by Boone on behalf of Columbia.

In May 1994, MTV aired the *Catwalk* show. MTV did not exercise its option to order additional shows.

All the televised episodes of *Catwalk* credited Levy as the show's creator, even though Levy did not participate in writing the second season.

PROCEDURAL BACKGROUND

On October 23, 1992, Kidron filed a complaint. Following successful demurrers to the original and the first amended complaints, Kidron filed a second amended complaint on October 19, 1993.

The second amended complaint named multiple defendants, including Franklin, Waterman, their entities, Franklin/Waterman 2, Cat Run, King Street, Grean, Baird, Chesler, Levy, MAC, Columbia, CAT Holdings, MTV Networks and Viacom. The complaint alleged Franklin and Waterman and their entities developed and exploited the *Catwalk* concept and the remaining defendants helped Franklin and Waterman do so.

The complaint alleged, "from the outset of each defendant's participation, and in any event fi7om shortly after May, 1992," all the defendants conspired to exploit *Catwalk* for their own enrichment "without according to plaintiffs the rights and benefits to which plaintiffs were entitled, and of which each defendant was aware.

According to the complaint, the Columbia defendants provided production and marketing financing for *Catwalk,* guaranteed the receipt of production financing to be provided by the other non-F/W defendants, provided the *Catwalk* series' completion guarantee to third parties who provided financing, and acted as the episodes' domestic distributors. MTV and Viacom agreed to exhibit the second season of *Catwalk.* Grean, Baird and Cat Run produced the show. Chesler acted as the show's executive producer.

The complaint's first cause of action for fraud alleged the F/W defendants, knowing the representation to be false, promised plaintiffs they would exploit *Catwalk for* the parties' joint benefit', through a newly-created and jointly-owned and -controlled entity. As for the remaining defendants, the fraud cause of action alleged they "assisted and acted in concert with" the F/W defendants in exploiting *Catwalk.* The complaint further alleged, "from the outset of their participation, and **in** any event fi7om in or about May, 1992," the non-F/W defendants knew *Catwalk* was being exploited through the F/'W defendants' fraud and the F/W defendants could not benefit from their misconduct without the remaining defendants' participation.

The complaint asserted six other causes of action, including a second cause of action for breach of fiduciary duty and a seventh cause of action for injunctive relief.

Appellant-defendants answered the second amended complaint on January 27, 1994.

The case was tried in two phases, with the latter phase on punitive damages.

Both Franklin and Waterman testified they did not read the October 1991 joint venture agreement prior to trial. Yet Waterman was "sure" he glanced at the contract with Claster.

Waterman admitted he never showed Kidron correspondence from Kaplan leading up to the Columbia deal, and he and Franklin never got Kidron's written consent to the Columbia and MAC deals and the agreement to have MTV air the *Catwalk* show.

According to Franklin's testimony, some time after the October 9, 1991 agreement, there was an oral agreement to substitute Stallion for Catwalk Ltd. as the joint venture company.

Franklin admitted none of the money from MAC, Beta-Taurus or MTV went to Stallion.

During his testimony at trial, Boone described his comment about being "in a state of panic" written in his August 13, 1992 letter as "facetious," and denied having panicked about Kidron's lawsuit. Boone then testified, "I was concerned because I didn't want our company to be, in a sense, buying into a piece of litigation . . . ."

On direct examination at trial, Epstein admitted Stallion was never a jointly owned company. Epstein first testified Kidron agreed to all major contracts and knew about the MTV agreement, but then testified Kidron did not approve of the MTV agreement.

Chesler testified Kidron never told Chesler he endorsed any deal Franklin and Waterman wanted to make with Chesler.

Claster testified Franklin and Waterman did not tell him Kidron was their equal partner in *Catwalk* and did not state Kidron had full joint control over the show's creative and business aspects.

After the parties rested, the trial court instructed the jury. The court gave special instructions on two kinds of fraud, intentional misrepresentation of a material fact and promises made without intent to perform.

On June 17, 1994, the jury rendered its special verdict for phase one of the trial. The jury made the following three findings: (1) Franklin, Waterman, Franklin/Waterman Entertainment, ATI, Seabrook Productions and Stallion committed fraud and breached their fiduciary duty to Kidron; (2) Franklin/Waterman 2, Columbia, CAT Holdings, Viacom, MTV, Grean, Cat Run, King Street and Chesler conspired to defraud Kidron or breach a fiduciary duty to Kidron; and (3) Kidron proved by clear and convincing evidence defendants acted with fraud, malice and/or oppression. The jury found Kidron suffered $16 million in economic damages and $15 million in emotional distress damages.

On July 11, 1994, the jury rendered its special verdict on phase two of the trial. The jury assessed $1.5 million in punitive damages against Franklin, $1 million in punitive damages against Waterman, $10,000 in punitive damages against Grean, $15,000 in punitive damages against Chesler, $IO million in punitive damages against the Columbia defendants, $ 1 0 million in punitive damages against the Viacom and MTV defendants, and $1 each in punitive damages against Franklin/Waterman Entertainment, ATI, Seabrook Productions, Stallion, Cat Run, King Street and Chesler's company, LBC Productions.

On July 22, 1994, the trial court entered a judgment for Kidron. The judgment awarded Kidron $31 million in compensatory damages, to be paid jointly and severally by defendants, as well as the punitive damages the jury assessed. In addition, the judgment permanently enjoined the defendants from further exploiting *Catwalk* and any of the 48 episodes already produced.

DISCUSSION

All the appellants primarily challenge the judgment as not supported by substantial evidence. They also raise issues regarding alleged instructional error, judicial and juror misconduct, and impermissible injunctive relief. We first consider whether substantial evidence supports the judgment.

In deciding whether substantial evidence supports the judgment, we apply the deferential "substantial evidence" test. There are two aspects to this standard of review. "First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences. [Citation.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that our 'power' begins and ends with a determination that there is substantial evidence [citation], this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal 'was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review.' [Citation.] '[I]f the word "substantial" [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. . . . It must be reasonable. . ., credible, and of solid value. . . . ' [Citation.] The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. [Citation.] While substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [Citations.]" (Fns. omitted.) (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633.)

I. <u>FRAUD CLAIMS SUPPORTED BY SUBSTANTIAL EVIDENCE</u>

The F/W defendants contend the fraud judgment must be reversed for lack of substantial evidence.

A cause of action for fraud contains the following five elements: "(a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance;
and (e) resulting damage." (5 Witkin, Summary of Cal. Law (9th ed. 1990) Torts, § 676, p. 778.)

A) <u>Substantial Evidence Supports Fraud Liability on Some Claims</u>.

The F/W defendants correctly argue there was no fraud with respect to ATI's promise in the October 9, 1991 joint venture agreement to assign its September 21, 1990 agreement with Fairground under which Fairground promised to give $500,000 in seed money for a television show, Although the record evidences no formal assignment, Kidron acknowledged *Catwalk* received the benefit of Fairground's funding. Fairground money helped finance a television pilot, hire staff and repay development expenses.

Kidron cites an August 6, 1993 letter Epstein wrote to Sullivan of Fairground indicating Fairground's money was earmarked for use on *Boogie's Diner,* an F/W television show not affiliated with *Catwalk* or Kidron. However, this letter also stated the $500,000 was returned to *Catwalk.* Therefore, even if the first four elements of fraud were met, the cause of action as to these allegations must fail because the fifth requisite element of resulting damage is not met.

Next, the F/W defendants attack three promissory fraud claims made by Kidron. The first claim is Franklin and Waterman did not intend to perform ATI's promise to form a new corporation jointly owned with Marvellous. The F/W defendants contend Kidron agreed to use already existing Stallion as the joint corporation. However, the testimony they cite evidences Kidron's insistence the joint venture be held by a new, jointly-owned company. Kidron testified he asked Franklin if Stallion was a new company, and was told it was. Although Epstein testified Kidron agreed in late 1991 or early 1992 to use already formed Stallion, the existence of conflicting testimony does not negate Kidron's testimony. Where, as here, there is conflicting testimony, we defer to the findings of fact made in the trial court, even though contrary findings could have been made. *(Shamblin v. Brattain* (1988) 44 Cal.3d 474,479.)

The F/W defendants contend Kidron accepted Stallion, pointing out a prospectus, which sought investors in Marvellous, stated Marvellous owns half of Stallion and Stallion is the financing corporation for Catwalk. Notwithstanding these statements, Kidron and his transactional lawyer, Gill, repeatedly requested joint ownership of Stallion. Yet it is undisputed neither Marvellous nor Kidron received any stock, let alone 50 percent of the stock, in Stallion, and Stallion was never used to hold anything in *Catwalk* other than the actors' service contracts.

The F/W defendants maintain their failure to issue share certificates is immaterial as a matter of law. While the joint venture agreement does not specify shares be issued to Marvellous, it does provide the joint venture corporation "shall be owned . . . by ATI and Marvellous equally." The only way to obtain an ownership interest in a corporation is to have stock in the company. Therefore, the failure to issue shares is material. Franklin, Waterman and Epstein's repeated assurances of Kidron or Marvellous's equal ownership of Stallion were deceptive.

The second claim is the F/W defendants did not intend to perform ATI's promise to form a new corporation jointly controlled by ATI and Marvellous. The F/W defendants never made Kidron an officer or director of Stallion, and Waterman admitted Kidron could not exercise the powers of a 50 percent owner with respect to Stallion. Franklin conceded he did not think Kidron participated in any decisions made by Stallion. Kidron did not waive Marvellous's right to joint control, as evidenced by a February 19, 1992 memorandum to Epstein written by Kidron's transactional lawyer, Gill. This memorandum stated, "I assume that no agreements have been entered into in relation to Catwalk of which I am not aware . . . ."

'Me F/W defendants argue Gill knew Stallion was previously incorporated and this knowledge is imputed to Kidron. A June 26, 1991 memorandum from Gill to Epstein confirms Gill knew Stallion was not a new company. As the F/W defendants correctly note, a lawyer's knowledge is generally imputed to a client. *(Chapman College v. Wagener (1955)* 45 Cal.2d 796, 802.) Even if this knowledge were imputed to Kidron, which Kidron's testimony refutes, Kidron did not give up his right to joint ownership and control, as expressed in the June 26, 1991 memorandum. Gill wrote regardless of the name of the joint company, "it will be jointly owned and controlled by both parties."

Despite the joint venture agreement's requirement in Clause 12 for joint approval by ATI and Marvellous of all agreements relating to the *Catwalk,* there is no evidence Kidron was given the opportunity to approve any contracts. Instead, he was often told after the fact deals were made. For example, Franklin and Waterman told Kidron they entered a deal whereby Claster agreed to distribute the *Catwalk* show. Franklin and Waterman argue Kidron should have demanded Claster to stop syndicating the show, but given his desire since 1982 to create the show, it was unreasonable to expect Kidron to do so. Without being given access to most of the contracts, Kidron could not make an informed decision whether to approve, or disapprove their terms. While he was given the opportunity to review and comment on a contract with MCA Records, the record indicates this is the only contract Kidron was given the authority to approve beforehand.

The F/W defendants point out contracts were not finalized and executed until after May 1992, when Kidron was indisputably forced out of Franklin and Waterman's offices. However, Kidron's physical absence from the offices did not prevent his receipt of contracts for his review and approval. Franklin and

Waterman could easily mail, telefax or deliver draft contracts to Kidron's multiple residences or his attorneys.

It is undisputed Franklin and Waterman did not obtain Kidron or Marvellous's written consent to assume the risk of completion of the television program, although required by Clause 9 of the October 1991 joint venture agreement. Nevertheless, the F/W defendants argue Kidron's written consent was not required because Franklin and Waterman believed Marvellous waived the requirement of a writing. In support of this argument, appellants refer to Franklin's and Epstein's testimony. Epstein testified the written consent requirement "was waived, because that's how we did business." However, Kidron did not testify he waived the written consent requirement, and testified on the significance of the requirement. One can infer from Kidron's testimony he did not waive this requirement. As for Franklin and Waterman, they testified they never looked at the agreement until the time of trial. Consequently, their credibility regarding contract requirements is questionable. In light of the record, this argument lacks merit.

The F/W defendants argue Kidron withheld written consent and demanded joint control, thereby breaching Marvellous's duty to act in good faith. While joint venturers assume the status of fiduciaries *(Epstein v. Stahl (I* 959) 176 Cal.App.2d 53, 57), there is no evidence Kidron acted in bad faith. In making this argument, Franklin and Waterman cite to Kidron's testimony about a June 1, 1992 settlement negotiation meeting with him, Waterman, Epstein, Weil and Leher. Nowhere in the part of the record cited is there any mention of withholding written consent.

The third and last promissory fraud claim the F/W defendants challenge involves the issue of denying Kidron and Marvellous credit. As support for their challenge, the F/W defendants cite four items: (1) a newspaper clipping in the *Daily Variety* naming *Catwalk* a "Franklin Waterman Marvellous Television and Lewis B. Chesler production"; (2) a brochure listing Waterman, Franklin and Kidron as executive producers and Kidron's company as creator of the *Catwalk* concept; (3) Herzog's deposition testimony on an article naming Franklin, Waterman and Kidron as the creators of *Catwalk;* and (4) Epstein's testimony on Franklin/Waterman and Marvellous receiving a joint “presentation" credit for all the *Catwalk* episodes.

However, Waterman conceded the promotional videotape taken to the television trade convention held in January 1992 referred only to Franklin/Waterman Entertainment. When asked why the tape excluded mention of Kidron or Marvellous, Waterman replied, "I can't think of one, other than the fact that it wasn't a recognized company . . . . " Although Franklin and Waterman could change the tape, knowing it was to be shown to distributors MAC and Beta-Taurus, as well as other potentional distributors, Franklin and Waterman did not correct the credit omission. Since Franklin and Waterman knew of the significance of credit at such a convention, and the long-standing importance of *Catwalk* to Kidron, their nondisclosure of Marvellous’s and Kidron's affiliation can be inferred to be intentional.

It can also be inferred Kidron and Marvellous suffered damage from the nondisclosure, as Waterman believed a press release from MAC was the source of two articles which omitted mention of Kidron or Marvellous, one appearing in *The Hollywood Reporter* and another in the *Daily Variety*.

An advertisement entitled "Remote Possibilities" and appearing in an entertainment trade publication listed *catwalk* and four other shows in a picture of a television clicker, and then gave Franklin/Waterman Entertainment's address and phone number. According to Waterman's uncontroverted testimony, Franklin and Waterman were responsible for this advertisement, and they ran it to announce the shows they were doing. Knowing credit was important to Kidron, Franklin and Waterman nevertheless intentionally did not name Kidron or Marvellous in the advertisement. Franklin and Waterman defend this advertisement on the ground it did not mention any of their partners in the four other shows. However, the portions of the record they cite do not indicate whether the four shows were made with other partners and what credit arrangements they made with the other partners. In contrast, there is much evidence Franklin and Waterman knew Kidron felt strongly about receiving credit.

Moreover, it is relevant the July 17, 1992, rights acquisition agreement between Cat Run and Franklin/Waterman Entertainment excluded Kidron or Marvellous from receiving credit, even though a couple months before, on May 12, 1992, Kidron's litigation attorney, Leher, threatened to sue if Kidron were not accorded credit.

Viewing the evidence in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference and resolving all conflicts in their favor, we hold substantial evidence supported the jury verdict of fraud against the F/W defendants.

B) Emotional Distress Damages Not Recoverable by Corporation

The F/W defendants attack the $15 million awarded for emotional distress damages on the grounds a corporation cannot recover such damages and Kidron assigned all his rights in *Catwalk* to Marvellous.

It is uncontested generally a sole shareholder may not sue in his individual capacity for wrongs inflicted on a corporation.[12] The parties cite *Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525 as articulating the

12/ This general rule is articulated clearly in *Bingham v. Zolt* (2d Cir. 1995) 66 F.3d 553, 561-562: "When the claim is that corporate property has been removed from the corporation, it is the corporation--having an independent legal identity--that must seek, on its own or derivatively, to redress its injury. The shareholder in such a case is injured only as a result of the injury to another, i.e., the corporation, and therefore generally lacks standing." We adopt the federal court's articulation of this general rule.

exception to the general rule. There, the California Supreme Court held, "'If the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action.' And a stockholder may sue as an individual where he is directly and individually injured although the corporation may also have a cause of action for the same wrong." (*Id.* at p. 530.)

However, the exception to the general ban against shareholder awards does not apply here because Kidron formed Marvellous and transferred the *Catwalk* concept long before the idea of a joint venture with F/W was conceived. Pursuant to a January 8, 1990 agreement between Kidron and Y Z Ltd., a company wholly owned by Kidron, Kidron assigned to Y Z Ltd. all his "right, title and interest in and to all the original literary material written by the Assignor including any and all literary or dramatic material based upon the said literary material . . . ." Kidron testified through him, Y Z Ltd. orally transferred the rights to Marvellous while formerly known as Gremerion. He also testified nobody ever reassigned him these rights.

Kidron's testimony is consistent with the joint venture contract, which states it is between Franklin's company, ATI, and Marvellous. Significantly, the contract conferred no benefits and imposed no obligations on Kidron personally. Even with respect to his personal services, the contract obligated only Marvellous to provide them.

As a general rule, "when rights are assigned, the assignor's interest in the rights comes to an end." (*Contemporary Mission, Inc. v. Famous Music Corp.* (2d Cir. 1977) 557 F.2d 918, 924.) 'Mere is no exception to this general rule for an artist or other person who developed some type of creation. The only exception to this rule is where the assignor has not made an absolute, unqualified assignment.

For an assignor to make an absolute assignment, the "assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. [Citation.] It is the substance and not the form of a transaction which determines whether an assignment was intended. . . . [¶] From the foregoing it will be evident that 'intent' is of major significance." (*McCown v. Spencer* (1970) 8 Cal.App,3d 216, 225-226.)

In the supplemental letter brief requested by our court, Kidron refers to a portion of the reporter's transcript. Kidron argues this portion shows his lack of intent to make an absolute assignment of all his *Catwalk* rights. This argument lacks merit, as exemplified by the first page referred to by Kidron. There, the court reporter transcribed Kidron as testifying "whatever rights [he] had had from the inception [of the *Catwalk* concept] had been transferred to [his British company] Marvellous. . . . "

Absent a piercing of the corporate veil, Marvellous, not Kidron, was the holder of all rights to *Catwalk*. However, the legal remedy of piercing of the corporate vel -1, which is available under the alter ego doctrine when one party claims the opposing party is using the corporate form unjustly (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300), is an equitable remedy. The alter ego doctinre "is not a doctrine that allows the persons who actually control the corporation to disregard the corporate form." (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal-App.4th 980, 994.) Since monetary damages constitute a legal remedy, and since the October 1991 joint venture agreement was with Marvellous, the trial court committed reversible error in allowing an award of any emotional distress damages to Kidron.[13/]

13/ Since we overturn the emotional distress damages award, we need not consider the remaining arguments against the award.

C) Sole Shareholder May Not Recover Damages Directly Suffered Only by Corporation

Having concluded the general prohibition against a damages award for a sole shareholder preclude Kidron, as the indirect beneficiary of the joint venture agreement between ATI and Marvellous, from recovering emotional distress damages, we hold Kidron may not recover any other damages. Kidron cites three California cases as support for an award for damages to him as an individual, (1) *Welch v. Metro-Gold-KynMayer Film Co.,* previously published at (I 988) 207 Cal.App.3d 164 but later depublished following the state Supreme Court's grant of review (Cal. Rules of Court, rule 976, subd. (d)); (2) *Tan Jay International, Ltd. v. Canadian Indemnity Co.* (1988) 198 Cal.App-3d 695; and (3) *Truestone, Inc. v. Travelers Insurance Co.* (1976) 55 Cal.App.3d 165. Both published cases are distinguishable from the instant action because the shareholders in those cases were direct beneficiaries of the contractual relationship between their corporations and the defendants.

Truestone, supra, concerned a corporation's two sole shareholders who were joint insureds with their corporation on a liability insurance policy. Division One of our district allowed the shareholders to pursue their claim of the insurer's breach of the covenant of good faith and fair dealing. Division One also held "the complaint as now framed does not support the [shareholders'] alternative contention that it states a cause of action personal to them for the intentional infliction of emotional distress." (*Trueston, Inc. v. Travelers Ins, Co., supra,* 55 Cal.App.3d at p. 171.)

Relying on *Truestone, the Tan Jay* court permitted a corporation's shareholder named as an additional insured on the corporation's comprehensive business policy to sue for injuries to himself. (*Tan Jay Internat. Ltd. v. Canadian Indemnity Co., supra,* 198 Cal.App.3d at p. 707.)

D) Economic Damages for Future Lost Profits Not Supported by Substantial Evidence

The F/W defendants contend the jury's $16 million economic damage award is defective as a matter of law because it purports to represent the future lost profits of a new entertainment venture which generated a $9.4 million loss and is expected to lose $6,246,000, amounts opined by defense expert Arnold Morgen, C.P.A. Without citing evidence in support of the damage award, plaintiffs counter since the jury awarded much less than the $33 million they requested, the jury must have taken a "thoughtful and discriminating approach" to the evidence.

Further, the F/W defendants argue the damages are speculative. As plaintiffs concede, evidence of lost profits may not be speculative and "must show 'with reasonable certainty *both their occurrence* and the *extent* thereof.' [Citation; italics in original]" *(Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.) However, they argue defendants' successful opposition to plaintiffs' motion for a preliminary injunction estops defendants from challenging the damages as speculative. This argument lacks merit. Not only is it common for defense counsel to oppose all forms of relief sought, but it is counsel's duty to zealously represent clients within the boundaries of the law. (*Norton v. Hines* (1975) 49 Cal.App.3d 917, 924.)

To support their lost profits claim, plaintiffs rely on the testimony of Ronald Glazer, their expert on the economic aspects of television production and distribution. Glazer based his calculations on the assumption *Catwalk* would have achieved a 4.0 rating,[14/] which he explained is a successful rating for a syndicated show and which would mean about 3.5 million out of 94 million homes would watch *Catwalk*.

14/ In fact, *Catwalk* achieved a 2.2 rating the first year.

Significantly, there is no evidence of solid value supporting reliance on the 4.0 rating. This rating came from Steven Hirsch, President of Camelot Entertainment. Hirsch did not testify how he arrived at a 4.0 rating.[15/] Glazer did not know any statistical support for assuming *Catwalk* could achieve a 4.0 rating, He admitted he had no evidence *Catwalk* could have achieved a 4.0 rating had Kidron taken control of the show.

Multiple witnesses, including Glazer and Kidron, consistently testified about the unpredictability of the success of any television show. Glazer testified most television shows fail, and television is a "very high-risk business." Claster testified as of 1992, when *Catwalk* was to be on television, there were no successful one-hour dramas in first-run syndication.

Whether Kidron's involvement in the show after May 1992 would have resulted in a 4.0 rating is conjecture, given his undisputed lack of television experience and the fact he was obligated to share control over the show because of his status as a joint venturer.[16/] Plaintiffs argue the success of Kidron's sales tape directed by Stefan Wuernitizer shows Kidron's absence after May 1992

15/ Respondents assert Claster independently projected that *Catwalk* would achieve a 3.5 or 4.0 rating, but the portion of the record they cite states otherwise. All Claster testified was the show "needed to do 3.5 to 4.0 . . . ."

16/ Following oral argument, we requested counsel to file supplemental briefs citing any case in any jurisdiction which addressed the issue of whether a creator whose creation is misappropriated is entitled to "lost profits" based on the profits the creator could have earned had he been able to produce and market his creation but which the creation failed to cam because of misuse of the creation, None of the parties could find a case concerning this issue.

We also requested the parties to brief cases addressing analogous situations, including where a new business is misappropriated and handled in a significantly different way than the business founder would have handled the business. Kidron argued the "new business" situation is not analogous because *Catwalk* lasted two years. The F/W defendants, as well as Kidron, cited multiple new business cases concerning lost profits, but none of them pertain to the entertainment industry. Given the unique character of this industry, we do not discuss the cases cited by the parties in response to the court clerk's letter requesting supplemental briefing.

harmed profits. However, according to Wuernitizer's testimony, the tape was more in the form of a music video than a story.

The record therefore shows all Glazer's calculations are speculative and based on an arbitrary rating.

The only substantial evidence of economic damages was the $38,000 incurred by Kidron in *Catwalk* expenses.

II. PROMISSORY FRAUD JURY INSTRUCTIONS ARE NOT ERRONEOUS

The F/W defendants next argue the trial court erred in instructing the jury pursuant to plaintiffs' special instruction No. 32.

Based on BAJI No. 12.4 1, which relies on *Santoro v. Carbone* (1972) 22 Cal.App.3d 721, special instruction No. 32 provides, "You may consider the conduct of a party making a promise, either before or after the promise was made, in determining whether there was an intention not to perform the promise when made." The F/W defendants argue special instruction No. 32 allowed the jury to find fraud based only on post-promise evidence of nonperformance, in violation of *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30-3 1. In *Tenzer,* the California Supreme Court disapproved the portion of *Santoro, supra,* 22 Cal.App.3d at p. 728, holding "[t]he subsequent failure to perform as promised warrants the inference that defendant did not intend to perform when she made the promise."

However, BAJI No. 12.41 refers to page 727, not page 728, of *Santoro.* On page 727, the *Santoro* court allowed for circumstantial evidence of fraudulent intent, recognizing direct proof of intent is often unavailable. The *Tenzer* court only overruled the quoted language on page 728, accepting "fraudulent intent must often be established by circumstantial evidence." (*Tenzer v. Superscope, Inc., supra,* 39 Cal.3d at p. 30.)

Moreover, in the present case, by stating the jury must determine "whether there was an intention not to perform the promise *when made,"* special instruction No. 32 steered the jury's attention to the requirement of contemplation of nonperformance at the time the promise was made. (Italics added.) By instructing the jury pursuant to special instruction No. 31 just before giving the challenged Instruction No. 32, the trial court reinforced the requirement of contemplation of nonperformance when the promise is made. Based on BAJI No. 12-40, special instruction No. 31 sets forth four elements for promissory fraud. Significantly, the instruction requires plaintiffs to prove as the first element the defendant "made a promise as to a material matter and, *at the time it was made,* he must have intended not to perform it. . . ." (Italics added.)

Therefore, we hold there was no instructional error. Even if there were such error, a "judgment may not be reversed for instructional error in a civil case 6uniess, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Soule* v. *General Motors Corp.* (1994) 8 Cal.4th 548, 580.) Since substantial evidence supported the verdict, there could be no miscarriage of justice.

III. CHALLENGE OF CLAIMS FOR BREACH OF FIDUCIARY DUTY MOOTED BY UPHELD FRAUD CLAIMS

The F/W defendants next contend there is no substantial evidence to support the jury's finding of a breach of fiduciary duty. In the special verdict, the jury answered "yes" to whether plaintiffs suffered economic damage "caused by defendants' fraud *or* breach of fiduciary duty". In light of the use of the disjunctive "or" and our holding substantial evidence supported plaintiffs' fraud cause of action, we need not decide whether the issues raised regarding the cause of action for breach of fiduciary duty can withstand review.

IV. JUDICIAL AND JUROR MISCONDUCT REGARDING ALTERNATE JUROR'S INTERFERENCE WITH DELIBERATIONS NOT REVERSIBLE ERROR WHERE PRESUMPTION OF PREJUDICE REBUTTED

The F/W defendants adopt Grean's arguments regarding judicial and juror misconduct as another basis for overturning the judgment. Grean maintains the trial court engaged in misconduct by coercing defense counsel into stipulating alternate jurors could be present in the jury room during deliberations, and one alternate juror engaged in misconduct by communicating to the jury about an exhibit concerning damages.

A) Trial Judge's Handling of Alternate Jurors' Presence in Jury Room During Deliberations Constitutes Judicial Misconduct

Prior to jury selection, plaintiffs' counsel suggested the alternates be allowed to attend the jury deliberations. Trial Judge David Workman responded he encouraged this practice with the stipulation of trial counsel. Defense counsel for appellants, Bert Deixler, then responded he wanted to wait to decide whether to stipulate to allowing alternates to audit deliberations.

During jury selection, Deixler told prospective alternate jurors they "may" be in the jury room during jury deliberations, and, if so, they would not be allowed to say a word. Deixler asked how they would respond to such a situation. After one prospective juror responded, Judge Workman told the prospective jurors, "the attorneys are going to stipulate that the alternates may audit the deliberation, if you wish . . . ."

Soon before deliberations, the trial court announced the alternate jurors will be segregated from the jury during deliberations. After one alternate juror said she thought the alternate jurors were allowed to sit with the jurors during deliberations, Judge Workman conducted a side bar conference off the record.

According to the apparently undisputed engrossed statement on appeal, Deixler stated he did not want alternate jurors to be present in the jury room during deliberations. "The court said that if Mr. Deixler continued to object, the court would have to explain the change to the jury, and would tell them that stipulation of counsel was required and that Mr. Deixler would not give his consent. Mr. Deixler then consented to the procedure."

Kidron claims "the engrossed statement simply does not reflect the coercion which defendants assert." However, coercion can arise in a subtle way. For example, in *Shippy v. Peninsula Rapid Transit Co.* (1925) 197 Cal. 290, at the conclusion of the taking of evidence, the trial court asked the jurors whether they would like oral argument. After ten jurors expressed disinterest, the court asked counsel if they wished to argue. Both counsel waived oral argument. (*Id.* at pp. 291-291.) The *Shippy* court determined the waiver of oral argument was not freely obtained. (Id. at p. 295.) "The trial judge had no right to put upon counsel engaged in a jury trial the stress of such a dilemma, since to insist upon arguing the cause under the circumstances thus improperly created by the action of the trial judge would be to run counter to the expressed desire of the majority of the jurors not to hear argument and thereby risk whatever of favor counsel hoped to have in their eyes; or, on the other hand, to surrender the right of his client to the full benefit of an argument by his counsel of his case." (*Ibid.*)

Similarly, defense counsel in the present case was forced to acquiesce to alternate jurors' presence in the jury room during jury deliberations, so as not to alienate the jurors.

While the court in *People v. Britton* (1935) 4 Cal.2d 622, 623 held the presence of an alternate juror in the jury room during jury deliberations is reversible error, the court later concluded "the presence of alternates in the jury room during deliberations is not necessarily detrimental to a defendant's right of trial by jury and that defense counsel may stipulate to such procedure." (*People v. Valles* (1979) 24 Cal.3d 121, 125.) In light of *the Valles* court's choice of wording, stipulation is not mandatory to avoid automatic reversal. Although *Valles* is a criminal case, it applies to the present action because article I, section 16 of the California Constitution guarantees a right to a jury in civil and criminal cases. Whether the presence of the alternate jurors in the instant case requires reversal depends on whether the alternates engaged in misconduct denying the parties a fair trial.

B) <u>Alternate Juror's Interjection Into Deliberations Constitutes Juror Misconduct</u>

The juror misconduct at issue here concerns an isolated incident during jury deliberations over the amount of compensatory damages to award. According to a declaration of alternate juror Peter Chow, he "walked to the head of the jury's table .... I had one of the trial exhibits -- I don't recall which -- in my hand. I said: 'May I make a suggestion? Instead of arguing based on what you think you know, you should look at the evidence.' I then placed the exhibit I was carrying on the jury's table and returned to my chair." Juror Carlos Nava confirmed Chow's account of what occurred.

The polling of the jury after the verdict on phase one of the trial indicated nine out of twelve jurors voted for the compensatory damages.

Although Chow disobeyed the trial court's instruction not to participate "in any way" in the jury deliberations, disobedience does not require automatic reversal. Instead, "the standard rule concerning juror misconduct applies, namely, that it is presumed prejudicial to the defendant unless the contrary appears." (*People v. Valles, supra,* 24 Cal.3d at P. 128.) Where, as here, there is a presumption of prejudice, "the burden shifts to the respondent to overcome the presumption by presenting a record sufficient to sustain the trial court's decision." (*Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 683.)

Here, out of the 10 jurors, only two provided declarations regarding the incident. Nava declared he did not know what exhibit Chow handled, and juror

Elfe Lichtman declared she did not recall Chow placing any trial exhibits on the table of the jury room. The three jurors who did not join in the compensatory damages verdict, Mr. Enriquez, Mr. Maisch and Mr. Change, did not submit declarations regarding Chow's misconduct.

It appears from the record Chow's choice of a trial exhibit was random, and his comments did not indicate his opinion about what evidence should be examined and what damages outcome the jury should reach. Rather, Chow merely told the jurors what they were already required to do--to consider the evidence in making a decision. We therefore hold the presumption of prejudice was rebutted in this particular case.

V. CONSPIRACY CLAIMS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The non-F/W defendants contend the conspiracy claims against them are not supported by substantial evidence, and *Kidron v. AIovie Acquisition Corp. (I* 995) 40 Cal.App.4th 1571 (*Kidron 1*) disposes of the conspiracy claims under the collateral estoppel doctrine.

Kidron I concerns plaintiffs' appeal of a nonsuit for MAC in the instant action. In *Kidron I.,* we extensively analyzed plaintiffs' conspiracy claims based on their causes of action for fraud and breach of fiduciary duty.

For the collateral estoppel doctrine to apply, the following three elements must be met: "(1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the plea is asserted was a party, or in privity with a party, to the previous suit." (*Producers Dairy Delivery Co., Inc. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910.)

While *Kidron I* concerned a nonsuit and the present appeals concern a jury verdict, the evidence in both situations must be reviewed in the light most favorable to plaintiffs, and any conflicting evidence must be disregarded.[17] As the underlying fraud and breach of fiduciary duty causes of action against the F/W defendants at issue in *Kidron I* are also at issue here, the applicable portions of *Kidron I* are binding.

"To prove a claim for civil conspiracy, Kidron was required to provide substantial evidence of three elements: (1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct. As is well established, civil conspiracy is not an independent tort. [Citation.] Rather, civil conspiracy is a 'legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.]" (*Kidron I, supra,* 40 Cal.App.4th at p. 1581.)

Here, the jury based its conspiracy finding on two underlying theories of liability: fraud and breach of fiduciary duty. While joint venturers assume the status of fiduciaries (*Epstein v. Stahl, supra,* 176 Cal.App.2d at p. 57), only ATI is a joint venturer with Kidron's company. The remaining defendants have no contractual relationship with Kidron or Marvellous. As a matter of law, a nonfiduciary cannot conspire to breach a duty owed only by a fiduciary. (*Kidron I, supra,* 40 Cal.App.4th at p. 1597.) Therefore, the jury verdict of conspiracy can only survive under the fraud basis for liability.

Plaintiffs contend the non-F/W defendants have an independent duty under Civil Code section 1708. This statute provides, "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights." However, absent a legal duty owed by the

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17/ *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 sets forth the standard of review of a nonsuit.

defendants to the plaintiffs, "any damage caused is injury without wrong." (*Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 897.)

Citing *Vai v. Bank of America* (1961) 56 Cal.2d 329, where a husband was held to owe a fiduciary duty to his wife as a result of his management and control of the community property, plaintiffs argue the non-FfW defendants had fiduciary obligations to Kidron because they assumed and exercised control over the *Catwalk* concept. As a mere financier of *Catwalk,* the Columbia defendants lacked control or management over *Catwalk.* Merely telecasting the second season *of Catwalk,* Viacom/MTV likewise lacked control or management over *Catwalk.* Reliance on *Vai* is misplaced because the fiduciary duty there "arose because by statute the husband had management and control of the community property, in which husband and wife shared equal ownership ' interests under one of the recognized forms of joint ownership of property." (*Worldvision Enterprises, Inc. v. American Broadcasting Companies, Inc. (I* 983) 142 Cal.App.3d 5 89, 595.)

With respect to the Columbia defendants, plaintiffs claim they are liable to Kidron because of the Franklin/Waterman 2 joint venture. However, Franklin/Waterman Entertainment and Columbia subsidiary CAT Holdings expressly agreed CAT Holdings "shall not directly or indirectly assume, or be obligated, liable or otherwise responsible for" litigation concerning the Kidron claim. While Corporations Code sections 15013 and 15014 render partners liable for their partners' misconduct, Corporations Code section 15018 allows partners' rights and duties in relation to their partnership to be subject to any agreement between them . . . ."

Even if there were no agreement not to assign the F/W defendants' obligations to Kidron, "[a]s a matter of law, the alleged conspiracy to defraud was completed and actionable when Franklin/Waterman obtained control of the *Catwalk* concept. This occurred at the latest by May 1992, when Kidron allegedly was excluded from further participation in the production of *Catwalk.*"

(*Kidron I, supra,* 40 Cal.App.4th at p. 1595.) Moreover, the fact the F/W defendants "had not yet realized any profits at that time is not a basis on which to allege a continuing conspiracy." (*Id.* at p. 1593.)

Given the May 1992 cutoff set forth in *Kidron 1,* Viacom/MTV cannot be liable for conspiracy because they did not become involved with *Catwalk* until 1993.

Plaintiffs cite *de Vries v. Brumback* (1960) 53 Cal.2d 643 for the proposition the non-F/W defendants can be liable for conspiracy after the F/W defendants commenced their scheme to defraud Kidron. In *de Vries,* Paul de Vries sued James Brumback for conversion of property stolen during a robbery a Frank Mendes committed on February 18, 1955 and planned with Edward Bigarani and others beforehand. Mendes, Bigarani and the others agreed Bigarani should receive the stolen property, and the robbers delivered most of the property soon after the robbery. (*Id.* at p. 645.) A few hours after the robbery, Brumback saw most of the stolen property received by Bigarani, knew the property was stolen, and joined Mendes and Bigarani in a conspiracy to convert all the stolen property to their own use and benefit. (*Id.* at p. 646.) The *de Vries* court held the tort of conversion is "a continuing tort--as long as the person entitled to the use and possession of his property is deprived thereof. Contrary to appellant's argument, it does not necessarily end when the original wrongdoer transfers physical possession to another. Likewise, a conspiracy to convert is a continuing concert of action lasting so long as the agreement to exercise dominion over another's property continues. The time when the common design of the conspirators is fully accomplished depends on the facts and circumstances of each case, and on the nature and purpose of the conspiracy--all matters for the determination of the trier of fact." (*Id.* at p. 647.)

Significantly, Brumback unquestionably had knowledge of the scheme to convert all the stolen property in *de Vries.* In contrast, there is no evidence the non-F/W defendants knew of Franklin and Waterman's alleged scheme to wrongfully steal the *Catwalk* rights and benefits from Kidron's company. Instead, they merely had knowledge of Kidron's claim to those rights and benefits. Just as MAC's receipt of Kidron's complaint cannot be construed as evidence of MAC's knowledge of Franklin and Waterman's alleged scheme (*Kidron I, supra,* 40 Cal.App.4th at p. 1586), the other alleged coconspirators' receipt of Kidron's complaint does not show knowledge of Franklin and Waterman's alleged scheme to defraud Kidron.

"Kidron equates knowledge of the <u>claim</u> of fraud with <u>actual</u> knowledge of fraud. Kidron, however, cites no authority for the proposition, in the context of conspiracy, knowledge sufficient to arouse suspicion that an allegation <u>may be</u> true, is equivalent to positive knowledge that the allegation's true. To the contrary is *Lewis v. Superior Court* (1994) 30 Cal.App,4th 1850, 1859 [37 Cal.Rptr,2d 63]. ' "Fraudulent intent," "collusion," "active participation," "fraudulent scheme"--this is the language of *deliberate wrongful conduct.* It belies any notion that one can become a fraudulent transferee by accident, or even negligently. It certainly belies the notion that guilty knowledge can be created by the fiction of constructive notice.' (Original italics.)" (*Kidron 1, supra,* 40 Cal.App.4th at p. 1586.)

"An entity that engages in legitimate business with a party that is acting tortiously cannot be deemed a coconspirator, absent clear evidence of an agreement to join in the tortious conduct." (*Kidron I, supra,* 40 Cal.App.4th at p. 1590.) Here, there is no clear evidence of the non-F/W defendants' agreement to join the F/W defendants in defrauding Kidron out of *Catwalk* rights.

According to Kidron, Chesler knew Kidron was a 50 percent partner with Franklin and Waterman. However, in the portion of the record Kidron cites, Chesler at first testified he did not recall being told Kidron was a 50 percent partner. Rather, Chesler testified he was advised Kidron "was involved in the development of the concept. . . . " Plaintiffs' trial counsel then asked, "You mean Adam . . . never told you he was a 50 percent partner in the show?" Chesler replied, "I do not recall who specifically advised me of that., The business transactions between Adam Kidron and Franklin and Waterman were not necessarily my concern." In any event, Chesler testified he understood Kidron approved of Chesler's involvement in the production of *Catwalk,* and there is no evidence to the contrary.

Kidron argues the payment arrangements between the F/W defendants and Chesler amounted to "splitting the swag" between them, but points to no evidence showing their financial transactions were anything but legitimate.

With respect to Grean, Kidron maintains he explained to Grean he created *Catwalk,* entered into a joint venture with Franklin and Waterman for the development of and exploitation of *Catwalk,* and he was Franklin and Waterman's partner. However, in the portions of the record Kidron cites, Kidron testified he met with Baird, but he did not 44 remember whether Wendy Grean was there or not." Kidron also testified with respect to a casting session where he told Grean an auditioner was not right for a particular role, "it must have been very clear to her that I had cast all the *Catwalkers* and the previous generation of *Catwalkers,* and that's what we had talked about; and I had a clear idea; and I had been involved in the project." This testimony does not constitute substantial evidence of Grean's knowledge beforehand of Franklin and Waterman's scheme to defraud Kidron out of *Catwalk.* Absent evidence of Grean's knowledge of Kidron's full role and rights in *Catwalk,* the conspiracy claim against Grean must fail.

Next, Kidron refers to the financial arrangements with Grean, arguing Grean assisted Franklin and Waterman to skim money from the *Catwalk* budget and put the money in their own pockets.

Regarding the "story rights" payments, Grean testified she made the payments pursuant to Cat Run's acquisition rights agreement with Franklin and Waterman entered into in July 1992 and amended in September 1992 after the August 1992 joint venture agreement between Franklin/Waterman

Entertainment and Columbia subsidiary CAT Holdings. Significantly, the rights acquisition agreement was entered after May 1992, the cutoff date for the fraud scheme. (*Kidron 1, supra,* 40 Cal.App.4th at p. 1595.)

With respect to the interest payments, Grean testified she could not answer if Franklin and Waterman paid interest to the people who gave them money to produce *Catwalk.* Despite this testimony, there is support for the interest payments. For example, Franklin and Epstein testified Columbia had issued an interest-bearing loan. Such a loan is credible, as Columbia got involved with *Catwalk* only after the F/W defendants failed to obtain financing through a bank. Further, Mercantile National Bank consultant Irene Romero testified about the practice of having studios lend money where a bank cannot. Romero explained a studio "can lend money to a company and take a percentage of the profits, where a bank isn't permitted to do that."

As for the sale of equipment, Kidron cites the portion of the record where Grean testified about her knowledge of Kidron's lawsuit. Again, knowledge of a fraud claim in a complaint does not equate with actual knowledge of fraud. (*Kidron I, supra,* 40 Cal.App.4th at p. 1586.) Kidron also maintains Grean admitted knowing Kidron had no interest in Way North. However, in the portion of the record Kidron cites, Grean merely answered questions whether she "thought" Kidron had an interest or was involved in Way North.

With respect to the "music services" payments, the portion of the record Kidron relies on refers to a November 1, 1993 agreement between Cat Run and Way North for music services for the second season of *Catwalk.* Since this agreement occurred after the May 1992 cutoff, there can be no liability for conspiracy to defraud.

Regarding the payments for "development costs," Grean testified she had "no idea" where the F/W defendants got the costs. In response to whether the F/W defendants told Grean the development costs were money for themselves, Grean replied, "I didn't ask; they didn't tell me." This testimony shows no more than Grean's passive and unquestioning dealings with the F/W defendants. To be a coconspirator of fraud, one must knowingly agree to conspire to defraud someone else.

While Cat Run paid Segal even though he was not affiliated with *Catwalk,* Grean testified her and Baird's company did so because "Franklin/Waterman had asked us if . . . we had some money in our bank account at that time and they asked if we could please, on their behalf, advance the money for them and then they would reimburse us the following week."

At best, the financial arrangements show Grean was an unsophisticated producer who was neither meticulous nor well-informed about financial matters and who deferred to the savvy F/W defendants.

Since the judgment against the non-F/W defendants is based on the conspiracy verdict, and there is no substantial evidence to support the conspiracy claims, the judgment as to the non-F/W defendants must be overturned.

VI. THE PUNITIVE DAMAGE AWARD AGAINST THE F/W DEFENDANTS IS JUSTIFIED BY THE REPREHENSIBILITY OF THEIR CONDUCT, THE RELATIONSHIP BETWEEN THE AMOUNT OF THAT AWARD AND THE ACTUAL HARM THEY CAUSED, AND THE NEED TO DISCOURAGE SUCH CONDUCT IN THE FUTURE.

All the appellants contest the punitive damage awards. Since we conclude only the claims against the F/W defendants were actionable, we focus only on the F/W defendants.

Review of punitive damages awards requires consideration of two issues. The first issue is whether clear and convincing evidence shows the defendants were guilty of oppression, fraud, or malice. (Civ. Code, § 3294.) Where, as here, the first preliminary issue is answered in the affirmative, punitive damages are recoverable. The second issue is whether substantial evidence supports the amount of punitive damages awarded.

While the amount of punitive damages is not fixed or susceptible to mathematical calculation (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3 d 773, 790), in deciding whether substantial evidence supports the amount of punitive damages, we generally consider the degree of reprehensibility of the defendants' conduct, the relationship between the amount of the award and. the actual harm suffered, and the defendants' financial condition. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. . . . This principle reflects the accepted view that some wrongs are more blameworthy than others. Thus, ... 'trickery and deceit' [citation] are more reprehensible than negligence." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. ___ [116 S.Ct. 1589, 1599].) This case reeks of trickery and deceit -- a case of intentional fraud and breach of fiduciary duty. So the first requisite for a substantial punitive damage award ' is more than satisfied.

While we have cut the compensatory damages quite substantially from what the jury awarded, we have done so not because the damages were not inflicted or the defendants did not commit the tortious acts which caused the harm.[18/] Rather we reduced the damage award largely because the putative

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18/ The F/W defendants urge our reliance on the rule "[e]vil thoughts or acts, barren of result, are not the subject of exemplary damages" (*Mother Cobb's Chicken T., Inc. v. Fox* (1937) 10 Cal.2d 203, 206). While this is still the rule, it is inapplicable where, as here, defendants' intentional misconduct results in some damage. (See, e.g., *Finney v. Lockhart* (1950) 35 Cal.2d 161, 162, 165 [judgment awarding $1 in general damages and $2,000 in punitive damages upheld].)

Moreover, even where a plaintiff is not awarded compensatory damages, exemplary damages may still be recoverable. (*James v. Public Finance Corp.* (1975) 47 Cal.App.3d 995, 999-1000 criticized in *Jackson v. Johnson* (1992) 5 Cal.App.4th 1350, 1358-1359 (plur. opn. of Woods, J.) [but see dis. opn. of Johnson, J.] and not followed in *Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677.) For punitive damage purposes, the

(continued...)

"victim" was a corporate entity ineligible for emotional distress damages and because the F/W defendants were unsuccessful in exploiting their stolen project and consequently earned no profits to be recovered. This does not mean the F/W defendants did not commit fraud and breach their fiduciary duty to Kidron and his corporate entity. We have found more than enough evidence to support the jury's finding the F/W defendants' actions were despicable, reprehensible and oppressive. Nor does it mean the defendants' intentional acts failed to harm Kidron or inflict damages on him. Kidron merely had the misfortune, in retrospect, to have assigned his rights to a corporation or he would been entitled to a very substantial award for emotional injuries suffered when his creation was stolen from under him.

Accordingly, we conclude this is one of those cases where the defendants' conduct warrants substantial punitive damages even though the compensatory damages the injured party is entitled to receive are not that large.

In holding punitive damages recoverable under the circumstances in this case, we note the California Supreme Court has upheld a punitive damages award for a plaintiff defrauded by a real estate broker, even though the realty the plaintiff received was worth what he had paid for it and thus his compensatory damages inconsequential. (*Ward* v. *Taggart* (1959) 51 Cal.2d 736, 740.) "Courts award exemplary damages to discourage oppression, fraud, or malice by punishing the wrongdoer. (Citations.] Such damages are appropriate in cases like the present one, where restitution would have little or no deterrent effect, for wrongdoers would -run no risk of liability to their victims beyond that of returning what they wrongfully obtained." (Id. at p. 743.) Similarly, in the entertainment field individual creators and other participants commonly use

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requirement of "actual damages" "is simply the requirement that a tortious act be proven if punitive damages are to be assessed." (*Topanga Corp. v. Gentile* (1967) 249 Cal.App.2d 681, 691.)

whollyowned corporations in their dealings and most projects fail to produce net profits even though many participants profit along the way. Consequently, without substantial punitive damage awards "wrongdoers would run no risk of liability to their victims" in stealing and exploiting other people's creations if they only had to repay lost net profits in the rare instance they were earned and avoided compensation for the creator's emotional injuries as well.

Accordingly, we affirin the $1.5 million punitive damage award against Franklin and the $1 million punitive damage award against Waterman. We also uphold the $1 each in punitive damages against Franklin/Waterrnan Entertainment, ATI, Seabrook Productions and Stallion.

VII. PERMANENT INJUNCTION AGAINST FUTURE EXPLOITATION OF SHOW NEITHER PREEMPTED BY FEDERAL COPYRIGHT LAW NOR BARRED BY ELECTION-OF-REMEDIES DOCTRINE

The Columbia defendants make two main arguments against the trial court's injunction which the F/W defendants adopt. First, the Columbia defendants argue the federal preemption provisions of the federal Copyright Act deprived the trial court of jurisdiction to enjoin the defendants' exploitation of *Catwalk-*. Second, the Columbia defendants, as well as Viacom/MTV, maintain having sought damages for the future exploitation of *Catwalk,* plaintiffs are barred from seeking an injunction against such exploitation pursuant to the doctrine of election of remedies. Since the decisive facts of these two issues are undisputed, the independent standard of review applies. (*Ghirardo v. Antonioli* (*I* 994) 8 Cal.4th 791, 799.)

A) Federal Copyright Law Does No Preempt Causes of Action for Fraud and Breach of Fiduciary Duty

Citing Gladstone v. Hillel (1988) 203 Cal.App.3d 977, 990 and *Maheu v. CBS, Inc.* (1988) 201 Cal.App.3d 662, 673, the Columbia defendants maintain the injunction gives plaintiffs a right in *Catwalk* which is equivalent to copyright. The *Gladstone court* held section 301 of the Copyright Act of 1976 governs federal preemption of state causes of action asserting rights comparable to copyright. (*Gladstone v. Hillel, supra, 203* Cal.App.3d at p. 986.) Quoting *Harper & Row Publishers, Inc. v. Nation Enterprises* (2d Cir. 1983) 723 F.2d 195, 200, the *Maheu* court explained, "'When a right defined by state law may be abridged by an act which, in and of itself, would infringe one of the exclusive rights,' the state law claim must be deemed preempted. [Citation.] 'Conversely, when a state law violation is predicated upon an act incorporating elements beyond mere reproduction or the like, the rights involved are not equivalent and preemption will not occur.' [Citation.]" (*Maheu v. CBS, Inc., supra,* 201 Cal.App.3d at p. 67 1.)

Section 301 of the Copyright Act provides "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title." (17 U.S.C. § 301.) The phrase "works of authorship" encompasses "dramatic works," "motion pictures and other audiovisual works" and "sound recordings." (17 U.S.C. § 102.) Section 106 entitles the owner of a copyright to "reproduce" the copyrighted work, "prepare derivative works" based on the copyrighted work, "distribute copies or phonorecords of the copyrighted work to the public" and "display the work publicly." (I 7 U. S.C. § 106.)

In *Gladstone,* the defendants appealed a judgment for plaintiff, a jewelry designer and defendants' former business associate. The plaintiff based his lawsuit on ft aud and conversion theories of liability. The trial court had enjoined defendants "from using the molds and designs of Plaintiff" and prohibited defendants from using "all molds, jewelry, sketches, designs and other representations of Plaintiff's work . . . for any purpose." (*Gladstone v. Hillel, supra,* 203 Cal.App.3d at p. 988.) The appellate court determined the injunction gave plaintiff a right equivalent to copyright. (*Id.* at p. 990.)

Here, the judgment stated all appellants "shall be and hereby are permanently enjoined and restrained from further producing, developing, distributing, exhibiting, or otherwise exploiting any television show or television series based upon plaintiffs' concept known as 'Catwalk;' and specifically from further distributing, exhibiting, exploiting, or licensing others to distribute, exhibit, or exploit, any of the 48 episodes of 'Catwalk' heretofore produced by them."[19/]

The out-of-state case *Editorial Photocolor Archives, Inc. v. Granger Collection* (1984) 61 N.Y.2d 5 17 [463 N.E.2d 365, 367, 368] involved a similarly broad injunction. There, plaintiffs sued defendant for common-law unfair competition,.interference with contractual relations and violation of New York's antidilution law. Plaintiffs had maintained archives *of film* transparencies to lease or license for reproduction, and defendants had been credited with several published pictures apparently taken from the transparencies. The trial court enjoined defendant ... from in any manner appropriating, reproducing, leasing, licensing, selling, displaying, or otherwise using the . . . transparencies . . . .'" The New York Court of Appeals overturned the injunction, explaining federal copyright law preempted the subject of litigation and divested jurisdiction from the state court.

Plaintiffs argue the injunction is based on conduct far different from "mere copying" because it was drafted to prevent only knowing participants in the alleged fraud and breach of fiduciary duty from profiting from their misconduct.

19/ The trial court later modified the injunctive provisions to allow appellants to deliver materials to specific third parties pursuant to agreements with those third parties.

However, the injunctive relief in *Gladstone* likewise addressed specific defendants.

Plaintiffs also argue the injunction did not give them any benefit, since it did not order defendants to return *Catwalk or* give plaintiffs money. However, the injunctive relief in *Gladstone* likewise did not order the defendants there to turn over materials or money to the plaintiff.

Notwithstanding the comparison of the present case to *Gladstone,* federal case law indicates state fraud claims are not subject to federal copyright law preemption. (*Valente-Kritzer Video v. Pinckney* (9th Cir. 1989) 881 F.2d 772.) This is because a fraud claim under California law requires the element of misrepresentation, which is an "extra" element not required under federal copyright law. (*Id.* at p. 776.) Accordingly, plaintiff s allegation of defendant's intentional misrepresentation of its intent to perform the parties' contract "is not substantially equivalent to a claim for copyright infringement." (*Ibid.*)

Similarly, Kidron's claims of breach of fiduciary duty are not subject to federal copyright preemption because joint venturers' duties to their joint venturers differ from the interests protected by copyright law. (*Oddo v. Ries* (9th Cir. 1984) 743 F.2d 630, 635 [federal copyright right law did not preempt partner's California-law cause of action for breach of fiduciary duty].)

While copyright infringement "is both explicit and broad", federal copyright law governs only copying. (*G.S. Rasmussen & Associates, Inc, v. Kalitta Flying Service, Inc.* (9th Cir. 1992) 958 F.2d 896, 904.) If violation of a state right is based on an act including elements "'beyond mere reproduction or the like,' (citation] there is no preemption," (*Oddo v. Ries, supra,* 743 F.2d at p. 635.) Pursuant to *Valente-Kritzer Video, supra, Oddo and G.S. Rasmussen & Associates,* we hold Kidron's fraud and breach-of-fiduciary-duty claims against the F/W defendants are not preempted by federal copyright law.

B) Doctrine of Election of Remedies Does Not Apply Where Injunction Remedies Future Conduct and Compensatory Damages Remedy Past Conduct

We next consider whether the doctrine of election of remedies bars injunctive relief. "Broadly speaking, election of remedies is the act of choosing between two or more concurrent but inconsistent remedies based upon the same state of facts. Ordinarily a plaintiff need not elect . . . between inconsistent remedies during the course of trial prior to judgment. [Citations.] However, if a plaintiff has unequivocally and knowledgeably elected to proceed on one of the remedies he is pursuing, he may be barred recourse to the other. [Citation.] It is to such a situation that the doctrine of election of remedies pertains. The doctrine of election of remedies acts as a bar precluding a plaintiff from seeking an inconsistent remedy as the result of his previous conduct or election. In California the doctrine is theorized on the principle of estoppel." (*Roam v. Koop* (1974) 41 Cal.App.3d 1035, 1039.)

"The general rule is that a plaintiff in an injunction suit is entitled to no more than relief consisting of an injunction against future injury and damages for past injury [citation]. It is well settled that a plaintiff cannot obtain equitable relief commensurate with its claim of rights and damages in addition thereto [citations]." (*Lemat Corp.* v. *Barry* (1969) 275 Cal.App.2d 671, 679.)

Here, after the jury returned its verdict on compensatory damages in phase one of the trial, plaintiffs sought a permanent injunction. By doing so, plaintiffs arguably disaffirmed the October 1991 joint venture agreement. According to defendants, this position contradicted plaintiffs' prior position to affirm the agreement by seeking the remedy of damages as opposed to rescission. "The remedies of affirmance and rescission are inconsistent,[20/]

20/ The remedy of rescission terminates the contract and bars an action for fraud. (*Evans v. Rancho Royale Hotel Co.* (1952) 114 Cal.App.2d 503, 507.)

involving different types and amounts of recovery, and the defrauded party must *elect* to proceed on one theory or another." (5 Witkin, Summary of Cal. Law (9th ed. 1990) Torts, § 727, p. 826.)

However, the equitable remedy of rescission, which plaintiffs elected not to pursue, differs from the equitable remedy of an injunction. While the remedy of rescission is sought for the limited purpose of cancelling a contract, the remedy of an injunction may have multiple and broad purposes all aimed at dictating the wrongdoer's current and future conduct. Therefore, the F/W defendants' reliance on *Helm* v. *K.O.G. Alarm Co.* (1992) 4 Cal.App.4th 194, 204, fn. 10 is misplaced. There, the appellate court noted the record showed plaintiffs "(a) prayed in their complaint only for tort damages for the (alleged) misrepresentation and never moved the trial court for leave to amend their complaint to allege facts in support of an action for rescission and to set forth a prayer for restitution and (b) sought tort damages for the (alleged) misrepresentation throughout the conduct of the trial itself. By their conduct, the Helms elected to pursue a tort remedy and waived their right to pursue the equitable contract remedy of rescission/restitution . . . . 'If . . . the defrauded party elects to affirm [the contract] and recover damages, . . . he cannot thereafter attempt to rescind.' [Citation.]"

Plaintiffs contend *Gladstone v. Hillel, supra,* 203 Cal.App.3d at p. 977 illustrates the election-of-remedies doctrine does not apply because plaintiff there was allowed injunctive and monetary relief.[21/] A conversion case, *Gladstone* is distinguishable because Kidron and Marvellous did not assert a cause of action for conversion. Unlike a fraud cause of action, a conversion cause of action always concerns personal property, and allows for damages for trying

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21/ While the *Gladstone* court disapproved of the injunction, it allowed for an injunction &&more closely tailored to the rights conferred by state law." (*Gladstone v. Hillel, supra,*
203 Cal.App.3d at p. 990.)

to recover the. property. (Civ. Code, § 3336.) Significantly, the *Gladstone* court determined plaintiff's "struggle to recover his property provides the basis for his claim of damages . . . ." (*Id.* at p. 984.) Such damages are not recoverable for fraud.

Citing Pacific Western Oil Co. v. Bern Oil Co., Ltd. (193 9) 13 Cal.2d 60, *Farrell v. City of Ontario* (1919) 39 Cal.App. 351 and *Los Angeles Brick & Clay Products Co. v. City of Los Angeles* (1943) 60 Cal.App.2d 478 as examples, plaintiffs further contend victims of continuing torts may sue for and recover damages for past injury and an injunction to prevent future injury. *Pacific Western Oil* concerned an appeal from a judgment restraining defendants from taking oil from land controlled by plaintiff, and awarding compensation for already taken oil. (*Pacific Western Oil Co. v. Bern Oil Co., supra,* 13 Cal.2d at p. 62.) The California Supreme Court affirmed the judgment. (*Id.* at p. 74.) The plaintiffs in *Farrell and Los Angeles Bricks & Clay Products Co.* sought injunctions abating storm water nuisances. In *Farrell,* the appellate court reversed the judgment for defendants with directions to enter a judgment in accordance with the jury verdict awarding plaintiff damages, and to consider the case's equitable issues. (*Farrell V. City Of Ontario, supra,* 39 Cal.App. at p. 360.) In *Los Angeles Brick & Clay Products Co.,* the appellate court affirmed the judgment for plaintiff. *(Los Angeles Brick & Clay products Co. v. City of Los Angeles, supra,* 60 Cal.App.2d at p. 483.)

While *Pacific Western oil, Farrell and Los Angeles Bricks & Clay Products Co.* are clearly factually distinguishable from the present case, Kidron is correct an injunction against future misuse of *Catwalk* does not duplicate the legal remedy of compensatory damages for past injuries. Accordingly, the election-of-remedies doctrine does not bar the injunction with respect to the F/W defendants.

C) <u>Injunctive Relief Is Available Against Non-F/W Defendants Because Neither They Nor The F/W Defendants with Whom They Contracted to Co-Venture Ever Gained Legitimate "Title" To The Catwalk Project and Thus They Are Constructive Trustees for Marvelous and Kidron</u>.

Despite the absence of a viable cause of action against the non-F/W defendants, Kidron argues the injunction properly extends to them. In support of this argument, Kidron cites Civil Code section 2224 and two recent cases, *Recorded Picture Co., Ltd. v. Nelson Entertainment* (1997) 53 Cal.App.4th 3 50, 54 Cal.App.4th 26f [opinion modified on denial of rehearing on April 3, 1997; rev. denied June 11, 1997] and *Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906.

We do not reach the question whether Civil Code section 2224 applies to someone who only receives something from another who gained it wrongfully but committed no wrong personally.[22/] Rather, we rely on our opinion in *Strasberg* and the authority cited in that case for the proposition one who receives property, however innocently, from one without title has no lawful claim to the property, must return it to the rightful owner and certainly may not use it without the true owner's permission. This principle applies as well to the non-F/-W defendants even though we ultimately concluded they did not commit any wrong.

In Strasberg, supra, the heirs of Marilyn Monroe's business manager thought they had inherited some of Monroe's personal and business effects the business manager claimed Monroe had given her shortly before her death.

22/ Civil Code section 2224 provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

When they sought to auction those effects, however, the heirs of Lee Strasberg, a close friend and mentor of Monroe, intervened claiming Monroe had willed all her effects to Strasberg. Eventually, the Strasberg heirs filed suit and won a judgment imposing a constructive trust on the auction house which had possession of those effects and requiring their return. We affirmed despite the claim by the business manager's heirs that "even if [the business manager] fraudulently concealed the items in the Monroe collection, her bad state of mind cannot be imputed to appellants, who believed they had valid ownership and possession of the property."

In our opinion, we explained, "[a]ppellants [*sic*] bad or good faith is simply irrelevant. The reason they are defendants in this action and the reason they are held to be constructive trustees of the Monroe collection is not because they have committed any wrong themselves nor because [the business manager's] wrongful intent is imputed to them. Instead it is because they received possession of the items from one who had no legal title and therefore no right to transfer the items, (See *Harpending v. Meyer* (1880) 55 Cal. 555, 560-561; *San Francisco Credit C. House* v. *Wells* [ ] 196 Cal. 701, 706.) Thus, appellants have no lawful claim to this property as against the rightful Owner. (*Harpending v. Meyer, supra,* 55 Cal. 555, 559 [the guilty party had no rightful possession against I the true owner, and he could convey none to another].) Accordingly, they are bound to turn the items over to their rightful owner regardless of their innocent intent and despite their innocence of having fraudulently concealed the true facts from the Strasbergs." (*Strasberg* v. *Odyssey Group, Inc., supra,* 51 Cal.App.4th 906, 919.)

Similarly, the non-F/W defendants may have been sufficiently innocent of the F/W defendant's fraud and breach of fiduciary duty to avoid a damage award for their past participation in that fraudulent scheme. But that does not mean they are entitled to continue that scheme into the future by further exploiting the project a jury found the F/W defendants stole from Kidron. They are now, along with the F/W defendants, merely constructive trustees of that property for Kidron's benefit. Accordingly, we affirm the permanent injunction as to the non-F/W defendants as well as the F/W defendants.

DISPOSITION

The judgment is affirmed in part, reversed in part and remanded with directions. The $1 each in punitive damages against Franklin/Waterman Entertainment, ATI, Seabrook Productions and Stallion and the $1.5 million in punitive damages against Franklin and the $1 million in punitive damages against Waterman are affirmed. On remand, the trial court is ordered to modify the judgment against the F/W defendants to award $38,000 in compensatory damages. The permanent injunction is affirmed as to all defendants. The 'remainder of the judgment against the non-F/W defendants is reversed in its entirety. All parties arc to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J. We concur: LILLIE, P.J. WOODS, J.