Filed 1/30/07; part. pub. & mod. order 2/28/07 (see end of opn.)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JET SOURCE CHARTER, INC., Plaintiff and Respondent, v. BRIAN J. DOHERTY et al., Defendants and Appellants.	D044779 (Super. Ct. No. GIN14623)

APPEAL from a judgment of the Superior Court of San Diego County, Lisa Guy-Schall, Judge. Reversed and remanded in part; affirmed in part.

The jury in this case determined that in locating and negotiating the purchase price of aircraft on behalf of the plaintiff, the defendant aircraft dealers owed the plaintiff the duties of a fiduciary. The jury further found that in providing the plaintiff with misleading information about the negotiated price of the aircraft, the defendants breached their fiduciary duty to the plaintiff.

There is sufficient evidence in the record to support the jury's finding of liability. Although the parties did not have a written agency contract, their course of conduct and the customary practice in the aircraft industry fully supported a finding the aircraft

dealers were the plaintiff's agents and therefore obligated to provide the plaintiff with accurate information about the price the aircraft dealers had negotiated with the sellers of the aircraft.

Although we agree the trial court erred in instructing the jury that both brokers and agents owe purchasers the duties of a fiduciary, in light of testimony from the aircraft industry experts offered by the parties and the record of willful deceit on the part of the defendants, the error was harmless. Moreover, the record contains ample evidence from which the jury could reasonably infer the aircraft dealer had retained concealed secret profits equal to or greater than the compensatory damages awarded to plaintiff.

However, we reverse and remand as to the award of punitive damages with instructions that the trial court limit them on a pro rata basis to an amount which in total does not exceed the compensatory damages awarded. Where, as here, the conduct in question only involves economic damage to a single plaintiff who is not particularly vulnerable, an award which exceeds the compensatory damages awarded is not consistent with due process.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and respondent Jet Source Charter, Inc. (Jet Source), was formed in 1997 by Richard McWilliam. McWilliam is the sole shareholder of Jet Source and its chief executive officer. At all pertinent times McWilliam was also the chairman and chief executive officer of Upper Deck, a sports memorabilia and trading card company. McWilliam devotes most of his time and energy to management of Upper Deck.

From 1997 to 1999 Jet Source's business consisted of chartering private aircraft and renting office and hangar space at Palomar Airport in Carlsbad. In 1999 McWilliam hired Steven Bogner, a pilot with marketing experience, to act as a full-time manager of Jet Source.

Defendant and appellant Mach I, Inc. (Mach I), was formed in 1998 by defendant and appellant John Moyous. Moyous is the sole shareholder and chief executive officer of Mach I. Moyous has been a pilot since 1969. Moyous flew contract missions for a number of government agencies, including the Department of Justice, and developed a number of relationships with people working in the aircraft industry throughout the world. Mach I is registered with the FAA as an aircraft dealer. Mach I Aircraft, Inc. (Aircraft), was a second entity owned by Moyous.[1]

Defendant and appellant Brian Doherty is also a licensed pilot. Like Moyous, Doherty flew contract missions for government agencies and in that capacity befriended Moyous. Doherty was an officer of Mach I and worked with Moyous at Mach I.

In March 1999 Mach I began renting office space from Jet Source at the Carlsbad airport. Mach I executed a standard form lease which in part stated that neither party was the agent of the other.[2] Shortly after Mach I became a tenant of Jet Source, McWilliam,

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1 Unless otherwise indicated, all references to Mach I include Mach I Aircraft.

2 The lease stated: "15.7. No Agency. Nothing contained in this Agreement and no action by either party will be deemed to constitute any party or any such party's employees or agents to be employee or agent of the other party or will be deemed to create any partnership, joint venture, association, syndicate among or between any of the parties or will be deemed to confer on any party any express or implied right, power or

Bogner, Mouyos and Doherty met at Mach I's office and discussed Jet Source's interest in acquiring a particular airplane, a Falcon 50, Serial No. 15. They also discussed Jet Source's general interest in acquiring aircraft for its charter business.

According to McWilliam, Doherty informed him that Mach I did not have the money to fund purchases or pay the expenses of inspecting aircraft. McWilliam understood that Mach I was offering to act as Jet Source's broker in acquiring aircraft for Jet Source and being paid an enhanced commission on the resale of the aircraft. McWilliam, on behalf of Jet Source, agreed to have Mach I act as its broker.

Between April 1999 and August 2001, Mach I assisted Jet Source in six aircraft transactions. According to McWilliam, Mach I located aircraft for purchase by Jet Source, negotiated the "lowest possible price" for the aircraft, and used Jet Source's funds to acquire the aircraft for Jet Source. Jet Source would then pay Mach I a commission of between one and two percent on the resale of the aircraft to third parties. In some instances Jet Source also paid Mach I a commission on the acquisition of the aircraft. In all cases Jet Source paid Mach I's expenses in connection with the transactions.

In the first transaction in May 1999, Mach I negotiated a price of $9.7 million from Philips Electronics for the purchase of a Falcon 50, serial number 15. However, Mach I represented to Jet Source that the price of the aircraft was $10.6 million and in fact produced a sales contract which reflected the higher price. Jet Source paid $10.6 million for the Falcon 50 and eventually resold it. During the course of discovery Jet

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authority to enter into any agreement or commitment, express or implied, or to incur any

Source obtained a sales contract which was largely identical in form to the sales contract initially provided by Mach I, except that it showed that Mach I only paid $9.7 million for the Falcon 50. An escrow statement Jet Source obtained through discovery showed that an entity known as Aircraft Dealer Services received $985,000 from the transaction. Mouyos conceded that Mach I controlled Aircraft Dealer Services and ultimately received the $985,000.

In the second transaction Mach I negotiated a purchase price of $9.4 million for a second Falcon 50 from Volvo. However, Mach I represented to Jet Source that the purchase price was $10 million and produced a purchase contract which reflected that price. Although in its discovery responses Mach I maintained that the negotiated price was $10 million, Jet Source established at trial the negotiated price was $9.4 million.

In the third transaction Mach I represented to Jet Source that it had negotiated a purchase price of $8.7 million for three Lear jets, when in fact the price for the three aircraft included $2.25 million in secret profits obtained by Mach I. In addition to the secret profits, Jet Source paid Mach I a buyer's commission of $75,000.

The fourth transaction involved another Falcon 50. Mach I negotiated a $10.3 million purchase price with the seller, Ronaele Aviation, Inc. However, Mach I provided Jet Source with a sales contract which showed a price of $10.85 million. At trial Doherty conceded that the sales contract appeared to have been altered.

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obligation or liability on behalf of the other party."

In the fifth transaction Mach I obtained over $500,000 in undisclosed profits by using a "confidence company" it controlled to act as the purported seller of a Falcon 20.

In the sixth and final transaction Jet Source purchased a Cessna Citation from Cessna for $2.2 million and leased it back to Mach I. The parties agreed Mach I would bear the costs of maintaining the Cessna Citation as part of Jet Source's charter fleet, that they would split any profits upon resale, and that Mach I would bear the risk of any loss on the resale. After Mach I had failed to pay the expenses of the Cessna Citation, Jet Source sold the aircraft back to Cessna for $950,000. It incurred a $1.25 million loss on the transaction.

According to Bogner, Mach I brought several proposed transactions a week to him during the period Mach I was acting as Jet Source's agent. During this period Doherty and Moyous used Jet Source's credit cards to pay for approximately $100,000 in expenses they incurred in locating aircraft and negotiating with their owners. Although Mach I found propeller driven aircraft for other clients during this period, Jet Source was the only client to whom it provided jet aircraft.

PROCEDURAL HISTORY

Jet Source sued Mach I, Mouyos and Doherty in August 2001. Initially, Jet Source's claims were limited to the losses it had suffered upon Mach I's breach of the Cessna lease. Later, Jet Source amended its complaint to include claims seeking to recover the undisclosed profits Mach I, Mouyos and Doherty had earned on the other five transactions on theories of fraud and breach of fiduciary duty.

The case was tried to a jury which returned a special verdict in favor of Jet Source. The jury found Moyous and Doherty liable for intentional misrepresentation, negligent misrepresentation, breach of fiduciary duty, breach of contract and conversion. The jury awarded Jet Source $3,783,667 in damages for breach of fiduciary duty; $1.25 million for breach of contract on the Cessna lease and resale; and $20,396.90 for misuse of Jet Source's credit cards. In addition to compensatory damages the jury awarded Jet Source $11.4 million in punitive damages against Doherty and $7.6 million in punitive damages against Moyous; the jury assessed $3.8 million in punitive damages against Mach I and $3.8 million in punitive damages against Aircraft. The trial court determined that Jet Source was entitled to $1.5 million in prejudgment interest.

The trial court denied the defendants' motions for new trial and judgment notwithstanding the verdict. Judgment was entered on the jury's verdict and the defendants filed timely notices of appeal.[3]

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[3] John Moyous filed a notice of appeal on behalf of himself and Mach I, dba as Mach I Aircraft. This was the manner in which Mach I and Aircraft were denominated in the complaint and in the judgment entered by the trial court. Thereafter Mach I and Aircraft were the subject of bankruptcy petitions and the automatic stay provided by Title 11, United States Code, section 362. Those stays were lifted on January 24, 2006, and Mach I and Aircraft filed briefs simply joining in the briefs filed on behalf of Doherty. We deny Jet Source's motion to dismiss Mach I's and Aircraft's appeals. Because it replicated the manner in which those entities had been denominated in Jet Source's complaint and in the underlying judgment, the notice of appeal filed on behalf of Mach I and Aircraft was sufficient to preserve their right of appeal. (See *Luz v. Lopes* (1960) 55 Cal.2d 54, 59; *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361-363.) Under Title 11, United States Code, section 108 (c)(2), Mach I and Aircraft were not required to meet any other appellate deadlines until after the automatic stays were lifted.

DISCUSSION

I

In their first argument on appeal, the defendants contend there is no substantial evidence to support the jury's implied finding they owed Jet Source any fiduciary duty. In making this argument the defendants confront a familiar burden. "Where findings of fact are challenged on a civil appeal, we are bound by the principal that 'the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. [Citation.]" (*Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd*. (2003) 113 Cal.App.4th 1118, 1127.)

At trial in attempting to show the existence of a fiduciary duty, Jet Source argued that Mach I was at all times Jet Source's agent and therefore obligated to tell Jet Source the price it had negotiated for each of the aircraft Jet Source acquired as a result of Mach I's efforts. Mach I on the other hand argued it was a "middleman" in each of the transactions and was acquiring the aircraft for its own account and then, as owner of the aircraft, selling them to Jet Source in a series of arms length transactions. The respective positions of the parties were aptly described by the court in *Zalk v. General Exploration Co.* (1980) 105 Cal.App.3d 786, 793: "The middleman falls under no obligation to others, and he may act solely to further his own best interests. . . . [T]he middleman . . . remains free to peddle his find to the highest bidder . . . . In sharp contrast . . . an agent

exclusively employed by a principal to seek out acquisitions stands in a confidential relationship to his principal and owes him an individual duty of loyalty. He is a fiduciary, held to the standard of loyalty and honesty of a trustee [citations]." In finding the defendants liable for breach of fiduciary duty, the jury apparently resolved this dispute in Jet Source's favor and found that Mach I owed Jet Source the duties of an agent. The record amply supports the jury's conclusion.

"An agent 'is anyone who undertakes to transact some business, or manage some affair, for another, by authority of and account of the latter, and to render an account of such transactions.' [Citation.] 'The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties. [Citations.]' [Citation.] *'The significant test of an agency relationship is the principal's right to control the activities of the agent*. [Citations.] *It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent; the existence of the right establishes the relationship.'* " (*McCollum v. Friendly Hills Travel Center* (1985) 172 Cal.App.3d 83, 91, italics added.)

Importantly, immediate physical control over an agent is not necessary and many agents are in fact independent contractors. " '[M]ost of the persons known as agents, that is, brokers, factors, attorneys, *collection agencies*, and selling agencies are independent contractors as the term is used in the Restatement . . . since they are contractors but, although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performance of the services.

However, they fall within the category of agents. *They are fiduciaries; they owe to the principal the basic obligations of agency: loyalty and obedience.*' [Citations.]" (*Cross v. Bonded Adjustment Bureau* (1996) 48 Cal.App.4th 266, 277, quoting Rest.2d Agency, § 14 N, com. a.)

Here, with respect to what the court in *McCollum* stated is the chief characteristic of agency, the right to control the activities of the agent, there is very little dispute. None of the defendants contend Mach I had the resources to finance the worldwide search and negotiations it conducted for the aircraft Jet Source eventually acquired, let alone the wherewithal to purchase any of those aircraft for its own account. Rather, Jet Source produced evidence that its resources financed both Mach I's activities and the purchase price of each of the subject aircraft. The financing provided by Jet Source created a very strong inference that Jet Source had the right to control Mach I's activities, even if Jet Source never exercised that right. The role Jet Source played in financing Mach I's activities and in acquisition of the aircraft plainly undermines Mach I's argument that it was a middleman who held the subject aircraft in its own right and for its own account.

We also note there does not seem to be any dispute in the record that any decision to purchase aircraft was solely Jet Source's. As Bogner testified, in any given week during the two years Mach I helped Jet Source acquire aircraft, Mach I would bring him between 15 and 20 prospective purchases and in the end Jet Source only acquired aircraft in six transactions.

In addition to the evidence which showed that only Jet Source had the ability to acquire the subject aircraft and Jet Source made its own purchase decisions, the record

also contains evidence that Mach I, Doherty and Moyous themselves believed they had an obligation to provide Jet Source the actual price they had negotiated with the sellers of the aircraft. This evidence comes in the form of the sales contracts which the defendants provided to Jet Source and which, with the exception of the price listed, were identical in form to sales contracts which listed the actual, lower price Mach I had negotiated with the sellers of the aircraft. From these fairly blatant, purposeful and repeated misrepresentations of the price Mach I had negotiated, the jury was entitled to infer, and probably did infer, the defendants believed they were fiduciaries and therefore were obligated to provide accurate price information to Jet Source.

Contrary to the defendants' argument, the terms of the office space lease did not prevent them from acting as Jet Source's agent in the aircraft transactions. The lease cannot be expanded beyond its subject matter. (See Civ. Code, § 1648; *Hollander v. Wilson Estate Company* (1932) 214 Cal.582, 585; *Brookshire Oil Co. v. Casmalia Ranch Oil & Development Co.* (1909) 156 Cal. 211, 215-216.) By its terms the scope of the lease is limited to the "lease [of] office space."

In sum, there is more than sufficient evidence the defendants acted as agents for Jet Source in acquiring the subject jet aircraft and owed Jet Source the duties of a fiduciary.[4]

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4 We note the defendants rely upon the unpublished opinion in *Omni Jet Trading, Inc. v. Heerensperger* (4th Cir. 1997) 121 F.3d 699 (1997 WL 543381] (*Omni Jet*).) However, in *Omni Jet* the jury rejected claims that an agency or contractual relationship existed and given that finding, the Court of Appeals held that no liability for negligent

II

Next, the defendants contend the trial court erred in permitting Jet Source's expert to testify that in the aircraft industry an aircraft broker or agent owes fiduciary obligations to his or her client. They contend the expert's opinions were improper because they embraced the ultimate issue in the case and were otherwise inadmissible legal conclusions. We find no error.

As Jet Source points out, the fact that the expert's opinion embraced the ultimate issue in the case did not make it inadmissible. (Evid. Code, § 801, subd. (a); *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1179.) Moreover, while an expert may not testify as to the legal conclusion the jury should draw from particular facts (see *Summers v. A. L. Gilbert Co., supra,* 69 Cal.App.4th at p. 1179), an expert can testify as to the standards of care and practices required in certain professions, including their fiduciary obligations. (See *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1087; *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606-607; *Landeros v. Flood* (1976) 17 Cal.3d 399, 410.) As the court in *Stanley v. Richmond* stated with respect to attorneys: "Whether an attorney has breached a fiduciary duty to his or her client is generally a question of fact. [Citation.] Expert testimony is not required [citation], but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge. [Citations.]" (35 Cal.App.4th

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misrepresentation could be imposed on aircraft brokers. Here we have no such factual finding by the jury.

at p. 1087.) Here the aircraft expert's testimony was limited to the customs and practices in the aircraft industry. The trial court did not abuse its discretion in admitting it. (*Ibid*.)

III

Defendants contend that the trial court erred in failing to give agency instructions it offered and in instructing the jury that brokers are fiduciaries.

A. *Defendant's Proposed Instructions*

The defendants offered a series of instructions on agency relationships and the relationships between buyers and sellers. However, the defendants did not make the proffered instructions part of the record on appeal until *after* Jet Source's respondent's brief had been filed. Thus Jet Source was not able and did not fully respond to the defendants' contentions with respect to the instructions. On that basis alone we could find that no error occurred. (See *Singh v. Lipworth* (2005) 132 Cal.App.4th 40, 43, fn. 2; *Sparks v. Bledsaw* (1966) 239 Cal.App.2d 931, 940.)

However, we also note the trial court is not required to give instructions which are duplicative, incomplete, or erroneous. (See *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 654.) Here the trial court fully instructed the jury on the central question of whether a fiduciary relationship existed. The court instructed the jury: "Although a fiduciary relationship may be created by the express words of an oral or written contract, such express agreement is not necessary or determinative. A fiduciary relationship may be created or implied by the conditions or circumstances found in the facts, including the parties' conduct and statements.

"You shall, therefore, find that a fiduciary relationship existed between Jet Source and defendants, or any one of them, if you find that the facts or circumstances indicated that a relationship arose where Jet Source reposed a special confidence in defendants, or any one of them, such that in good conscience, defendants, or any one of them, were bound to act in good faith and with due regard for the interest of Jet Source."

The instructions offered by the defendants are largely duplicative of these instructions, and in some instances erroneous or misleading.[5] Thus the trial court did not abuse its discretion in declining to give them to the jury.

B. *Trial Court's Instruction*

The trial court gave the jury the following instruction: "It is the law of the state that brokers and agents are fiduciaries towards their clients. If you find that -- from the evidence that Jet Source Charter . . . retained defendants, or any of them, as a broker and/or agent and that defendants, or any one of them, carried out transactions for Jet Source as a broker and/or agent, then you must find that defendants, or any one of them, had a fiduciary relationship with Jet Source for these transactions."

As the defendants note this instruction was not an accurate statement of the law. Although in many contexts brokers are agents of their clients and hence fiduciaries (see

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[5] For instance, one of the proffered instructions states: "A fiduciary relationship exists where the parties intended, either by written contract or the facts and circumstances, to create a special confidence to act in good faith to each other." This was clearly covered in the trial court's instruction. Another proffered instruction states: "The law requires that an agency relationship exist in order to confer a fiduciary relationship between the parties." This of course is not an accurate statement of the law. A host of other relationships may create fiduciary obligations.

Cross v. Bonded Adjustment Bureau, supra, 48 Cal.App.4th at p. 277), in a number of contexts brokers are *not* fiduciaries. (See *Petersen v. Securities Settlement Corp.* (1991) 226 Cal.App.3d 1445, 1451 [settling brokers]; *Marsh & McLennan of Cal., Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 [insurance brokers]; *Anderson v. Thacher* (1946) 76 Cal.App.2d 50, 67 [brokers acting as middlemen].)

However, "[a] judgment may not be reversed on appeal, even for error involving 'misdirection of the jury,' unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' [Citation.] When the error is one of state law only, it generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. [Citation.]

"Thus, when the jury receives an improper instruction in a civil case, prejudice will generally be found only ' "[w]here it seems probable that the jury's verdict may have been based on the erroneous instruction . . . ." ' [Citation.] That assessment, in turn, requires evaluation of several factors, including the evidence, counsel's arguments, the effect of other instructions, and any indication by the jury itself that it was misled. [Citation.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 621-622.)

Here the record contains fairly convincing documentary evidence the defendants repeatedly misrepresented the prices they paid for the aircraft Jet Source acquired. We also note that notwithstanding the defendants' arguments to the contrary, their own expert testified that aircraft brokers owed their clients the duties of a fiduciary. According to the defense expert, in the aircraft industry a person does have "fiduciary obligations if you're

holding yourself out as a broker."[6] This strong evidentiary record makes it unlikely the jury was confused as to what duties the defendants believed they owed Jet Source. In this regard we also note the substantial amount the jury awarded in punitive damages. That award makes it clear not only that the jury disapproved of the defendants' conduct, but that the jury believed the defendants' conduct was knowing and willful. Thus the punitive damage award also shows that the jury was not confused about the duties the defendants owed Jet Source. In sum the trial court's erroneous instruction was not prejudicial.

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[6] During his cross-examination the defense expert gave the following testimony:

"Q. And do you also recall testifying that when one holds themself out as a broker, they have the same fiduciary obligations that a real estate broker has?

"A. I would say similar.

"Q. Okay.

"A. They do have fiduciary obligations if you're holding yourself out as a broker.

"Q. Okay.

"A. The obligation is to be truthful.

"Q. And it's more than just truthful, isn't it? You have an obligation affirmatively to tell your client if you're making any money on the side, don't you?

"[Objection overruled by trial court]

"A. A broker normally will be working for either a salary or a commission or something for doing that particular piece of work, as opposed to a dealer who is there to make a profit on a transaction.

"So I would say that a broker who also makes a profit as well as getting a commission is not fulfilling all of his duties that he should disclose to his principal that he's making a profit on this transaction.

"Q. And there's an affirmative obligation to make that disclosure; correct? That's what you testified to at your deposition.

"A. Right, uh-huh."

IV

On appeal the defendants dispute the amount of compensatory damages awarded on the first and fifth transactions.

With respect to the first transaction, contrary to the defendants' argument on appeal, in reviewing an escrow statement on the stand Moyous did concede the statement showed that an entity Mach I controlled earned $985,000. That testimony was sufficient support the jury's award in that amount.

With respect to the fifth transaction, for which the jury awarded Jet Source $556,667 in damages, the defendants dispute the evidence of what they paid for the plane. However, Moyous himself testified Mach I paid around $3.85 million for the plane; in light of evidence that Mach I incurred $243,333 in expenses and that Jet Source paid $4.6 million for the plane, the record fully supports the jury's award.

The defendants also dispute the $20,396 the jury awarded for defendants' misuse of Jet Source's credit card. However, at trial Doherty conceded he felt that when he was traveling on Jet Source's credit card he was free to pursue his own business interests or the interests of other clients. On the basis of that testimony, and the evidence that the defendants did use the credit card to pay expenses of transactions that did not involve Jet Source, the jury could reasonably apportion the $100,000 in expenses the defendants incurred on Jet Source's credit card and award it as damages.

V

Finally, the defendants challenge the punitive damages awarded to Jet Source. We agree with the defendants' contention that the punitive damages awarded in this case are

excessive under the principles and holding in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419-427 [123 S.Ct. 1513] (*Campbell*).

We review a punitive damage award de novo, "making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct. [Citations.] This '[e]xacting appellate review' is intended to ensure punitive damages are the product of the ' " 'application of law, rather than a decisionmaker's caprice.' " ' [Citation.]" (*Simon v. San Pablo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172, fn. omitted.)

A. *Reprehensibility of Conduct*

" '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' [Citation.] We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. [Citation.] The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so

reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. [Citation.]" (*Campbell*, *supra*, 538 U.S. at p. 419.)

In *Campbell* the defendant, a nationwide insurer, had been guilty of bad faith in defending one of its insureds in a wrongful death lawsuit. The state court awarded the insureds $1 million in compensatory damages for the 18 months of emotional distress they suffered as a result of the insurer's conduct. In addition the state court awarded the insureds $145 million in punitive damages based largely on evidence the insurer had engaged in unethical and oppressive conduct with respect to other insureds and its own employees. In characterizing the reprehensibility of the insurer's conduct, the court stated: "Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." (*Campbell, supra*, 538 U.S. at pp. 419-420, fn. omitted.)

B. *The Ratio Between the Harm Suffered by the Plaintiff and the Punitives*

"Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In [*Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1], in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. [Citation.] . . . .

"Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages." [Citations.] . . . . The converse is also true, however. *When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.* The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*Campbell, supra,* 538 U.S. at p. 425, italics added.) Thus, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." (*Id*. at p. 426.)

In *Campbell* in discussing the compensatory award the insureds recovered and its relationship to the punitive damages, the court stated: "The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction

in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. (See Restatement (Second) of Torts § 908, Comment *c*, p. 466 (1977) ('In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both')." (*Campbell, supra*, 538 U.S. at p. 426.)

C. *Civil Penalties*

"The third guidepost . . . is the disparity between the punitive damages award and 'the civil penalties authorized or imposed in comparable cases.'" (*Campbell, supra*, 538 U.S. at p. 428.) In *Campbell* the maximum civil penalty for fraud was a $10,000 fine, which was entirely dwarfed by the $145 million in punitive damages.

In light of its consideration of all three factors, the court in *Campbell* found the Constitution would not permit an award of punitive damages which was greater than the compensatory damages. (*Campbell, supra*, 538 U.S. at p. 429.) The court in particular

noted the substantial amount of compensatory damages and the fact that they already included a punitive element. (*Ibid*.)

D. *This Verdict*

Application of the *Campbell* factors to the record in this case requires that the jury's punitive damages award be reduced.

Although, in the words of the *Campbell* court, the defendants' fraudulent scheme, repeated over a number of transactions, "merits no praise;" nonetheless, the harm the defendants caused was solely economic and did not involve, in any sense, a vulnerable victim. Indeed, Jet Source was a far less vulnerable plaintiff than the insureds considered in *Campbell*. Moreover, the total of $6.5 million in compensatory damages and prejudgment interest was, to say the least, substantial. We must note however, that unlike the emotional distress damages awarded in *Campbell*, it is difficult to ascribe to this compensatory award a very large punitive element. The amounts awarded in compensatory damages were largely in the way of restitution to Jet Source for funds which had been improperly taken from it. Nonetheless, the total of $26 million in punitive damages awarded, representing four times the compensatory damages, is excessive viewed in light of the principles set forth in *Campbell*. In light of all the circumstances, we do not believe a total punitive damage award in excess of the $6.5 million compensatory award is appropriate.

Because varying amounts of punitive damages were awarded separately against all the defendants, evidently reflecting the jury's determination as to varying degrees of culpability, we remand to the trial court for further proceedings by which it can reduce on

a pro rata basis the punitive damage award so that the total does not exceed the $6.5 million compensatory award.

That portion of the judgment awarding punitive damages is reversed and remanded for further proceedings; in all other respects the judgment is affirmed.

Respondent to recover its costs of appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

Filed 2/28/07

CERTIFIED FOR PARTIAL PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JET SOURCE CHARTER, INC., Plaintiff and Respondent, v. BRIAN J. DOHERTY et al., Defendants and Appellants.	D044779 (Super. Ct. No. GIN14623) [No Change in Judgment]

THE COURT:

The opinion filed January 30, 2007, is modified as follows:

1. At the fourth paragraph, last sentence beginning with "Where, as here," and ending with "with due process" (slip opn. p. 2), delete the sentence and replace it with "Where, as here, substantial compensatory damages have been awarded, and the conduct in question only involves economic damage to a single plaintiff who is not particularly vulnerable, an award which exceeds the compensatory damages awarded is not consistent with due process."

2. At DISCUSSION V, D. *This Verdict*, second paragraph, after third sentence beginning with "Moreover," and ending with "substantial" (slip opn. p. 22), insert the

following citation: "(Compare *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 23, 27 [relatively small compensatory award justifies 9 to 1 ratio of punitives to compensatory damages].)"

3. At DISCUSSION V, D. *This Verdict*, third paragraph beginning with "Because" and ending with "award" (slip opn. pp. 22-23), insert footnote reference number 7 at the end of the sentence. Footnote 7 text should read: "We reject Doherty's argument that allocation to him of a pro rata share of $6.5 million in punitive damages would impose on him a penalty disproportionate to his ability to pay. Given Doherty's underlying conduct and his lack of credibility, in reviewing the record we are not bound by his statement of his net worth. (See *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 581.) Rather, our review of the record demonstrates that at the time of trial Doherty had access to considerable resources and that imposition as punitive damages of a pro rata portion of $6.5 million will not impoverish him. (See *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 625.)"

3. At DISCUSSION V, D. *This Verdict*, third paragraph, after footnote 7 reference (slip opn. p. 23), insert the following citation: "(See *Bardis v. Oates, supra,* 119 Cal.App.4th at pp. 21, fn. 8, 27.)"

As modified, the opinion is ordered certified for publication with the exception of DISCUSSION parts I, II, III and IV. The attorneys of record are:

Niddrie, Fish & Buchanan and David A. Niddrie for Defendant and Appellant Brian J. Doherty.

John P. Mouyos, in pro. per.

William P. Fennell for Defendant and Appellant Leslie T. Gladstone, Trustee, etc.

Rutan & Tucker, Richard K.. Howell, Paul J. Sievers and Treg A. Julander for Plaintiff and Respondent.

There is no change in the judgment.

The petition for rehearing is denied.

McCONNELL, P. J.