

Electro Lock, Inc. v. Core Industries, Inc., No. B134386 (Cal.App. Dist.2 05/28/2002)

[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND
APPELLATE DISTRICT DIVISION TWO

[2]

No. B134386

[3]

2002.CA.0004817

[4]

May 28, 2002

[5]

ELECTRO LOCK, INC., PLAINTIFF AND APPELLANT,

v.

CORE INDUSTRIES, INC. ET AL., DEFENDANTS AND APPELLANTS.

[6]

APPEALS from orders and a judgment of the Superior Court of Los Angeles County.
Robert Devich, Special Master, and S. Patricia Spear, Judge. Affirmed. (Los Angeles
County Super. Ct. No. BC155007)

[7]

Greenberg & Soderberg and Fred Greenberg; Leonard, Dicker & Schreiber, Richard C.
Leonard and Steven A. Schuman for Plaintiff and Appellant.

[8]

Folger Levin & Kahn and Thomas P. Laffey; McDermott, Will & Emery, Robert P.
Mallory, James T. Grant and Michael L. Meeks for Defendant and Appellant Dynamic
Acquisition Corporation.

[9]

McDermott, Will & Emery, Robert P. Mallory and James T. Grant for Defendants and
Appellants Core Industries, Inc. and Cherokee International, Inc.

[10]

The opinion of the court was delivered by: Cooper, J. *fn1

[11]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

[12]

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying
on opinions not certified for publication or ordered published, except as specified by rule
977(b). This opinion has not been certified for publication or ordered published for
purposes of rule 977.

[13]

Three appeals confront us. The first is an appeal by Dynamic Acquisition Corporation
(Dynamic) from a judgment after a jury trial in which plaintiff Electro Lock, Inc. (Electro
Lock) was awarded over \$5 million in damages in a breach of contract action against
Dynamic. *fn2

[14]

In addition, Electro Lock has filed a cross-appeal contesting the trial court's conditional
grant of a new trial on the issue of lost profits; the reduction of future lost profits to
present value without awarding interest on past lost profits under Civil Code section

3287(b); and the denial of attorney's fees to Electro Lock pursuant to Civil Code section 1717 and Commercial Code section 2207. A third appeal is from a finding in the first phase of the bifurcated proceedings, where retired Justice Devich found that Core Industries, Inc. (Core), and CII Tustin, Inc., formerly known as Cherokee International, Inc. (Cherokee), were the alter egos of Dynamic. *fn3

[15]

Dynamic manufactured automobile anti-theft devices and sold them to Electro Lock, which in turn resold the devices to automobile dealers, who installed them in vehicles. The devices were found to be defective; the defect caused vehicle fires as well as causing some automobiles to stall and not restart and others inexplicably to move. The devices were recalled. Electro Lock sued for its losses, including what it claims as substantial lost profits as its business sank due to Dynamic's defective devices. Demurrers were sustained to the fourth and fifth causes of action (fraud and negligent misrepresentation), and the matter proceeded to trial on breach of contract, breach of express warranty, and breach of implied warranties. Dynamic cross-complained on a common count for goods sold and delivered, alleging that Electro Lock failed to pay invoices totaling \$236,349.93. *fn4

[16]

The jury awarded damages of \$96,591.22 to Electro Lock for various incidental damages such as unreimbursed refunds to customers, tow bills for cars that would not start, and other out-of-pocket expenses. That award is not contested on appeal. Dynamic challenges the \$5,373,504 awarded to Electro Lock as "lost profits" that allegedly would have been incurred from January 1, 1994 through June 30, 2003, had Dynamic's devices not been defective. *fn5 We shall affirm the judgment.

[17]

PROCEDURAL HISTORY AND STATEMENT OF FACTS

[18]

The alter ego ruling

[19]

The case was bifurcated, and the alter ego issue was tried before a special master, retired Justice Devich, before the breach of contract case was tried to a jury. In a statement of decision dated October 1998, the special master found Core and Cherokee were both alter egos of Dynamic. The relevant record relating to the alter ego issues is set forth in the discussion section below. *fn6

[20]

The Dynamic appeal

[21]

The essence of Electro Lock's case is that Dynamic designed, engineered and manufactured dangerously defective anti-theft devices that caused automobile fires, unwanted movement, and disablement of the vehicles in which they were installed. A recall of the devices was conducted under the auspices of the National Highway Traffic Safety Administration ("NHTSA"). The second phase of the trial was tried principally on the issue of damages; especially whether Electro Lock was entitled to lost profits and, if so, in what amount.

[22]

Motions in limine

[23]

The dispute regarding damages was set forth inter alia in two defense motions in limine. Defendants filed motion in limine #2 to exclude presentation of a tort theory of damages to the jury or, alternatively, to conduct a preliminary hearing requiring plaintiff to lay a foundation that special damages for lost business opportunities were within contemplation of the contracting parties. Defendants argued that Dynamic's contractual liability does not include damages for the destruction of Electro Lock's business, a tort remedy. *fn7

[24]

Defendants filed motion in limine #3 to exclude speculative testimony of plaintiff's damages expert or, alternatively, to conduct a preliminary hearing regarding the foundation for the experts' opinion. The motion sought to exclude testimony by "Electro Lock's purported damages expert, Steven Franklin, concerning legally unforeseeable damages" The trial court granted this motion to the extent that plaintiff's expert "will not be allowed to testify concerning calculations of claimed . . . lost [future] profits derived from the introduction of additional, unknown and unnamed future product lines. The court found that these are speculative and not proper damages for breach of contract or warranty." However, the court denied the defense request for a limitation on plaintiff's expert basing his opinion on compilation business records and other hearsay, as opposed to audited financial records, and denied the defense request for a foundational hearing prior to the testimony of plaintiff's expert. *fn8

[25]

The dispute over damages continued into the trial briefs and at trial of the second phase. Dynamic argued its profit margin on the Electro Lock business was slim or nonexistent and it never would have agreed to assume unlimited liability for consequential damages. In addition, Dynamic again emphasized this is not a tort action and that the damages for lost profits were not "reasonably foreseeable" to Dynamic at the time of contracting. (See Comm. Code, § 2715(2)(a).) Moreover, Dynamic argued that the claims of millions of dollars in lost future profits is "at best, grossly speculative." Finally, Dynamic argued that Electro Lock assumed the risk of loss.

[26]

Trial testimony

[27]

We will not set forth in detail the testimony regarding the defects in the anti-theft devices manufactured by Dynamic. The devices caused fires, disablement, and movement of the cars in which they were installed. Mr. Bailey, president of Electro Lock, had the idea of "front loading" an entire dealer's lot of vehicles with the after-market anti-theft devices. Thus, the device protected the fleet on the lot, to the benefit of the dealer. If the customer did not want to buy the device, it was plugged; the consumer was not charged, did not receive the benefit of an anti-theft device, but was still susceptible to the defective nature of Dynamic's product. Bailey also offered warranty programs, i.e., if a car with the device was stolen, the customer would be paid, ranging from \$1500 to replacement of the vehicle with a new car.

[28]

Cars with the devices had problems including unwanted movement, stalling and inability to start, and fires. *fn9 Dynamic unsuccessfully attempted to cure the defects. After a

request by Electro Lock, Dynamic at first refused to recall the devices, denying they were defective, but did so after Electro Lock petitioned the NHTSA.

[29]

The issues in Dynamic's appeal center on the effect of the defective devices on Electro Lock's business. Hank Bailey, president of Electro Lock, claimed at trial that he lost almost all his business, all his agents, and almost all of his sales value because of the dangerously defective products designed and manufactured by Dynamic. Dynamic does not contest the portion of the judgment that reimburses Electro Lock for the amounts Electro Lock had to pay satisfying dealers and consumers. Rather, Dynamic challenges only the lost profits awarded by the jury and diminished by the trial court. In opening statement, Dynamic characterized the case as "about the litigation lottery in a lawsuit happy world" and stated the numbers used by plaintiff's expert "are created out of whole cloth. Pie in the sky. They bear no resemblance to anything that really happened or could happen in this real world in which both companies make their way." Moreover, Dynamic argued that the agreement between Dynamic and Electro Lock did not extend beyond the last purchase order and Electro Lock is therefore precluded from seeking lost profits for a hypothetical 10-year period. Rather, according to Dynamic, lost profits were not part of the contractual relationship between the parties nor were they recoverable by Electro Lock. Moreover, Dynamic argued that consumers and dealers may have been concerned about Dynamic's products but did not hold that against Electro Lock and, in any event, the market for low-tech anti-theft devices not installed by the automobile manufacturer was, for a variety of reasons, "simply shrinking." The same line of attack continues as Dynamic's principal issues on appeal.

[30]

Dynamic's former president, William Orum, testified that Electro Lock was a customer of Dynamic when he became president in 1990. In 1990, Electro Lock was selling in Southern California and parts of the United States. By November or December 1993, Electro Lock was selling throughout the United States and probably overseas. There was a large volume increase in sales to Electro Lock through late 1993, both of keys to the device and the device itself. Mr. Bailey, president of Electro Lock, was well known throughout the industry.

[31]

At a 1994 automobile association conference, Electro Lock launched an ad campaign and had a large booth that "was a big splash." Orum told Bailey that the new unit was an improvement, would be safe and reliable, and that Dynamic, with a U.L. listed laboratory behind it, had the capability to design, manufacture and test a safe and reliable anti-theft device. There was an agreement by Orum in November 1993, regarding the non-relay unit, that Dynamic would supply all of Electro Lock's needs. *fn10 However, Orum conceded that Dynamic was not able to keep up with Electro Lock's demand for the product, that Electro Lock would basically sell every unit it could get its hands on, and that the units were back ordered for most of 1994. *fn11

[32]

Although Orum thought the products were safe at the time, in retrospect, he did not believe the non-relay unit was designed, manufactured, or tested properly. There were a high number installed in GM vehicles that failed to operate. The relay unit could be picked by steel wool. The first catastrophic failures, involving unwanted movement or a

vehicular fire, were reported in April or May of 1994. *fn12 A 1989 Bronco was a "total loss." There were 15 to 25 nonstarts in the nonrelay units. After at least six efforts to cure the defects, Orum ultimately decided that the device was not manufactured properly, was not tested well enough, and was not reliable. He concurred that one modified version was "a piece of junk." Orum also concluded that Dynamic did not have the capacity to design and properly manufacture the more sophisticated relay and non-relay devices.

[33]

Bailey was concerned that somebody was going to get killed by the product and offered to participate in a recall. Following internal delays, Orum wrote to the NHTSA in 1995 and reported the safety-related claims against the devices. *fn13 Orum sent another letter to NHTSA in April 1996. Core/Dynamic tried to develop a replacement product, but Bailey found a different device, Saco, which Orum supported from November 1995 and, several months later, supported via Dynamic without Core's approval. Orum could see no legitimate reason for the delay by Dynamic between November and April.

[34]

Sixty thousand to 75,000 of the units had been distributed by Dynamic from January 30 to October/November 1994; counting the 1995 units, a total of 70,000 to 100,000 were distributed. The prices of the units ranged from \$7.50 to \$8.75 and the keys were \$2.50 a key. Dynamic also sold plugs for under 50 cents each. *fn14

[35]

On the units sold for \$7.50 and \$8.75 a unit, Orum anticipated a profit of \$1 or \$2 per unit. He heard Bailey say he sold the non-relay harness for \$17 and the package of the harness and keypack for \$25 to \$100. The warranty program was part of the package price.

[36]

Orum knew that Electro Lock was losing customers after the devices started failing. *fn15 Orum also met a Sacramento dealer who was "hopping mad" because someone on his lot was able to "pick" the Electro Lock, and that dealer declined to continue doing business. He was aware that Electro Lock's business was "deteriorating significantly." He wanted to restore Bailey's name. In answer to the question "is it your opinion as a result of the defects in the products and the recall that Mr. Bailey's business was substantially damaged?", Orum replied "In my opinion I do believe his business was substantially damaged."

[37]

Orum acknowledges there were discussions about how he would "stand behind the product." There was a specific agreement about reimbursement and picking up half of any tow bill and incidental expenses. Electro Lock would not be required to pay for a product that did not work or which was defective, and Dynamic paid for fuses that needed to be replaced but not for the labor by Electro Lock's agents for installing the fuses. However, when he left Electro Lock in June 1996, not all the invoices for out-of-pocket expenses had been paid. According to Orum there was no intention to exclude lost profit damages; that just "wasn't even part of the consideration." He denied ever agreeing to be liable for lost profits prior to the introduction of the product. However, Orum testified there was no agreement Dynamic would not be responsible for lost profit damages, nor did he ever take the position with Bailey that Dynamic was not liable for lost profits. *fn16

[38]

Moreover, Orum was at the time of trial doing business with Electronic Padlock, which produced a lower-tech, less sophisticated device than the Dynamic products purchased by Electro Lock. *fn17 He believed there was still a market for such a product.

[39]

Steven M. Franklin, Electro Lock's expert accountant opined that the total loss in lost profits suffered by Electro Lock as a result of Dynamic's defective products was \$10,890,530. He examined Electro Lock's past profits, the Department of Commerce's statistics and a Los Angeles Times article to establish growth rate for the automobile after-market industry rather than Electro Lock's own 55% growth rate at the time. Once the projected sales were established, he subtracted the actual sales through the time of trial. He then factored in the variable and fixed expenses of the business, the incremental profit margin, and calculated lost profits. Franklin was subjected to intensive cross-examination by the defense. At the close of Mr. Franklin's testimony, the defense moved for non-suit stating "that the evidence on lost profits and damages is so thin and so speculative that it does fall well within the ambit of the cases we've cited" The court felt this was a jury question and denied the non-suit. *fn18

[40]

Defense expert Garber admitted a huge level of growth by Electro Lock preceding the receipt and distribution of Dynamic's defective products and a growth rate of 8 to 10% in the overall market for secured devices for the five years preceding trial. However, although not accessing comparable databases himself, he did not believe Franklin's calculations were reasonable. Garber opined lost profits for \$27,000 for 45 days, stating that Electro Lock should have been able to deal with the situation in a relatively short period of transition and "be up and running again with their agents, relationships and product in place." Given a hypothetical, Garber estimated lost profits "in the range of 150,000." Making other assumptions, he calculated consequential damages of \$182,000 as of April 30, 1999.

[41]

Garber believed any lost profits past one or two years would be "more uncertain" and speculative. Nevertheless, using Franklin's methodology for a longer period of time, Garber calculated \$111,000 for one and a half years; \$165,000 for 2 ½ years, \$241,000 for five years; and \$443,447 for 10 years. Using his own adjustments for correction of the discount rate, but Franklin's methodology, Garber calculated \$293,000 in lost profits for ten years.

[42]

Motion for new trial and judgment notwithstanding the verdict

[43]

Judgment was entered on the jury verdict. Defendants, conceding admissible evidence of total damages of \$278,157, continued to attack Mr. Franklin's opinions and the amount of damages in their motions for new trial and judgment notwithstanding the verdict. *fn19 The defense characterized the award as "a runaway jury verdict," "grossly speculative and excessive," and based on an unprecedented 10-year period for lost profits.

[44]

The court's tentative ruling was to deny the motion for JNOV and grant the motion for new trial on the issue of damages. Furthermore, the court requested that counsel submit calculations on lost profits, broken down on an annual basis, and based on a 19-month base period that would contain two Junes and two Julys. *fn20

[45]

On July 12, 1999, the trial court granted defendants' motion for new trial, as to damages only. Faulting the methodology of the calculations, the court nevertheless opined that plaintiff "did suffer a substantial loss of business because of the Defendant's defective products, and . . . should be awarded lost profits to compensate for that loss." The court summarized its concerns about the evidence as well as the evidence it felt supported an award to Electro Lock and concluded by ordering a new trial on the issues of damages only, "unless Plaintiff Electro Lock accepts a remittitur of the damages award to \$5,470,096."

[46]

On July 23, 1999, the trial court granted Electro Lock's motion for prejudgment interest as to the sum of \$96,591.22 from the date of the filing of the complaint and denied prejudgment interest as to all other amounts. *fn21 The court set forth its reasons in a detailed Basis for Rulings. On July 26, 1999, Electro Lock accepted the court's remittitur of the verdict to \$5,470,096.00, with the understanding the amount is exclusive of costs, including attorney fees and interest.

[47]

The parties thereafter argued regarding whether the court could and/or should enter a new judgment. On August 9, 1999, the trial court amended the judgment nunc pro tunc to reflect the remittitur, costs of suit, prejudgment interest, attorneys fees under Code of Civil Procedure section 425.16, and the referee's report. After outlining the postjudgment changes and rulings, the court determined the total amount of the judgment, as of May 28, 1999, to be \$5,609,276.50 and ordered postjudgment interest at 10 per cent per annum from that date.

[48]

The appeals

[49]

Dynamic appeals from the judgment as entered nunc pro tunc, as well as from the orders denying the motions for new trial and JNOV. Core and Tustin appeal from the same judgment and orders and specifically include all orders that became part of the judgment, including both the alter ego ruling and jury trial judgment concerning damages. Electro Lock's notice of appeal includes the issues it raises in its appellate briefs as well as issues since abandoned.

[50]

CONTENTIONS ON APPEAL

[51]

Appellant Dynamic contends: 1. The award for lost profits damages is speculative and not supported by substantial evidence. 2. The judgment is grossly excessive and tantamount to an award of tort damages. 3. There is insufficient evidence to support a finding that Dynamic caused Electro Lock to lose \$10 million over ten years. Thus, Dynamic seeks a new trial on the issue of damages.

[52]

Electro Lock argues in its cross-appeal: 1. The trial court improperly gave defendants a second chance to submit evidence, arguments and calculations regarding the proper calculation of Electro-Lock's lost profits. 2. The order conditionally granting a new trial on damages should be set aside. 3. Electro Lock is entitled to recover its attorney fees under Civil Code section 1717. 4. Electro Lock is entitled to an award of prejudgment interest on its past lost profits.

[53]

Appellants Core and Cherokee contest the trial court's application of law regarding the alter ego issues, arguing:

[54]

1. The court's rejection of the contract-tort distinction in its alter ego analysis infected the outcome and is reversible error.

[55]

2. The trial court's rejection of the requirement for a causal connection between defendants' corporate dealings and plaintiff's purported economic loss is also reversible error.

[56]

3. The actual, objective evidence contradicts the trial court's "mere instrumentality" findings.

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4. There is no evidence that either Cherokee or Core denied plaintiff the benefit of its contractual bargain with Dynamic.

[58]

DISCUSSION

[59]

The Dynamic appeal

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1. The award for lost profits damages, as modified by the trial court, is justified by the record.

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Dynamic's contentions attack the award for lost profits on a variety of grounds. We conclude that an award of lost profits is supported by the record and that substantial evidence supports the trial court's determination regarding the amount of lost profits.

[62]

In its multifaceted attack on lost profits, Dynamic concedes the standard of review is whether substantial evidence supports the trial court's ruling (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053) but argues that the evidence in the case at bench does not meet the test that substantial evidence must be "of ponderable legal significance. . . .

[and] must be reasonable . . . , credible, and of solid value' [Citation.]" (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

[63]

Dynamic challenges the evidence on the following grounds: a. The basis for Electro Lock's expert's opinion, that its business had been destroyed by the failure of the devices produced by Dynamic, was wrong; the expert admitted that if that assumption was wrong, all of his assumptions would be invalid; b. The expert utilized a misleading and distorted 18-month snapshot, consisting of Electro Lock's best sales period ever, as a base

from which to project ever-increasing sales and thus profits, ignoring the full history of Electro Lock; c. The expert used the unrepresentative 18-month base period to project ever-increasing sales, assuming that sales of low-end anti-theft devices would increase at the same rate as tires and seat covers; d. The expert violated Evidence Code section 801, subdivision (b) by failing to consider relevant and readily available information; e. The expert's opinion that there were lost profits during calendar years 1994 and 1995 was not supported by substantial evidence and was contradicted by all evidence in the record; and f. The record does not reflect the substantial evidence necessary to support the "opinion" testimony offered by the expert, nor the numerous assumptions he made in reaching his opinion.

[64]

"When appellants challenge the sufficiency of the evidence, all material evidence on the point must be set forth and not merely their own evidence. [Citation.] Failure to do so amounts to waiver of the alleged error and we may presume that the record contains evidence to sustain every finding of fact. [Citation.]' (Jordan v. City of Santa Barbara (1996) 46 Cal.App.4th 1245, 1255); see also Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881 [.]'" (Toigo v. Town of Ross (1998) 70 Cal.App.4th 309, 317.)"

[65]

"On an appeal challenging sufficiency of the evidence, appellant's opening brief must set forth all the material evidence on point; the brief cannot merely state facts favorable to appellant. [Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 166; Toigo v. Town of Ross (1998) 70 Cal.App.4th 309, 317, 82 Cal.Rptr.2d 649, 653-654; see Bresnahan v. Chrysler Corp. (1998) 65 Cal.App.4th 1149, 1153, 76 Cal.Rptr.2d 804, 807, fn. 5 (citing text)] . . . [¶] When appellant's opening brief states only the favorable facts, ignoring evidence favorable to respondent, the appellate court has discretion to treat the substantial evidence issue as waived and may presume the record contains evidence to sustain every finding of fact. [Toigo v. Town of Ross, supra, 70 Cal.App.4th at 317, 82 Cal.Rptr.2d at 654; see County of Solano v. Vallejo Redevelop. Agency (1999) 75 Cal.App.4th 1262, 1274, 90 Cal.Rptr.2d 41, 49; and Fortman v. Hemco, Inc. (1989) 211 Cal.App.3d 241, 256, 259 Cal.Rptr. 311, 320, fn. 9--appellant failed to set forth an account of evidence to support its claim of excessive damages: 'Such failure can result in the argument being deemed waived' (emphasis added) (but appellate court opted to consider the argument 'in the interests of justice.')]'" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2001) ¶ 8:70-8:71, p. 829.)

[66]

In view of Dynamic's failure to point out evidence contrary to its position, and given the state of the record, which Electro Lock claims contains substantial evidence, Electro Lock asks this court to consider sanctions. (See Westphal v. Wal-Mart Stores, Inc. (1998) 68 Cal.App.4th 1071, 1082-1083 [sanctions imposed where appeal indisputably had no merit.]) Indeed, we are concerned by Dynamic's failure to provide a complete statement of facts in light of the contentions being made on appeal. Especially when an appellant argues lack of substantial evidence, it is essential to this court's review that all relevant evidence be set forth. Appellant's failure has caused this court to devote substantial additional time to our review of the lengthy record on appeal. Nevertheless, we have reviewed the record in light of the applicable standard of review.

[67]

"Under general contract principles, when one party breaches a contract the other party ordinarily is entitled to damages sufficient to make that party 'whole,' that is, enough to place the non-breaching party in the same position as if the breach had not occurred. (Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 515 []; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 813; Rest.2d Contracts, ¶ 347.) This includes future profits the breach prevented the non-breaching party from earning at least to the extent those future profits can be estimated with reasonable certainty. (See, e.g., Sanchez-Corea v. Bank of America (1985) 38 Cal.3d 892, 907-908 []; Coughlin v. Blair (1953) 41 Cal.2d 587 []; 1 Witkin, Summary of Cal. Law, supra, Contracts, § 823.)" (Postal Instant Press, Inc. v. Sealy (1996) 43 Cal.App.4th 1704, 1708-1709.)

[68]

Moreover, "[u]nder contract principles, the non-breaching party is entitled to recover only those damages, including lost future profits, which are 'proximately caused' by the specific breach. (See, e.g., Metzenbaum v. R.O.S. Associates (1986) 188 Cal.App.3d 202, 211 []; Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal.App.3d 442, 457 [] [lost profits must be the natural and direct consequence of the breach]; 1 Witkin, Summary of Cal. Law, supra, Contracts, § 814 [It essential to establish a causal connection between the breach and the damages sought.].) Or, to put it another way, the breaching party is only liable to place the non-breaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the non-breaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain." (Postal Instant Press, Inc. v. Sealy, supra, 43 Cal.App.4th 1704, 1708-1709.)

[69]

We agree with Electro Lock that California law provides: "'Where the fact of damages is certain, the amount of damages need not be calculated with absolute certainty. . . . The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. . . .'" (GHK Associates v. Mayer Group (1990) 224 C.A.3d 856, 873, 274 C.R. 168.) [¶] See also Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 C.A.3d 442, 456, 457, 458, 277 C.R. 40; DuBarry Int. v. Southwest Forest Industries (1991) 231 C.A.3d 552, 562, 282 C.R. 181, citing the text; Al-Husry v. Nilsen Farms Mini-Market (1994) 25 C.A.4th 641, 651, 31 C.R.2d 28, Supp., infra, § 833; Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co. (1996) 47 C.A.4th 464, 489, 54 C.R.2d 888 [lost profit from impaired bonding capacity not inherently speculative]; Auerbach v. Great Western Bank (1999) 74 C.A.4th 1172, 1185, 88 C.R.2d 718 [promise to negotiate in good faith to modify existing loan agreement; because good faith did not require defendant to accede to modification allowing plaintiffs to stop payments for year without some concession, there was no basis for calculating actual financial benefit to plaintiffs from moratorium on payments, and damages awarded on evidence of payments made during year were pure speculation]" (1 Witkin, Summary of Cal. Law (2001 Supp.) Contracts § 823, p. 430; accord Grube v. Glick (1945) 26 Cal.2d 680, 692, 160 P.2d 832.)

[70]

Substantial evidence supports an award of lost profits. That is, as the trial court found, plaintiff "did suffer a substantial loss of business because of the Defendant's defective

products, and . . . should be awarded lost profits to compensate for that loss." The principal concern is whether the method used to determine lost profits and the amount awarded comports with the law.

[71]

Dynamic argues that the judgment is grossly excessive and tantamount to an award of tort damages in that a) an award of \$10 million in "lost profits" over ten years was not reasonably foreseeable as the "probable result" or "natural and direct consequence" of Dynamic's breach of its purchase order/invoice agreements with Electro Lock; b) the judgment represents "damages" well beyond the benefit of Electro Lock's bargain with Dynamic; and c) the judgment is disproportionate to any harm caused by Dynamic and therefore unconscionable.

[72]

Dynamic argues that the verdict places Electro Lock in a "far better position than it could have hoped to be from full performance of the contract." The contention focuses on the lack of any fixed-term contractual relationship between Electro Lock and Dynamic, Electro Lock's later utilization of an alternative supply of a better product, and the allegedly disproportionate nature of any harm caused by Dynamic (See Civ. Code, § 3359 ["Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."].) Dynamic emphasizes it sold only 75,000 devices with a potential of making a total profit of no more than \$75,000 to \$150,000 itself.

[73]

In an attack on the ground of excessive damages, "The standard of review is well established. [¶] The amount of damages is a fact question, committed first to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. [Citations.] All presumptions favor the trial court's ruling, which is entitled to great deference because the trial judge, having been present at trial, necessarily is more familiar with the evidence and is bound by the more demanding test of weighing conflicting evidence rather than our standard of review under the substantial evidence rule. [Citations.] [¶] We must uphold an award of damages whenever possible [citation] and `can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' [Citations.] [¶] In assessing a claim that the jury's award of damages is excessive, we do not reassess the credibility of witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor. [Citation.]" (Westphal v. Wal-Mart Stores, Inc. (1998) 68 Cal.App.4th 1071, 1078.)

[74]

We have reviewed the record and, especially given the trial court's conditional grant of a new trial and Electro Lock's acceptance of the reduced amount, cannot fault the judgment awarded on these grounds. We agree with the trial court's statement in denying non-suit that lost profits is generally a jury question and "[w]hether they can prove the amount they would like to prove is something for the Jury to decide, certainly, in the first instance" The jury made its decision "in the first instance" and the trial court reduced the

damage award. The court's judicious exercise of its discretion in substantially reducing the award took into account many of the arguments made by Dynamic.

[75]

Lost profits in the case at bench are more speculative than those for a buyer of seeds who paid for seeds that were not delivered. (See *Tomlinson v. Wander Seed & Bulb Co.* (1960) 177 Cal.App.2d 462, 472-473.) In such a situation, the prospect of lost profits is high and the period during which the loss will occur is fairly certain. (See also 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 832, pp. 741-743 [listing many contractual cases awarding lost profits on prospective resales and other future profits].)

On the other hand, Electro Lock has more certain losses than most new businesses whose "lost profits" may be quite speculative. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 890.)

[76]

The general rule is set regarding speculative lost profit damages, in contract and in tort, is set forth in *Grupe v. Glick*, supra, 26 Cal.2d at pp. 692-693, which explains, citing numerous cases, that "where the operation of an established business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales. [Citations.] On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] . . . But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. [Citations.] All of these cases recognize and apply the general principle that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent." (Italics added.) We conclude the law permits lost profits under the facts presented in the case at bench.

[77]

In a related contention, Dynamic phrases its attack on lost profits in terms of insufficiency of the evidence to support a finding that Dynamic caused Electro Lock to lose \$10 million over ten years. Dynamic argues that Electro Lock failed to present any evidence that the defective devices sold by Dynamic had "caused" Electro Lock's claimed 9 ½ years of lost business in that there was no testimony any dealer or agent would not do business with Electro Lock again. To the contrary, according to Dynamic, Electro Lock continued to use the same product name on its replacement device and successfully sold it to dealers and agents and the only dealer testified he returned to purchasing Electro Lock's new device. Dynamic cites an absence of proof that anyone refused to buy the new device marketed by Electro Lock because of previous problems with the Dynamic devices. The record is to the contrary.

[78]

The former president of Dynamic, William Orum, testified he knew that Electro Lock was losing customers after the devices started failing. He was aware that Electro Lock's

business was "deteriorating significantly" and the clear inference was that this precipitous decline was due to the defective devices provided by Dynamic.

[79]

Orum specifically knew of the loss of Newsome's Chevrolet, a Montana dealership, and a few others. He also went to a couple other dealers, including one in Denver. Orum met a Sacramento dealer who was "hopping mad" because someone on his lot was able to "pick" the Electro Lock, and that dealer declined to continue doing business.

[80]

We thus find substantial evidence to support an award of lost profits to Electro Lock caused by Dynamic's seriously defective products. Substantial evidence also supports the amount awarded following the court's grant of a conditional new trial. Plaintiff's expert Franklin set forth a reasonable methodology for calculating lost profits. He used the actual sales as of January 1993; applied percentages of growth rate; deducted actual sales; applied a percentage calculated to be an incremental profit margin; and, for future lost profits, applied a discount rate. *fn22 The trial court used that methodology but adjusted some of Franklin's calculations using numbers and a time period that are supported by substantial evidence in the record.

[81]

Dynamic's contentions about Franklin's assumptions neglect to view the record as a whole. For example, Franklin answered in the affirmative to the question "and if it [Electrolock's business] weren't destroyed, then none of your assumptions would be valid; correct sir?" But in giving his opinion, he obviously knew and acknowledged that "Mr. Bailey is still in business today . . . struggling, but I . . . never opined that it couldn't be rebuilt." The ongoing nature of the business and actual sales made in the intervening years were factored into his opinion of lost profits.

[82]

Our job as an appellate court is not to decide if substantial evidence would support a result different from that reached by the jury and, as here, by the trial court after serious consideration of a motion for new trial. Neither is it to determine if, given the same evidence, we would have reached a different result. Rather, we review the record and the relevant law. Both support the judgment.

[83]

Electro Lock's cross-appeal

[84]

Electro Lock argues in its cross-appeal that the jury verdict should stand and that it should be awarded attorney fees under Civil Code section 1717 and prejudgment interest on past lost profits. As we next explain, the trial court did not err in granting the conditional new trial motion or in denying attorney fees.

[85]

1. The trial court considered only evidence submitted at trial and reasonable inferences therefrom in granting the conditional new trial motion.

[86]

Electro Lock contends that the trial court improperly gave defendants a second chance to submit evidence, arguments and calculations regarding the proper calculation of Electro Lock's lost profits. The unusual amount of posttrial briefing did not prejudice Electro Lock in light of the court's insistence in its order granting the motion for new trial that the

"[c]ourt has not based its ruling on any new evidence, but believe[s] it has the power to apply reasonable inferences from the evidence introduced at trial and has sought to do so."

[87]

In granting the motion, the court found that defendants' adjustments to those figures were based on the evidence received at trial and specifically identified portions of the record, including testimony of Bailey, Franklin, Garber, and Weber, as well as various exhibits, the court found to be supportive. Given the complexity of the data and the calculations, we can fully empathize with the trial court's request for clarification of both methodology, the basis for the figures used, and the calculations. Whether or not the extra briefing and alleged attempts by defendants to introduce additional evidence after trial was appropriate, the trial court's reliance on only evidence produced at trial and reasonable inferences drawn therefrom, even if the inferences became apparent through the defendants' briefing, does not nullify its ruling.

[88]

2. The order conditionally granting a new trial on damages was not an abuse of discretion.

[89]

Electro Lock claims that the trial court abused its discretion in granting a conditional new trial on the issue of damages. The challenge to the grant of a conditional new trial is based on both procedural and substantive concerns. Electro Lock characterizes the court's order as relying exclusively on the "19th month issue" and states that that issue does not support the order, which Electro Lock argues is not otherwise supportable.

[90]

Code of Civil Procedure section 657 requires that an order granting a new trial on the ground of either insufficiency of the evidence or excessive or inadequate damages shall not be affirmed "unless such ground is stated in the order" Moreover, if granted on either of those grounds, it is "conclusively presumed that said order as to such ground was made only for the reasons specified" and "such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (Ibid.)

[91]

"Strict Supreme Court interpretations of Code of Civil Procedure section 657 have created a 'procedural minefield' for trial judges who issue new trial orders. [Citation.]" (Thompson v. Friendly Hills Regional Medical Center (1999) 71 Cal.App.4th 544, 550, fn. 5.) Electro Lock seeks to invoke that procedural minefield in its effort to reverse the order granting a new trial and to reinstate the jury's verdict. (See, e.g., Ballou v. Master Properties No. 6 (1987) 189 Cal.App.3d 65, 71 ["If a statement of reasons has not been filed within the 10-day period, the order granting new trial must be reversed and the judgment automatically reinstated."].)

[92]

The trial court's order in the case at bench specified both "insufficient evidence" and "excessive" damages not supported by sufficiently credible evidence. The order explained deficiencies in the calculations and recalculated the lost profit damages. Whether the standard of review is substantial evidence or abuse of discretion, *fn23 we find no error in the trial court's decision to recalculate and reduce lost profit damages.

[93]

3. Electro Lock is not entitled to recover its attorney fees under Civil Code section 1717.
[94]

The trial court declined to award attorney fees to Electro Lock, which based its claim on a provision on its own invoices that states "Plus Attorneys Fee." *fn24 As the trial court explained in denying Electro Lock's request for attorney fees, the invoices on which the claim is made "first were used after the failure of the non relay devices as a way of returning the defective devices to Dynamic, and requesting payment of the charges that Dynamic had previously agreed to pay on a per-device basis." (Italics added.)

[95]

Commercial Code section 2207 does not compel imposition of attorney fees in this situation. *fn25 As Justice Tobriner wrote in *Steiner v. Mobil Oil Corp.* (1977) 20 Cal.3d 90, 100, "Section 2207 is thus of a piece with other recent developments in contract law. Instead of fastening upon abstract doctrinal concepts like offer and acceptance, section 2207 looks to the actual dealings of the parties and gives legal effect to that conduct. Much as adhesion contract analysis teaches us not to enforce contracts until we look behind the facade of the formalistic standardized agreement in order to determine whether any inequality of bargaining power between the parties renders contractual terms unconscionable, or causes the contract to be interpreted against the more powerful party, section 2207 instructs us not to refuse to enforce contracts until we look below the surface of the parties' disagreement as to contract terms and determine whether the parties undertook to close their deal. Section 2207 requires courts to put aside the formal and academic stereotypes of traditional doctrine of offer and acceptance and to analyze instead what really happens."

[96]

Where as here Electro Lock's own invoices were generated postbreach as a request for reimbursement for the breach, and there was no agreement by Dynamic to the attorney fee provision, the trial court justifiably concluded that the attorney fee provision did not become part of any contract between these parties. (See *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 513-519, rev. denied [liability limiting language was not part of the parties' contracts though included in forms for 12 years and stated to expressly condition acceptance of purchase orders on assent to the additional limitation of liability terms].)

[97]

Cross-appellant Electro Lock's opening brief does not even mention *Transwestern*. Moreover, Electro Lock's reliance on *Boyd v. Oscar Fisher Co., Inc.* (1989) 210 Cal.App.3d 368, 378-379 [attorney fee provision found in manufacturer's invoices to dealer and not in their dealership agreement was nevertheless enforceable under section 2207]; *South Bay Transportation Co. v. Gordon Sand Co.* (1988) 206 Cal.App.3d 650, 660 [recognizing that signed bills of lading can add terms to a carrier's contract]; and *Frank M. Booth, Inc. v. Reynolds Metals Company* (E.D.Cal. 1991) 754 F.Supp. 1441, 1448 [where buyer and seller exchanged forms which did not agree on all terms of contract, and each party's form permitted it to recover attorney fees in specified circumstances, section 2207 converted such provisions into clauses permitting the prevailing party to recover attorney fees for any dispute on the contract], is misplaced.

[98]

South Bay Transportation does not discuss section 2207 and instead relies on a general understanding that "[s]igned bills of lading, like the sample in evidence, can add terms to a carrier's contract. (Civ. Code, § 2176.)" (South Bay Transportation Co., supra, 206 Cal.App.3d at p. 660.) The motion was based on a provision in the invoices or bills of lading from carrier signed by shipper for recovery of attorney fees involved in effecting payment and thus existed before any breach. In resolving "the battle of the forms" in Frank M. Booth, Inc., supra, 754 F.Supp. 1441, 1448, the court recognized that the forms used by both parties included a provision for attorney fees, not the situation in the case at bench. Moreover, the court in Frank M. Booth, Inc. explains that the California Supreme Court in Steiner, supra, has rejected a rule favoring the party who sends the last form.

[99]

Boyd v. Oscar Fisher Company, Inc., supra, 210 Cal.App.3d 368, 378-379, is more helpful to Electro Lock but is not dispositive. In Boyd, there was a written dealership agreement between the manufacturer of photographic equipment and its dealer. After the original agreement had been executed, the manufacturer sent the dealer invoices for goods, and those invoices contained an attorney fees provision. Many of the same arguments made by Dynamic in the case at bench were made and rejected in Boyd, which held that the invoices in that case were part of the contract although sent after the dealership agreement had been signed. (210 Cal.App.3d 368, 379.) However, the dealer in Boyd had been employed by the manufacturer, going from sales to management, before leaving New York for California to act as a dealer. He asked the manufacturer to be billed by manufacturer rather than collecting his commission after the manufacturer was paid. (Id. at p. 374). Moreover, the dealer was aware that the manufacturer's standard invoice provided: "If referral to a collection agency or an attorney becomes necessary as a result of non-payments cost of collection proceedings including reasonable attorneys fees shall be added to the amount due." (Ibid.) The dispute between the parties in Boyd began when dealer began selling a competing product and manufacturer therefore terminated dealer's exclusive dealership. (Id. at p. 375) Dealer sued manufacturer; manufacturer filed a cross complaint and filed a motion for attorney fees, which was granted and upheld on appeal. (Id. at pp. 376-380.) The Boyd court found that substantial evidence "supports implicit conclusions that the parties were merchants who added terms to the dealership agreement by subsequent invoices," including the attorney fees agreement. (Id. at p. 379.)

[100]

In the case at bench, the original agreement included provisions about compensating Electro Lock if there were problems with Dynamic's products. The parties had not, however, agreed to attorney fees. The invoices were sent only after the products were found to be defective and inserted an almost parenthetic provision for 18% interest and stated "Plus attorney fees." Given the analysis of additional terms set forth in Transwestern, supra, 46 Cal.App.4th 502, 514, and Steiner, supra, 20 Cal.3d 90, 100, such a material alteration of the agreement at that point in the relationship between the parties need not be considered part of their contract. The trial court did not err in denying Electro Lock's motion for attorney fees.

[101]

4. Electro Lock is not entitled to an award of prejudgment interest on its past lost profits.

[102]

Civil Code section 3287 provides for the awarding of prejudgment interest:

[103]

"(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.

[104]

"(b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed."

[105]

The amount due to Electro Lock in the case at bench was not "certain, or capable of being made certain by calculation," pursuant to subdivision (a). The trial court did not err in denying prejudgment interest. Nor can we imagine, based on the reasonable conflict in the testimony regarding the calculation of damages, that the trial court in any way abused its discretion in denying prejudgment interest. (*Jones v. Wagner* (2001) 90 Cal.App.4th 466, 481; compare *Cheng v. California Pacific Bank* (1999) 76 Cal.App.4th 274, 283.)

[106]

"[I]t is clear the policy underlying the requirement for prejudgment interest where the damages are deemed 'certain' or 'capable of being made certain . . . ' (Civil Code, § 3287) is that in situations where the defendant could have timely paid that amount and has thus deprived the plaintiff of the economic benefit of those funds, the defendant should therefore compensate with appropriate interest." (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 962.) As in *Wisper Corp. ibid.*, "[t]he difficulty in applying such policy in this case is patent from the facts" The trial court granted Electro Lock's motion for prejudgment interest as to the sum of \$96,591.22 from the date of the filing of the complaint. Its denial of prejudgment interest as to all other amounts is clearly justified given the difficulty of ascertaining the amount upon which interest would be calculated.

[107]

The Alter Ego Appeal

[108]

Justice Devich tried the alter ego issue in a bifurcated proceeding without a jury. The hearing was held on several dates in September 1998. The 20-page statement of decision on the alter ego issues concludes: "Both Core and Cherokee ran Dynamic as its own. Core was the Alter Ego of Dynamic. Cherokee was the Alter Ego of Dynamic. Core was the Alter Ego of Cherokee. They can not be separated because of the way they operated. [¶] Core and Cherokee were Alter Ego corporations. Their subsidiaries were not allowed to function independently when it came to the concerns of Dynamic. Dynamic was treated in business as a division not as a separate and distinct corporation. Cherokee was not treated by [its] parent corporation, Core, as a true independent subsidiary when dealing with the operations of Dynamic.

[109]

"Further, the conduct of Core and Cherokee created a situation that strongly showed an intent of Bad Faith on their part to limit their losses at the expense of certain creditors such as the Plaintiff. ¶ That by their conduct, an inequitable result could and did occur."

[110]

Moreover, "Although there was additional evidence that showed the doctrine applied, more need not be shown than the evidence discussed. Plaintiff sustained [its] burden in all respects. The doctrine applied. Bad Faith existed. An inequity could and did occur."

[111]

Core and Cherokee reject Justice Devich's analysis of the alter ego issue and contend that there is no basis for holding either entity liable for Dynamic's breach of contract. They emphasize that limitation on shareholder liability is the primary benefit of incorporation and the alter ego doctrine is a narrow exception to the general rule that a parent corporation is not liable for the acts or omissions of a subsidiary. (*Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc.* (1981) 116 Cal.App.3d 111, 199.) "Because society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that imposition of alter ego liability be approached with caution. (*Cascade Energy and Metals Corp. v. Banks* (1990) 896 F.2d 1557, 1576.)" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249.)

[112]

"Liability may be imposed only where the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former. [Citations.] `With increasing frequency, courts have demonstrated a readiness to disregard the corporate entity when a wholly owned subsidiary is merely a conduit for, or is financially dependent on, a parent corporation. In the interests of justice and to prevent fraud, the courts will ignore the existence of a corporate entity used to cut off either causes of action against or defenses by another corporate entity.' (1A *Ballantine & Sterling, Cal. Corporation Laws* (4th ed. 1980) § 296.02, pp. 14-32.1-14-33.)" (*Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc.*, supra, 116 Cal.App.3d 111, 119.) Part of the reason given to justify the liability is that "it would be unjust to permit those who control companies to treat them as a single or unitary enterprise and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity." (*Las Palmas Associates v. Las Palmas Ctr. Associates*, supra, 235 Cal.App.3d 1220, 1249.)

[113]

As a general matter, corporate entity will be disregarded on alter ego principles where (1) there is such unity of interest and ownership that the personalities of the separate entities no longer exist; and (2) if the acts are treated as those of the corporation alone, an inequitable result will follow. (*Riddle v. Leuschner* (1959) 51 Cal.2d 574, 580; accord *Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1032.) When the "entity sought to be held liable is another corporation instead of an individual," California has recognized that "[a] very numerous and growing class of cases wherein the corporate entity is disregarded is that wherein it is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation." [Citations.] [Citation.]" (*Las Palmas Associates. v. Las Palmas Center Associates*, supra, 235 Cal.App.3d 1220, 1249).

[114]

Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 838-840, sets forth an extensive list of factors to be considered in applying the alter ego doctrine: "[1] Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses . . . ; [2] the treatment by an individual of the assets of the corporation as his own . . . ; [3] the failure to obtain authority to issue stock or to subscribe to or issue the same . . . ; [4] the holding out by an individual that he is personally liable for the debts of the corporation . . . ; [5] the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities . . . ; [6] the identical equitable ownership in the two entities ; [7] the identification of the equitable owners thereof with the domination and control of the two entities; [8] identification of the directors and officers of the two entities in the responsible supervision and management; [9] sole ownership of all of the stock in a corporation by one individual or the members of a family . . . ; [10] the use of the same office or business location; [11] the employment of the same employees and/or attorney . . . ; [12] the failure to adequately capitalize a corporation; [13] the total absence of corporate assets, and undercapitalization . . . ; [14] the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation . . . ; [15] the concealment and misrepresentation of the identity of the responsible ownership, management and financial interests, or concealment of personal business activities . . . ; [16] the disregard of legal formalities and the failure to maintain arm's length relationships among related entities . . . ; [17] the use of the corporate entity to procure labor, services or merchandise for another person or entity . . . ; [18] the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another . . . ; [19] the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge for illegal transactions . . . ; and [20] the formation and use of a corporation to transfer to it the existing liability of another person or entity. . . ." (See also Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft (1999) 69 Cal.App.4th 223, 249-250 [list is not exhaustive].)

[115]

Justice Devich heard testimony concerning the interaction of the entities during the period from about 1989 through to 1998 and clearly considered those factors. The statement of decision carefully and in detail identifies many factors that support the conclusion of alter ego and rejects defendants' contention that their associations and conduct was merely "that of a parent corporation dealing with one of its subsidiary corporations."

[116]

Justice Devich initially found that, factually, there was such a unity of interest and ownership in Cherokee and Dynamic that their separate personality no longer existed. First, he found that there was acceptable and relevant evidence that "Cherokee controlled and ran the day by day operations of Dynamic." The president of Cherokee tried to "give the impression the business output" from Dynamic to Cherokee was "not even 50%, [but] more like 20%," other evidence shows that for six months in 1990, fully 90% of

Dynamic's business output went to Cherokee. Moreover, there was evidence "that products were sold at a loss from Dynamic to Cherokee."

[117]

Other evidence used by Justice Devich to support a unity of interest include: both the intent of Cherokee to control Dynamic from the time of its acquisition as well as Dynamic's treatment as a division of Core and Cherokee; overlapping business relationship where Core eventually took complete control of the Dynamic recall in 1995; correspondence between the administration and officers of Cherokee and Core showing they viewed Dynamic as their own and not a separate entity; administrative control of Dynamic where Orum was "treated as a `puppet;'" *fn26 lack of any true governing board of directors or board meetings for Dynamic; a controller for Dynamic who was also Cherokee's controller, never an employee or officer of Dynamic, but told Orum what to do; *fn27 and control by administrative assistance from Core, including legal advice, and placing Cherokee and Dynamic under Core's umbrella insurance program without their input. Justice Devich concluded that these indicia and others satisfied the relationship of the control prong between Core, Cherokee and Dynamic. That is, "Dynamic relied on Cherokee for its performance and operation. Cherokee then relied on Core for its own performance and operation as it related to Dynamic. A separate corporate life did not prevail within Dynamic as to its manufacturing operations, nor a separate corporate being within Cherokee when it came to Dynamic. Both were beholden to Core for their existence."

[118]

The statement of decision then reviewed a second prong of the alter ego analysis and concluded that an inequitable result follows if the acts of Core, Cherokee and Dynamic were treated as those of Dynamic alone. In its discussion of this issue, the statement of decision reiterated control issues of the "financial dependence of Dynamic from Cherokee and then Core; the manipulation of Dynamic assets by Core and Cherokee; the inadequacy of capitalizing Dynamic by Core and Cherokee; the general insolvency of Dynamic; the asset stripping of Dynamic by Core and Cherokee; and finally the lack of normal business motivation of Core and Cherokee towards Dynamic."

[119]

These of course are factors set forth in *Associated Vendors, Inc. v. Oakland Meat Co.*, supra, 210 Cal.App.2d 825, 838-840. In addition to citing the factors in support of the argument that Core and Cherokee controlled Dynamic, Justice Devich observed that several of these factors also give strong credence to Electro Lock's position that an inequity would take place if the alter ego doctrine were not applied in the case at bench. The statement of decision added that "Core and Cherokee consistently diverted the major portion of the cash assets of Dynamic." The process of asset stripping left Dynamic with insubstantial financial assets either to run its own day to day operations or to pay any liabilities. *fn28

[120]

A third principal issue discussed in the statement of decision was the defense contention that absent a showing of bad faith, the alter ego theory is inapplicable. Justice Devich found that, if bad faith must be shown, it was shown here and plaintiff was affected by the bad faith.

[121]

The statement of decision tackled other issues. For example, Justice Devich rejected the defense position that proximate cause and damages must be proven by plaintiff as a necessary element of an alter ego relationship and decided that any injury or damage to a plaintiff is a separate issue. Nevertheless, he found that plaintiff did present "reliable testimony that it was owed but never paid monies due them" in excess of \$236,000. Therefore, assuming damages were required, plaintiff Electro Lock met its burden.

[122]

Finally, Justice Devich rejected the defense argument that the alter ego doctrine should not be applied because the case at bench is based on a contract and not a tort theory.

[123]

Core and Cherokee contest Justice Devich's conclusion of alter ego, arguing: 1. The court's rejection of the contract-tort distinction in its alter ego analysis infected the outcome and is reversible error; 2. The trial court's rejection of the requirement for a causal connection between defendants' corporate dealings and plaintiff's purported economic loss is also reversible error; 3. The actual, objective evidence contradicts the trial court's "mere instrumentality" findings; and 4. There is no evidence that either Cherokee or Core denied plaintiff the benefit of its contractual bargain with Dynamic. We disagree with this analysis.

[124]

Regarding the contract-tort distinction in application of the alter ego doctrine, Core and Cherokee first cite primarily cases from other states and treatises that invoke the consensual element in contract law compared to the lack of ability of a tort plaintiff to protect against the alter ego situation. Defendants initially make this argument without referencing contrary and controlling California cases applying the alter ego doctrine to contractual disputes (see, e.g., *Automotriz etc. De California v. Resnick* (1957) 47 Cal.2d 792), *fn29 or by categorizing California cases in ways not particularized in those cases.

[125]

California cases may look to the knowledge of the parties in a contractual situation when deciding whether to disregard the corporate entity (*Lynch v. McDonald* (1909) 155 Cal. 704, 719), *fn30 but that is merely part of the total analysis applied in determining whether the alter ego doctrine applies. For example, in *Hiehle v. Torrance Millworks, Inc.* (1954) 126 Cal.App.2d 624, 630, distinguishing *Lynch v. McDonald*, this district concluded that plaintiff should not be estopped from invoking alter ego in a contractual situation where defendants "in reality, were essentially partners operating through a corporate form, and they are liable for its debts." There, as here, the trial court "looked through all the make-believe to the facts of the situation and . . . reached a just decision." (*Ibid.*) Whether a plaintiff actually looked to the alter ego corporation or individual is one factor among the many that can be considered. (See *Harris v. Curtis* (1970) 8 Cal.App.3d 837, 843 [no alter ego where no undercapitalization and plaintiff was not led to believe he was dealing with the officers and shareholders as individuals]; accord *T W M Homes, Inc. v. Atherwood Realty & Inv. Co.* (1963) 214 Cal.App.2d 826, 853 [upholding trial court's decision against an alter ego finding, stating "while the evidence thus relied upon might have supported a contrary finding, it did not compel one and that substantial evidence supported the finding that the separate personalities of both the corporation and the individuals connected with it continued to exist"].)

[126]

As for the defense contention that the trial court's rejection of the requirement for a causal connection between defendants' corporate dealings and plaintiff's purported economic loss is reversible error, to the extent they mean there is a lack of evidence that plaintiff sustained harm, substantial evidence before both Justice Devich and the jury bely that assertion.

[127]

"A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice. (Taylor v. Newton, supra, 117 Cal.App.2d 752, 757 ; accord, Most Worshipful Sons v. Sons etc. Lodge (1958) 160 Cal.App.2d 560, 565-566 []; see also, 5 Witkin, Cal.Procedure (3rd. ed. 1985), Pleading, § 875, pp. 316-317.)" (Hennessey's Tavern, Inc. v. American Air Filter Company, Inc. (1988) 204 Cal.App.3d 1351, 1359.)

[128]

Finally, we agree with Justice Nott, writing for this division in Las Palmas Associates. v. Las Palmas Center Associates, supra, 235 Cal.App.3d 1220, 1248, that: "'The law as to whether courts will pierce the corporate veil is easy to state but difficult to apply.' (Talbot v. Fresno-Pacific Corp. (1960) 181 Cal.App.2d 425, 432, [5 Cal.Rptr. 361].) Because it is founded on equitable principles, application of the alter ego `is not made to depend upon prior decisions involving factual situations which appear to be similar. . . . "It is the general rule that the conditions under which a corporate entity may be disregarded vary according to the circumstances of each case.'" [Citations.] Whether the evidence has established that the corporate veil should be ignored is primarily a question of fact which should not be disturbed when supported by substantial evidence. (Jack Farenbaugh & Son v. Belmont Construction, Inc. [(1987)] 194 Cal.App.3d [1023] at p. 1032.)" Justice Devich's analysis, findings and conclusions are amply supported in the record.

[129]

DISPOSITION

[130]

The orders and judgment appealed from are affirmed. The parties are to bear their own costs on appeal.

[131]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

[132]

We concur:

[133]

BOREN, P.J.

[134]

DOI TODD, J.

Opinion Footnotes

[135]

*fn1 Presiding Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[136]

*fn2 The jury initially awarded \$9,157,402 in consequential damages. Following motions for new trial and judgment notwithstanding the verdict that challenged the award, the trial judge remitted the award to \$5,470,096.

[137]

*fn3 Dynamic was a manufacturing subsidiary of Core Industries, Inc. (Core) and C II. Tustin, Inc., formerly known as Cherokee International, Inc. (Cherokee), which were found to be the alter egos of Dynamic. Core and Cherokee, the grandparent and parent corporations of Dynamic, appeal the alter ego ruling. Electro Lock also sued Motec, Dynamic's successor. Motec's summary judgment was reversed in an unpublished opinion (B120581) during the second phase of the bifurcated trial.

[138]

*fn4 Core cross-complained for defamation. A demurrer to that cross-complaint was sustained without leave to amend, and the cross-complaint was ordered dismissed by the court.

[139]

*fn5 The jury returned special verdicts that Dynamic breached its contract(s) with and breached express and implied warranty provided to Electro Lock; such breaches caused damage to Electro Lock; and Electro Lock was not barred from recovery by the defense of unclean hands.

[140]

*fn6 Similarly, facts discretely relating to Electro-Lock's cross-appeal are set forth below.

[141]

*fn7 The court tentatively denied this motion based on the official commentary to Commercial Code section 2715; but, after hearing extensive argument, the court took the ruling under further submission. Later the same day, the court denied the motion, concluding that whether the buyer's consequential damages were foreseeable by the seller was an issue for the jury.

[142]

*fn8 The court requested additional briefing on the period of time for which plaintiff's damages expert could reasonably project loss of future profits. Defendant argued the court should either exclude such evidence or limit the evidence to a short period of time because "Electro Lock could have no reasonable expectation of recovering damages for lost 'future' profits arising out of its 'invoice to invoice' relationship with Dynamic." Plaintiff responded that the court should permit the jury to determine lost profits, "without any limitation."

[143]

*fn9 The first notice received by Dynamic was information from Electro Lock that a car in Oregon had run into the end of its garage or into a sign or post and had banged up the

front end of the car. Dynamic's president, Orum, investigated and made changes to the device; he sent free fuses to Bailey to "have him fuse all vehicles" in which the device was installed. By June, Dynamic started putting fuses in every non-relay unit. Orum was never able to substantiate that a fire occurred on a unit that was fused. His advice to add a relay to solve other problems was not followed by Electro Lock; Bailey believed it would invalidate Electro Lock's marketing of a semi conductor solution. Electro Lock continued to order the non- relay unit from Dynamic. Dynamic began to produce the relay unit in summer or fall of 1994 and discontinued the nonrelay unit in October- November 1994. The purchase orders for the non- relay units began in March 1995.

[144]

*fn10 The same agreement applied to the nonrelay unit, i.e., Electro Lock had to buy the two products exclusively from Dynamic and, within reason, Dynamic had to produce what Electro Lock was requesting.

[145]

*fn11 According to Orum, until October or so of 1995, Electro Lock was able to sell whatever Dynamic could produce.

[146]

*fn12 After several more occurrences, Orum started logging them in. He did not log smoke coming of a dashboard if there was no fire outside of the unit. The first catastrophic failure was a phantom movement, which Orum thought was the result of a defect in that particular unit. One event was reported fire that totally destroyed a vehicle in Billings, Montana, in 1993.

[147]

*fn13 Dynamic did not agree to the recall of the relay unit until after Orum left. According to Orum, after the summer of 1995, Core became the decision maker regarding these issues.

[148]

*fn14 Given the numbers, Electro Lock was billed from \$800,000 to around a million dollars and paid at least half a million dollars. At some point, Bailey stopped paying because he said the product was not working. Orum did not ask for the money or threaten collection proceedings; the product did not work.

[149]

*fn15 Orum knew of the loss of Newsome's Chevrolet, a Montana dealership, and a few others. He also went to a couple other dealers, including one in Denver. When the units began failing and some dealers were cutting back or refusing to do business with Electro Lock in 1994, Bailey did not request payment for lost profits. Electro Lock first requested lost profits in 1995 following a September meeting in Detroit to recall the units.

[150]

*fn16 Furthermore, Orum did not take the position that Dynamic was not liable for 100 per cent of the cost of a car that burned or had unwanted or phantom movement when the device failed. Denying that the double sided harness had incidents of burning cars and unwanted movement, Orum acknowledged there was an occasional failure to operate when someone got stranded.

[151]

*fn17 Orum is the only employee of Electronic Padlock and supplies Electro Lock with the lit key for Electro Lock's current anti- theft device. The keys look to the naked eye the

same as those sold by Dynamic in 1994 and 1995. He also supplies Padlock product to Mr. Bailey under the SL- 1 name. Some of the keys purchased by Bailey in mid- 1996 said Electro Lock on them; others said Smart Lock.

[152]

*fn18 A motion for directed verdict and to preclude Franklin's testimony as wholly speculative and violative of Evidence Code section 801(b) was also denied.

[153]

*fn19 The defense projected other possible consequential damage awards ranging from a lost profits award for fiscal year 1996 of \$675,520 to a two year projection of lost profits, with a yield of \$1,466,725.

[154]

*fn20 The tentative ruling criticized plaintiff's expert's methodology in choosing a base period with one June ("which regularly contained significant amounts accelerated business expenses, as the result of income tax planning strategy") and two Julys ("which regularly contained significant amounts of deferred income receipts"), thus skewing the damage calculations towards excessive profitability. The tentative concluded that the damage calculations were "therefore speculative, and are not supported by any credible evidence."

[155]

*fn21 In the same minute order, the court granted in part and denied in part the defense motion to strike and tax costs and continued plaintiff's motion for reconsideration of its motion to strike the cross- complaint.

[156]

*fn22 Electro Lock was a very high- growth business in 1994, with actual sales of \$199,542 in January 1993 and a calculated compounded growth rate of 55 percent and a 69 percent growth rate the previous year. Nevertheless, Franklin used a much lower growth rates of 16 percent for 1994 and 51.9 percent for 1994, then averaged to 7.5 percent for future years, using the United States Department of Commerce and Los Angeles Times figures for after- market automotive parts and accessories, which ranged from 16 percent to a forecasted 2.5 percent. He deducted the actual sales of Electro Lock for 1994- 1998, which were known at the time of trial, and deducted the project actual sales for the following years by increasing the actual sales by the 7.55 percent figure. Then, considering both fixed and variable expenses, Franklin applied an incremental profit margin of 47.18 percent to the total lost sales figures. For the future lost sales, the five years following trial, he additionally applied a discount rate of 5.45 percent, the interest rate a United States Treasury Bill was paying on a five year note in June 1998.

[157]

*fn23 "[W]hen a trial court grants a new trial on the issue of excessive damages, . . . the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the order. . . . "Whatever may be the rule which should govern the trial judge, it is certain that when his [or her] action in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, [the] order will not be reversed unless it plainly appears that [the judge] abused his [or her] discretion; and the cases teach that when there is a material conflict of evidence regarding the extent of damage the imputation of such abuse is repelled, the same as if the ground of the order were

insufficiency of the evidence to justify the verdict." [quoting *Doolin v. Omnibus Cable Co.* (1899) 125 Cal. 141, 144-145, 57 (P. 774)] . . . The reason for this is that the trial court, in ruling on the motion, sits not in an appellate capacity but as an independent trier of fact.' (*Neal v. Farmers Ins. Exchange* [(1978)] 21 Cal.3d 910, 932- 933.)" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1052- 1053.)

[158]

*fn24 We note that the language is in small type at the bottom of the invoice sent by Electro Lock to Bill Orum at Dynamic and stated: "Delinquent after 30 days. A finance charge of 1 ½ % per month (18% per annum) will be charged on unpaid balances. Plus attorney fees." (Italics added.)

[159]

*fn25 Commercial Code section 2207 provides: "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. "(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: "(a) The offer expressly limits acceptance to the terms of the offer; "(b) They materially alter it; or "(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received. "(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code."

[160]

*fn26 For example, Orum was never provided with a copy of the by- laws and articles of incorporation, though he requested them. Rather, the evidence was that "he was placed in that position to do the bidding of Cherokee and Core." Core and Cherokee's formation of a company called Cable and Harness, created to avoid the workers compensation claims of Dynamic, also demonstrated Core and Cherokee's control of Dynamic and "to what extent Core and Cherokee would go to avoid their own responsibilities and those of a subsidiary."

[161]

*fn27 Justice Devich found that for almost a year, "Mr. Shah [Cherokee's controller] was an on site voice for Cherokee as to how Dynamic should be operated."

[162]

*fn28 The statement of decision observed "The overwhelming testimony showed that Dynamic received financial aid from Core, through Cherokee, almost daily, weekly or monthly. The financial aid was required to simply pay its normal vendors, provide for its payroll, meet its daily expenses and utility responsibilities. Core served as a bank not a parent." Core and Cherokee at one point "strongly considered filing bankruptcy for Dynamic."

[163]

*fn29 As Electro Lock points out, Core and Cherokee have also failed to provide a complete statement of facts in the opening brief on the alter ego issues. Where the legal

issues being presented are as here very factually based, even where there is a statement of decision setting forth the facts, such failure is a disservice both to opposing counsel and to the court. Furthermore, although some facts and issues in a statement of decision are waived by not bringing them to the attention of the trial court (Code Civ. Proc., § 634; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; 61 Cal.App.4th 158, 167), appellants may argue legal errors grounded in the statement of decision as written. Nevertheless, without objecting to any factual deficiencies in the statement of decision regarding stripping of assets, unprofitability, bad faith, and other such findings, Core and Cherokee have waived the factual bases of those issues for purposes of this appeal. (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140- 141.)

[164]

*fn30 As the Lynch court observed regarding the very special knowledge of the plaintiff in that case: "If this were an action by a stranger to the facts, who had been injured by ignorance of McDonald's holding of nearly all of the stock of the company, there might be some force in appellant's position, and some necessity for the application of the principle which he invokes; but appellant was not only an attorney at law, but was one who by years of association with McDonald and service for him and the company was thoroughly familiar with all the facts concerning the president's relation to the corporation. If he was content to act under a contract which respondent refused to sign except as an officer of the company, he cannot complain that McDonald, who was not a party signatory to the instrument, is not bound. True, McDonald, according to the findings, deceived Lynch with reference to the net earnings of the mines, but this deception had nothing to do with McDonald's relation to the corporation. Lynch knew all about McDonald's holdings, was cognizant of the resolution of the board of trustees authorizing the president to act for the corporation in practically all matters, and had advised respondent in all business affairs, including the effect of the various contracts prepared by Lynch and signed by him and one or both of these defendants." (*Lynch v. McDonald*, *supra*, 155 Cal. 704, 706.)