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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

EVEREST INVESTORS 8, LLC, et al., Plaintiffs and Respondents, v. MCNEIL PARTNERS, LP, et al., Defendants and Appellants.	B184498 (Los Angeles County Super. Ct. No. BC243024)

APPEAL from a judgment of the Superior Court of Los Angeles County. Brett C. Klein, Judge. Affirmed in part, reversed in part and remanded with directions.

Browne Woods & George, Eric M. George and Marta B. Almli for Defendants and Appellants.

Kendig Law Firm, Dennis A. Kendig; Law Offices of John A. Case, Jr. and John A. Case, Jr. for Plaintiffs and Respondents.

Following a merger of real estate limited partnerships with a real estate investment company, certain limited partners sued the general partner and its affiliates for breach of fiduciary duty and other claims. Trial was to the court sitting in equity. The court found the general partner had breached its fiduciary duty by inflating the value of its wholly owned property management company thereby depriving limited partners of the actual value of their partnership interests. The court awarded the limited partners their pro rata share of improperly diverted proceeds amounting to $1,270,755, plus prejudgment simple interest at the rate of 10 percent. The court also awarded twice the compensatory damage amount in punitive damages against the principal of the general partner and its related entities.

The general partner and its affiliates appeal from the judgment, claiming (1) the limited partners' exclusive remedy was an appraisal proceeding under the Corporations Code; (2) their action was barred in whole or in part because the court in a related class action derivative suit (as to which these limited partners had opted out) found the merger transaction procedurally fair and reasonable, and the units they held were subject to the release in the class action settlement agreement; (3) their lawsuit was barred because all the facts regarding the proposed transaction were fully disclosed before they purchased their partnership units; (4) liability is precluded as a matter of law where all the financial and legal experts reviewing the merger transaction opined the transaction was fair and reasonable to the limited partners; (5) the evidence was insufficient to find a breach of fiduciary duty and to support an award of punitive damages; (6) the court erred in its calculation of compensatory damages by including management fees legitimately earned in the period between the management company's valuation and the closing date of the merger; and (7) the court erred in awarding prejudgment interest of 10 percent rather than 7 percent.

We agree the general partner and management company had contract rights to the fees they earned in the interim period before the closing date of the merger transaction and thus it was improper for the court to return this amount to the limited partners when calculating their compensatory damage award. Accordingly, we will reverse this portion of the judgment and remand to the trial court to recalculate its damage and interest awards. We otherwise affirm the judgment in its entirety.

FACTS AND PROCEEDINGS BELOW

The McNeil partnerships consisted of 19 real estate limited partnerships and were all controlled by general partner appellant McNeil Partners, LP. The general partner was itself a limited partnership. Its sole limited partner was appellant Robert A. McNeil. The general partner's general partner was appellant McNeil Investors, Inc., a corporation whose shares were all owned by Robert A. McNeil (collectively McNeil).

McNeil Real Estate Management, Inc. (McREMI) was the management company for all the real estate assets in the limited partnerships. McREMI was also wholly owned by Robert A. McNeil.

Respondents are five limited liability companies which held interests in 14 of McNeil's public real estate limited partnerships (collectively Everest).[1]

Robert A. McNeil had been involved in real estate and as a real estate partnership syndicator for decades. In the 1970's and 1980's real estate partnerships were popular investments primarily because investors were permitted to deduct expenses of the partnerships against ordinary income. In 1985 McNeil sold his general partner interest in his real estate partnerships together with his management company to Southmark Corporation for approximately $60 million. In 1986 Congress passed the Tax Simplification Act of 1986. One of the primary purposes of the Act was to eliminate the offsetting of passive losses against ordinary income.

A few years later Southmark Corporation filed for bankruptcy. In 1991 McNeil repurchased the general partner interest and management company from Southmark Corporation for slightly over $5 million in the bankruptcy proceedings. In connection

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[1] Respondents are Everest Investors 8, LLC, Everest Investors 9, LLC, Everest Investors 12, LLC, Everest Management, LLC and KM Investments, LLC.

with McNeil's purchase of Southmark's interests the partnership agreements of the affected partnerships were amended to require McNeil (1) to begin liquidating the properties within seven years (or 1998) and (2) to use commercially reasonable efforts to complete the liquidation of the partnerships by December 31, 1999.

At the time of the events in this case McNeil's partnerships had increased to 19 (14 public and five private) and included 88 different properties: 59 multi-family residences, 13 retail properties, eight office buildings and eight self-storage facilities.

By 1995 McNeil had sold only a few properties and many limited partners became impatient. By August 1995 numerous investors filed suit seeking to compel McNeil to liquidate the properties. These suits were later consolidated in a class action entitled *Schofield v. McNeil Partners, L.P*. (*Schofield*).[2] The complaint in the *Schofield* action alleged McNeil had breached fiduciary duties by failing to fulfill its obligation to liquidate partnership assets and distribute proceeds of the sales to the limited partners; by charging excessive management fees; by refusing to liquidate the properties in order to continue collecting the excessive management fees, and other claims.

Everest is a sophisticated investor specializing in purchasing interests in real estate partnerships. Beginning sometime after the filing of the *Schofield* case Everest purchased some units and thereafter began making mini tender offers to individual investors in the McNeil partnerships. Everest offered the investors discounted prices for their units representing on average a 25 percent discount from the anticipated liquidation price. Apparently, there were numerous investors who preferred Everest's offer of immediate payment to the prospect of further delay in receiving proceeds from any eventual liquidation of the properties. Everest ultimately held approximately four percent of all the partnership units in the McNeil partnerships affected by the merger transaction involved in this case.

[2] *Schofield v. McNeil Partners, L.P*. (Case No. BC133799).

McNeil began to explore options for liquidating the partnerships or their assets. He considered creating an ESOP[3] and transferring his equity into this newly formed entity. This plan did not bear fruit. The president and CEO of McREMI, Ron Taylor, then made a presentation to CalPERS in the hopes CalPERS would be interested in investing in the partnerships or in acquiring their assets. Apparently, CalPERS had a policy of investing only in A grade real estate. The vast majority of the properties in the McNeil partnerships, however, were B, B minus or C grade properties. CalPERS declined the McNeil proposal.

In October 1997 McNeil, his wife, Carole McNeil, and Ron Taylor went to a convention for investment bankers in Chicago where they interviewed several investment bankers for the purpose of liquidating the partnership assets. In November 1997 McNeil retained the investment bank PaineWebber, Inc. PaineWebber recommended all the properties, including McNeil's management company, McREMI, be sold in a single portfolio transaction to maximize the potential return. PaineWebber believed there was greater potential for receiving a premium by selling in bulk rather than by selling one property at a time, or groups of properties piecemeal. The properties in the McNeil partnerships were relatively low grade and geographically diverse, located in all parts of the nation. Some properties suffered from deferred maintenance and/or environmental problems. PaineWebber expressed concerns about "cherry picking" which might leave some undesirable properties unsaleable.

McNeil presented PaineWebber's proposed portfolio sale to class counsel in the *Schofield* action. In a memorandum of understanding signed in March 1998 the parties agreed (1) McNeil would retain an investment bank; (2) the bank would submit all the

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[3] An ESOP, or employee stock ownership plan, is an employee benefit plan which makes the employees of a company owners of stock in that company. Several features make ESOPs unique as compared to other employee benefit plans. First, only an ESOP is required by law to invest primarily in the securities of the sponsoring employer. Second, an ESOP is unique among qualified employee benefit plans in its ability to borrow money. As a result, "leveraged ESOPs" may be used as a technique of corporate finance.

partnership interests to a bidding process; (3) any proposed sale would be subject to final negotiation with the *Schofield* class plaintiffs; and (4) require approval by the *Schofield* court.

In September 1998 the *Schofield* class action plaintiffs and McNeil affiliates entered into a stipulation of settlement. The stipulation set out the agreed procedures for sale of the partnership and management assets, and procedures for allocating values to each. Specifically, it entitled the *Schofield* class plaintiffs to review the fairness of any proposed transaction by an independent investment advisor who would analyze the values attributed to each asset, as well as the allocations of value between the properties and the management interests.

PaineWebber began soliciting bids shortly after it was retained. PaineWebber's bid form restricted all bids to an "all or nothing" format. Each bidder was asked to commit to confidentiality agreements. The firm had hoped to create a "feeding frenzy" by placing such a large portfolio on the market. At the time R.E.I.T.s were growing in popularity and size. However, and apparently for numerous reasons (including possibly a temporary tightening in the capital markets), it took two years and three months before McNeil received its one and only viable offer. This offer came from Whitehall Street Real Estate (Whitehall), an "opportunity" investment affiliate of the Goldman Sachs investment bank. Whitehall bid slightly over $644 million for all the assets. McNeil accepted Whitehall's bid.

Whitehall already owned numerous residential properties. Its business model was to leverage properties up to 80 percent and to retain them for only a short time. On average, Whitehall "flipped" its property holdings every 2.6 years. Based on its bid price, Whitehall expected to receive an internal rate of return on its investment of over 20 percent.

Whitehall had its own internal management company, Arcon, to manage its properties. Thus, according to Whitehall's analyst, Jonathan Langer, Whitehall placed no value on McNeil's management company, McREMI, when making its bid. Langer testified because Whitehall based its bid price on solely the real estate assets, it would have bid the same amount whether or not McREMI had been included in the transaction.

McNeil proposed a merger with Whitehall rather than a sale of the McNeil partnership assets. McNeil wanted equity in a new company to be formed in order to avoid capital gains tax on the sale of his general partner, limited partner and management assets. McNeil also wanted to be able to share in the profits as a partner when assets in the portfolio of the new proposed company were sold. Ultimately, Whitehall and McNeil agreed to a merger transaction and formed a new entity, WXI/McN Realty, L.L.C., to acquire the McNeil partnerships' assets. As a seller, McNeil would transfer the value of his wholly owned McREMI, the value of his general partner interest, the value of his limited partner interests, and with an additional $6 million in cash, McNeil, as a buyer, would receive a 46 percent interest in the new entity.

McNeil hired the investment banking firm, Robert E. Stanger & Co. to act on behalf of the limited partners. Stanger was engaged to value the real estate partnership assets and to render an opinion on the fairness of any proposed transaction. Stanger was also retained to determine the proper allocation of the proceeds to each partnership and management asset once a bid had been received and accepted. In analyzing each of the properties Stanger valued the entire portfolio at $601 million. Because Whitehall's bid of $644 million was considerably more than Stanger's overall valuation, Stanger opined Whitehall's bid was, from a financial point of view, fair to the limited partners.

In the process of allocating amounts to the various assets, Stanger valued McNeil's management company, McREMI, at $35 million. According to every witness who considered the issue, McREMI's value was in its management contracts with the partnerships McNeil controlled. Historically, McREMI had generated over $9 million in management fees annually. Stanger considered numerous alternatives to valuation of the management company but ultimately employed a valuation of McREMI as a going concern. Stanger prepared a five-year analysis of expected future cash flow based on these contracts, discounted this amount to present value, and arrived at a valuation for McREMI of $35 million.

Kevin Gannon of Stanger, who prepared the allocation analysis, had read the management contracts and was aware each was terminable on 90 days' notice. However, Gannon testified, in the real world management contracts are rarely terminated, and are usually extended. Moreover, Gannon reasoned, the management company had an alternative contract value. Some of the later contracts provided for disposition fees represented as a percentage of the sale price of the property. Some of the earlier partnership agreements instead provided for termination penalties called asset management and/or property management fees worth a year's worth of fees in the event the general partner was removed or the management contracts cancelled in favor of an outside company. This combination of termination, asset management and property management fees, assuming they were applicable, amounted to a contract value of $16.9 million.

Gannon supported Stanger's valuation of McREMI at $35 million by providing comparable sales prices of management companies. However, in each of the comparables given as examples, the sales were between affiliated companies in consolidations and the like, and not to an unaffiliated third party as in the proposed Whitehall transaction.

In May 1999 McNeil added a long-term acquaintance, Paul B. Fay, Jr., to the board of directors at the suggestion of McNeil's counsel, Skadden, Arps, Slate, Meagher & Flom. The board then named Fay to a "Special Committee" to review the fairness of the proposed Whitehall transaction on behalf of the limited partners. Fay, as the only member of the "Special Committee," retained Orrick, Herrington & Sutcliffe as counsel and the real estate investment firm Eastdil Realty to analyze the transaction. Eastdil went to Stanger's offices and reviewed Stanger's paperwork. Eastdil also performed a spot check on Stanger's assigned values of certain real properties. Eastdil issued an opinion stating Stanger's work was within the range of reasonableness.

Class counsel in the *Schofield* litigation also hired an investment banking firm, CFC Capital LLC, to assist in analyzing the Whitehall transaction and Stanger's proposed values and allocations. CFC Capital LLC reviewed Stanger's paperwork but conducted no independent investigation or appraisals. In reviewing Stanger's financial data CFC Capital LLC issued an opinion stating Stanger's conclusions were within the range of reasonableness.

In final negotiations, class counsel in the *Schofield* action was permitted to join certain meetings where Stanger was asked to explain or defend his assigned values and allocations. Orrick Herrington represented the "Special Committee" at these meetings. Financial advisors, Houlihan Lokey Howard & Zukin Capital, and the law firm of Skadden, Arps, Slate, Meagher & Flom represented the McNeils. Houlihan Lokey asserted McNeil's management company, McREMI, had a value of at least $60 million. Gannon of Stanger insisted his value of $35 million was more accurate/reasonable. After apparently several heated discussions, Stanger's value prevailed. None of the advisors suggested or discussed the possibility McREMI would have no value at closing.

After these meetings class counsel, on June 29, 1999, informed the *Schofield* court he was satisfied the proposed Whitehall transaction would be fair to the class plaintiffs, based primarily on the fact Stanger had managed to limit the value assigned to McREMI to the originally proposed $35 million.[4]

A few days earlier, on June 25, 1999, McNeil and the new merger entity, WXI/McN Realty, issued a press release announcing the essential terms of the Whitehall merger, including the "aggregate consideration" of approximately $644 million. The press release stated this amount included an allocation of value to McREMI and other general partnership interests of approximately $58 million, but did not provide specifics on this point.

Later in June 1999 the *Schofield* plaintiffs and McNeil and his affiliates moved jointly for approval of the proposed stipulated settlement. Everest, which had opted out of the class action lawsuit in December 1998, filed objections to the proposed settlement as did Carl Icahn and his real estate partnership affiliates. In the absence of complaint by

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[4] Later in his deposition, class counsel acknowledged he would have been concerned had he known McREMI would cease to exist and have no value as a going concern after the transaction closed.

the class members, the *Schofield* court approved the process for liquidating the partnerships in proposed settlement. In July 1999 the court entered judgment dismissing the *Schofield* action stating "[t]he Settlement is hereby approved by this Court as fair, reasonable and adequate to the Settlement Class . . . and the Partnerships . . . ." The judgment authorized the parties to "consummate the Settlement according to the terms and conditions of the Stipulation," but did not make closing a condition of settlement. All the specifics of the proposed merger transaction, such as specific asset valuations, were not before the *Schofield* court.

The settlement provided for release of all derivative claims for every unit holder whether or not any such person had properly and timely opted out of the class action lawsuit. On the other hand, the court's final order and judgment specified, "Nothing contained in the Stipulation or this Final Order and Judgment shall act as a release of unknown, future claims whether derivative or individual for acts of the General Partner occurring after the date upon which this Final Order and Judgment is Signed." The *Schofield* court signed the final order and judgment on July 8, 1999.

In December 1999 McNeil mailed several-hundred-page-long proxy statements to the unit holders. The proxy statements, among other things, discussed in detail McNeil's actual and potential conflicts of interests by being both a buyer and a seller in the proposed merger transaction. The proxy statements provided detailed information regarding the history of the partnerships, the *Schofield* litigation, and the settlement with Carl Icahn in fighting off his attempted hostile take-over. The proxy statements included the details of the transaction and allocations and included the various fairness opinions. A few of the partnerships voted against the merger and agreed to be sold instead to David Johnson who had several real estate partnerships in Texas. Ultimately, 62 percent of the units voted in favor of the merger.

The merger transaction closed on January 31, 2000. The limited partners received cash for their units. Based on McNeil's contributions of approximately $65 million from the McNeil entities, plus $6 million in cash, he received a 46 percent equity interest in WXI/McN Realty, the new merger entity.

McREMI's management contracts were cancelled effective the date of the closing and its income stream dissolved. McREMI as an entity ceased to exist. Ron Taylor, former president and CEO of McREMI, returned to the headquarters in Dallas from the closing in New York to find the offices empty and his personal belongings in a box. Taylor testified he knew McREMI would close down after the transaction and had expected it to do so. Months prior to the closing Taylor had prepared a time line for informing certain personnel about the impending merger to permit them to seek employment elsewhere. At some point PaineWebber expressed concern key employees and officers, knowing they would soon be out of a job, might leave prematurely which could have a deleterious effect on property maintenance, accounting matters, and the like in the period before the closing. With PaineWebber's assistance Taylor arranged for "success" or "retention" bonuses for himself and other key personnel at McREMI to keep them on board through closing.

After the closing, McREMI's assets merged into Archon, Whitehall's management company. These assets consisted of the books and records of the business, furniture, software and computers. The 12 regional McREMI offices had all been in leased premises. These leases were cancelled as unnecessary as well as undesirable because the lease rates were all above market. None of McREMI's employees or officers had employment contracts. Arcon hired many McREMI employees, primarily the on-site managers in the various states because of their familiarity with the properties. McREMI's key executives were not hired. Ron Taylor formed a new real estate management company in Dallas and he employed several of the McREMI key personnel.

Within a year or two Whitehall had sold off the self-storage facilities, the commercial properties and the retail properties acquired through the merger with McNeil. Prior to trial McNeil had already received $38 million from his investment in the new entity.

Everest filed suit in 2001 against McNeil and his affiliated entities for breach of fiduciary duty and other claims. In 2002 the trial court granted summary judgment in favor of McNeil finding Everest's claims were derivative and thus released in the

Schofield class action settlement. In a unanimous opinion, Division One of this court reversed, holding, "[a]s a matter of law, Everest's claims [were] individual in nature and not derivative."[5]

On remand, trial was to the bench. Documentary evidence consisted of seemingly every document generated in the case's ten-year history since the filing of the class action lawsuit in 1995. The parties, and nearly every percipient witness to some aspect of the transaction, testified through live testimony, deposition transcript, or deposition video.

In addition, each side presented expert testimony. Everest's expert on real estate and fiduciary duties, William Elliott, testified McREMI had no value as a going concern. Elliott asserted McNeil knew McREMI's value lay in its management contracts, and because these contracts would terminate at closing, McREMI had no value at closing because it had no potential future income stream. Elliott expressed the view the value of the management company should have been based on what the company was expected to collect in fees after the closing, reduced by expenses. Elliott opined including McREMI in the all or nothing transaction was "nothing short of fraud" and a "sham" for the sole purpose of attributing value to McREMI to personally benefit McNeil in the merger transaction.

Everest's expert on damages, Dr. Stephen Cauley, similarly opined McREMI had no value.

McNeil's expert on fiduciary duties, Justice Elwood Lui, opined McNeil had not breached any duty to his limited partners. Justice Lui explained full disclosure was the most important aspect in determining whether a fiduciary had discharged his or her duties. Specifically, he testified a fiduciary has a duty to provide full disclosure to his partners of all facts known and knowable about a transaction, "plus any reasonabl[y] anticipated facts that could occur." Justice Lui agreed a fiduciary has to exercise his or her independent judgment and may not delegate fiduciary responsibilities to others.

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[5] *Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 429.

Justice Lui also agreed a fiduciary should not rely on the professional advice of experts if he or she knows the advice is flawed.

After closing arguments the trial court ruled from the bench, finding in favor of Everest on its breach of fiduciary cause of action only. The court awarded compensatory damages of $1,270,755 based on Everest's pro rata share of the value attributed to McREMI and other expenditures the court found were improperly imposed against the limited partners.[6] The court awarded punitive damages of twice that amount, or $2,541,509, against McNeil personally. Finally, the court awarded prejudgment simple interest of 10 percent from the date of the closing on January 31, 2000. At McNeil's request the court issued a statement of decision to explain its findings and conclusions.

McNeil appeals from the adverse judgment.

DISCUSSION

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDINGS.

McNeil challenges the sufficiency of the evidence to support the trial court's key findings McREMI had no value and thus McNeil's receipt of the benefit of the erroneous valuation which rightfully belonged to the limited partners constituted a breach of fiduciary duty.

When findings of fact are challenged on appeal on the ground there is no substantial evidence to sustain them, the power of the reviewing court begins and ends

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[6] The expenditures the court found improperly imposed against the limited partners because necessitated by the general partner's conflict of interest were: $1,800,000 for Stanger's fairness opinion; $1,037,808 for "Special Committee" expenses; $2,124,309 for directors' and officers' insurance premium cost and retention and success bonuses for McREMI's key personnel; and $1.7 million previously deducted from McREMI's value in accounts receivables which had been credited to the general partner at closing. The court deducted from this gross damage amount $6,026,000 in disposition fees the general partner was otherwise contractually entitled to in the event the properties were sold.

with the determination whether there is any substantial evidence, contradicted or uncontradicted, to support the trial court's findings.[7] In assessing whether substantial evidence exists, the appellate court views all factual matters in the light most favorable to the prevailing party, resolving all conflicts and indulging all reasonable inferences from the evidence to support the judgment.[8] The deference to the trial court applies equally whether the issues were tried on affidavits, deposition or live testimony.[9]

We review the record evidence with these standards in mind.

A. Substantial Evidence Supports the Court's Finding McREMI Should Have Been Valued At Zero at Closing.

In its statement of decision, the trial court found: "A sizeable portion of the proceeds of the liquidation was diverted to McNeil Partners, allocated as a payment for the value of McREMI. This allocation was improper, and the diversion of this portion of the proceeds was tantamount to theft. McREMI had no assets. Its only potential value lay in any expectation of future profitable operation[s]. In the merger, this expectation was evaluated based on past profitability. Such a valuation can be appropriate, but only when there is a true expectation that the magnitude of future profits will be related to the record of past profits. Such relation can exist only where the business is expected to remain operational. Here, defendants and their advisers knew with certainty, once the structure of the merger was determined, that McREMI would have no post-merger operations, and therefore could have no post-merger profits. McREMI had unexpired leases on its office space in several locations, but the evidence was that these had no value. McREMI's past income derived solely from its fees for managing the real estate

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[7] *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053; *Crawford v. Southern Pacific Co*. (1935) 3 Cal.2d 427, 429.

[8] *Bickel v. City of Piedmont, supra,* 16 Cal.4th 1040, 1053; *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 10.

[9] *Bolkiah v. Superior Court* (1999) 74 Cal.App.4th 984, 1000.

leases on its office space in several locations, but the evidence was that these had no value. McREMI's past income derived solely from its fees for managing the real estate assets of the partnerships. The termination of the partnerships represented the termination of McREMI's business. In the merger, WXI/McN Realty L.L.C. acquired both McREMI and the assets it managed. If WXI/McN Realty L.L.C. had decided to employ McREMI after the merger to continue managing those assets any fees paid to McREMI would be paid by WXI/McN Realty L.L.C., and therefore could not generate profits for WXI/McN Realty L.L.C. This was known before the merger and before the decision to allocate value to McREMI was made. It was, therefore, unsurprising that WXI/McN Realty L.L.C. caused McREMI to cease operations on the day the merger closed. It was unreasonable, and dishonest, to divert any of the merger proceeds to McNeil Partners as payment for the acquisition of McREMI, which everyone knew would become worthless on the day the merger closed. The entire McREMI sale allocation is recoverable, because it represents proceeds of the sale of the real estate assets that should have been paid to the limited partners."

McNeil asserts the court's finding McREMI had no value is contrary to the evidence. McNeil points out three independent financial advisors concluded McREMI was worth at least $35 million: Stanger, after a comprehensive review and analysis, Eastdil Realty on behalf of the limited partners and CFC Capital on behalf of the class plaintiffs in the *Schofield* litigation. McNeil also points out (1) some early would-be bidders considered having a management company included in the portfolio to represent a benefit, (2) Everest's expert agreed a management company could have considerable value if the buyer did not already have its own management company in place; and (3) even Langer of Whitehall recognized some other buyer in different circumstances might have valued McREMI between $10 to $14 million.

The trouble with McNeil's assertions is they are nothing more than theoretical possibilities for placing a legitimate value on McREMI. However, none of these theoretical possibilities materialized. As a consequence, it is irrelevant to consider that which might have occurred but did not, and that which McNeil knew for many months would not.

Taking an alternate tack, McNeil argues McREMI had intrinsic value. McNeil describes McREMI's assets as its 650 employees, their familiarity with the difficult and diverse properties, and the management systems they employed in effectively and profitably managing those properties. McNeil notes, as of the time of trial many of McREMI's employees were employed by Arcon, and some had even replaced Arcon employees and managers at Whitehall's management company.

Whitehall could not and did not purchase the McREMI employees. They were not chattel. Because none of the employees had an employment contract each was free at the closing to seek employment with Arcon or to seek employment elsewhere at any time. If Arcon hired a previous McREMI employee Whitehall, of course, had to pay that person's salary as a separate and independent arrangement from its purchase of the management company which had previously employed the employee. Thus, in no financial sense can McREMI's employees be considered assets to which merger consideration may properly attach.

Contrary to McNeil's assertions and arguments, the record evidence showed when Whitehall emerged as the successful bidder all interested parties knew McREMI would go out of existence. Whitehall had no need for a management company. Ron Taylor, President and CEO of McREMI, prepared for this eventuality. He knew the management contracts would be cancelled, he knew there would be no future income stream and knew McREMI would become a redundancy once Whitehall's Arcon took over. He created a time line for informing employees when their jobs would be eliminated. Taylor knew his own job and the job of other key employees would be eliminated. He negotiated a "success" bonus for himself and retention bonuses for other key employees as consideration for keeping them from "jumping ship" before the closing date.

Brandon Flaming, McNeil's and McREMI's in-house accountant, echoed Taylor's testimony on these points.

As the trial court correctly found, the value of McREMI was its contract rights to receive management fees from partnerships McNeil controlled. The evidence further showed all management contracts were cancelled effective the date of closing.[10] As of that date McREMI had no potential for future earnings and thus no value. Accordingly, the trial court correctly found McREMI was valueless at closing and it was thus inappropriate to have given it a $35 million value in the merger transaction despite McNeil's actual knowledge it had inappropriately been valued as a going concern.[11]

B. Substantial Evidence Supports the Trial Court's Finding of Breach of Fiduciary Duty.

"Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other. '"'"Partners are trustees for each

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[10] The exception being private partnerships McNeil personally owned and controlled which were outside the merger transaction, for example, a partnership representing his pension funds.

[11] In a type of "no harm no foul" argument McNeil argues its affiliates would have been entitled to $16.9 million in disposition and termination fees under the contracts and thus the court's finding McREMI had no value cannot be sustained. Some of the partnership agreements provided for "disposition" fees in the event the properties were sold. McNeil had waived the right to collect these fees in exchange for including McREMI in the merger transaction. The trial court deducted over $6 million in disposition fees from the gross damage amount to reflect McREMI's contract right to collect those fees in the event the properties were sold, although technically a sale did not occur in this case.

Other of the partnership contracts provided for asset management and property management "termination" fees in the event the general manager was ousted or if the management contracts were terminated in favor of another management company. These fees would have amounted to over $10 million. McNeil asserts the amount representing the termination fees should also have been deducted from the gross damage amount. We disagree. The factual predicates did not occur. The partnerships and management company were instead merged into the new entity and managed by the new entity. Accordingly, these particular contract rights to termination fees did not materialize.

Moreover, McNeil should not be heard to complain where technically the disposition fees were also unearned. The properties were not sold, but were transferred into the new merger entity.

other, and in all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.' [Citations.]'"' (*Leff v. Gunter* (1983) 33 Cal.3d 508, 514.) Moreover, this duty extends to all aspects of the relationship and all transactions between the partners. '"Each [partner] occupie[s] the position of a trustee to the other with regard to all the partnership transactions, including the transactions contemplated by the firm and constituting the object or purpose for which the partnership was formed.'" (*Ibid*., italics omitted.)" [¶] . . . A general partner of a limited partnership is subject to the same restrictions, and has the same liabilities to the partnership and other partners, as in a general partnership (Corp. Code, § 15643). . . . "[12]

As the general partner McNeil was a fiduciary and thus owed a duty to act in the best interest of the limited partners and in the best interest of the partnerships.

We agree with McNeil there was nothing inherently wrong with the structure of the transaction per se. That is to say, the decision to pursue a merger arrangement rather than an outright sale of the assets is not the decision which caused the harm to the limited partners.

The evil in this case arose when the general partner abdicated his fiduciary role by attempting to shift fiduciary responsibilities to his financial and other advisors. Such deference was inappropriate because the advisors proceeded on a faulty premise, left uncorrected by the general partner despite the opportunity—and the obligation—to correct the misinformation underlying each of the advisors' erroneous opinions. The opinions of valuation and allocation might have been at some point within a "range of reasonableness." However, once the circumstances changed by virtue of the Whitehall bid for only the real properties, and thus once it became apparent McREMI would close down and have no going concern value, then it was McNeil's obligation as a fiduciary to

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[12] *BT-I v. Equitable Life Assurance Society of the United States* (1999) 75 Cal.App.4th 1406, 1410-1411.

correct his advisors' flawed assumptions to reflect reality, and to reallocate the value previously attributed to McREMI to the limited partners where it rightly belonged. In the words of our Supreme Court, "the necessity of exercising the highest good faith . . . is especially marked between a managing partner and his copartners, . . . In the course of negotiations for dissolution, each partner must deal fairly with his copartners and not conceal from them important matters within his own knowledge touching the business and property of the partnership. . . . "[13]

All this information was known for months and during this time McNeil could and should have directed Stanger to prepare revised allocations of value. Stanger's preliminary allocations of value were issued March 31, 1999. Stanger issued its fairness opinion in June 1999 and updated its reports and assumptions again in December 1999 before the closing to reflect changes with respect to the properties in the portfolio and the like. There was no valid reason to continue the erroneous assumption McREMI would have value as a going concern after the closing once McNeil knew with certainty this assumption was untrue.[14]

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[13] *Vai v. Bank of America, N.T. & S.A.* (1961) 56 Cal.2d 329, 339.

[14] Corporations Code section 309 embodies an aspect of the "business judgment rule." This section specifies corporate directors are generally entitled to rely on the advice of reliable and competent employees and specified professionals meeting similar criteria. However, the protection from liability provided by this rule does not extend to actions taken without reasonable inquiry, or to actions taken as a result of a conflict of interest. (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 715 [the presumption directors' decisions were made in good faith may be overcome by evidence of fraud, bad faith, overreaching or of an unreasonable failure to investigate material facts].)

This is what occurred in the case at bar. The general partner had a conflict of interest by being on both sides of the transaction. These conflicts of interest were later explored in great detail in the proxy statements. However, what the general partner never disclosed was the fact McREMI would cease to exist as a going concern after the closing and thus should be valued at zero. Given the general partner's bad faith decision not to reveal this fact in order to reap the benefit of McREMI's valuation for himself personally, the trial court correctly found he cannot seek protection from the "business judgment rule."

In the words of the trial court, "The amassing of fairness opinions and valuation opinions did not demonstrate that there was no breach of fiduciary duty. The opinions were all based on an assumption that the inclusion of McREMI in the sale was proper. That was a false assumption, because McREMI was included in the sale for only one reason: to attempt to justify diversion of proceeds of the merger away from the limited partners and into the hands of the general partner." The court explained McNeil's decision to keep McREMI in the merger transaction, "was motivated by Mr. McNeil's financial self-interest, and was made in conscious disregard of the limited partners' interests. Every business judgment made thereafter was done to effectuate this decision. And every independent opinion obtained thereafter was infected by this disloyal and dishonest decision, because all such opinions involved the business justification of the various means to carry out this decision, and no such opinion examined whether the decision itself was justified."

Because of the general partner's lack of candor, the limited partners who voted in favor of the merger transaction cannot be deemed to have "ratified the transaction." It is true, the proxy statements provided a detailed view of the history of the merger transaction and of the transaction itself. The proxy statements also make clear $35 million of the $644 million merger proceeds would be attributed to McREMI. The statements explain McNeil would use these and other proceeds from the merger, to acquire his equity interest in the new merger entity. However, nowhere do the proxy statements explain McREMI would have no value once the merger transaction was approved, or that it would lose its income stream and thus the justification for its allocated value.

Throughout the 200-page proxy statement all references to McREMI are to that entity as if it would continue to be a going concern after the merger. For example, the proxy statements explain how PaineWebber had advised the marketing process would likely benefit from McREMI's "on-going" familiarity with the assets because of its track record in managing the properties and its familiarity with those properties. The proxy statements speak of "certain" of McREMI's "assets" which would be transferred in the transaction. The proxy statements even assert Whitehall's management company "will own and operate the assets of McREMI." The proxy statements explain how the structure of the transaction would permit McNeil to transfer the "assets of McREMI" to the new entity to be formed.

This was all misleading, however, because nowhere in the proxy statements is it revealed McREMI would have no assets to transfer, purchase or operate once the transaction was approved, and thus crediting McNeil for its alleged $35 million value was unwarranted.[15] Thus, it is erroneous to assert, as does McNeil, the 62 percent of the limited partners who voted in favor of the merger did so with "full knowledge" and thereby ratified the transaction. The limited partners were not informed of the key fact McREMI would have no future income stream and would thus be rendered valueless at closing. Nor were they informed that by attributing a $35 million value to McREMI McNeil would be diverting partnership proceeds to himself.[16]

In sum, the record evidence demonstrated McNeil did not correct the misrepresentation of McREMI's value in the underlying fairness opinions in order to personally reap the benefit of its $35 million allocation which rightfully belonged to the limited partners. However, "'"[a] partner has no right to deal with partnership property

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[15] In the corporate context Corporations Code section 310 specifies a transaction involving an interested director is neither void nor voidable, provided, all material facts bearing on the director's interests are disclosed or known to the shareholders and the transaction is thereafter approved by the shareholders in good faith. Even assuming the applicability of this section in this case involving limited partnerships instead, it provides no relief. Not disclosed to the limited partners prior to their approval of the transaction was the material fact if the merger occurred McREMI would have no value and McNeil would be diverting the proceeds representing McREMI's value to himself rather than distributing the proceeds to the limited partners.

[16] It is true, as McNeil points out, the court found "no constructive fraud because all the mechanics of the merger were publicly revealed in complete detail." To the extent this conclusion can be interpreted to include a finding the proxy statements publicly disclosed the material fact McREMI would have no value as a going concern if the merger was approved, it is not supported by the evidence.

other than for the sole benefit of the partnership [citation].” [Citations.]’”[17] This self-dealing and diverting partnership proceeds to enrich himself was a breach of fiduciary obligations as the general partner.[18]

The trial court correctly so found.

C. McNeil Has Failed to Demonstrate Error In The Court’s Decision to Include Certain Transactional Expenses In Its Award Of Compensatory Damages.

McNeil challenges the part of the compensatory damage award which restored to the limited partners certain transaction costs, namely, the costs for Stanger’s fairness opinions, the amounts paid McREMI’s key employees in retention and success fees, the fees incurred by the “special committee,” and premium expenses for directors’ and officers’ liability insurance. McNeil claims this was error because the partnership agreements obligated the partnerships to pay such expenses. Moreover, McNeil asserts, the expenses were fully disclosed in the proxy statements and approved by the unit holders.

The trial court reasoned these amounts should not have been charged to the limited partners because the limited partners derived no benefit from these expenses. The court found these particular expenses were instead “attributable to the extra work necessitated by” McNeil’s “conflict of interest.”

Because these expenses were incurred solely for McNeil’s benefit to justify the self-interested transaction, and not for “operation” or “administration” of the partnerships as specified in the contracts, McNeil has failed to demonstrate error in the court’s decision to include these amounts in calculating the compensatory damage award.

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[17] *Cagnolatti v. Guinn* (1983) 140 Cal.App.3d 42, 48.

[18] See, e.g., *Bardis v. Oates, supra*, 119 Cal.App.4th 1, 13 [“As managing partner, Oates was prohibited from engaging in self-dealing in any way, shape or form. [Citation.] ‘The law does not permit a fiduciary to deal with himself in any transaction in his individual capacity [citation].’”].

II. EVEREST WAS NOT PROCEDURALLY BARRED FROM MAINTAINING THIS LAWSUIT.

McNeil asserts numerous grounds for claiming Everest was precluded from bringing or maintaining its lawsuit. None of McNeil's arguments has merit.

A. As A Limited Partner Everest Was Not Limited To An Appraisal Remedy.

McNeil contends the judgment must be reversed because Everest was limited to an appraisal remedy.[19] Relying on various provisions in the Corporations Code and the Supreme Court decision in *Steinberg v. Amplica, Inc.*,[20] McNeil claims an appraisal remedy is the exclusive procedure to challenge the "validity of the reorganization" which McNeil claims Everest is attempting to do in this case.

Corporations Code section 1312, subdivision (a) provides in pertinent part, "[n]o shareholder of a corporation who has a right under this chapter to demand payment of cash for the shares held by the shareholder shall have any right at law or in equity to attack the validity of the reorganization or short-form merger, or to have the reorganization or short-form merger set aside or rescinded [except in certain circumstances not present in the case at bar]."

The Supreme Court in *Steinberg v. Amplica, Inc*.[21] analyzed the preclusive effect of Corporations Code section 1312 in the context of a dissenting shareholder in a corporate merger. The Court framed the issue as "whether under section 1312(a) a minority shareholder who is aware of the facts underlying his claim of breach of fiduciary duty may choose whether to seek appraisal or to allow the merger to proceed without

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19 McNeil makes this argument although the proxy statements for many of the affected partnerships provided: "Limited partners of the Partnership are not entitled to exercise dissenters' rights or other rights of appraisal in connection with this transaction."

20 *Steinberg v. Amplica*, *Inc*. (1986) 42 Cal.3d 1198.

21 *Steinberg v. Amplica*, *Inc*., *supra*, 42 Cal.3d 1198.

dissent and to pursue an action not only for the fair market value of his shares (the same remedy he would obtain by appraisal), but for exemplary damages as well, and in the process hold individual corporate officers and others involved in the merger liable for such damages."[22]

The *Steinberg* court answered the question in the negative. "In deciding whether the Legislature intended to render appraisal the exclusive remedy under the circumstances of the present case, we consider the objectives which the Legislature sought to achieve in enacting section 1312(a). As we have seen, the aim of appraisal is to allow mergers which are advantageous to the corporation to proceed, while assuring that minority shareholders receive a fair value for their shares. It seems clear that a minority shareholder who, like plaintiff, claims that his shares were undervalued because of self-dealing and other misconduct by corporate insiders cannot obtain a fair value for his shares unless he is afforded the opportunity to demonstrate that the misconduct he alleges has in fact occurred. The question is whether he must do so in an action for appraisal or whether he may forego that remedy and seek damages."[23] The court concluded that "at least in a case such as this, where the plaintiff was aware of all the facts leading to his cause of action for alleged misconduct in connection with the terms of the merger prior to the time the merger was consummated but deliberately opted to sue for damages instead of seeking appraisal, section 1312(a) acts as a bar."[24]

The Revised Limited Partnership Act contains a similar provision restricting attacks on the validity of a reorganization except in certain circumstances, and for appraising the interests of dissenting limited partners in a reorganization.[25] However, and

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[22] *Steinberg v. Amplica, Inc.*, *supra*, 42 Cal.3d 1198, 1207.

[23] *Steinberg v. Amplica, Inc.*, *supra*, 42 Cal.3d 1198, 1208-1209.

[24] *Steinberg v. Amplica, Inc.*, *supra*, 42 Cal.3d 1198, 1214.

[25] Corporations Code section 15679.14, subdivision (a) provides: "No limited partner of a limited partnership who has a right under this article to demand payment of cash for the interest owned by such limited partner in a limited partnership shall have any right at law or in equity to attack the validity of the reorganization, or to have the reorganization set aside or rescinded, except in an action to test whether the vote or

unlike the provision governing dissenting shareholder rights in a corporate reorganization, the Revised Limited Partnership Act *expressly excludes from the appraisal remedy* actions "against a general partner of the limited partnership, the limited partnership, or any person controlling a general partner at law or in equity as to any matters (including, without limitation, *an action for breach of fiduciary obligation* or fraud) other than to attack the validity of the reorganization or to have the reorganization set aside or rescinded."[26]

This case does not involve a dissenting partner attacking the validity of a limited partnership reorganization. That is to say, in this lawsuit Everest does not seek to rescind or set aside the merger transaction and does not even claim the merger transaction is invalid. This suit is instead an action brought by a limited partner against the general partner of the limited partnerships for breach of fiduciary duty. This type of action is expressly authorized by Corporations Code section 15679.14, subdivision (e). For this reason, Everest is not limited to an appraisal remedy.[27]

B. Everest Is Not Limited To Damages For Only Those Units Purchased Prior To The Opt-Out Date In The *Schofield* Action.

McNeil claims Everest may not recover for any units it purchased after the opt-out date in the *Schofield* class action of December 3, 1998. This is so, McNeil argues, because units which did not opt out before that date released all claims relating to or arising out of the merger transaction in the settlement. McNeil asserts the familiar

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consent of limited partners required to authorize or approve the reorganization has been obtained in accordance with the procedures established therefor by the partnership agreement of the limited partnership." (See also, Corp. Code, § 15679.2 [describing the process of purchasing dissenting partnership interests].)

26 Corporations Code section 15679.14, subdivision (e), italics added.

27 See also, 9 Witkin, Summary of California Law (10th ed. 2005) Partnership, section 121, pages 687-688 [a partner is not prohibited from bringing an action against a general partner, the limited partnership, or another party controlling a general partner, for breach of fiduciary duty or fraud].

principle a predecessor cannot transfer or assign to its successor-in-interest any legal rights greater than it possessed.[28] Moreover, McNeil asserts, a successor in interest takes property with the same limitations or restrictions which bound its predecessor-in-interest.[29] Accordingly, McNeil argues, Everest should not be able to recover because it did not prove each of the units it held was purchased from a limited partner who had properly and timely opted-out, and thus it must be presumed the units it held were subject to the release in the *Schofield* settlement.

We agree with the trial court when it found in this particular case it was immaterial Everest likely held units from limited partners who had not opted out of the *Schofield* action. The release of the settlement expressly pertained to "*owners* of Units" and their assigns and expressly excluded "all *persons* who properly excluded themselves . . . ." The release did not provide a limited partner's right to opt out passed with the units, rather than with the "person" or the "owner," although it could have so provided. The settlement spoke of "members" of the class, and not to "units" comprising the class. Because Everest had timely and properly opted out, nothing in the agreement, settlement or release restricted its opt-out rights to only those units held before the cut-off date for opting out. Given these circumstances, Everest was not required to establish it had standing to pursue this action by proving each unit it held had previously been held by a limited partner who had personally opted out as well.

Moreover, the *Schofield* settlement expressly excluded from the release future claims against the general partner for acts occurring after the date of the judgment. As the trial court found, the harm of which Everest complained occurred at the merger closing, and thus long after the court entered judgment on the *Schofield* settlement. Accordingly, McNeil's argument all Everest's claims were released in the *Schofield* settlement agreement are not well taken.

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[28] Citing *Serra Canyon Company, Ltd. v. California Coastal Commission* (2004) 120 Cal.App.4th 663, 668.

[29] Citing *Ojavan Investors, Inc. v. California Coastal Commission* (1994) 26 Cal.App.4th 516, 527.

In any event, the trial court limited Everest's damages to the units it held prior to its receipt of the press release issued June 25, 1999. The court found this press release was the first public disclosure of the fact a substantial portion of the proceeds from the proposed merger would be attributed to McNeil's general partnership and management assets. The court further concluded any units Everest purchased after that date were purchased with knowledge of McNeil's proposed wrongful diversion of funds to himself.

Notwithstanding the court's limitation on Everest's damages, McNeil has repeatedly and strenuously argued throughout trial and in the briefing on appeal Everest was not entitled to *any* damages because Everest was fully aware of its breach of fiduciary claims and the alleged wrongdoing by virtue of the claims asserted in the *Schofield* class action. The class had alleged a claim for breach of fiduciary duty, primarily on the ground McNeil had failed to liquidate the partnership assets in a timely manner. On this basis, McNeil claims Everest has no standing to bring claims for breach of fiduciary duty based on misconduct of which it was aware when it purchased its units.[30]

Surely Everest knew McNeil was under attack for past alleged breaches of fiduciary duties, and was aware, as McNeil puts it, of at least the "nature" of the wrongdoing. Everest is apparently in the business of tracking such matters in the hopes of acquiring potentially profitable investments at distressed values. However, that is not the same as saying Everest or anyone else was privy to what would later amount to an entirely new breach of fiduciary duty. The record facts show only a few select persons had early information McNeil would be on both sides of a proposed merger transaction and would attribute value to a soon to be defunct management company in order to divert proceeds to enrich himself. The bidding process was purposefully kept secret and confidential. No one outside the inner circle of McNeil and the advisors knew the proposed valuations or allocations until at earliest from the press release issued June 25,

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[30] Citing *Bird v. Lida, Inc.* (Del. Ch. 1996) 681 A.2d 399, 406; *Omnicare, Inc. v. NCS Healthcare, Inc.* (Del. Ch. 2002) 809 A.2d 1163, 1169-1170.

1999. The only outsider with whom McNeil and the financial advisors shared this information was with class counsel, and then for purposes of settling the *Schofield* litigation.

As noted, the court awarded no damages to Everest for units purchased after the date it was presumed to know McNeil would be diverting over $30 million to himself in the merger by misrepresenting McREMI as a going concern. Because no damages were awarded for units Everest purchased post-disclosure, McNeil's argument Everest's knowledge of the wrong doing precludes any finding of causation lacks merit.[31]

Similarly unpersuasive is McNeil's argument Everest was not entitled to any relief because it failed to mitigate its damages by purchasing partnership units after it detected problems with the McNeil partnerships through the *Schofield* litigation and nevertheless continued to purchase additional units. McNeil's argument ignores business reality. The short answer is it was a purely financial decision for Everest in weighing the risks and potential benefits when deciding whether, when, and at what price it was willing to continue to purchase units. Even without the prospect of additional damages as a result of this litigation, Everest made a handsome profit when its units were cashed out in the merger for $12 million. Everest's "damage" in this case was not from its purchase of the units, but from McNeil's later act of diverting some of the limited partners' proceeds from the merger for his own benefit.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING AN AWARD OF PUNITIVE DAMAGES WAS WARRANTED.

The trial court explained its rationale for imposing punitive damages against McNeil personally in its statement of decision as follows: "Mr. McNeil knew that McREMI would have no function, and therefore no value, after the partnerships were

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[31] *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101 [causation is an essential element of a claim for breach of fiduciary duty].

liquidated. His decision to divert a portion of the liquidation proceeds away from the limited partners, so that the general partner would receive that portion instead, was intentional, deliberate, and willful. He knew it was a form of theft, and any advice he solicited and obtained stating that the McREMI allocation was a reasonable one was not advice that caused him to have any doubt that it was a form of theft. These facts were proved by clear and convincing evidence."

McNeil argues even assuming including McREMI in the merger transaction constituted a breach of fiduciary duty, evidence of a breach of fiduciary duty alone is an insufficient ground to support an award of punitive damages.[32] McNeil asserts the court made no express findings of, and the evidence was insufficient to show, malice, oppression or fraud. Accordingly, McNeil asserts the punitive damage award is unsupported and must be reversed.[33]

In reviewing McNeil's challenge to the propriety of the court's award of punitive damages, this court accords the ordinary deference to the trial court's findings of historical fact.[34]

We agree with McNeil, "a breach of a fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. (*Delos v. Farmers Group, Inc*. (1979) 93 Cal.App.3d 642, 656-657.) The wrongdoer '"must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. [Citations.]'

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[32] McNeil does not challenge the amount of the punitive damage award.

[33] McNeil asserts the punitive damage award must be reversed for another reason as well. McNeil points out Everest purchased most of its partnership units after the *Schofield* lawsuit was filed and was thereby improperly investing in potential claims for punitive damages. McNeil argues Everest is not entitled to an award because a party may not assign its claims for punitive damages. (Citing, *Murphy v. Allstate Ins. Co*. (1976) 17 Cal.3d 937, 942.) This argument is inapposite. The wrong on which the trial court based its punitive damage award did not occur until the merger transaction closed, long after the *Schofield* litigation settled.

[34] *Simon v. San Paolo U.S. Holding Co., Inc*. (2005) 35 Cal.4th 1159, 1172.

(*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 922.)"[35] In other words, to establish malice, "it is not sufficient to show only that the defendant's conduct was negligent, grossly negligent or even reckless. (*G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 31-32.) There must be evidence that defendant acted with knowledge of the probable dangerous consequences to plaintiff's interests and deliberately failed to avoid these consequences."[36]

This is precisely what occurred in the case at bar. McNeil acted with extreme indifference to the limited partners' interests. He misrepresented the value of his management company with clear knowledge by doing so he was diverting to himself merger proceeds which rightfully belonged to the limited partners. As the trial court found, McNeil knowingly, willfully and deliberately failed to avoid this adverse consequence to the limited partners. This evidence of conscience disregard of the limited partners' rights was an adequate basis for finding malice, and thus an adequate basis for an award of punitive damages. Accordingly, and contrary to McNeil's argument, the evidence in this case shows considerably more than simply a negligent breach of fiduciary duty.

IV. PREJUDGMENT SIMPLE INTEREST AT A RATE OF 10 PERCENT WAS APPROPRIATE IN THIS CASE INVOLVING A FIDUCIARY.

McNeil contends because there is no statute setting another rate of interest for breach of fiduciary duty claims, Everest was limited to prejudgment interest of 7 percent, and not the 10 percent awarded by the trial court. Everest counters, 10 percent interest was properly awarded under Probate Code section 16441, governing a trustee's liability

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[35] *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1986) 185 Cal.App.3d 1149, 1154.

[36] *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co., supra*, 185 Cal.App.3d 1149, 1155.

for breach of trust, which section applies by analogy to a fiduciary's liability. Tellingly, McNeil's reply brief does not challenge Everest's claim.

Probate Code section 16440, enacted in 1986 and superseding former Civil Code sections 2237 and 2238, provides in pertinent part: "(a) If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: [¶] (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest. [¶] (2) Any profit made by the trustee through the breach of trust, with interest."

Under Probate Code section 16441, if the trustee is liable under Probate Code section 16440, the trustee is also liable for the greater of "[t]he amount of interest that accrues at the legal rate on judgments in effect during the period when the interest accrued" or "[t]he amount of interest actually received."[37]

The legal rate of interest on judgments is 10 percent.[38] The court in *Baker v. Pratt,*[39] citing the predecessors to Probate Code sections 16440 and 16441, held a plaintiff who establishes a breach of fiduciary duty by a corporate officer or director is entitled "to be made whole," and may require the defendant "to account for the lost profits of the corporation *with interest* pursuant to [former] Civil Code section 2237."[40]

In short, McNeil has failed to demonstrate error in the award of prejudgment interest at the rate of 10 percent.

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[37] Probate Code section 16441, subdivisions (a), (b).

[38] Code of Civil Procedure section 685.010, subdivision (a) ["Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied"].

[39] *Baker v. Pratt* (1986) 176 Cal.App.3d 370.

[40] *Baker v. Pratt*, *supra*, 176 Cal.App.3d 370, 384–385, italics added.

V. ADDING THE $1.7 MILLION IN MANAGEMENT FEES McREMI ACCRUED BETWEEN ITS VALUATION DATE AND THE CLOSING DATE INTO THE CALCULATION OF EVEREST'S DAMAGES WAS ERROR.

Stanger initially valued McREMI at $35 million on March 31, 1999. Gannon of Stanger calculated McREMI would earn $190,000 in property and asset management fees each month thereafter until closing. At the closing Stanger thus deducted $190,000 for each month for the interim period, or a total of $1.7 million, from McREMI's receivables account and moved it into and credited McNeil's management account as management fees earned prior to closing.

In determining the gross damage award the trial court added this $1.7 million (and the other expenses wrongfully charged to the limited partners noted above) to McREMI's closing value of $31,286,000. McNeil contends adding back this so-called "190 adjustment" was erroneous and should be reversed. We agree.

The effect of the court's act of adding the $1.7 million to McREMI's value for purposes of taking monies away from McNeil and returning it to the limited partners, was no partnership had to pay any management fees during the interim period between valuation and closing. However, no one disputes McREMI and McNeil had contract rights to such management fees so long as they were managing the properties—here until the closing date of January 31, 2000. Because the court found the harm occurred at the closing on January 31, 2000, and for this reason made prejudgment interest payable from this date, no serious question arises but that McREMI and McNeil were legitimately entitled to their management fees until the closing occurred and the management company became defunct. Accordingly, it was error to have included the $1.7 million in fees payable during the interim as returnable to the limited partners.

We will reverse this portion of the judgment and remand to the trial court to recalculate the compensatory damage award and prejudgment interest on the award. Because the trial court awarded punitive damages in twice the amount of compensatory damages, the court, on remand, may wish to reconsider its punitive damage award as well.

DISPOSITION

The matter is remanded to the trial court to recalculate the damage award to eliminate the so-called “190 adjustment” of $1.7 million and to recalculate prejudgment interest on the revised compensatory damage award. The trial court, on remand, may, if deemed reasonable or necessary, reconsider the amount of punitive damages awarded as well. The judgment is affirmed in all other respects. Each side to bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, Acting P. J.

We concur:

WOODS, J.

ZELON, J.