Filed 12/10/08 Atallah v. Equilon Enterprises CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| ELIAS ATALLAH,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>EQUILON ENTERPRISES,<br><br>Defendant and Appellant. | B195336<br><br>(Los Angeles County<br>Super. Ct. No. BC 330285) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Andria K. Richey, Judge. Reversed and remanded.

Gwire Law Offices, William Gwire and Tia Pollastrini for Plaintiff and Appellant.

Fulbright & Jaworski, Helen L. Duncan, Joseph H. Park and Fred Rowley, Jr., for Defendant and Appellant.

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Elias Atallah brought an action against Equilon Enterprises LLC, dba Shell Oil Products, U.S. (Equilon), and others who are not parties to this appeal.[1] Atallah's claim for intentional misrepresentation was tried to a jury that returned a verdict for $1.7 million in favor of Atallah. Although the jury found that Equilon had acted toward Atallah with oppression, malice or fraud, the trial court found that there was no evidence of Equilon's net worth and therefore refused to allow the jury to consider the amount of punitive damages to be awarded. The trial court denied Equilon's motions for a directed verdict and for a judgment notwithstanding the verdict and also denied Atallah's motion for a new trial on the issue of punitive damages.

Equilon appeals from the judgment, principally on the ground that the evidence does not support the verdict. We find no merit in any of Equilon's contentions. Atallah also appeals from the judgment to the extent that it operated to deny Atallah's claim for punitive damages. We find that the trial court erred in refusing to allow the jury to consider the amount of punitive damages to be awarded. Accordingly, we reverse the judgment and remand with directions to conduct proceedings to determine the amount of punitive damages that should be awarded. Following such proceedings, we direct the entry of a judgment that is consistent with the jury's verdict, the views expressed in this opinion and the additional proceedings mandated by our order.

## FACTS

### *1. Introduction*

This case arises from the sale by Equilon to Atallah of a Texaco gas station located in Riverside that Atallah previously operated under a lease for about 10 years; Atallah paid $759,575 for the gas station. After protracted and complex discussions between various public entities and Equilon over the problem of groundwater contamination, which overlapped the negotiation of the sale of the station to Atallah, the

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[1] As we discuss below, Atallah also named Attorney Thomas Bleau and the firm of Bleau, Fox & Fong as defendants in this action. The case against the attorneys was referred to arbitration.

gas station, which had been closed down pending the sale, never reopened. The fundamental problem that prevented the gas station from being opened for business was the potential of groundwater contamination by the gas station.

In essence, the jury's verdict was predicated on the finding that Equilon had concealed from Atallah both its dealings with the various governmental entities and the fact that the gas station was seen by these entities as a threat to groundwater wells situated in the area where the gas station was located.

***2. The Parties, the Property and the Water Wells***

Equilon is a fully owned subsidiary of Shell Oil Products, U.S., and was formed by a merger of Shell Oil Products, U.S., and Texaco Oil Company (Texaco).

For about 10 years prior to 2002, Atallah operated the gas station in question, located on Magnolia Avenue in Riverside, first as an authorized franchisee of Texaco and, after the merger, as a franchisee of Equilon. Directly across the street from Atallah's gas station was another station owned by Equilon, which the parties refer to as the "Shell" station.

There were five wells situated along and below Magnolia Avenue that provided water to a treatment facility known as the Arlington Desalter facility. The well nearest to Atallah's gas station was well No. 5, located approximately 960 feet downgradient from the station. The water in these wells was not potable, i.e., it was not fit for human consumption.

***3. Atallah Sues Equilon in Federal Court***

Following a study of the profitability of its gas stations in Equilon's western region, Equilon decided to sell the station operated by Atallah and to keep the Shell station. Equilon also notified Atallah that it was terminating his franchise.

Equilon claims that in January 2002 it gave Atallah the right of first refusal to buy the gas station for the amount offered by a third party. According to Atallah, however, Equilon failed to comply with the Petroleum Marketing Practices Act (PMPA) by refusing to sell the station to Atallah. Be that as it may, in March 2002 Atallah filed an action in federal court under the PMPA; Attorney Bleau and his firm (see fn. 1, *ante*)

represented Atallah in this federal action. According to Attorney Bleau, Equilon defended this action vigorously.

***4. Government Agencies Decide to Convert the Wells to Produce Potable Water***

The Santa Ana Watershed Project Authority (SAWPA) oversees the quality and quantity of water in the so-called Santa Ana Watershed, which covers the area where Atallah's gas station was located. In mid-2002, SAWPA decided to convert the five wells under Magnolia Avenue to produce potable water. In August 2002, the Department of Environmental Health for the County of Riverside notified Equilon that these wells would be converted to produce potable water, that Equilon needed to clean up underground gasoline storage tanks (UST's) and that corrective action needed to be taken to prevent groundwater contamination.

***5. The Federal Action Is Settled***

In October 2002, discussions to settle the federal action began between Equilon and Atallah. Most of the settlement terms were agreed upon by February or March 2003. On April 14, 2003, Atallah signed the settlement agreement that provided that Equilon would sell the gas station to Atallah for $759,575 and would also pay Atallah $90,000 for the early termination of his franchise agreement. The agreement also called for Equilon to remove the UST's. Escrow was to close on or before August 29, 2003.

In accordance with the settlement agreement, Atallah closed the gas station down on April 14, 2003, in order to allow Equilon to remove the existing UST's, which was done in May 2003, and to install in their stead new, state-of-the-art UST's. As it turned out, the station was never reopened.

***6. Equilon, SAWPA and the Regional Water Quality Control Board Meet Throughout 2003 and Early in 2004***

Equilon, represented by hydrogeologist Brad Boschetto; SAWPA, represented by Eldon Horst; and the Regional Water Quality Control Board (RWQCB), represented by its UST section chief, Kenneth Williams, met seven times in 2003 and once on

February 10, 2004. These meetings began in February 2003 while the settlement discussions between Equilon and Atallah of the federal action were still pending.[2]

In these meetings, SAWPA stated that if the groundwater became contaminated, it would require Equilon to treat and remove the contamination. Both SAWPA and RWQCB focused particularly on well No. 5 and wanted Equilon to present plans concerning groundwater monitoring, action plans in the event of contamination and a guaranty that Equilon would implement and finance remediation if that should become necessary.

At trial, Equilon stipulated that it never told Atallah about its meetings in 2003/2004 with SAWPA and RWQCB. Nor did Equilon ever tell Attorney Bleau, who represented Atallah in the settlement negotiations of the federal action with Equilon, that it was discussing groundwater contamination at the site of the gas station with SAWPA and RWQCB, that it was being asked to come up with an expensive contingency plan and that, as it had been informed, a spill might result in a liability of millions of dollars. Because Bleau was unaware of any of these problems, he did not advise Atallah to hire an environmental consultant.[3]

***7. The Miller-Brooks Environmental Site Reports***

Equilon retained Miller-Brooks, an environmental consultant, to conduct an assessment of the area in which Atallah's gas station was located. In 2001 and 2002, Miller-Brooks prepared four reports that noted the presence of a well approximately 700 feet from the station (well No. 5) and stated that there was no evidence of groundwater contamination and no further action was warranted. A report issued in 2002 stated that contamination has been detected around the UST's some 17 years previously and that this had been fully remediated. Atallah was given these reports in April 2003 and read them.

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**2** The meetings in 2003 between the agencies and Equilon took place in February, March, May, June, July, September and November.

**3** Bleau's law practice specialized in representing gas station owners vis-à-vis franchisors.

In April 2003, Miller-Brooks prepared yet another report in which it noted SAWPA's operation of the Arlington Desalter, the existence of well No. 5 and the fully remediated contamination 17 years previously. There is no reference in this report to the interest and concern that SAWPA and RWQCB were showing in the matter of groundwater contamination, nor of the demands that these agencies were making on Equilon.

***8. May 2003: Equilon Becomes Aware of the Cost of Containment***

Faced with SAWPA's request that Equilon enter into an indemnification agreement, in late May 2003 Equilon's Boschetto made some calculations that yielded disturbing results. He concluded that it would cost between $300,000 and $500,000 to install a containment system, that it would take $40,000 a year to maintain the system and that, given the rapid groundwater velocity at the site, a spill could result in a liability between $20 million and $50 million. These calculations were never released to anyone outside Equilon.

One result of these calculations was that Equilon decided to sell the Shell station across the road from Atallah's station. Given the proximity of well No. 5, Equilon would not even sell gasoline to the new owner of the Shell station. In fact, when the Shell station was sold, a deed restriction prevented the sale of gasoline from the site. Atallah remained ignorant of the circumstances of this sale.

Equilon's general manager for its western region, David Burrow, testified that he never told Atallah about the groundwater problem, the cost of remediation and the reason that Equilon decided to sell the Shell station. Burrow conceded at trial that if he could go back in time, he would have provided Atallah with this information.

***9. SAWPA and RWQCB Are Led to Believe That Equilon Was Shutting Down Atallah's Gas Station***

While Equilon's Boschetto testified that he did not specifically recall that he told SAWPA that Equilon was removing the UST's from Atallah's gas station, he stated that "[i]t makes sense" that he did so; he did not recall telling SAWPA that the station would again open as a gas station. In fact, SAWPA's Horst testified that by mid-2003, the site

of Atallah's gas station was no longer of concern to SAWPA because he believed the station had been closed permanently. (It is to be remembered that Atallah had in fact shut the station down in April 2003 under his sale agreement with Equilon in order to allow Equilon to remove the old UST's; Atallah intended to install new UST's.) RWQCB was not treated any differently than SAWPA and, like SAWPA, it was not told that the plan was to sell the station to a party who would operate it as a gas station.

***10. June 2003: Miller-Brooks Prepares a Contingency Plan***

Under constant pressure from SAWPA, Equilon directed Miller-Brooks to prepare a contingency plan to identify the risks posed by well No. 5. Miller-Brooks did so and concluded that the velocity of groundwater seepage was a fast 32 to 40 feet per day; this posed a substantial problem. Boschetto testified that he could have but did not inform Atallah of this report. At this point in time, the scheduled closing of the escrow was four months away. This is significant because, as we set forth below (text, *post*, p. 18), Atallah testified that if he had learned of the environmental problems in the summer of 2003, he would have hired the appropriate experts and would have been able to open the gas station for business by mid-October 2003.

***11. Escrow Is Extended***

Originally, escrow was to close on or before August 29, 2003. In July 2003, Wells Fargo requested a tank closure report from Atallah. Because Equilon had broken the well monitor when it removed the UST's in May 2003, the process of obtaining the report was delayed, which in turn delayed Wells Fargo. Bleau requested and obtained an extension of the escrow to October 10, 2003. Although Atallah met this deadline, Equilon did not, which resulted in yet another extension of the escrow to October 31, 2003. As we show below, the last extension of the escrow to October 31, 2003, was to prove fateful.

***12. July 2003: Equilon's Boschetto Tells Atallah's Environmental Consultant That He Expects a "Closure" or "No Action" Letter from RWQCB***

In July 2003, Wells Fargo, the lender financing the purchase of the gas station, notified Atallah that it required an environmental report.

Atallah retained Property Consultant whose employee James McElroy contacted Boschetto and another outside environmental consultant retained by Equilon. Even though by this time Boschetto had attended meetings with SAWPA and RWQCB in February, March, May and June 2003 during which he had listened to the agencies' concerns, he made no mention of the meetings or of the concerns voiced in those meetings. Nor did he tell McElroy of the cost calculations that he had performed that had yielded results bad enough to cause Equilon to sell the Shell station. Instead, he told McElroy that he, Boschetto, was happy with the groundwater monitoring and that he expected RWQCB to issue a "closure" or "no further action" required letter after the next quarterly testing. Not surprisingly, McElroy's eventual report made no mention of any groundwater problems nor of the agencies' concerns about those problems.

***13. The Conditional Use Permit Lapses***

Unbeknownst to Atallah, the conditional use permit (CUP) for the gas station lapsed six months after the gas station was closed, i.e., on October 14, 2003. The rule is that a CUP terminates automatically and without notice if there is no continuous use of the property for six months. Equilon's Burrow acknowledged that he knew of this rule. Atallah, on the other hand, did not even know that there was a CUP covering the property.

As we discuss below, the termination of the CUP was a fateful development. If Atallah had known of this, he would have come up with cash to buy the gas station since he had assets of approximately $4 million composed of cash and realty with equity that he could refinance.

***14. December 2003: Atallah Learns of the Groundwater Problem***

In December 2003, after escrow had closed, Equilon gave Atallah a report discussing the groundwater testing that Equilon had done while escrow was pending. This was the first time that Atallah learned of the problems posed by well No. 5.

***15. SAWPA Successfully Objects to the Issuance of a CUP***

It was not until the contractor who was to install new UST's learned in March 2004 that the CUP had lapsed that Atallah became aware of the existence and importance

of the CUP. Although Atallah immediately applied in person for the CUP, he did not yet know that SAWPA had gone on record requesting to be informed if anyone applied for a CUP for the gas station. As Atallah was about to learn, SAWPA adamantly opposed the issuance of a CUP for the gas station.

Although the Riverside planning commission initially approved reissuance of the CUP, SAWPA appealed this decision to the city council and there vigorously opposed the issuance of a CUP.

It was now that Atallah hired an expert urban planner, Douglas Shakelton, to help him through these growing difficulties. There was testimony that if Shakelton had been consulted in May or June 2003, and if Shakelton had known of SAWPA's opposition to the gas station, Shakelton would have advised Atallah to reopen the gas station before the CUP lapsed on October 14, 2003. According to Shakelton, the opposition of an organization like SAWPA to the issuance of a CUP creates a great risk.

While the city council approved the issuance of a CUP with many environmental safeguards, SAWPA was not satisfied. SAWPA filed an action against the city and Atallah, contending that the environmental review (CEQA) was in error and that a new CEQA was required. After the court had issued a preliminary injunction stopping Atallah from opening the gas station, the court eventually ruled that a new CEQA had to be prepared. This would have cost Atallah between $100,000 and $200,000 and would have taken up to two years.

At the time of the trial of this case, the regional water district had commenced an eminent domain proceeding against the property on which the gas station is located.

**THE VERDICT**

As noted, Atallah's case against Attorney Bleau and his firm was severed and was ordered into arbitration. Prior to trial, the court sustained Equilon's demurrer to the cause of action for beach of contract without leave to amend. The only claim that went to trial was the cause of action for intentional misrepresentation. In essence, this cause of action alleged that SAWPA was opposed to the operation of the gas station and that Equilon, who knew of this opposition, intentionally concealed this fact from Atallah. The cause of

action alleged that if Atallah had known of SAWPA's opposition, he would not have bought the gas station.

The jury found that Equilon had a duty to disclose to Atallah the facts "arising out of" Equilon's meetings with SAWPA, including the fact that the meetings took place, and that Equilon also had to disclose what Equilon itself had "discovered relating to environmental activities or conditions that affected the Texaco station site." The jury found that Equilon intentionally concealed from Atallah "important facts" about the property and that Atallah neither knew nor reasonably could have discovered these facts. The jury concluded that Equilon intended to deceive Atallah, that Atallah reasonably relied on Equilon's concealment of these facts and that the concealment was a substantial factor in causing harm to Atallah. The jury also found that Equilon had acted with oppression, malice or fraud toward Atallah.

## DISCUSSION

## EQUILON'S APPEAL

### *1. SAWPA's and RWQCB's Opposition to the Operation of the Gas Station Materially Affected the Value of the Property*

Equilon's contention that Atallah "never claimed that the 'undisclosed facts'[4] at issue affected the value of the Property" is disingenuous, as is the further assertion that the value of the property had actually increased to $1 million at the time of trial.

Equilon's argument is predicated on the assumption that it sold Atallah a tract of real property. This is a wholly false and misleading assumption. Equilon sold Atallah a gas station, i.e., *an operating business.* But, after pocketing $759,575, Equilon handed

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**4** Equilon cites seven facts or circumstances that at trial Atallah, in his closing argument, listed as undisclosed facts. They are SAWPA's and RWQCB's concern over the operation of the gas station; the meetings held with these agencies; requests by the agencies that Equilon disclose what plans it had for the station operated by Atallah and the Shell station; a request by the agencies for contingency plans covering the possibility of contamination; groundwater velocity that could contaminate the nearest well in 30 days after spillage; a potential liability in the millions of dollars; and a request by SAWPA for an indemnity agreement.

Atallah the keys to a gas station that could not be operated as a gas station. In other words, the value of Atallah's purchase -- an operating gas station -- was reduced to zero.

Atallah's damages calculations and the jury's award of damages reflect the loss of a business and not the depreciation in the value of real property. Atallah's expert calculated that lost profits were $610,000 and that Atallah sustained a loss of business value of $1,050,000 between September 2003 and the time of trial. The jury's award was for $1.7 million. It is significant that Equilon does not directly challenge these awards.

That one of Equilon's experts testified that the current highest and best use of the property, i.e., a restaurant, has increased the value of the property to $1 million is beside the point. Atallah did not agree to buy a restaurant but an operating gas station. We reiterate that this action is about the loss of an operating business and not the sale of real property. It is also true that the possibility of alternate uses of the realty on which the gas station is located has been placed in limbo by the eminent domain proceeding brought by the regional water district.

***2. Atallah Did Not Testify That He Would Have Bought the Gas Station Even If He Knew About SAWPA's Opposition and the Groundwater Problem***

Taking a single, one-word answer ("absolutely") given by Atallah during his deposition[5] out of context, Equilon contends that Atallah conceded that he "would have bought the Property in any event." We set forth in the margin the exchange on which this claim is based, together with additional questions and answers that Equilon has omitted to cite.[6]

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[5] In presenting the quotation in its brief, Equilon fails to state that the exchange leading to the answer on which Equilon relies was given during Atallah's *deposition*, leaving the reader to suppose that it was *testimony* given during the *trial*. In fact, the initial line in the brief purportedly quoting Atallah's testimony has been altered to remove the indication that it was deposition and not trial testimony that was being quoted.

[6] "Ms. Duncan [Equilon's counsel]: [¶] (Reading) [¶] 'Question -- to Mr. Atallah -- what is it that you felt should have been disclosed to you? [¶] 'Answer: That the risk of a gas station being there and pressure from SAWPA, that they don't want a gas station

Equilon omits to explain what it means by the phrase "in any event" when it claims that Atallah "has admitted that he 'absolutely' would have bought the Property in any event." In another portion of its brief where Equilon contends that Atallah did not rely on Equilon's concealment of material facts, Equilon states that Atallah admitted that he would have bought the property even if he knew of the "undisclosed" facts. We will therefore assume that by claiming that Atallah stated he would buy the property "in any event," Equilon means to claim that Atallah testified that he would have bought the gas station even if he knew of SAWPA's opposition to the gas station, the groundwater problem, the cost of remediation, and the agencies' demands for contingency plans and indemnity agreements, to name some examples.

An adverse party may use for any purpose the deposition of a party to the action. (Code Civ. Proc., § 1015.620, subd. (b).) The quoted deposition testimony cannot be interpreted to mean that Atallah would have bought the gas station even if he knew of SAWPA's opposition and the other problems we have listed. Atallah's testimony was that if he knew of these problems, he would have retained experts to address the problems. He did not state, either during his deposition or in trial, that he would have bought the gas station even if his experts could not resolve the problems, including SAWPA's opposition. On the other hand, he did state in substance that if the experts

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in that corner. [¶] 'Question: And had that been disclosed to you before you closed an escrow, what would you have done? [¶] 'Answer: I would have hired an expert to look into it and advise me. [¶] 'Question: And then what? [¶] 'Answer: They would say what's necessary step or the outcome from the expert person. They're going to tell me what is on the table. [¶] 'Question: Okay. And then what? What would have -- would you have brought -- would you have bought the property? [¶] 'Answer: Absolutely.[']" This is where Equilon's counsel stopped reading from the deposition. Atallah's counsel read on from this point: "'So you would have bought the property anyway? [¶] 'Answer: Knowing what I know now, we could have had another expert involved in it to see where it is, where I stand.[']"

Atallah then testified at trial that he would have hired a land-use attorney and an expert like Shakelton and that if he had known about SAWPA and the groundwater conditions in May 2003, he could have had the station operating before October 2003.

could resolve the problems, he would have bought the property. The context of the answer "'[a]bsolutely'" was that if the experts were able to resolve the problems, Atallah definitely would have bought the gas station.

If "in any event" is intended to include Atallah's ultimate realization that the gas station could never be opened for business, Equilon's argument is that Atallah admitted that he would have bought the gas station even if he knew that it could never open as an operating gas station. This is, of course, an untenable suggestion since it ascribes to Atallah the perverse position that he was willing to pay $759,575 for nothing.

As noted, Equilon also relies on Atallah's one word answer "'[a]bsolutely'" to contend that this purported admission shows that Atallah did not rely on Equilon's concealment of material facts. The factual predicate of this contention is, as we have explained, in error. Taken in its true context, Atallah's answer was that if the experts would have solved the problems, he would definitely have bought the gas station.

On the issue of reliance, the fact is that Equilon actively mislead Atallah into thinking that there were no environmental problems. First, Equilon provided Atallah in April 2003 with earlier Miller-Brooks environmental site reports that reflected a clean bill of environmental health. Next, when Atallah's consultant McElroy contacted Equilon's Boschetto, McElroy was told in July 2003 that Equilon expected a "closure" or "no action" letter from RWQCB, which meant that once again Equilon was representing that there were no environmental problems. Thus, this is not one of those fraud cases when the plaintiff reasonably relied on passive conduct by the party practicing fraudulent concealment. This is one of those cases when the defrauding party *affirmatively induced reliance* on the part of the plaintiff. Very unfortunately for Atallah, Equilon's fraudulent inducements produced their desired effect, i.e., reliance by Atallah.

***3. SAWPA's Opposition to the Gas Station Was an Operative Fact and Not Merely an Indication of Future Intent***

Relying on *Nussbaum v. Weeks* (1989) 214 Cal.App.3d 1589, Equilon contends that "SAWPA's concerns did not manifest in affirmative action until long after the sale." According to Equilon, there must be a "specific present intention" (*id.* at p. 1602) that is

being concealed. The argument is that there was no duty to disclose "the concerns of a third-party, particularly one without authority or intent -- either stated or demonstrated -- to regulate or shut down gas stations." In substance, Equilon's argument is that SAWPA merely indicated that at some future time it would oppose the operation of the gas station, i.e., that SAWPA did not have the specific present intention of opposing the gas station.

In *Nussbaum v. Weeks*, Nussbaum, the seller of land, contended among other things that Weeks, the general manager of a water district, intended to change the policy of the water district with relation to the land being sold by Nussbaum to the water district. The change in policy, when it was eventually implemented after the sale of the land, increased the value of the land. (*Nussbaum v. Weeks*, *supra*, 214 Cal.App.3d at p. 1593.) Nussbaum contended that Weeks concealed the fact that he intended to change water board policy. The appellate court concluded that Weeks did not in fact have the power to change the policy, nor did Weeks do anything to bring about the change in policy. (*Id.* at pp. 1602-1603.) Thus, the appellate court found that the material fact that was being allegedly concealed, that Weeks intended to change the policy of the water board, was in actuality not a fact at all, i.e., Weeks did not have the power to change the board's policy and he therefore could not have concealed the intent to do so.

At the most basic level, *Nussbaum* is distinguishable on its facts since in the case before us there is no doubt that SAWPA opposed the gas station prior to the sale, during the pendency of the sale and thereafter. Thus, there is no question that the concealed fact, SAWPA's opposition, was vigorously pressed by SAWPA at all material times.

*Nussbaum* is also distinguishable in connection with the principle for which Equilon cites it, i.e., that intention is a material fact only if it is a "specific present intention." (*Nussbaum v. Weeks*, *supra*, 214 Cal.App.3d at p. 1602.) Contrary to Equilon's claim, the case before us does not involve intention to take action in the future. Over the course of eight meetings commencing in February 2003, SAWPA informed Equilon that if ground water contamination occurred, Equilon would have to treat and remove the contamination. During these meetings, SAWPA also kept demanding plans for groundwater monitoring, action plans in case of contamination and guarantees by

Equilon that it would implement and finance remediation. This is a far cry from simply intending to take future action; SAWPA was energetically pressing Equilon for immediate action. Significantly, SAWPA concluded that the gas station was no longer a matter of concern when it concluded, erroneously, that the gas station was being closed down. Completely consistent with Equilon's deceptive conduct toward Atallah, by omitting to inform the agencies that the gas station was being sold to a private party, Equilon managed to hoodwink SAWPA and RWQCB into thinking that the gas station in fact was being closed down, as it was actually closed down (by Atallah) in April 2003.

We find no merit in Equilon's contention that because SAWPA did not have the authority to actually close down the gas station, "SAWPA's requests were not material to the sale of the Property." What mattered was that SAWPA was adamantly opposed to the operation of the gas station. As it turned out, SAWPA was successful in blocking the reopening of the station. Thus, as expert Shakelton confirmed, the opposition of an agency like SAWPA creates a great risk -- a risk that turned into a disaster for Atallah.

We must also reject the contention that Equilon was under no duty to disclose opinions, such as the experts' conclusions about groundwater velocity and Equilon's own calculations about the cost of remediation. The critical point was SAWPA's opposition, and not opinions about groundwater velocity. To the extent that information about groundwater conditions explained SAWPA's acute concerns, such information was certainly relevant. As far as the cost of remediation is concerned, Equilon concedes that this cost informed and guided its own decision regarding the Shell station. One would think that it is obvious that if the cost of remediation was the basis for Equilon's decision to sell the Shell station, the cost of remediation would be also basic for Atallah's business decisions. There is no question that the cost of remediation was a material fact that should have been disclosed.

***4. Equilon Did Not Inform Atallah of the Actual Groundwater Conditions***

Equilon contends that it informed Atallah of the existence of SAWPA, the presence of a well within 1,000 feet of the station and that he was responsible for any contamination of the well.

Needless to say, informing Atallah of the existence of SAWPA is not the same as informing Atallah of the fact that SAWPA was adamantly opposed to the operation of the station and was making multiple demands on Equilon for action. It is not SAWPA's existence but SAWPA's actions that are germane. And, standing alone, the circumstance that there was a well nearby is a neutral fact. Atallah testified that he knew that the gas station had been there since 1964, that he had operated the station since 1993 and that he had not heard of or known of any environmental problems during that time. While he acknowledged that as owner he would be responsible for any contamination, in light of what he knew of the environmental record, he was not concerned over this problem.

Equilon also contends that it furnished Atallah with the Miller-Brooks environmental site reports and that this informed Atallah of the possibility of contamination. As it turned out, the Miller-Brooks reports of 2001 and 2002, which were furnished to Atallah, were yet another aspect of the deception practiced by Equilon. While they referred to some contamination 17 years previously, the reports stated that this had been fully remediated and that there was no contamination on the site. In other words, the reports were intended to give Atallah the false impression that there were no environmental problems, which was an impression that tallied with his own experience.

When it came to the June 2003 Miller-Brooks report that actually noted a problem, i.e., groundwater velocity, Boschetto conceded that he could have, but did not, given this report to Atallah.

For the first time on appeal, Equilon contends that Atallah knew enough to be placed on notice that he should make further inquiries about environmental issues. There are two substantial flaws in this contention. First, this theory was not pursued at trial and was therefore not submitted to the jury. Second, Equilon's campaign of deception was designed to, and had the effect, of lulling Atallah into thinking that there were no environmental problems. It was therefore not unreasonable that Atallah concluded that there were no problems and it is thus incorrect, as a factual matter, to assert that he knew of enough problems to be on inquiry notice.

It is, of course, basic that a party cannot adopt a new theory on appeal that was not presented at trial. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 407, pp. 466-468.) As Atallah correctly observes, inquiry notice is primarily a factual matter that should be decided by the finder of fact. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 428.) It is too late to present this theory for the first time on appeal, and to expect the reviewing court to decide a factual issue that should have been resolved by the jury.[7]

We have already noted Equilon's efforts to assure Atallah that there were no environmental problems, such as the Miller-Brooks reports and the misleading statements made to Atallah's consultant McElroy, and do not repeat them here.

***5. There Is Substantial Evidence That Equilon Intended to Conceal Material Facts and to Deceive Atallah***

Equilon contends that there is no evidence of any intent to conceal and deceive. We find this contention to be remarkable.

It is a remarkable contention because the entire structure of Equilon's dealings with Atallah was predicated on Equilon's efforts to keep Atallah in the dark about the serious environmental problems of the gas station. The simple fact is that no one would have bought the gas station if it was known that it required half a million dollars or so to clean it up, $40,000 per year to keep it clean and that, after all that, one would still face a liability of $20 million, not to speak of the alarming liabilities imposed by the contingency and indemnity agreements demanded by the agencies. This is obvious to us and of course it was obvious to Equilon. Thus, if the gas station was to be sold at all, it had to be sold to someone who knew nothing of the environmental problems.

Equilon's conduct conformed at all times with its realization that Atallah had to be kept in the dark. Equilon completely concealed the fact and substance of its meetings with SAWPA and RWQCB. The evidence of this was so overwhelming that Equilon

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[7] We note only in the margin that Equilon was ably represented throughout and that the decision at trial not to pursue the inquiry notice argument must be assumed to have been a well-considered decision.

even stipulated to this fact. Equilon handed Atallah those Miller-Brooks reports that assured Atallah there were no environmental problems. Boschetto actively misled McElroy into thinking that there were no environmental problems. And Equilon said nothing about the cost of remediation and the extent of liability after remediation. We could go on, but the foregoing suffices.

In many ways, this case is a paradigm fraudulent concealment case. There is no doubt about what was concealed, no doubt that what was concealed was not merely material but crucial -- a literal deal-breaker -- and no doubt that Equilon intended to deceive Atallah. There simply was no other way of unloading the gas station *as a gas station*, especially for the sum of $759,575.

***6. There Is Substantial Evidence of Causation***

Equilon contends that the evidence is that it was the lapse of the CUP and Atallah's inability to have it reinstated that brought about the closure of the gas station. In other words, the contention is that even if there was fraudulent concealment, it was not the cause of Atallah's damages.

Equilon's concealment of material and critical facts set the events in motion that resulted in the making the gas station inoperable. As Atallah put it in his trial testimony, if he had known about SAWPA's opposition and the facts and circumstances on which its opposition was based, he would have retained legal and land use experts who would have informed him about the CUP and the importance of not allowing it to lapse on October 14, 2003. He would have had the station up and running by mid-October 2003. The concealment of the material and critical facts that we have discussed had the direct and immediate result of keeping Atallah in ignorance until it was too late to reverse the events that led to the permanent closure of the station. "Where the defendant's conduct is the stimulus for some other act which causes the injury, there is no break in the chain of causation." (*Maupin v. Widling* (1987) 192 Cal.App.3d 568, 575.)

As Atallah notes, the question of causation is usually held to be a question of fact for the jury. (See generally 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §

1184, pp. 551-552.) In this case, the correctly instructed jury[8] found that Equilon had caused Atallah's damages. Because, as we have discussed, the concealment of material facts led directly to those damages, there is substantial evidence to support the verdict.

***7. There Was Substantial Evidence of Loss of Profits***

Equilon contends that Atallah did not have a reasonable expectation of making a profit because (1) Atallah did not really buy a business from Equilon but only land and fixtures, and (2) Atallah allowed the CUP to lapse and therefore could not expect to operate the gas station.

We find both arguments unpersuasive. Equilon supports the first argument by the claim that when Equilon paid Atallah $90,000 for the early termination of his franchise, Equilon was in effect buying the business from Atallah. In a manner of speaking, it may be an apt observation that Equilon bought the remaining term *of the franchise*, but that is far as that idea goes. With the franchise terminated, what Atallah bought was a going concern that he had operated for 10 years. The fact that he was buying a business was recognized, as Atallah points out, in the jointly agreed-upon statement of the case that was read to the jury, which stated that Atallah purchased a gas station from Equilon and that facts had been concealed that related to the future operation of the gas station.

The fact that the CUP lapsed was, for the reasons we have set forth in part 6 of the Discussion, *ante*, directly the result of Equilon's fraudulent concealment of material facts. It really puts matters on their head to claim that Atallah should not recover damages because Equilon brought about the condition that caused those damages.

Atallah's damages expert testified that Atallah sustained $1,660,000 in damages. This figure was composed of $610,000 in lost profits and $1,050,000 loss of business value from September 2003 to the time of trial. Equilon does not directly challenge these figures, which constitute substantial evidence of damages.

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**8** The jury was given Judicial Council of California Civil Jury Instructions (2008) CACI No. 430.

***8. There Was No Error in the Jury Instructions***

Equilon contends that the following instruction was erroneous:

"Mr. Atallah relied on Equilon's concealment if it caused him not to take action that he probably would otherwise have taken had he known the fact that Equilon failed to disclose."

The trial court refused to give the following instruction that was requested by Equilon:

"Mr. Atallah relied on Equilon's failure to disclose if it caused him to purchase the property, and if he would probably not have done so without such concealment."

Contrary to Equilon's theory, a party's reliance is not limited to the act of purchasing property. "One who willfully deceives another with intent to induce him *to alter his position* to his injury or risk, is liable for any damage which he thereby suffers." (Civ. Code, § 1709.) "One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093.)

In this case, Equilon intended, by concealing material facts, to produce inaction. It was only if Atallah remained passive vis-à-vis environmental issues that Equilon could hope to sell the gas station to him. Fraud that produces inaction, when action would be critical, is nonetheless fraud.

The case on which Equilon relies, *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, does not state otherwise. That case arose from the action of a lender against a real estate appraiser and broker who fraudulently induced the lender to make loans to purchasers of property. In that case, reliance was the making of loans. In that context, the passage on which Equilon relies certainly makes sense.[9] But this decision does not limit reliance to the act of purchasing property.

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[9] "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable

### *9. The Trial Court's Order Denying Equilon's Motion for a Judgment Notwithstanding the Verdict Is Affirmed*

As our analysis of Equilon's contentions and of the facts of record reveals, there is no doubt that the jury's verdict is supported by substantial evidence. The trial court was therefore correct in denying Equilon's motion for a judgment notwithstanding the verdict. (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703.)

## ATALLAH'S APPEAL

### *1. Introduction*

While a party who has recovered judgment, as Atallah has, is usually not aggrieved and for that reason cannot appeal, an exception is made when the party has been awarded less than that party has demanded. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 42, p. 103.) Atallah sought punitive damages but was not awarded any. Thus, Atallah may appeal from the judgment for the limited purpose of reviewing the trial court's decision not to allow the jury to consider the amount, if any, of punitive damages to be awarded.

### *2. Procedural History*

After two days of deliberations, the jury returned a unanimous verdict for Atallah, answering 12-0 on each of the nine substantive verdicts submitted to it for decision. The special verdict form also contained the following two interrogatories: Did Equilon act with oppression, fraud or malice toward Mr. Atallah? Was the conduct constituting malice, oppression and fraud committed by one or more officers, directors or managing agents of Equilon? The jury also answered these two interrogatories favorably to Atallah by 12-0.

After the verdicts were returned, a relatively short hearing took place outside the presence of the jury that terminated with the court's ruling that the question of the

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probability, have entered into the contract or other transaction." (*Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1239.)

amount of punitive damages would not be submitted to the jury. Before summarizing this hearing, we digress to note the circumstances under which David Burrow, the general manager of Equilon's western region, closed out his trial testimony. This is germane because, according to Atallah's counsel, Burrow would have testified about Equilon's financial condition; Atallah, however, was not able to call him as a witness on the punitive damages issue. We explain the last point when we describe the hearing on punitive damages.

During trial, Burrow was called out of order in order to accommodate a vacation that he was taking. When he was finished testifying, an exchange took place between court and counsel about excusing Burrow. Atallah's counsel did not want him excused because he might require Burrow for a "different part of the case." He did not specify the punitive damage phase because, according to Atallah's appellate brief, counsel did not want to mention punitive damages in the presence of the jury. The trial court, supported by Equilon's counsel, nevertheless excused Burrow.

According to Atallah, Burrow was knowledgeable about Equilon's profits and losses, he was informed about the profitability of service stations and he was knowledgeable about Equilon's assets.

We return to the hearing on punitive damages that took place after the jury had returned its special verdicts.

That hearing commenced with Atallah's counsel moving to introduce a statement reflecting the revenues of Royal Dutch Shell of the Netherlands for the year 2005. Counsel stated that Equilon was wholly (100%) owned by Royal Dutch Shell. Equilon's counsel responded by citing authority (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1282-1286) that a parent company's financial statement cannot be used to show a subsidiary's net worth. Atallah's counsel countered by stating that Equilon's revenue was not shown separately because "all revenue flows to the parent." The following transpired:

"THE COURT: This is refused [meaning Equilon's objection to the Royal Dutch document is sustained]. All right.

"Are you ready to go?

"MR. GWIRE [Atallah's counsel]: Well, Your Honor, in light of the court's ruling, I don't have evidence to establish Equilon's earnings.

"THE COURT: All right. So what do we want to do, folks?

"MR. GWIRE: I'm going to present it in the form of argument, Your Honor.

"THE COURT: Based on what?

"MR. GWIRE: Well, based upon the evidence that's come in in terms --

"THE COURT: What evidence do you have of net worth that's in the record?

"MR. GWIRE: Well, it's not net worth, it's revenue. It's the testimony of Mr. Burrow.

"THE COURT: Who said what?

"MR. GWIRE: Who established that there were 1100 to 1200 stations under his control.

"THE COURT: What evidence is there of the company's value worth or revenues in the record, not of that business unit? That's not the law. It's the company.

"MR. GWIRE: Well, Equilon.

"THE COURT: There may be. I'm not trying to challenge you. I'm just asking what do we have?

"MR. GWIRE: We have the experts who established what revenue was for individual stations on an average.

"THE COURT: Is that the law, revenue, or isn't it supposed to be net worth?

"MR. GWIRE: I think it's either, Your Honor.

"THE COURT: Give me some law. I'm waiting. This isn't a big shock, folks. Give me some law.

"Can anybody give me some law?

"MS. DUNCAN [Equilon's counsel]: Yes, Your Honor.

"THE COURT: Please, give me some law.

"MS. DUNCAN: Evidence of defendant's annual income standing alone is not meaningful evidence of defendants [*sic*] financial condition -- Lara, L-A-R-A, versus

Cadag, C-A-D-A-G, 1993, 13 Cal.App 4th [*sic*] 1061 -- defendants [*sic*] assets versus liabilities must be established.

"THE COURT: So being told we have no evidence to support the request for punitive damages, is there a motion?"

Equilon's counsel stated that since there was no evidence showing financial condition, the matter could not go to the jury. The court responded by granting the motion and called for the jury to be called in. Before the jury came in, Mr. Gwire spoke up:

"MR. GWIRE: Your Honor, may I have a recess to, at least, deal with these issues that have come up?

"THE COURT: You had, unfortunately, two weeks to deal with these issues. I warned you at the beginning of the case that as soon as the verdict came in, we would go to the punitive phase. I don't know what you've been doing. Please bring the jury in and we'll dismiss them."

The trial court then thanked the jury at some length. After the court stated that the jury would be discharged but evidently before the jury actually left the courtroom, Mr. Gwire again spoke up:

"MR. GWIRE: Your Honor, may I be heard at sidebar for one moment, please?

"THE COURT: On the same issue we just addressed?

"MR. GWIRE: Yes.

"THE COURT: No.

"MR. GWIRE: It's an important issue, Your Honor.

"THE COURT: All right. Thank you, ladies and gentlemen. You are discharged."

In Atallah's appellate brief, counsel represents that prior to the very last exchange we have quoted he remembered that he had served a notice to appear for the person most knowledgeable about Equilon's gross and net earnings and profits for the years 2003 to 2005 and he also recalled that he had objected to Burrow being excused at the conclusion

of his trial testimony. The gist of this is that, according to counsel, Burrow could have testified about Equilon's financial condition.

***3. Net Worth Is Not the Exclusive Measure of a Defendant's Ability Pay Punitive Damages***

"Various measures of a defendant's ability to pay a punitive damages award have been suggested. Defendant in this case contends the best measure of his ability to pay is his net worth. The Association for California Tort Reform . . . advocates the profitability of the defendant's misconduct as the proper measure. We decline at present, however, to prescribe any rigid standard for measuring a defendant's ability to pay." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 116, fn. 7.) "Traditionally, 'net worth' was the criterion against which an award of punitive damages was measured to decide whether the award was excessive. (*Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1267-1269.) However, in *Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291, the court held (apparently for the first time in this state) that a punitive damage award was proper without regard to the defendant's net worth, and that such award could be based solely on the amount of profit defendant garnered from the fraud. (*Id.* at pp. 1300-1301.)" (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 56.)

The purpose of requiring information about a defendant's financial condition before punitive damages are assessed is to "assure that the award punishes but does not cripple or bankrupt the defendant." (*Kenly v. Ukegawa*, *supra*, 16 Cal.App.4th at p. 57.) Thus, while it is true that in *Lara v. Cadag*, *supra*, 13 Cal.App.4th 1061, 1064, the case that Equilon cited during the hearing, the court held that, *in that case*, evidence of earnings was not meaningful evidence of the defendant's financial condition, what the cases come down to is "evidence of the defendant's ability to pay the damage award." (*Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1152, citing *Kenly v. Ukegawa*, *supra*, 16 Cal.App.4th 49, *Lara v. Cadag*, *supra*, 13 Cal.App.4th 1061 & *Cummings Medical Corp. v. Occupational Medical Corp.*, *supra*, 10 Cal.App.4th 1291.) This squares with the holding of *Adams v. Murakami*, *supra*, 54 Cal.3d 105, 109, that for an award of punitive damages to be sustained on appeal, the record must contain

"meaningful evidence of the defendant's financial condition." We note the existence of pre-*Adams v. Murakami* authority approving the use of gross sales and gross income to support punitive damages awards (*Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d 952, 967-968) with the proviso that this type of information must be "meaningful" in the sense of *Adams v. Murakami.*

Given this background, Mr. Gwire was not far off the mark when he answered "I think it's either" when the court asked him whether the basis for a punitive damage award is revenue or net worth. Broadly put, when revenues are supported by other financial information that describes the defendant's financial condition, i.e., the defendant's ability to pay punitive damages, it may well be that there is meaningful evidence of a defendant's financial condition. It is understandable why under the facts of *Lara v. Cadag, supra,* 13 Cal.App.4th at page 1064, the court clearly rejected a "bare showing of income" as inadequate.[10] According to Atallah's showing, however, Burrow was knowledgeable about Equilon's assets, its profits and losses, and the operations and profitability of its service stations. There is every reason to believe that as general manager of the western region overseeing over a thousand service stations he was indeed knowledgeable about these and other financial matters. While we decline to express a view about a showing that was never made, it is clear that meaningful information about Equilon's financial condition was in fact available.

We can appreciate the pressures on the trial judge in dealing with a jury that has just finished deliberating in a lengthy and difficult trial; it is understandable that the trial

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**10** "No evidence of [the defendant's] net worth was presented. The evidence of his financial condition, such as there is, came in by way of his answers to questions on cross-examination -- that he owns and operates a family medical clinic with a monthly net profit of $3,000 and that he works part-time at another clinic where he earns an additional $5,000 to $6,000 each month. That is all there is. We do not have a clue about his assets or liabilities and we have no idea if he owns or owes money on a house or a yacht or a racehorse. Anything beyond the pure arithmetic necessary to figure out that his annual income is somewhere between $96,000 and $108,000 would be pure speculation." (*Lara v. Cadag, supra,* 13 Cal.App.4th 1061, 1063.)

court, having told counsel that the punitive damages phase would commence immediately after the verdict, intended to do just that. Yet it is also very likely that the trial court's ruling excluding financial information about Royal Dutch Shell of the Netherlands came as a surprise to counsel. Having deprived counsel of evidence that he was obviously counting on, nothing would have been lost if counsel would have been given a few minutes to gather his thoughts and resources. Further reflection and reading would have produced the awareness that net worth is not the sole permissible measure of a defendant's ability to pay punitive damages.[11] In short, the trial court erred in not granting a continuance in order to resolve the problem caused by the plaintiff relying on something other than net worth and the trial court's ruling that excluded financial information about Royal Dutch Shell.

We find that it is a weighty matter that the jury found the factual predicates for an award of punitive damages. As our review of the evidence shows, the facts supported a finding that Equilon acted fraudulently, as that term is defined in Civil Code section 3294, subdivision (c)(3).[12] This finding came after what must have been a vigorously litigated case prior to trial and it came at the end of a long and difficult trial. But, of course, it is not the effort expended but the result of those efforts that is important. And that result was a jury verdict that recognized that Equilon was answerable to Atallah for punitive damages. This is not only of importance to Atallah but it is also of more broadly gauged, social importance as punitive damages deter future misconduct. While counsel's *planning* left something to be desired, the trial court's decision deprived Atallah of a substantial right that the jury's punitive damage verdict conferred on him.

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[11] The trial court appears to have been inclined toward the view that net worth is the only measure.

[12] "'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).)

What is decisive in the final analysis is that there are substantial grounds to think that Atallah was and is in possession of adequate financial information about Equilon. How that information is marshaled, analyzed and presented is of course an important matter. Given the performance of counsel in this case, there is no reason to think that counsel is unable to analyze and present that information.

Although we reverse the judgment, the party who has prevailed in this appeal is Atallah. Accordingly, we award costs on appeal to Atallah.

**DISPOSITION**

The judgment is reversed. The court's ruling that there is no evidence of Equilon's financial condition for the purposes of a punitive damage award is vacated and the case is remanded, upon a proper showing of Equilon's financial condition, for further proceedings to determine the amount of punitive damages to be awarded. Following such proceedings, the court is directed to enter a judgment consistent with the verdict returned by the jury on July 12, 2006, with this opinion and with the result of the additional proceedings mandated by our order. Atallah is to recover his costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

FLIER, J.

We concur:

COOPER, P. J.

BIGELOW, J.