2019 WL 4942091
Not Officially Published
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Only the Westlaw citation is currently available.

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Court of Appeal, Fourth District, Division 3, California.

Ahmed D. HUSSEIN, Plaintiff, Cross-defendant and Appellant,
v.
QUALITY SYSTEMS, INC. et al., Defendants, Cross-complainants and Appellants.

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Filed 10/8/2019
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As Modified 11/7/2019

Appeal from a judgment and orders of the Superior Court of Orange County, Glenn R. Salter and Mary Fingal Schulte, Judges; Michael Brenner (retired judge of the Orange Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Affirmed in part, reversed in part. (Super. Ct. No. 30-2013-00679600)

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OPINION

GOETHALS, J.

***1** Plaintiff/Cross-defendant Ahmed Hussein appeals from the trial court's entry of judgment against him on his shareholder fraud claims after granting summary judgment in favor of defendants Sheldon Razin, Steven Plochocki, and Quality Systems, Inc. (hereafter collectively QSI, or sometimes defendants or cross-complainants). Defendants also cross-appeal after a bench trial in which the court denied their breach of fiduciary duty cross-complaint against Hussein, a member of QSI's board of directors and its second-largest shareholder at the time in question.

A shareholder who alleges he refrained from selling shares in reliance on false representations about the company's financial performance can bring a claim for fraud or misrepresentation under California law. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 171 (*Small*).) *Small* referred to such lawsuits as a "holder's action"; we will do the same. Hussein contends the evidence did not support summary judgment against him on his holder's claim for lack of justifiable reliance.

On our de novo review, we believe the issue is close, but conclude QSI did not meet its burden as the moving party to establish as a matter of law that Hussein could not prove reasonable reliance on QSI's alleged misrepresentations. Alternate grounds

advanced by QSI based on lack of the necessary specificity in pleading a holder's claim or inability to prove damages also fail to support summary judgment.

As we explain, the trial court after a bench trial properly found no merit in QSI's breach of fiduciary duty cross-complaint against Hussein. We also conclude the court did not err in denying, without prejudice, Hussein's request for attorney fees under QSI's indemnity agreement with its directors. We therefore affirm the judgment in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

QSI is a publicly traded company in the healthcare software market. Razin is QSI's founder and largest shareholder, and Plochocki was its chief executive officer at the time in question. Hussein was one of QSI's largest shareholders and a QSI board member until May 2013.

In October 2013, Hussein filed a holder's action in the superior court in which he alleged that, if not for defendants' misrepresentations, he would have sold his QSI shares before they suffered a precipitous drop in their value in July 2012. He specifically alleged, "Had Hussein never heard or relied upon Defendants' representations about QSI in late 2011 ... [¶] ... [and] throughout 2012[,] he would have continued working with Jones Trading to sell his 9,333,700 QSI shares."

The alleged misrepresentations included:

"1) November 7, 2011: Plochocki [told] *Investor's Business Daily* that 'worries about flattening and saturation' in the healthcare software market 'were baseless,' and 'there is nothing drying up and there is nothing slowing down';

"2) January 25, 2012: Plochocki [told] the board of directors, including [Hussein,] that QSI's growth was 'rivaled only by Apple' and that the company expected to achieve 30% revenue and net income growth during its 2013 fiscal year, which began on April 1, 2012;

***2** "3) January 26, 2012: Plochocki, on a public earnings conference call ... stat[ed] that the QSI sales 'pipeline' 'continues to build to record levels';

"4) May 17, 2012: Plochocki stated on an earnings call [regarding] QSI's [preceding fiscal year] that 'we remain confident about the growth opportunities, as evidenced by our recent guidance for the 2013 fiscal year. We have stated that we expect revenues to increase 20 to 24%, and earnings per share to grow 20 to 25%.' Paul Holt, QSI's CFO, made similar statements on this call about ... QSI's confidence in the [expected] growth;

"5) June 26, 2012: Similar financial expectations were stated in proxy materials filed with the SEC, signed by Razin, Plochocki and five QSI directors; and

"6) July 13, 2012: In a definitive proxy statement filed with the SEC, QSI stated that 'for fiscal year 2013, we expect that revenues will increase in the 20-24% range and we expect earnings per share to grow by 20-25%.' "

Hussein alleged that "contrary to these statements, QSI's revenues and net income were in fact decreasing, not increasing, and the growth projections were baseless." He claimed QSI engaged in "a continuous reforecasting process based on real-time information regarding QSI's revenue and income" and, therefore, defendants knew the statements were false.

In a July 26, 2012 public earnings call, Plochocki revealed a significant quarterly net income loss and QSI retracted its recent positive projections. Following the call, QSI's stock price lost almost one-third of its value in one day, falling from $23.63 to

$15.95 per share. If Hussein had sold his shares, as he claimed he intended to do before defendants' misrepresentations, he would have avoided a multi-million dollar loss in the value of his QSI holdings.

During the July 26th earnings call, Plochocki admitted QSI's net income for the first fiscal quarter of 2013 declined 18 percent compared to the previous year and its diluted earnings per share declined 19 percent in that same time frame. On behalf of QSI, Plochocki also retracted the earnings guidance QSI had issued in May, June, and July 2012, and stated that QSI was " 'not affirming our previous guidance nor providing revised guidance at this time.' "

Hussein served as a QSI board member, but alleged he had been excluded from board committees by Razin's domination or "Dictatorship" over the board. Hussein further alleged he had previously requested "backup information in connection with the company's projections" from QSI management but did not "to his knowledge" receive it, and he was not privy to QSI's "real-time financial information." Consequently, he "had to rely on the accuracy of the Company's public statements and the information provided to the board." Hussein claimed he was therefore "completely surprised" by the July 2012 retraction and unaware that QSI's financial projections " 'had no factual basis.' "

Hussein presented evidence he had discussed the sale of his stock in late 2011 and early 2012 with multiple trading partners in addition to Jones Trading, including JP Morgan and Credit Suisse, and that he had disclosed the possibility of selling " 'some or all of his shares' " in a November 2011 13D filing with the SEC. In previous years he had unsuccessfully sought control of QSI through proxy contests by cumulating his shares with other shareholders, but Hussein stated in a declaration he did not "decide[ ] to launch his proxy contest in late May 2012" until after "speaking with" members of QSI's former and present leadership team, including Plochocki. Absent defendants' unfounded and false misrepresentations about its financial condition and prospects, Hussein alleged he would have sold his stock before March 2012.

***3** Defendants moved for summary judgment on grounds Hussein could not prove the reliance or damages elements of his fraud claims. They contested both actual and justifiable reliance.

Defendants asserted the undisputed evidence showed Hussein never detrimentally relied on their alleged statements because, rather than planning to sell his shares, his actions demonstrated his intent to maintain or increase his stake in QSI to wage another proxy contest. In fact, Hussein purchased additional QSI shares on November 10, 2011, told his financial advisors he was not interested in selling his shares because of his proxy plans, and forced his broker to unwind a margin sale of his shares in May 2012.

Defendants further argued Hussein's open and repeated denunciation of QSI's financial projections showed he never relied on defendants' projections. Defendants argued that denunciations like Hussein's precluded reasonable or justifiable reliance by him on projections he had consistently attacked as untrustworthy. Defendants observed that Hussein repeatedly challenged the accuracy and truthfulness of QSI's financial statements—fatally contradicting any assertion that he could have reasonably relied on the same statements.

The trial court granted summary judgment in favor of defendants finding Hussein could not establish justifiable reliance. The court ruled, "[a]s a matter of law, Plaintiff cannot prove he reasonably relied on Defendants' alleged misrepresentations in making his decision to hold his shares." The court observed "[t]he undisputed evidence shows that, at the time he allegedly relied on Defendants' statements and financial projections, Plaintiff had 'extensive concerns' regarding the company and extreme distrust of defendants ...," including "their willingness to provide truthful information about the company."

To support its ruling, the court cited undisputed facts that included: during the same year he was allegedly relying on QSI's various financial statements, Hussein sent a letter to NASDAQ requesting that NASDAQ investigate QSI because QSI had " 'totally inadequate and inaccurate disclosure[s]' "; and at the same time he requested that the SEC " 'launch an inquiry into the quality of QSI's financial reporting and the accuracy and completeness of its disclosures to shareholders.' " In the SEC letter, Hussein " 'strenuously urge[d]' " an investigation because he was " 'extremely concerned' " with QSI's accounting of

expenditures which caused him to question " 'the efficacy of QSI's internal control over financial reporting and the integrity of its reported financial statements.' "

The court also noted that Hussein publicly stated "concerns" about the accuracy and quality of QSI's financial reporting not just in the run-up period to later statements on which he based his complaint, but throughout the 2011 and 2012 time frame of his complaint. For example, in his November 2011 Schedule 13D filed with the SEC, Hussein stated he " 'continues to be deeply troubled by the deterioration in corporate governance at [QSI],' " including " 'the board's failure to ... evaluat[e] the reasonableness of the assumptions underlying the budget,' " and he remained " 'concerned about the accuracy of public disclosures made by [QSI].' "

***4** Similarly, at QSI's May 24, 2012 board meeting, Hussein voted against the fiscal year 2013 budget because he " 'didn't have enough information ... to base [his] judgment whether this budget [was] rosy, too conservative.' " (Trial court's brackets.) As reflected in the court's citation to undisputed facts, this was a recurring issue which caused Hussein to implicitly cast doubt on QSI's stated projections by complaining he had on " 'several' " occasions " 'asked [QSI] management for clarification of the quantitative assumptions that underlie their projections,' " but he " 'received no answer' " or was " 'refused' " access " 'to underlying data or records.' "

In granting summary judgment, the trial court found Hussein's "self-serving declaration" in opposition to the motion for summary judgment "contending he 'never had any reason to doubt the accuracy of QSI's financial projections until July 26, 2012" was "insufficient to raise a triable issue of fact on the issue of reasonable reliance." The court concluded that, "in light of the undisputed evidence of Plaintiff's long standing battle with, and extreme distrust of, QSI's leaders, along with Plaintiff's sophistication [as an investor] and desire to seek control of the board, reasonable minds could not conclude that Plaintiff relied on any statements made by Defendants in deciding to hold his shares." The court specified that "reasonable minds could not conclude that Plaintiff *reasonably* relied on Defendants' projections and statements in deciding to hold his shares." (Italics added.)

The trial court also relied on undisputed statements Hussein made in his proxy contest materials. In his June 27 and July 20, 2012 proxy materials, published before the July 26, 2012, drop in QSI's share price, Hussein reiterated that he remained " 'concerned that the current Board is failing to properly ... evaluat[e] the reasonableness of the assumptions underlying the budget.' "

Those proxy materials reflected both Hussein's market sophistication and his distrust of QSI's leadership. Hussein stated, "[t]he Company's proxy statement is asking shareholders to support the Company's slate of nominees, detailing the financial performance of the Company and expecting that financial performance to continue if the shareholders elect the Company's nominees. However, the stock market represents the collective judgment of all market participants. For the trailing twelve months, the Company's price-earnings-ratio has been significantly lower than its industry peers. Over the same period, shareholders have suffered an approximately 40% decline in the Company's stock price from a close of $41.74 on June 27, 2011 to a close of $24.72 on June 27, 2012. Clearly, with a 40% drop in the Company's stock price over the past twelve months, the market is telling shareholders that the market is not accepting the Company's claim." Hussein made similar statements in his July 2012 proxy materials, citing a 43 percent annual decline in QSI's stock price.

The trial court noted that "[f]our days" after QSI retracted its earnings guidance and its stock price dropped on July 26th, "Hussein issued a press release proclaiming that he had 'warned the shareholders repeatedly about the potential for poor financial results.' Hussein testified at his deposition that he was 'very proud' because his prediction of QSI's financial decline 'came true.' " Similarly, Hussein's proxy materials filed on July 30, 2012 reiterated his prescience about QSI's financial performance: " 'I have warned the shareholders repeatedly about the potential for poor financial results. The performance of the company has substantially damaged my financial interest as well as the financial interest of other shareholders.' "

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***5** The trial court did not reach an alternate basis defendants argued for summary judgment, namely, speculative damages. The court instead concluded its ruling: "Because the Court finds that Plaintiff could not have justifiably relied on Defendants' alleged misrepresentations, the Court does not analyze whether Plaintiff failed to prove cognizable damages."

After the court entered summary judgment on Hussein's complaint, the proceedings turned to QSI's cross-complaint against Hussein, which we discuss in detail below.

DISCUSSION

Part I of our discussion addresses Hussein's appeal from the trial court's summary judgment ruling; Part II concerns the court's decision rejecting QSI's breach of fiduciary duty cross-complaint after a bench trial.

Part I

Summary Judgment

Hussein contends the trial court erred in granting summary judgment on his holder's claim for lack of justifiable reliance. "We review orders granting summary judgment de novo." (*Vebr v. Culp* (2015) 241 Cal.App.4th 1044, 1050.) In other words, we stand in the shoes of the trial court, applying the same rules and standards governing a trial court's resolution of a summary judgment motion. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.)

A. *Law Governing Summary Judgment*

A motion for summary judgment is properly granted if the moving papers establish there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "A defendant moving for summary judgment bears the initial burden to show the plaintiff's action has no merit. [Citation.] The defendant can meet that burden by ... showing the plaintiff cannot establish one or more elements of his or her cause of action .... [Citations.] To meet this burden, the defendant must present evidence sufficient to show he or she is entitled to judgment as a matter of law." (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 889.)

If "the defendant meets that burden, the burden shifts to the plaintiff to present evidence establishing a triable issue exists on one or more material facts." (*Carlsen v. Koivumaki, supra*, 227 Cal.App.4th at p. 889.) "A triable issue of material fact exists ' "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." ' " (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 631.) The standard of proof for common law fraud or misrepresentation in civil cases is a preponderance of the evidence. (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291-293; *The Grubb Co., Inc. v. Department of Real Estate* (2011) 194 Cal.App.4th 1494, 1503.)

B. *Law Governing Holder's Actions: Actual and Reasonable Reliance Required*

In *Small*, the Supreme Court held that, unlike federal law, California common law permits holder's actions based on fraud or misrepresentation. (*Small, supra*, 30 Cal.4th at pp. 171, 177.) As *Small* explained, a stockholder's forbearance in deciding not to part with shares as a result of false claims "fulfill[s] the element of reliance necessary to sustain a cause of action for fraud or negligent misrepresentation." (*Id.* at p. 174.) Actual reliance is required to sustain such an action. (*Id.* at p. 171.) "The plaintiff must allege actions, as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the plaintiff actually relied on the misrepresentations." (*Id.* at 184.)

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1. *Actual Reliance*

***6** A plaintiff demonstrates actual reliance when, " 'without such misrepresentation or nondisclosure he or she would not, in all reasonable probability' " (*Manderville v. PCG & S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498), have held his or her shares, i.e., exercised "forbearance ... to refrain from selling stock." (*Small, supra*, 30 Cal.4th at p. 171.) Thus, the defendant's fraud or misrepresentation must be " 'an immediate cause of the plaintiff's [forbearing] conduct ....' " (*Manderville*, at p. 1498.)

The necessity of actual reliance distinguishes a holder's action from a derivative action. "Plaintiffs who cannot plead with sufficient specificity to show a bona fide claim of actual reliance do not stand out from the mass of stockholders who rely on the market." (*Small, supra*, 30 Cal.4th at pp. 184-185.) "[S]uch persons cannot bring individual or class actions for fraud or misrepresentation. They may, however, be able to bring a corporate derivative action against the corporate officers and directors for harm caused to the corporation. [Citation.] Because a plaintiff in a derivative action is suing on behalf of the corporation, he or she need not show personal reliance." (*Id.* at p. 185.)

2. *Reasonable Reliance*

Justifiable reliance is also a required element for a holder's action (*Small, supra*, 30 Cal.4th at p. 173), as it is for fraud and misrepresentation generally. (*Ibid.*, citing *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "[T]he plaintiff must show that the reliance was reasonable by showing that (1) the matter was material in the sense that a reasonable person would find it important in determining how he or she would act [citation], and (2) it was reasonable for the plaintiff to have relied on the misrepresentation." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1194.) The plaintiff is not " 'held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man' " (*Blankenheim v. E. F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1474 (*Blankenheim*)), but instead the reasonableness of his or her reliance is judged by the plaintiff's " ' "own intelligence and information." ' " (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1239 (*Thrifty*).)

This standard cuts both ways depending on the plaintiff's level of sophistication. " 'Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled.' " (*Blankenheim, supra*, 217 Cal.App.3d at p. 1474.)

By the same token, " ' "[i]f the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, ... he will be denied a recovery." ' " (*Thrifty, supra*, 218 Cal.App.4th at p. 1239.) Thus, the appellate court said of an attorney plaintiff in upholding summary judgment against her: "In essence, she is asking this court to rule that a practicing attorney can rely on the advice of an equestrian instructor as to the validity of a written release of liability that she executed without reading. In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered. [Citations.] Under these circumstances, we conclude as a matter of law that any such reliance was not reasonable." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843-844.)

C. *Standard of Review & Analysis: Reasonable Reliance*

***7** We first address whether summary judgment was proper against Hussein for lack of reasonable reliance on QSI's alleged misrepresentations, as the trial court found.

" 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.' [Citations.] 'However, whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239; see *Guido v. Koopman, supra*, 1 Cal.App.4th at p. 843-844.)

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As noted, the party moving for summary judgment bears the initial burden of production. (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 940.) If the evidence does not support judgment in the defendant's favor as a matter of law, we must reverse summary judgment without considering the plaintiff's opposing evidence. (*Ibid.*) The evidence we evaluate must be viewed in the light most favorable to the plaintiff as the losing party; we strictly scrutinize the defendant's evidence and resolve any evidentiary doubts or ambiguities in the plaintiff's favor. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

As the moving party, QSI presented what appeared to be a strong case for summary judgment by excerpting letters Hussein sent the SEC and NASDAQ, as well as selections from Hussein's SEC and proxy statement filings, his vote as a director on QSI's annual budget and requests to the company for further information, in addition to a gloating press release and other statements Hussein made after QSI's stock dropped. A jury considering this evidence could reasonably conclude a person speaking and acting as Hussein did would not justifiably rely on a company's financial statements and projections when the same person had so consistently and pervasively criticized the company. This is particularly true where that criticism did not exempt management as Hussein claims on appeal. But while a jury *could* make that determination, we conclude after scrutinizing the evidence that it was not conclusive on the issue.

In the year immediately preceding the issuance of the alleged financial misstatements on which Hussein claimed he relied, he demanded that NASDAQ and the SEC initiate investigations into " 'QSI's financial reporting,' " including " 'the accuracy and completeness of its disclosures to shareholders.' " He did not restrict his call for inquiry to his adversaries on the board or to QSI's executive team; rather he leveled his claims at *QSI*, including " 'QSI's financial reporting.' " Management's accounting practices caused him to state publicly an " 'extreme[ ] concern[ ]' " about " 'the efficacy of QSI's internal control over financial reporting and the integrity of its reported financial statements.' "

Hussein continued to express his concerns during the period when defendants' issued their alleged misstatements beginning in November 2011: (1) in his SEC filing that month, Hussein stated he was " 'deeply troubled' " about " 'fail[ed]' " board oversight of " 'the reasonableness' " of QSI's budget assumptions; (2) in his recurring requests to " 'management for clarification of [their] quantitative assumptions' "; (3) through his vote in May 2012 against the 2013 fiscal year budget; and (4) through his proxy statements in June and July 2012 appealing to shareholders to reject—as he and "the market" had—"the Company's" stated financial performance and stated expectations for future performance.

***8** Nevertheless, a strong case does not entitle the moving party to judgment as a matter of law, which is the high bar the moving party must meet to shift the burden of production to the opposing party. QSI did not meet that burden. As counsel for Hussein persuasively demonstrated at oral argument—particularly in relation to the letters Hussein sent to NASDAQ and the SEC—the evidence QSI presented was open to alternative interpretations on the question of reasonable reliance.

It is true that Hussein's letter to NASDAQ in October 2010 sought an "inquiry into QSI's compliance with Nasdaq's listing standards," complaining that cronyism between Razin and QSI's outside counsel allegedly hindered a previous NASDAQ inquiry. Hussein lamented that such "outrageously poor corporate governance ... inevitably lead[s] to totally inadequate and inaccurate disclosure regarding QSI's affairs to its shareholders." Excerpted from its context, this accusation regarding "totally inadequate and inaccurate disclosure" hardly suggests the person lodging the complaint would justifiably rely on QSI statements to its shareholders.

But the context of the letter also could suggest to a reasonable juror that Hussein's actual complaint was against his rival, Razin. In particular, the letter stated: "The public disclosures by QSI give no hint of the complete control that Mr. Razin wields over QSI and its board." While Hussein implied ominously that "poor corporate governance" under Razin "inevitably" would have negative corporate consequences, including "inadequate and inaccurate disclosure[s]," the text of the letter did not state any complaint about the accuracy of QSI's financial data or its sales pipeline, which formed the core of Hussein's subsequent

holder's claim. It is also not clear that outside legal counsel, whom Hussein criticized, would have any input or bearing on QSI's underlying financial performance or prospects.

A reasonable jury could find there could be no justifiable reliance by Hussein on any future QSI disclosures after he expressed the grave concerns articulated in his letter. But a jury could also reasonably conclude under the preponderance of evidence standard that the letter gave voice only to board jealousy or in-fighting, and did not preclude justifiable reliance on future public QSI financial statements not made by or otherwise connected to an attorney consultant. And as counsel for Hussein pointed out at oral argument, the letter closed with an appeal to NASDAQ officials to "ask Mr. Plochocki ... to comment before deciding whether or not to end your inquiry." A reasonable jury could view this statement as a vote of confidence in Plochocki, suggesting implicit trust in him and reasonable reliance on his judgment—which Hussein's complaint alleges was later betrayed when he relied on subsequent financial misrepresentations Plochocki made on QSI's behalf.

The same analysis applies to Hussein's November 2010 letter to the SEC. On the one hand, the letter opens by alleging "troubling developments at QSI" allegedly impacting "the accuracy of QSI's financial statements." With that introduction, a reasonable jury could find it hard to believe Hussein later justifiably put faith in anything QSI said. But a closer examination of the three-page letter reveals its primary topic was "board oversight of corporate expenditures," and specifically, "allegations of improper reimbursement of travel expenses by QSI ...." Hussein complained that Razin approved reimbursement of QSI's president for his "use of personal private aircraft ... for business travel" and that Razin himself "was reimbursed for travel expenses" though he "retired from his position as president and CEO of QSI more than 10 years ago and is described in QSI's filings with the [SEC] as [an] independent" board member.

***9** A reasonable jury could conclude that the letter's stated purpose reflected "extreme[ ] concern[ ]" over QSI's financial reporting, "calling into question the efficacy of QSI's internal control over financial reporting and the integrity of its financial statements." Taking this view, a juror might find it hard to believe a person expressing such alarm would reasonably put stock in *any* subsequent QSI financial statements, including those Hussein claimed to rely on as he chose to forbear from selling shares.

On the other hand, a jury could also reasonably view the letter as evidence that, as F. Scott Fitzgerald [1] put it, the "very rich" are "different from you and me," as their squabbles and jealousies involve private jets and corporate boards. Considered in that light, a reasonable jury could view the letter as being limited in scope to travel policy complaints and allegations of favoritism and board extravagance. But because the letter gave no hint of concern about QSI's sales data and sales pipeline—the core subjects of alleged QSI misstatements Hussein later claimed he relied on—a reasonable jury could discount the importance of the letter to the litigation.

As counsel for Hussein noted at argument, this letter could also be read as supporting Hussein's claimed faith in Plochocki because Hussein described Plochocki as having "had no input regarding the [travel] policy," perhaps suggesting implicit trust that Plochocki would have disapproved of the policy had he known of it. Jurors therefore could view the letter as potentially bolstering the reasonableness of Hussein's alleged reliance on Plochocki's later statements about QSI's financial condition and projected sales.

A close review of other Hussein statements and actions on which QSI relied in its motion for summary judgment reveals similar ambiguity, precluding judgment as a matter of law for QSI. For example, QSI excerpted "Item 4 of Hussein's November 10, 2011 Schedule 13D" filed with the SEC, including his " 'concern[ ] about the accuracy of public disclosures made by [QSI].' " But this concern, which QSI left unspecified in its moving papers—either purposefully or because Hussein left it ambiguous in his 13D filing—may have been a rehash of his earlier travel policy complaint. It added nothing to support summary judgment.

Just as ambiguous was Hussein's 13D statement expressing his " 'concern[s]' " that, in his view, the QSI board consistently " 'fail[ed] to perform its main function of exercising meaningful supervision over the development by senior management of proposed strategic direction,' " failed to " 'evaluat[e] the reasonableness of the assumptions underlying the budget,' " and failed to " 'tak[e] steps to hold senior management accountable for achievement of the business plan and the budget.' " A jury could

righteously question the reasonableness of Hussein's alleged reliance on subsequent company statements when he expressed such deep misgivings about the company, including doubts about " 'assumptions underlying [QSI's] budget.' "

But in context, jurors could alternatively conclude the " 'assumptions' " Hussein referred to meant high-level policy choices driving the board's overall " 'strategic direction,' " *not* that he lacked faith in the company's stated financial data or potential sales prospects on which he later claimed to rely. Indeed, in asserting in the same 13D filing that QSI's " 'financial results are adversely affected' " by the board's failings, his complaint could be read as having faith that the company's prospects could be even brighter, if not for the board's poor leadership.

***10** We need not review in depth every factual argument QSI advanced to support its claim Hussein could not establish the reasonable reliance element of his holder's claim. It is enough that each piece of evidence generally reflected the same ambiguity as discussed above, precluding summary judgment on this ground.

D. *Alternate Grounds to Uphold Summary Judgment on Appeal*

1. *Specificity Standard for Actual Reliance*

As an alternate ground to uphold summary judgment, defendants renew on appeal their challenge to the sufficiency of the evidence related to the specificity of Hussein's holder's claim. As summarized by the trial court in its summary judgment ruling, QSI asserted "that because Plaintiff had not discussed with his brokers the specific price, timing, or quantity of any sale, never authorized them to begin negotiating a sale on his behalf, and no offer to purchase his shares was ever made, Plaintiff cannot prove actual reliance." The court disagreed, concluding that, "contrary to Defendant's contentions, the evidence does show more than just 'unspoken' or 'unrecorded' thoughts on Plaintiff's part that he was considering selling his shares during the 2011/2012 time frame. The evidence shows that Plaintiff had actual discussions with advisors and brokers about the possibility of selling his shares during this time frame." We agree with the trial court.

Small recognized that "the risk of encouraging nonmeritorious suits" led the federal high court to reject holder's actions as potentially "vexatious ... to extort a settlement," particularly in light of "difficulties of proof" arising when "crucial issues may depend entirely on oral testimony from the stockholder" as to his or her intentions. (*Small, supra*, 30 Cal.4th at pp. 177, 183.) To dampen that risk and as an aid to "separat[ing] meritorious and nonmeritorious cases, if possible in advance of trial," the Supreme Court applied to holder's actions "California's requirement for specific pleading in fraud cases ...." (*Id.* at p. 184.) The requirement applies to a holder's claim whether based on fraudulent statements or negligent misrepresentation. (*Ibid.*)

Small held that a plaintiff's bare "assertion of having relied on defendants' misrepresentations was insufficient" to "satisfy the specificity requirement." (*Small, supra*, 30 Cal.4th at p. 184.) Instead, the plaintiff "must allege actions, as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the plaintiff actually relied on the misrepresentations." (*Ibid.*) For example, the Supreme Court contemplated that the shareholder may have "told his broker, or a friend, or a spouse, of his decision" to sell his stock. (*Id.* at p. 182.) To illustrate "specific reliance on the defendants' representations," the court gave an "example" (*id.* at p. 184) based on the fact that "[a] corporation's financial report invites shareholders to read and rely on it" (*id.* at p. 182). The court found sufficient a hypothetical allegation "that if"—instead of receiving false financial data—"the plaintiff had read a truthful account of the corporation's financial status[,] the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place." (*Id.* at p. 184.)

The trial court here concluded "the *Small* decision does not stand for the proposition that a plaintiff cannot bring a holder's claim unless he or she can prove that an actual sale was in the process of being effectuated, and was then canceled." We agree. The question is whether the plaintiff alleged conduct on his part that indicated "the plaintiff actually relied on the misrepresentations." (*Id.* at p. 184.)

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***11** Here, Hussein squarely met that standard. He presented evidence to corroborate his claim he contemplated selling shares in QSI but refrained from doing so based on QSI's misrepresentations. He produced evidence he had already contacted brokers—an objective indication that supports his claim he was contemplating a sale of shares but for the defendants' alleged misstatements. This evidence exceeded that contemplated in *Small.* The Schedule 13D he filed with the SEC in November of 2011, as required of large shareholders, notified other shareholders and interested parties that he was considering selling his stake in the company, though it left open the possibility he might also retain his shares or acquire more. Hussein also testified he then had extensive discussions with multiple investment bankers about potentially selling all of his nine million QSI shares. Multiple brokers confirmed Hussein's claim, including an understanding that, "if Mr. Hussein was going to sell his QSI shares, he was going to sell them all."

One of the brokers, when asked at his deposition if "Hussein informed you that he decided to step back from selling all of his QSI shares based on QSI's future prospects" answered, "[Y]es. I don't know the exact dates of these conversations, but, yes, he would state that numerous times."

Based on such evidence, a jury could infer that the "future [QSI] prospects" contributing to Hussein's decision to refrain from selling his shares included those based on one or more of QSI's alleged misrepresentations about QSI's financial condition and sales pipeline. A jury could also reasonably conclude that other "future prospects," such as Hussein's increasing interest in a proxy contest, dominated his thinking so that any alleged misrepresentations by QSI did not contribute to his decision to hold his QSI shares. But for summary judgment purposes, Hussein's disclosure to third parties of his potential intent to sell his shares brings him well within *Small*'s requirement that a holder's claim must be based on more than "unspoken and unrecorded thoughts and decisions." (*Small, supra*, 30 Cal.4th at p. 184.)

QSI argues that the brokers' uncertainty about the dates of these conversations, including whether Hussein "t[old] you in 2011 or 2012 that he was considering selling his QSI shares," renders Hussein's holder's claim void. A jury, however, could credit Hussein's testimony that he had "numerous conversation[s]" with brokers "between November 2011 and January 2012" and between "May and June [of 2012]," and similarly credit his testimony that QSI's alleged misrepresentations *during this time frame* caused him to refrain from selling his shares.

Small does not mandate a contrary result. There the court contemplated a hypothetical scenario in which, had the corporation given a truthful account of its financial status in a single report, the shareholder allegedly would have sold his shares. (*Small, supra*, 30 Cal.4th at pp. 182, 184.) *Small* required a shareholder alleging reliance on the report to specify, assuming he or she had read a truthful account instead of the false one, "how many shares the plaintiff would have sold, and when the sale would have taken place." (*Id.* at p. 184.)

Hussein pleaded his claim in compliance with *Small.* He alleged, "Had Plochocki not made those false representations to Hussein at the January 25 Board meeting or in the January 26 conference call, Hussein would have finalized his negotiations with Jones Trading, JP Morgan, and Credit Suisse and accepted their offers that he sell all nine million of his QSI shares before March 2012." Defendants point to nothing in the record that would *require* a jury to conclude that Hussein's delay in deciding to sell his shares until March 2012, despite alleged misrepresentations made in January, necessarily meant he did not actually rely on the January statements. As defendants themselves point out, there are other possible reasons for delay, including paperwork to complete and compliance obligations to fulfill.

***12** The fact that Hussein gave multiple alternate dates by which he might have chosen to sell his shares—based on defendants' multiple alleged misrepresentations—does not aid defendants. A jury reasonably could credit his explanation in his complaint that he "continued to evaluate his position" regarding holding his shares in QSI. Thus, he asserted defendants' allegedly false statements which continued through the spring of 2012 induced him to "rel[y] on each of those representations in deciding not to continue working with Jones Trading, JP Morgan, and Credit Suisse to sell his QSI shares." The allegedly ongoing nature of defendants' misrepresentations undercuts QSI's position that Hussein was required to provide a single fixed date by which

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he would have sold his shares. A jury reasonably could conclude that each successive alleged misrepresentation influenced Hussein to hold his shares longer than he otherwise would have.

QSI also contends that an unspecified "Rule 144" would have limited the number of shares Hussein could sell, introducing further ambiguity into the *Small* analysis. We disagree because even if "Rule 144" or some other factor limited Hussein's ability to sell "all" his shares at once, a jury reasonably could infer he intended to sell all that he lawfully or practically could.

2. Damages

As another basis to uphold summary judgment, defendants contend "[s]ummary judgment is also appropriate for the additional reason that Hussein failed to adduce evidence creating a triable issue as to compensable damages. Defendants raised this argument below, although the Superior Court declined to reach it because it instead ruled for Defendants on other grounds."

Defendants recast their *Small* arguments to assert Hussein could not prove damages. They argue his "failure to establish the manner, price, quantity, or timing of stock sales he allegedly forbore from making renders his damages claim impermissibly speculative."

This argument does not establish defendants were entitled to summary judgment as a matter of law. To the contrary, Hussein's exact damages—assuming arguendo the jury found in his favor on his holder's claim—would necessarily depend upon when the jury concluded he would have sold his shares and the actual number of shares he would have sold, so that determination would be made based on the evidence presented. "[T]hough the fact of damage must be clearly established, the amount need not be proved with the same degree of certainty but may be left to reasonable approximation or inference. Any other rule would mean that sometimes a plaintiff who had suffered substantial damage would be wholly denied recovery because the particular items could not, for some reason, be precisely determined." (6 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 1718, p. 1108.) Neither surgical precision nor "absolute certainty" is necessary; "damages may be computed even if the result reached is an approximation." (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873.)

Defendants' argument that Hussein cannot profit "based on a stock price he claims was artificially inflated due to fraud" is equally unavailing. It appears defendants attribute to Hussein a premise (QSI's share price "was artificially inflated") that by their own briefing they acknowledge he does not share. They acknowledge his expert's assessment that, as paraphrased by QSI, "there is no evidence that QSI's stock price was artificially inflated by QSI's public statements between November 2011 and July 2012." Expert testimony that there was "*no* evidence" of price inflation does not suggest Hussein claimed, as QSI asserts, that its "price ... was artificially inflated due to fraud." In other words, a jury crediting the expert's evidence could conclude QSI's pre-revelation share price *accurately* reflected the company's value, and the amount it dropped approximated the amount of the company's self-inflicted harm from its false statements. In any event, we need not decide at this juncture the proper measure of damages; it is enough that QSI's contentions do not support summary judgment.

Part II

QSI's Cross-complaint and Hussein's Motion for Attorney Fees

***13** QSI contends the trial court made three errors regarding its cross-complaint against Hussein for breach of fiduciary duty. Two of the alleged errors relate to the court's rulings on QSI's right to a jury trial, and the third concerns the court's decision finding no merit in the cross-complaint after a bench trial. Specifically, QSI argues the court erred procedurally by reconsidering its earlier denial of Hussein's motion to strike QSI's jury demand, and by determining QSI was not entitled to a jury trial. On the

merits, QSI contends the court applied the wrong legal standard when it found no breach of fiduciary duty and instead granted Hussein's motion for judgment (Code Civ. Proc., § 631.8) at the close of QSI's case-in-chief.

For his part, Hussein argues the trial court erred by denying his request for attorney fees related to his successful defense against QSI's cross-complaint. We review each of QSI's and Hussein's respective cross-appeal contentions in turn after summarizing the court's detailed ruling and statement of decision.

A. *Court's Ruling and Statement of Decision*

1. *The Ruling*

The trial court in its ruling from the bench provided a thorough overview of QSI's case, the evidence it presented, and the court's reasoning rejecting the cross-complaint. The court explained the gravamen of QSI's cross-complaint was that Hussein, as a QSI director, breached his fiduciary duty to the company by "margining" his QSI shares. Providing a historical context, the court concluded the evidence showed that "prior to 2004 and in the late 1990's ..., it was very common for directors who owned stock in their company to margin that stock; that is, pledge that stock and receive loans against it." Then, "sometime before 2004," some practitioners and scholars in "corporate governance and best practices" began to express concern that "there was something negative about this, about directors pledging their shares," including that "you can lose control if you pledge your shares ..., maximize the loans, and then the shares start going down [and thus] your collateral [for the loans] goes down, and the shares can be sold out from under you."

Apart from these negative effects for the pledging director, QSI's expert testified that "investors like to see large-block shareholders in companies because that shows stability," "so if the large-block shareholder had his stock all sold on a margin call," it could undermine the company's reputation for stability.

As an additional component of such reputational harm, "if there was a large block sold" due to a margin call, it could have "an immediate effect on the market." Nonetheless, the court noted other evidence suggested that because "investors ... analyze companies on the strength of the company," not just by fluctuations in their reputation, "the stock would come back." The court gave as an example of company value rebounding—despite initial reputational harm—the movement in QSI's stock price following its July 26, 2012 retraction of earnings guidance. The court observed that the retraction harmed the company's reputation and, as a result, its share value "went down, but within a fairly short period of time [it] drifted back up to what would seem to be a market evaluation of the shares by August, ... maybe September, but in a short period of time."

QSI's expert also observed that margining one's shares could enable directors or other company personnel to act on inside information when they would otherwise be prohibited from doing so during "black-out period[s]." They could do so by electing not to bolster their collateral for margin loans, and thereby failing to prevent the "automatic[ ]" sale of margined shares in a margin call. The court observed, however, that no SEC regulation precluded directors from margining their shares.

***14** The court concluded Hussein "did not have any insider knowledge" that QSI's stock would plummet before July 26, 2012, and that Hussein "didn't try [to] dump the stock." Instead, he "tried to fight for it" by unwinding margin calls or other means. Though he was not always successful in retaining his stock, and indeed his overall ownership share of QSI stock eventually declined from 15 to 10 percent, the court found Hussein "always wanted to keep his stock, which says something about his interests." In the context of potential insider trading harm theorized by QSI's expert, the court observed Hussein's efforts to keep his stock "[h]ardly suggests someone who doesn't have the best interests of the company in mind."

Backtracking historically, the court recounted that in 2004 the QSI board *declined* to prohibit QSI personnel from taking margin loans. Instead, QSI's "2004 policy" adopted guidelines against margining QSI stock "to buy more shares in QSI or shares from another issuer." No evidence suggested Hussein ever violated this policy and, in any event, the court concluded the policy was

toothless for directors. QSI “could enforce it against an employee [by] contractual agreement,” and similarly against managers, but “[t]hey can't fire a director, for example,” because “[d]irectors are chosen by ballot.” The court recognized, “[t]hey serve a period of time, I guess,” by shareholder election, “but QSI had no way to enforce this policy.”

Against this backdrop, the court found margin loans Hussein took out with his QSI shares as collateral did not violate any fiduciary duty he owed to the company. Before his resignation in May 2013 when his ownership share dropped to 10 percent, Hussein had been a member of the board of directors for 17 years. During that period, Hussein obtained loans from various broker margin accounts, including to pay off loans that, as the court described, “he had in Egypt at a higher rate ....”

As the court recounted, “that's the first item that the [cross-complainant], QSI, wants,” that “spread” in “the interest rates between Egypt and U.S.A. They want that disgorged” for Hussein's alleged breach of fiduciary duty by margining his QSI shares. The Egyptian loan rate “was 6.5 percent,” according to the court's recollection, and the “U.S. rate was around 1 percent” on average for Hussein's margin loans from “four different brokers ... based on QSI [shares Hussein pledged] as collateral.” QSI's expert estimated this difference in interest rates was worth “at least 2 million” dollars.

The court did not specify the dollar value of the Egyptian loans Hussein paid off, but noted that QSI's expert conceded “Hussein's loan to collateral ratio represented overcollaterization, not undercollateralization.” Hussein took out the margin loans to pay off the Egyptian loans in 2008 or, as the court noted, “[i]t might have been 2010 but it was prior to 2011, and [therefore] fell under the 2004 policy.”

In 2011, by an 8 to 1 vote, QSI's board of directors adopted a new policy the court described as “prohibit[ing] directors, managers [and] certain employees from margining their [QSI] stock at all.” Before the vote, Hussein had margin “loans of about [$]86 million” for which QSI's expert conceded he had pledged QSI shares “worth about 387 million” dollars. The court found no evidence Hussein “margined shares at all” before 2008, but between 2008 and 2011 Hussein had used the margin loans for other purposes besides paying off his Egyptian loans, including to fund an earlier $26 million “Bear Stearns” investment. Hussein “objected strenuously” to the new policy, but was outvoted at the board meeting adopting it.

Hussein vowed not to comply with the new policy, directing his attorney to advise the board of his position; he also failed to answer questions on a company questionnaire regarding “whether he had pledged shares.” The court observed that QSI, in response, “never inquired further on it.”

***15** The next year, in July 2012, in the face of QSI's inability to terminate or otherwise discipline Hussein as a director, the court found “[t]hey did maybe the only thing they could.” QSI censured him. “They had a board meeting, they voted to censure him and when you do that, th[ere]'s another SEC form you give to the SEC which becomes public record. So it's out there in the public that they had censured him for not revealing whether he had pledged shares or not.” Thereafter, in Hussein's 2012 proxy contest materials, which the court characterized as “setting up for another proxy battle trying to get his board members elected,” Hussein disclosed that his shares, which had increased to over 9 million shares with stock splits, “were all pledged.”

The court found Hussein did not breach a fiduciary duty to QSI by margining his shares to pay off the Egyptian loans; nor did he owe QSI disgorgement of any benefit he received from the loans. The court explained there was no breach based on the 2004 policy or any fiduciary duty independent of that policy. Specifically, the court ruled Hussein “did not violate the 2004 policy” because he did not use margin loans with QSI stock as collateral to “buy QSI stock.” The court found no fiduciary duty independent of the 2004 policy for Hussein to refrain from margining his QSI stock because, even “[a]t th[e] time of the 2011 policy[,] the court finds from the evidence that there were still—at least half the publicly traded companies [that] did not have such a policy. And the SEC did not have a regulation preventing a corporate director from margining his shares. That was not the law.”

Regarding disgorgement, the court said, "[e]quity does not demand that for some reason [Hussein should] give QSI the benefit that he got from getting a lower interest rate in the United States compared to the Egyptian rate." In other words, "[t]here's no benefit that QSI should have gotten that instead Mr. Hussein got. It [i.e., his margining] didn't violate the 2004 policy."

The court ruled similarly on a second category of funds for which QSI sought disgorgement: Hussein's salary as a director. The court observed that Hussein "was a salaried director, that was [his] job. He was voted on[to] the board, albeit by himself," but that did not delegitimize his directorship because "California [law authorizes] cumulative voting" and he "was a working, practicing member of the board." The court continued: "He was a director for 17 years, he was a dissident director, he was a pain in everybody's backside. But there's nothing wrong with that." Drawing on a guiding principle for disgorgement, namely, "receiving a benefit that should belong to another," the court concluded, "[T]his seems to be a punishment thing rather than disgorgement."

2. *The Court's Statement of Decision*

In its statement of decision, the court further explained its reasons for denying disgorgement of Hussein's salary. The court acknowledged QSI limited the claim "apparently [to] the period from July 27, 2011, when QSI's Board adopted their 2011 policy [against] a director margining his shares, to May 14, 2013, when Hussein resigned from QSI's Board." The court concluded that, "[t]o the extent this claim is based on his refusal to fill out QSI's questionnaire, during this period QSI knew that he had margined his shares or at least they were held in 'marginable' accounts," as Hussein's lawyer had disclosed and as QSI should have deduced from queries by his brokers about whether his shares were marginable. The court found that by "immediately" alerting QSI "he would not comply" with the 2011 policy, Hussein fulfilled any fiduciary duty of "honesty and candor" to QSI, suggesting also that this "should have alerted QSI that he may have margined his shares."

***16** In any event, the court found QSI suffered no harm related to Hussein's blank questionnaire or his margining of his shares. The court observed that earlier in the litigation, QSI had asserted " 'reputational harm' " as a theory of damages, but disclaimed it as a basis for damages; in turn the court found "no evidence of this claim." The court did not attribute any decline in QSI's stock value to a forced sale of Hussein's shares in a margin call, as QSI's expert had opined was theoretically possible. It also found QSI failed to prove "it suffered any real damages because Hussein's stock was sold." Instead, the court concluded: "The primary cause of QSI's stock dropping in price on July 26, 2012 was QSI's earnings report."

The court similarly found no basis for equitable disgorgement due to Hussein's margining activity. It reiterated that "[w]hile he may have received some benefit from paying off his Egyptian loans, on balance he lost millions of dollars when some of his [margined] shares in QSI were force[-]sold after QSI's quarterly income report caused QSI shares to go down in value, thus decreasing his collateral for his loans." The court found no breach of fiduciary duty in Hussein's payoff of his Egyptian loans with margin funds because "this activity was consistent with QSI's own 2004 policy." And, moreover, "QSI suffered no harm because of this activity and Hussein received no benefit that should have gone to QSI."

Likewise, the court rejected equitable disgorgement of Hussein's directorship salary, concluding: "Nothing about Hussein's margining his shares caused damage to QSI. He received no net benefit from margining his QSI shares, no benefit that should have gone to QSI."

B. *QSI's Contentions on Its Cross-Appeal Are without Merit*

1. *No Error in the Court Reconsidering Its Earlier Jury Trial Ruling*

QSI contends the trial court "exceeded its jurisdictional power" when, immediately before trial commenced on QSI's cross-complaint in June 2017, the court reconsidered a jury trial ruling it made almost a year earlier, in September 2016. That ruling

had denied Hussein's motion to strike QSI's request for a jury trial because "the cross-complaint seeks monetary damages according to proof," a quintessentially legal rather than equitable claim.

On the eve of trial, however, QSI alerted the court that it had changed its position; it was *not* pursuing the first item it enumerated in the cross-complaint's prayer for relief: "1. Actual damages in amounts to be determined at trial for Hussein's breaches of his fiduciary duty[.]" Instead, QSI informed the court it had decided to proceed only on the second remedy stated in the cross-complaint's prayer: "2. Disgorgement of profits and amounts by which Hussein was unjustly enriched ...." This prompted Hussein to file a renewed motion to strike, which QSI faults under Code of Civil Procedure section 1008 for failure to attach an affidavit.

Hussein points out that the court "never made clear whether it was granting [the renewed strike] motion or acting on its own motion when it struck QSI's jury demand." Instead, at the outset of the pretrial hearing during which the court and the parties addressed several issues, the court observed, "[t]here's been a number of motions filed this morning, but let me first discuss with you the court's concern. [¶] I've been struggling over the idea that the [cross-complainant] is entitled to a jury trial in this matter ...." The court and the parties then engaged in an extended discussion before the court decided to strike QSI's jury trial request because the proceeding now was "an equitable matter in which the [cross-complainant] is not entitled to a jury trial."

The court did not exceed its jurisdiction under Code of Civil Procedure section 1008 to reconsider its earlier ruling. A trial court retains inherent authority to do so, "even when ... prompted to consider its prior ruling by a motion filed in violation of section 1008." (*In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1303-1304.) As the Supreme Court explained in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, Code of Civil Procedure, section 1008 only "prohibit[s] a *party* from making renewed motions not based on new facts or law, but do[es] not limit a *court's* ability to reconsider its previous interim orders on its own motion, as long as it gives the parties notice that it may do so and a reasonable opportunity to litigate the question." (*Id.* at pp. 1096-1097, original italics.) QSI does not suggest the court failed to provide notice or an opportunity for it to be heard; consequently, the court did not err in reconsidering its earlier ruling. QSI's jurisdictional claim is without merit.

2. *The Court Did Not Err in Striking QSI's Jury Trial Request*

***17** QSI argues that even if the trial court did not exceed its jurisdiction by reconsidering the jury trial question, the court reached the wrong result. "The denial of the right to jury trial is reversible error per se. [Citations.] No showing of actual prejudice is required." (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698.)

" '[T]he state constitutional right to a jury trial "is the right as it existed ... in 1850, when the [California] Constitution was first adopted." ' " (*Shaw v. Superior* Court (2017) 2 Cal.5th 983, 995.) " 'As a general proposition, "[T]he jury trial is a matter of right in a civil action at law, but not in equity." ' " (*Ibid.*)

" ' " 'If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the *gist* of the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law.' " [Citation.] On the other hand, if the action is essentially one in equity and the relief sought "depends upon the application of equitable doctrines," the parties are not entitled to a jury trial. [Citations.] Although we have said that "the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded" [citation], the prayer for relief in a particular case is not conclusive [citations].' " (*Shaw*, *supra*, 2 Cal.5th at p. 995.)

The need to apply equitable doctrines is not conclusive on the jury trial issue either. " ' "Equitable principles are a guide to courts of law as well as of equity." ' " (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451,

1484 (*American Master Lease*).) “Where liability is definite and damages may be calculated without an accounting, the action is legal.” (*Ibid.*)

The issue here is whether Hussein's liability for his alleged breach of fiduciary duty by margining his shares and by failing to disclose that conduct established damages that were definite and could be calculated without an accounting. (*American Master Lease*, *supra*, 225 Cal.App.4th at p. 1484.)

As *American Master Lease* explained, “There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment.” (*American Master Lease, supra*, 225 Cal.App.4th at p. 1482.) Nonrestitutionary disgorgement does not involve restoring sums the defendant obtained from the plaintiff; instead, the defendant may be required to forfeit to the plaintiff amounts unjustly obtained. Bribes fall into this category. “Where a person profits from transactions conducted by him as a fiduciary, the proper measure of damages is full disgorgement of any secret profit made by the fiduciary regardless of whether the principal suffers any damage.” (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 543.) Punishment for wrongdoing and deterrence justify nonrestitutionary disgorgement. “Without this result, there would be an insufficient deterrent to improper conduct that is more profitable than lawful conduct.” (*Ibid.*)

***18** In asserting a right to a jury trial, QSI relied on a theory of restitutionary disgorgement, namely, “disgorgement of director fees that QSI paid to Mr. Hussein,” which the trial court acknowledged: “that's a sum certain.” QSI specifies the amount it sought in restitutionary disgorgement consisted of the “$640,622 [in] director fees that it paid to Hussein after Hussein concealed his pledging of QSI shares as collateral in order to avoid scrutiny for his failure to follow corporate policies.”

As the trial observed, however, a significant issue at trial would be determining which of those fees Hussein should forfeit if he breached a fiduciary duty to QSI, and which he legitimately earned for serving as a board director. The trial court aptly noted that Hussein's director fees were essentially “a salar[y]” because “that was a job.” And while from the board's perspective Hussein “was a pain in everybody's backside,” he was still a “working, practicing member of the board.” In discussing restitutionary disgorgement, courts have observed that “when consumers receive[ ] some benefit from products, disgorgement of full profits ‘would constitute nonrestitutionary disgorgement.’ ” (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 801.) “While a full refund may be proper when a product confers *no* benefit on consumers,” that is not the case when they receive some value, including even from a pack of cigarettes. (*Id.* at p. 802.)

Here, QSI sought the return or disgorgement of Hussein's full salary. QSI never offered any principle or suggested any means to apportion Hussein's director fees between those he legitimately earned and those he should forfeit. This failure doomed QSI's jury trial request because QSI could not establish definitive liability under which no accounting was required.

The Restatement instructs that where there is “unjust enrichment of a conscious wrongdoer, or of a defaulting fiduciary without regard to notice or fault,” the “object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty. Restitution remedies that pursue this object are often called ‘disgorgement’ or ‘accounting.’ ” (Rest.3d Restitution and Unjust Enrichment, § 51(4).) Consistent with this purpose, “[i]n determining net profit the court may apply such tests of causation and remoteness, may make such apportionments, may recognize such credits or deductions, and may assign such evidentiary burdens, as reason and fairness dictate ....” (*Id.*, § 51(5).) In other words, the court performs an accounting, and therefore there is no right to have a jury make this determination. The court did not err in denying QSI a jury trial.

3. *The Court Did Not Err in Finding against QSI on Its Cross-complaint*

QSI contends the trial court erred by failing to find Hussein breached his fiduciary duties of loyalty and candor to the corporation. Although breach of fiduciary duty is a question of fact (*In re Marriage of Kamgar* (2017) 18 Cal.App.5th 136, 144), QSI couches its challenge as one of law, asserting the court applied the wrong analysis to determine whether Hussein committed a breach.

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QSI suggests the court only "examined whether Hussein's attempts to stop the forced sale of his shares demonstrated a conflict of interests and whether QSI took sufficient steps to uncover Hussein's lies" in failing to disclose his pledged stock.

In effect, QSI argues the trial court looked at the wrong time period to ascertain whether there was a breach. Instead of relating the moment of potential harm to a margin call, or some earlier moment when QSI may or may not have been able to deduce or ferret out Hussein's pledging activity, QSI argues the trial court failed to consider whether the very act of pledging his shares violated his duty of loyalty and whether his failure to disclose the fact he had done so violated a director's "strict" duty of candor.

***19** QSI's premise for its challenge is mistaken. The court specifically analyzed whether Hussein violated a fiduciary duty by pledging his shares to obtain loans to pay off the Egyptian loans. The court expressly found "that no prohibition exists regarding a corporate director pledging his corporate stock as security for obtaining a loan by use of a broker's margin account." The court also found, based on the testimony by QSI's expert, that "during the relevant time periods in this case margin accounts were both lawful and commonplace among directors of public companies." That extended to the period postdating the 2011 policy, where the court found "that there were still—at least half the publicly traded companies did not have such a policy. And the SEC did not have a regulation preventing a corporate director from margining his shares. That was not the law." Accordingly, the court expressly concluded "that no generally-applicable fiduciary duty limited Hussein's right to hold margin accounts at the time of the conduct in this case."

Regarding the Egyptian loans in particular, the court denied disgorgement because "[t]his activity did not violate QSI's 2004 policy which allowed a director to borrow against his shares for purposes other than to buy more QSI stock or stock in another company." QSI asserts in its reply brief that Hussein's 2008 investment in Bear Stearns with margin loan proceeds violated the 2004 policy because it included purchases of Bear Stearns stock. This argument is forfeited both because QSI advances it for the first time in its reply, rather than in its opening brief, and because QSI provides no record references showing it preserved this argument. (*Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1274; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) To the contrary, it appears QSI focused its breach claim based on Hussein's margin loans to pay his Egyptian loans.

QSI asserts that policies adopted by other companies or the SEC do not define Hussein's fiduciary duty. It argues that "[u]nless Hussein could show *that QSI's policy* was so bad for the company or its shareholders[,] his duty of loyalty mandated that he oppose and disregard the policy (which he clearly could not and cannot [do]), Hussein's duty of loyalty required him to follow the policy." (Italics added.) Similarly, QSI contends "conduct that may otherwise be legal might still be a breach of fiduciary duty," and therefore "the determining factor in weighing Hussein's conduct should not have been whether margining shares is legal."

QSI premises its argument on the grave risk it says Hussein's margining activity posed for the company and its shareholders. QSI points out that even after it adopted the 2011 policy, Hussein "borrowed an additional $10 million secured by his QSI stock" and eventually admitted he held *all* of his shares in margin accounts, which at times comprised "15% of the total outstanding shares of QSI." Thus, QSI argues "the proper question" the court should have addressed in determining whether Hussein breached his fiduciary duty as a director was not whether he contravened an SEC regulation or common practices by other corporations or even QSI's own policies, but instead "whether he at all times forbore from taking any personal advantage that *could* impose negative consequences on QSI and its shareholders." (Italics added.)

Pointing to allegations Hussein made in a legal action against one of his own brokers for executing a forced sale against his entreaties, QSI argues the risk was not merely theoretical. Hussein had claimed in the action that by continuing to sell his stock to meet a margin call "without [Hussein's] authorization" following the sharp drop in QSI's share price after its July 2012 earnings retraction, the brokerage " 'thus oversaturat[ed] the market, still further depressing QSI's stock price.' " In those proceedings Hussein estimated that the broker's " 'relentless sell pressure' " in dumping his QSI stock on the margin call caused a 6.9 percent drop in QSI's share price in the first 14 minutes the broker began trading.

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***20** The flaw in QSI's appellate challenge to the trial court's ruling on its fiduciary duty cross-complaint is that QSI does not contest the court's factual finding that Hussein's margining activity caused it no harm. “The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach.” (*Mosier v. Southern Cal. Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1044.) QSI's failure to prove any one of these elements would defeat its claim. (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1536 [“plaintiff's fiduciary duty claim fails because she cannot establish damages”].)

Here, the court expressly found that “[n]othing about Hussein's margining his shares caused damage to QSI.” Specifically, the court found “[t]he primary cause of QSI's stock dropping in price on July 26, 2012 was QSI's earnings report,” suggesting in light of the court's no-damages conclusion that any effect from the margin call on Hussein's stock was imperceptible or de minimus. The court further found no benefit to Hussein from margining his shares “that should have gone to QSI.” As to Hussein's director fees, the court found none constituted damages that should be disgorged to QSI. Similarly, the court found no damage to QSI from Hussein's alleged breach of a fiduciary duty of candor by “refus[ing] to fill out the questionnaire.” The court explained, “At one point QSI claimed that [it] suffered some ‘reputational damage’ because of this but no evidence of this claim was ever offered.” QSI does not challenge these findings or suggest they are unsupported by substantial evidence in the record. QSI's bid for reversal of the court's ruling on its cross-complaint therefore fails.

4. *The Court Did Not Err in Denying Hussein Attorney Fees*

Finally, Hussein argues that because he prevailed on the cross-complaint, he was entitled to attorney fees under his director's indemnification agreement with QSI. The trial court denied Hussein's request “without prejudice” to Hussein subsequently “fil[ing] an action for breach of the Indemnification Agreement.” The court ruled that this was the “proper course” for Hussein to seek indemnity fees under the agreement, rather than by his post-trial costs motion. The court's ruling denying fees was correct.

Usually each party pays his or her own attorney fees. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751 (*Mountain Air*).) Attorney fees cannot be included as an item of costs awarded under Code of Civil Procedure section 1032, as Hussein requested here, unless authorized by statute or by contract. (Code Civ. Proc., § 1033.5, subd. (a)(10)(A)&(B).) Breach of fiduciary duty is a tort claim, not a contract cause of action. (*Loube v. Loube* (1998) 64 Cal.App.4th 421, 430.) Nevertheless, “ ‘ “[p]arties may validly agree that the prevailing party will be awarded attorney fees in any litigation between themselves, whether such litigation sounds in tort or in contract.” ’ ” (*Mountain Air*, at p. 751.) They may also agree that only one party is entitled to attorney fees under a unilateral indemnity provision, “by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.” (Civ. Code, § 2772; *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1336 (*Campbell*).) In other words, the parties' agreement controls.

Determining “whether the parties entered an agreement for the payment of attorney fees and, if so, the scope of the attorney fee agreement” requires applying “traditional rules of contract interpretation.” (*Mountain Air*, *supra*, 3 Cal.5th at p. 752.) Likewise, “[i]ndemnity agreements are construed under the same rules which govern the interpretation of other contracts.” (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 504.) Since the parties presented no extrinsic evidence for the trial court to consider in interpreting their agreement, our review is de novo. (*Mountain Air*, at p. 751; *Campbell*, *supra*, 78 Cal.App.4th at p. 1336.) We construe the words of an agreement “in their ordinary and popular sense” (Civ. Code, § 1644), and we read the contract as a whole, “each clause helping to interpret the other.” (Civ. Code, § 1641.) The goal is “to give effect to the mutual intention of the parties.” (Civ. Code, § 1636.)

***21** Section 15 of the parties' indemnity agreement sets out the “Remedies of Indemnitee,” including in instances, as here, where “The Company” (QSI) has notified the person under Section 13(a) of its determination that he or she is “not entitled” to indemnification under the agreement. (§ 15(b).) The Company's determination is not conclusive or afforded any particular weight. The person “shall be entitled” to adjudication “by a court” or, “at his option, may seek” arbitration of the issue (§ 15(a)), and “shall not be prejudiced by reason of that adverse determination” by the Company. (§ 15(b).) Instead, the matter, whether in

court or by arbitration, shall proceed "in all respects ... de novo." (*Ibid.*) The agreement distinguishes between "indemnification" and "advancement of Expenses" (§ 15(a)) but, for both, "the Company shall have the burden of proving Indemnitee is not entitled to indemnification or advancement of Expenses, as the case may be." (§ 15(b).)

Here, in his motion for attorney fees, Hussein did not seek advancement of funds to pay litigation expenses as they arose because he already had incurred them. He therefore sought indemnification. But section 15(e) of the parties' agreement unambiguously states: "Notwithstanding anything in this Agreement to the contrary, *no* determination as to entitlement of Indemnitee to *indemnification* under this Agreement shall be required to be made *prior to the final disposition of the Proceeding.*" (Italics added.) The agreement defines the term "Proceeding" to include, *inter alia*, "any ... pending or completed action, suit, claim, counterclaim, [or] cross claim ..., *including any appeal therefrom*[.]" (§ 2(g), italics added.)

The plain meaning of these words is that the proceeding must be final through appeal before a party becomes entitled to indemnification. Because the proceedings were not final between the parties as to Hussein's defense against QSI's cross-complaint—since an appeal was possible and, indeed, QSI did appeal—the trial court did not err in denying Hussein's attorney fee request. As the court observed, its ruling was "without prejudice" to Hussein subsequently seeking indemnification, and the same is true for our conclusion on appeal.

DISPOSITION

Summary judgment against Hussein on his holder's claim is reversed. The trial court's judgment after a bench trial against QSI on its breach of fiduciary duty claim against Hussein is affirmed. Hussein is entitled to his costs on appeal.

WE CONCUR:

MOORE, ACTING P.J.

IKOLA, J.

All Citations

Not Reported in Cal.Rptr., 2019 WL 4942091

Footnotes

1 Fitzgerald, *The Rich Boy* in The Short Stories of F. Scott Fitzgerald: A New Collection (Matthew J. Bruccoli ed., Scribner 1989).

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