IN THE SUPERIOR COURT OF GUAM

S/S INDUSTRIES, INC., MICHAEL SANTOS,

Plaintiffs,

vs.

PACIFIC FINANCIAL CORPORATION, PAUL J. "BUDDY" SOUDER,

Defendants.

CIVIL CASE NO. CV1114-94

DECISION AND ORDER

DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, A NEW TRIAL

I. INTRODUCTION

This action came on for jury trial before the Court, the Honorable Steven S. Unpingco, presiding on November 17, 1998. After a four week trial, the jury found one or both of the Defendants liable for actual and/or punitive damages on counts of fraud, conversion, breach of fiduciary duty, and misappropriation of corporate funds. Defendants moved for post-judgement relief in the form of Motions for Judgment Notwithstanding the Verdict under Guam Rule of Civil Procedure 50(b) or in the alternative, a New Trial under Rule 59(a) and 7 G.C.A. §21501. The motions were heard on August 19, 1998 and the Court, having considered the parties' written briefs and oral arguments, now issues this written decision and order.

II. BACKGROUND

Plaintiff Michael Santos ("Santos") operated Santos Equipment Company (SEC), a heavy equipment construction operation, as a sole proprietorship. He eventually created a new corporation, Plaintiff S/S Industries ("SSI"), with a loan officer at Defendant Pacific Financial Corporation (PFC), Defendant Buddy Souder ("Souder"). As the commercial loan officer at PFC, Souder was able to secure about $600,000.00 in short-term loans from his employer. Having worked with Santos as a client of PFC, Souder was convinced of the profitability of investing in the heavy equipment business. According to Santos, Souder invested the

$600,000.00 in the corporation, in exchange for a 45% ownership interest in SSI. The money was used to purchase additional heavy equipment including two dump trucks, a tractor, an end dump, a loader, an excavator, a bulldozer and an NPK hammer. Defendants claim that the money was not invested, but rather was always subject to Souder's control, and should have resulted in the equipment being put in Souder's or at least PFC's name.

Sometime in 1992, Santos signed 2 chattel mortgages, pledging the equipment purchased with the $600,000.00 allegedly to provide security for a loan to Souder. The NPK hammer did not appear on the chattel mortgages. The chattel mortgages read in part as follows:

> KNOW ALL MEN BY THESE PRESENTS:
>
> That S/S INDUSTIRES INC. DBA: SANTOS EQUIPMENT COMPANY hereinafter called the "mortgagor," in consideration of FIVE HUNDRED SEVENTY SIX THOUSAND AND NO/100 dollars ($576,000.00), *to him loaned and advanced by PACIFIC FINANCIAL CORP.*, hereinafter called the "Mortgagee," the receipt whereof is hereby acknowledged, and in order to secure the repayment thereof . . . .

Eventually, SSI defaulted on the chattel mortgages and PFC seized and sold the equipment. SSI and Santos also defaulted on other debts made in connection with the business.

Plaintiffs argue that when Santos signed the chattel mortgages, he did so as a favor to Souder, with the understanding that other more senior collateral existed, sufficient to satisfy the debt covered by the chattel mortgages, and that the heavy equipment would not be seized in the case of default. Plaintiffs claim that the loan was never made to SSI as stated in the chattel mortgages, but instead was made as a personal loan to Buddy Souder, and that SSI was merely a surety on the obligation. As a surety, Plaintiffs argue, SSI cannot be held liable as the original contractor. They sued for fraud and conversion regarding the heavy equipment against PFC, and for fraud, misappropriation of corporate funds, breach of fiduciary duty, and indemnity against Souder.

Defendant PFC claims that consideration was given, in the form of Santos' desire to benefit Souder. PFC further notes that it did attempt to satisfy the obligation with Souder's real

estate, but was prevented from doing so in a court of law, which adjudicated another mortgage on Souder's parents' property to be fraudulently obtained. In any case, PFC argues that Santos was well aware of what he was signing and cannot be heard to complain now.

At the conclusion of the trial the jury returned verdicts of over $7.3 million against Defendants. *See attached addendum for the full text of the Jury Verdict.*

III. ANALYSIS

A. Motion for Judgment Notwithstanding the Verdict.

Guam Rule of Civil Procedure 50(b) governs Defendants' Motions for Judgment Notwithstanding the Verdict (JNOV) and provides in part:

> **(b) Motion for Judgment Notwithstanding the Verdict. . . .** Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . .

If the motion for JNOV is granted, a court must also rule separately on the Motion for a New Trial. Rule 50(c)(1)[1]. In ruling on the motion for a new trial, the Court must state whether

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[1] Rule 50, subsections (c) and (d) provide in their entirety:

(c) Conditional Rulings on Grant of Motion For Judgment Notwithstanding the Verdict.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereof does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Denial of Motion for Judgment Notwithstanding the Verdict. If a motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in the rule

the new trial should be granted if the judgment is reversed or vacated on appeal. If the appellate court does reverse the JNOV, the trial court must then retry the case, unless the appellate court directs otherwise. Id. Finally, if the Motion for JNOV is granted, the party whose verdict has been set aside may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict. Rule 50(c)(2).

The standard in passing on the question of whether the evidence presented at trial is sufficient to have created an issue of fact for the jury is the same whether it arises in the procedural context of a motion for directed verdict prior to the submission of the case to the jury, or in the context of a renewed motion for JNOV after the jury has returned a verdict. Metromedia Co. v. Fugazy, 983 F.2d 350 (2nd Cir.1992). The analysis is the same in the trial court and on appeal. Hiltgen v. Sumrall, 36 F.3d 438 (5th Cir. 1994).

Since a JNOV deprives the party opposing the motion of a determination of the facts by a jury, it should be granted cautiously and sparingly. See Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993). All inferences must be drawn from the evidence in favor of the non-moving party. Lytle v. Household Mfg. Inc., 494 U.S. 545 (1990). However, a mere scintilla of evidence is not enough to sustain a jury's verdict. See Bankers Trust Co. v. Lee Keeling & Associates, Inc., 20 F.3d 1092 (10th Cir. 1992). The standard for reviewing a jury verdict is whether it is supported by substantial evidence. Leon Guerrero v. DLB Construction, 1999 Guam 9, 9 (April 30, 1999); Murray v. Laborers Union, Local No. 324, 55 F.3d 1445, 1452 (9th Cir. 1995). Substantial evidence means "such relevant evidence which reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." Leon Guerrero, 1999 Guam 9, 9.

Defendants Souder and PFC differ in their grounds for JNOV. Defendant PFC argues: 1) there is not enough evidence to support a finding of fraud; 2) a specific finding by the jury that the chattel mortgages were valid also precludes a finding of fraud; 3) Plaintiffs' conversion and punitive damages claims, being dependent upon the fraud claims, cannot be sustained if the fraud verdicts are struck; 4) the punitive damages awards violate due process and Guam law; and 5)

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precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

the jury verdict for exemplary damages regarding the NPK hammer cannot be sustained since the jury did not award compensatory damages. Defendant Souder, in contrast, bases his motion for JNOV primarily on the jury's conflicting verdicts and awards--not on any alleged insufficiency of evidence.

B. Motion for a New Trial

GRCP 59(a) governs new trials and provides in part:

> **Rule 59. New Trials: Amendment of Judgments.**
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> **(a) Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the Territory of Guam . . . .

7 G.C.A. § 21501 provides the substantive grounds on which a Court may base its decision to order a new trial, and provides in part:

> **§ 21501. When a New Trial May be Granted.**
>
> The finding may be vacated and any other decision may be modified or vacated; in whole or in part; and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such parties:
>
> * * *
>
> 4. Excessive damages appearing to have been given under the influence of passion or prejudice;
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> 5. Insufficiency of the evidence to justify the finding or other decision, and that it is against law;
>
> 6. Error in law, occurring at the trial, and excepted to by the party making the exception.
>
> When a new trial is granted on all or part of the issues upon the ground of the insufficiency of the evidence to sustain the finding, the order shall so specify; otherwise, on appeal from such order it will be presumed that the order was not based upon that ground.

Ruling on a motion for JNOV does not dispose of an alternative motion for a new trial on the grounds that the verdicts were against the weight of the evidence--rulings on both motions are required. Gordon Mailloux Enterprises, Inc. v. Firemen's Insurance Co. of Newark, N.J., 366 F.2d 740 (9th Cir. 1966). See also Vollrath Co. v. Sammi Corp., 9 F.3d 1455 (9th Cir. 1993). The granting of a motion for a new trial is subject to a less stringent standard than the granting of a

motion for JNOV. Airweld, Inc. v. Airco. Inc., 742 F.2d 1184, 1188 fn.1 (9th Cir. 1984). In contrast to a motion for JNOV, a motion for a new trial on the grounds that the verdict is against the clear or great weight of the evidence, the judge is free to weigh the evidence for himself. Thomas v. Stalter, 20 F.3d 298, 304 (7th Cir. 1994); Insurance Co. of North America v. Musa, 785 F.2d 370, 375 (1st Cir. 1986).

A trial court, before disturbing a jury verdict on a motion for a new trial, must find the jury's decision to have been against the clear weight, overwhelming weight, or great weight of the evidence. J.J. Moving Services, Inc. v. Sanko Bussan (Guam) Co., Ltd., 1998 Guam 19,12 (Sept. 14, 1998). In contrast to a motion JNOV a court may set aside the verdict even though there is substantial evidence to support it. Lama v. Borras, 16 F.3d 473, 477 (1st Cir. 1994).

The grant of a new trial is confined almost entirely in the exercise of discretion on the part of the trial court. Murphy v. City of Long Beach, 914 F.2d 183 (9th Cir. 1990). The trial court's decision, therefore, will not be reversed absent a showing of abuse of discretion. Murphy. Generally, an order denying a motion for a new trial is not an appealable order. J.J. Moving Services, 1998 Guam 19; Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 701 (2nd Cir. 1972). The appeal instead should be taken from the final judgment and the motion reviewed as part of such appeal. Id.

Defendant PFC's motion for a new trial is based on 1) the inconsistencies in the verdict; 2) the argument that the jury was improperly influenced by passion and prejudice; and 3) excessiveness in the amounts awarded. Souder's Motion for a New Trial is based on both the jury's inconsistent verdicts and awards and on the weight of the evidence presented at trial.

C. The Fraud Verdicts are Supported by Substantial Evidence and are not Against the Clear Weight of the Evidence.

The jury instruction on fraud, Jury Instruction No. 38 was based upon 18 G.C.A. §§ 90102, 90103, 85308, and 85309, (Fraudulent Deceit, Actual Fraud and Constructive Fraud) and read as follows:

FRAUDULENT DECEIT

> 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. A deceit, within the meaning of this instruction, is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for one of communication of that fact; or,

4. A promise, made without any intention of performing it.

5. Any other act fitted to deceive.

6. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him.

1. The Fraud Verdicts Imply SSI's Ownership of the Chattel Mortgage Equipment, and was Supported by Substantial Evidence.

Necessary to the jury's verdict of liability regarding the chattel mortgage equipment was a finding that one or both of the Plaintiffs actually owned the equipment. Defendant PFC argues that Plaintiffs did not own the chattel mortgage equipment reasoning that Santos did not have authority to put the equipment at issue in his name at the time of purchase, since the money to buy the equipment came from Souder, via a loan from PFC. PFC claims that the money used to purchase the equipment came from PFC, and since Santos had no authority to put the equipment in his name, he illegally converted Souder or PFC equipment for his own use. If the equipment never really belonged to Santos or SSI, according to PFC, Plaintiffs could not have been defrauded out of anything and the jury's award on the fraud counts must fail. However, there was substantial evidence adduced at trial, in the form of testimony from Santos and notations on copies of checks, that would allow the jury to reasonably find that Souder's loan money from PFC was actually invested in SSI, in exchange for a 45% ownership share in the corporation. Thus though Souder may have exerted some control as to how the money was spent, he was also acting as no more than an agent of the corporation, to whom the equipment rightfully belonged.

> Sometime midway in the conversation, Buddy explained to me about he had money to blow and needed to invest these monies. . . . So he said that he had this money he had to invest it and invest it quick.

R.T. Nov. 17, 1998, 84:12-18.

> Anyhow, midway, we started talking about how he had money to invest and he needed to invest this money quick. I thought it was all a joke when he told me. But then I decided to play along and I said to him, I said "*Well, what are you talking about? I mean, how much?*"
> And he said "*Three-quarters of a million dollars.*"
> And I said "*Well, you know, three-quarters of a millions bucks.*" And I've never been around that kind of money at all. Never even seen it.
> And told me that "*Well, let's just say that, you know, I wanna invest in your company and I put three-quarters of a million dollar into you company, what would you do with it?*"
> And I said "*Well, uh, I'd buy equipment. That's what I would do.*"
> And, so, he goes "*Well, I wanna make an investment.*"

R.T. Nov. 17, 1998, 85:12-17.

> And he told me "*Well Mike, I wanna know. If I give you the money, what are you gonna do with it?*"
> And I said "*Well, I'm gonna buy equipment.*"
> And he said "*What kind of equipment would you buy?*"
> "*Well, I'll buy dozer, loader, excavator. I'll buy a lowboy. I'll buy a hammer and so forth.*"
> And the thing about it, he goes "*Well, what do I get? I mean, what kind of percentage would I get for my investment?*"
> And he brought up that "*You're gonna be making this . . .if the equipment was bought, you're gonna be making lots of money. And it would be best to form a corporation for tax purposes.*"

R.T. Nov. 17, 1998, 89:11-22.

See also Plaintiffs' Exhibits 14-1 and 18-1 (copies of checks from Buddy Souder to Santos Equipment Co. for a trip deposit with a notation "Note: Buddy's inv.")

Additionally, both parties agree that Santos initially put all of the chattel mortgage equipment in his name when it was purchased, and when the equipment arrived on Guam, he put some of it under the name of S/S Industries.

> **Q:** How many pieces of equipment did you put in the name of S/S Industries, and how many pieces of equipment did you put in your name?
>
> **A:** Uh, everything was put in my name, except when we got to Guam. Uh, I put uh, transport equipment, which is required by law to be registered so I put that in S/S Incorporated, and that's the, the two (2) dump trucks, the tractor and the end dump, which are uh, which travel on the road, on public highways. And then the uh, the one that's under my name is the dozer, the loader and the excavator and, of course, the hammer.

R.T. Nov. 24, 1998, 123:1-11.

That PFC required Santos' signature on the chattel mortgage itself is further evidence the jury could have relied on in determining that the equipment belonged to Plaintiffs and not

Defendants. See Plaintiffs' Exhibit 51-2 and 52-3, chattel mortgage. Furthermore, Plaintiffs possessed the equipment.

> There is a rebuttable presumption of ownership of property from possession thereof, which is applied to real property and personal property alike (citations omitted) . . . . And possession of personal property may be sufficient evidence of ownership in a given case to protect one dealing with the property as that of the possessor (citations omitted). A person claiming ownership of property which is in the possession of another bears the burden of proving facts essential to the claim of ownership (citations omitted).

63 Am. Jur. 2d, Property §51. See also 29 Am Jur.2d, Evidence, §235 ("As a general rule, proof of the possession of real property is prima facie evidence of title or is said to raise a presumption of ownership" (citations omitted)).

Moreover, under the UCC "unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . . ." 13 G.C.A. §2401(2). Section 2103(a) defines "Buyer" to mean "a person who buys or contracts to buy goods," and it was not disputed that Santos was the actual purchaser. Finally, Government of Guam Certificates of Ownership, issued by the Department of Revenue and Tax all name SSI as the owner of various pieces of the chattel mortgage equipment. See Plaintiffs' Exhibits 7-7, 9-1, 10-3, and 12-1. See also Court's Oral Ruling on Ownership issue, Motion for Directed Verdict, R.T. Dec. 4, 1998, 19:22-21:9.

While John Benito ("Benito") testified at length that PFC was surprised that the equipment was not in Souder's name, and that the original loan to Souder was intended only to be a short term Note, to be later converted into a lease, see e.g. R.T. Dec.1, 1998, 90:22-91:10, and 103:24-104:3, and 116-119, this merely constituted conflicting evidence that the jury could accept or reject, based on their assessment of Benito's credibility. The Court cannot say that substantial evidence was lacking for the jury's finding, nor will it substitute it's own judgment for the jury's by holding that such a conclusion is against the clear weight of the evidence. Absent more dispositive evidence presented at trial that Santos misspent Souder's loan money, or that PFC had expressly demanded that Santos to put the equipment in PFC's name, Defendant's

argument regarding ownership is just that: argument. It is not evidence which the jury needed to consider in making their findings regarding ownership and fraud, and it is not evidence that this Court can say precludes a determination that substantial evidence supports the jury's verdict, or that the verdicts were against the clear weight of the evidence.

2. Substantial Evidence Supports the Jury's Verdict Regarding Liability on the Fraud Counts.

PFC next argues that the fraud verdicts were not supported by substantial evidence. Santos knew the significance and ramifications of the chattel mortgage he signed; understood that by signing a chattel mortgage on the equipment it was putting a lien on the equipment; had signed a chattel mortgage in the past; and knew that PFC had the legal authority to repossess the equipment if the payment obligations were not met. PFC also claims that Santos knew that Souder was not acting in any capacity with PFC and that Santos was sufficiently suspicious about the chattel mortgage transaction to preclude any confidential relationship between the two.

Plaintiffs argue the jury could have found fraud in any number of actions taken by Defendants. At trial, Santos testified that before Santos signed the chattel mortgage, he discussed the issue with Souder. Santos stated that Souder told him that Souder owned real property worth $1.3 million that would be sufficient to cover the indebtedness on the loan, and that the SSI's equipment was merely additional collateral that PFC required in order to grant the new loan to Souder. R.T. Nov. 17, 1998 at 126:18-129:15.

While Souder did own property, it was only valued at around $300,000.00, an amount insufficient to satisfy the new loan, and that property had already been mortgaged. That property which Souder represented as sufficient to cover the loan was in fact not his own property, but belonged to Souder's parents; the mortgage on that property was later invalidated by a court order.

Santos testified that Souder later called him to actually come sign the chattel mortgages, and Santos did so in Souder's office at PFC. This was disputed by Benito, R.T. Dec. 1, 1998, 100:22-101:21, but the Court cannot say that the jury lacked substantial evidence on this issue. According to Santos, the chattel mortgages contained descriptions of the equipment, but the

company descriptions and mortgage amount were absent. R.T. Nov. 17, 1998, 131:1-132:16. Nor were there dates on the documents, which Souder told Santos would be filled in later. Id. Thus the jury could find that when the blanks were filled in on the chattel mortgages in a manner different from what Souder had represented, that material misrepresentations of fact occurred, which Santos reasonably relied upon to his detriment.

While there was testimony to the effect that Souder no longer worked at PFC at the time of the signing of the chattel mortgages, Santos' testimony that he signed the documents in Souder's office, with Souder present, could allow a jury to conclude that Souder and Benito created an impression that Souder was in fact still working there, in order to procure his signature on the documents.

Further, the chattel mortgages which Santos signed did not have the legal effect as represented by Souder in their preliminary discussions. Noticeably absent from the chattel mortgages is any mention of the $1.3 million Souder property that would supposedly be primarily liable for the debt. Instead, the mortgages simply stated that SSI, in "consideration of FIVE HUNDRED SEVENTY SIX THOUSAND & NO/00 DOLLARS ($576, 000.00, to him loaned and advanced by PACIFIC FINANCIAL CORP. . . ." Such money was never advanced directly to SSI or Santos; it was given to Souder who later arguably invested it in SSI. The jury could reasonably have found that these misrepresentations on the chattel mortgages were to be attributed to PFC through their agent Benito, the loan officer during the transaction. Plaintiffs' witness on commercial lending practices, Dr. Hess, testified that the chattel mortgages signed by Santos represented a direct loan from PFC to Santos, which should have been accompanied by a promissory note. R.T. Dec. 1, 1998, 136:20-137:1. The mortgages were not, contrary to Souder's representations (according to Santos) commercial guarantees. R.T. Dec. 1, 1998, 137:8-17.

Despite the fact that Souder may or may not have been terminated as a loan officer at PFC at the time of the signing of the chattel mortgages, there was substantial circumstantial evidence that might allow a reasonable jury to find that PFC and Benito were acting with knowledge of Souder's representations. Before PFC had repossessed the chattel mortgage

equipment, it required Santos to ground the equipment, due to a lapse in insurance and chattel mortgage payments. Benito testified regarding notes he had made concerning the chattel mortgage equipment, and how there was some potential for Souder to purchase the equipment if it were to be repossessed. R.T. Dec. 1, 1998, 67:1-70:2. Thus the jury was presented with a situation where PFC was going to repossess the equipment, then resell it to Souder, who arguably was the primary debtor in default in the first place. Other collateral meant to secure Souder's original loan, including Souder's own property, and interests in a condominium owned by Souder and Benito together, were never foreclosed on. Id at 61:4-62:4. This pattern of conduct, the jury might well have inferred, began as far back as the signing of the chattel mortgages.

Furthermore, Benito testified that when Santos arrived at PFC to sign the chattel mortgages, PFC already had the documents prepared and waiting. R.T. Dec. 1, 1998, 19:25-20:1. If the jury believed that Santos came down at the request of Souder, it is not a great leap to infer that Souder and Benito had also been in contact regarding the chattel mortgages. Little discussion took place between Santos and Benito at the signing; the transaction took only a matter of minutes. R.T. Dec. 1, 1998, 22:4-15. Apparently both were familiar with what was to be done, and one logical explanation is that Souder had explained it to both.

Though the equipment listed in the chattel mortgages was repossessed by PFC and eventually resold to Souder and his sister, PFC never gave an accounting of Souder's Note and what was paid and what was left over to Santos after the sale. R.T. Dec. 1, 1998, 63:4-6. Additionally, PFC seized the NPK hammer belonging to SSI, despite the fact that the hammer was never listed on the chattel mortgages. Id. at 62: 8-14. Even when the equipment actually listed on the chattel mortgages was sold and the indebtedness of $576,000.00 paid off, PFC continued to retain the hammer, as opposed to returning it to Santos, claiming that PFC had decided to let a court decide the issue of who possessed lawful title. Id. at 62:13-25. The money used by Souder and his sister to purchase the repossessed equipment, came in part from other loans from PFC, secured partially by the equipment. Id. at 57:7-57:25.

PFC argues that any deficiencies in the contract regarding who was primarily liable for the obligation is irrelevant, since Santos chose to not read the chattel mortgages, and no confidential relationship existed between Souder and Santos. PFC claims that where a party fails to read a contract based on false representations as to its contents, no fraud occurs, citing Kane v. Mendenhall, 5 Cal.2d 749, 759 (1936). However, that case stated only that where a party signs a contract without reading it in reliance on false representations as to its contents, the contract *may* be avoided where a confidential relation exists between the parties. The case did not state that a confidential relationship *must* exist in order to find *fraud*. The Kane court also noted that California decisions were not in harmony on this point, and other cases speak of a "diversity of opinion" regarding the question when the parties were dealing at arm's length. See e.g. Mazuran v. Stefanich, 95 Cal.App. 327, 332 (1928); Gridley v. Tilson, 202 Cal. 748, 751 (1927). Further, there is authority for the principle that where a party is prevented from reading, or was induced by the agent not to read a contract, the party's failure to read the contract does not necessarily preclude a finding of fraud. Humphrey v. Harry H. Culver & Co., 32 P.2d 630 (Cal. 1934); Lange v. Curtin, 53 P.2d 185, 188 (Cal. 1936). Finally, Guam's statutory provisions on fraud, 18 G.C.A. §§ 90102, 90103, 85308, and 85309 require no such confidential relationship, and neither will this Court.

D. The Fraud and Conversion Awards Suffer from Excess, Due to Passion or Prejudice.

1. Santos' Fraud Awards for Consequential Damages, as Against PFC, is Excessive, Due to Passion or Prejudice.

PFC initially argues that the damages in the verdict were so excessive as to warrant a new trial. In closing arguments, Plaintiffs' counsel asked the jury for the following damages:

Actual Damages

$600,000.00—the value of the chattel mortgage equipment, under the fraud claim.

$39, 600.00—the value of the NPK hammer, under the conversion of the NPK hammer claim.

$191,880.00—6% simple interest on $639,600.00, from Sept. 1993 to September of 1998.

$831,480.00 total actual damages in favor of SSI. R.T. Dec. 9, 1998, 37:1-39:11.

Consequential Damages

$60,000.00—Santos' salary for one year.

$22,000.00—lost equity in real property.

$22,358.00—tax penalties.

Intangible losses: general damages such as anxiety, emotional distress, ruination of business, fears, according to what the jury felt proper; counsel suggests $100,000.00.

$104,358.00 consequential damages, plus intangibles, in favor of Santos. R.T. Dec. 9, 1998, 39:12-42:16.

Punitive Damages

Against PFC, double the actuals.

Against Souder, 1.5 times actuals.

R.T. Dec. 9, 1998, 43:5-43:24

Misappropriation of Corporate Funds

$24,500.00—checks written to "Cash."

$15,654.00—check to CSB.

$40,154.00 total actual damages, plus punitives, in favor of Santos, to be paid by Souder. R.T. Dec. 9, 1998, 44:3-18.

Beginning with verdict no. 1, the jury awarded SSI $831,480.00 in compensatory damages, against PFC. This is the amount requested by counsel for Plaintiffs in his closing arguments, and consists of the lost value of the chattel mortgage equipment and the NPK hammer, plus interest. Such damages were clearly supported by the evidence. Thus the jury did compensate SSI for every dollar requested by Plaintiffs' attorney, and for every piece of equipment lost.

Additionally, the jury awarded $639,600.00 in punitive damages, actually an identical restatement of the value of all the heavy equipment. Plaintiffs characterize this measure as "poetic justice;" whatever the jury's literary inclinations, the Court finds the amount reasonable.

Turning to Santos' awards against PFC, Santos' damages were alleged to be consequential, consisting of lost equity in property, lost salary, tax penalties, emotional damages, and ruination of business. Counsel for Plaintiffs largely characterized the emotional damages suffered by Santos as the "loss of a dream"—the dream of owing your own business. The jury awarded $2,494,440.00 in consequential damages to Santos, $104,358.00 of which can be traced to property loss, tax penalties, and Santos' salary for one year. This leaves $2,390,082.00 attributable to intangibles—emotional distress and ruination of business. In examining the ruination of business damages, the court in prior rulings held that lost profits were not available to Plaintiffs, on the grounds that the business did not have any established earnings—despite one or two years of stellar earnings as a new company, such losses were too speculative to be claimed as damages. In terms of what remained of the business to compensate Santos for "ruination of business," SSI had already been compensated directly for the loss of the chattel mortgage equipment in its actual damages award, and Santos for his lost salary. While there was little discussion regarding what constitutes "ruination of business," it was adduced at trial that SSI had no other assets to speak of, other than the chattel mortgage equipment and the NPK hammer. In any case, since the award addresses Santos' losses and not the losses of SSI, the Court finds that there can be no award for any such general harm as "ruination of business." Thus, all that is left to justify the remaining $2,390,082.00 is emotional damages.

California courts recognize that there is no fixed or absolute standard by which to compute the monetary value of emotional distress and a reviewing court must give considerable deference in matters relating to damages to the jury. Merlot v. Standard Acc. & Ins. Co., 59 Cal.App.3d 5, 17 (1976); Fletcher v. Western National Life Ins. Co., 10 Cal.App.3d 376, 408-409 (1976); accord: Bertero v. National General Corp., 13 Cal.3d 43, 64 (1974); Forte v. Nolfi, 25 Cal.App.3d 656, 688 (1972). However, "(w)hen the award, as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice, the duty is then imposed upon the reviewing court to act." Cunningham v. Simpson, 1 Cal.3d 301, 308-309 (1969). "In a federal court, a jury's verdict will not be reduced as excessive unless it is beyond the maximum that the jury could reasonably find

to be compensatory for a party's loss." Jones v. Wittenberg University, 534 F.2d 1203, 1202 (6th Cir. 1976).

While the Court in no way intends to minimize the value of Plaintiff Santos' ambitions, after reviewing all of the evidence the Court finds that the remaining $2,390,082.00 is clearly excessive, due to the passion or prejudice of the jury. Beginning a new business is certainly an anxiety-ridden proposition to begin with, even for a profitable company. Santos began doing business as Santos Equipment Company (SEC), a sole proprietorship, in 1990. In the summer of 1991 Santos went to the U.S. to buy the equipment at issue. SSI was formed in November of 1991, when Santos went into business with his brother and the loan officer from PFC who ultimately provided the equipment and financing in this case, Buddy Souder. The company began doing business with its new equipment in December of 1991. In 1991 Santos testified that "We made over a half a million dollars in 1991," which apparently was attributable largely to SEC. R.T. Nov. 17, 1998, 64:20. By August or September of 1993, Santos was told to stop operating his heavy equipment, due to nonpayment of insurance. The equipment was seized soon thereafter. Thus Santos had the benefit of the equipment that Souder invested in SSI for only 2 years; the equipment that he leased directly from PFC for only 3 years. It may be no more than a truism that most startups fail within the first two or three years, but to award almost $2.4 million dollars for such a startup, in such a cyclical industry, is grossly excessive, and can only be explained by a jury inflamed against Souder and PFC. Such an award finds little support in reason. The Court struggles to place an exact dollar figure on the amount of emotional damages suffered by Santos, but finds only that the pressures involved in such a venture are certain to bring considerable stress and personal anxiety, apart from any harm caused by PFC and Souder.

Santos did testify that he had a "nervous breakdown where [he] collapsed" in January of 1993. This was due to the turmoil in his business as a result of PFC pressuring him over the chattel mortgages, and Souder's failure to repay money taken from SSI accounts. He also suffered from sleeplessness, rashes, and fatigue. After the collapse, Santos went to the hospital where he was diagnosed with a low blood sugar count; Santos was diagnosed a diabetic. No testimony was introduced supporting causation—that his diabetic condition was proximately

caused by the stress from servicing the chattel mortgages, and it is a patently unreasonable assumption to award damages for the onset of Santos' diabetes. What is left is sleeplessness, a rash, and fatigue.

The Court acknowledges caselaw that provides for emotional distress damages in fraud actions, see Rosener v. Sears, Roebuck Co., 110 Cal.App.3d 740168 Cal. Rptr. 237 (1980) appeal dismissed, 450 U.S. 1051 (1981). However, the Court finds excessive almost $2.4 million for "the loss of a dream," and such ailments as sleeplessness and a rash which afflict people commonly everyday, and are an accepted part of human existence.

The Court arrives at its determination of excess based on the evidence presented at trial. The jury displayed an unabashed enthusiasm for awarding damages, such that they readily accepted Plaintiffs' requests for damages, and reacted more strongly than expected by even counsel for Plaintiffs, no doubt. Their enthusiasm in awarding damages appears to be a reaction to perceived injustice done to a hard-working individual at the hands of a large, wealthy, financial institution, and a former commercial loan officer. Such enthusiasm does not, however, in any way cause the Court to question the jury's findings on liability; the passion or prejudice appears limited to their damages awards. In redressing this surplusage or double recovery or excess, the Court notes that the jury already compensated Plaintiffs for all of their injuries by way of the jury's fraud awards, as explained earlier. Accordingly, the Court finds the fraud awards excessive.

The jury also awarded Santos $100,000.00 in punitive damages against PFC. This amount also corresponds exactly to what Plaintiffs' counsel requested in closing, and the Court finds the amount reasonable.

a. The Fraud Awards Against Souder Are Excessive Due to Passion or Prejudice.

Despite having fully and generously compensated SSI and Santos for every dollar requested and every injury complained of, the jury did not stop. They also awarded SSI $46,240.00 against Souder, with tripled punitives of $138,720.00, and Santos two equal awards of $500,000.00 for actual and punitive damages, also against Souder. Based on the preceding analysis, the Court also concludes that these fraud awards are excessive. However, since there

were a total of four fraud awards between the four parties, the Court is faced with a situation where it is difficult to say exactly how much of each award is in excess. In verdict 1 the jury compensated SSI for all apparent actual damages. It is tempting to rely on this one award as the "accurate" award and hold that the other three were in excess, since they do not correspond as well with the damages requested. That method is surely inappropriate, however. The jury unequivocally awarded both Plaintiffs considerable money from both Defendants. The Court can find no satisfactory means of allocating the excess between the parties, nor can the Court remit such damages proportionately, to an acceptable level such that a new trial might be avoided. Were this simply a case of excess punitives, the Court would have little difficulty in simply reducing the awards and entering judgment as a matter of law, or remitting the difference. Given the jury's overwhelming intent to compensate the Plaintiffs, and having found that the Plaintiffs presented sufficient evidence to sustain their claims, it is certainly tempting to engage in creative accounting in order to justify the actual dollar amounts. However, the Court cannot simply step in and substitute its judgment as to appropriate awards, in order to reconcile the verdict. D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245, 1249 (9th Cir.1982); Bippes v. Hershey Chocolate USA, 180 F.R.D. 386 (D.OR 1986). The Court being unable to find a guiding light for reducing the damages, the only just option appears to be to be to order a new trial, limited to the issue of damages. A new trial on damages alone is appropriate where liability is established and the only issue is the amount of damages. Kemp v. Balboa, 23 F.3d 211, 214 (8th Cir. 1994); Williams v. Armontrout, 977 F.2d 437 (8th Cir.1992).

Plaintiffs suggest that the considerable excess might be resolved on the basis of joint and several liability. If Defendants are held to be jointly and severally liable for all the fraud damages, then the judgment should be against both Defendants for the largest sum found against any one Defendant, citing Faison v. Nationwide Mortgage Corp., 839 F.2d 680, 687-88 (D.C. Cir. 1988).

The Court agrees that Defendants are jointly and severally liable for the fraud awards. The Restatement of Torts lays out the general rule in determining joint and several liability: "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible

harm to the injured party is subject to liability to the injured party for the entire harm." Restatement of Torts, 2d §875. There is no requirement that the Defendants act in concert, though the jury could have found here that they did so. Prior to the adoption of the Fair Responsibility Act of 1986, California courts also followed this principle. Holohan v. McGrew, 111 Cal.App. 443, 446 (1931) ("The rule of law is well established that, even though different parties may not act together with a common purpose which results in injury to another, if their concurring negligence produces the injuries complained of, both may be liable for damages as joint tortfeasors.") Additionally, when Defendants are joined in an action, it is generally improper to apportion compensatory damages among them; judgment for the full amount should be rendered against each. Hallinan v. Prindle, 220 Cal. 46, 55 (1934) ("in an action against joint tort-feasors the law will not permit an apportionment of damages, since it will not attempt to measure the degrees of culpability of the joint tort-feasors.")

However, this still does not solve the problem of excessive damages, since the Court has found that the $2.4 million verdict against PFC is excessive, even if only fraud verdicts were enforced. Plaintiffs offer to dismiss the claim against Souder, in order to address any inconsistency issues, citing Johnson v. Gallatin County, 418 F.2d 96, 100 (7th Cir. 1969). While the dismissal of a verdict appears acceptable were the Court's ruling based on inconsistency, that option fares less well in the excessive damages context. The basis for the excessive damages argument is that such awards were due to passion and prejudice, and thus the assessment of damages in general is deficient. The Court will not attempt any sort of surgical reduction of the awards in order to address this problem.

2. The Verdicts Are Consistent.

a. Under Ninth Circuit Law, Defendants did not Waive Their Right to Object to Verdict Inconsistencies by Their Failure to Object Before the Jury was Discharged.

PFC argues that inconsistencies in the jury's verdict require a new trial as a matter of law. Plaintiffs counters that the majority of federal circuits apply a waiver doctrine to such "inconsistency" arguments, whereby a party waives any right to object to inconsistencies in a jury verdict if it does not object to the inconsistencies before the jury is discharged, citing White

v. Celotex Corporation, 878 F.2d 144, 146 (4th Cir. 1989). Plaintiffs also note that the Ninth Circuit does not apply such a waiver analysis, citing Los Angeles Nut House v. Holiday Hardware, Corp., 825 F.2d 1351 (9th Cir. 1987).

Absent a Guam Supreme Court ruling contrary to the Ninth Circuit on a particular rule, this Court finds the Ninth Circuit precedent to be controlling. Lalonde v. Davis, 879 F.2d 665, 667 (9th Cir. 1989) ("When interpreting a Guam statutory rule that closely tracks a federal procedural rule, Ninth Circuit interpretation of the federal rule controls . . . .") The Ninth Circuit having declined to apply the waiver analysis, and the Supreme Court of Guam having not yet addressed the issue, this Court will apply Ninth Circuit precedent and also decline to hold against Defendants' their failure to object to the inconsistencies before the jury was discharged. This result is particularly appropriate on the facts of this case, where, in the context of the trial proceedings, little opportunity to object was afforded to the parties: the Court quickly dismissed the jury after polling the jury. R.T. Dec. 11, 1998, 8.

b. The Indemnity Verdicts are not Inconsistent With the General Verdicts.

The verdict question regarding indemnification read as follows:

> **11. The jury should answer the following question only in the event that the jury determined that the seizures and sale of plaintiffs' equipment by PACIFIC FINANCIL CORPORATION were valid. If you did not make that determination, do not answer the following question.**
>
> **Question**: Do you find that the equipment seizures and sale were performed to satisfy and exonerate Defendant BUDDY SOUDER'S debt to PACIFIC FINANCIAL CORPORATION, and not any debt of plaintiffs to PACIFIC FINANCIAL CORPORATION?
>
> Answer "yes" or "no."
>
> If you answer the above question "No," sign and return this verdict. If you answer the question with a "Yes," then Plaintiffs are entitled to be indemnified by defendant BUDDY SOUDER for all losses and damages sustained by plaintiffs. Enter the amounts in the spaces provided in paragraphs 12 and 13 below.

The jury then proceeded to award SSI $314,500.00 and Santos $639,600.00 at the expense of Defendant Souder.

Initially, the parties disagree as to whether verdict no. 11 constitutes a special verdict or a general verdict accompanied by an interrogatory under Guam Rule of Civil Procedure 49.

Generally, a special verdict under Rule 49(a) consists of a list of interrogatories that calls for findings of fact. Floyd v. laws, 929 F.2d 1390, 1395 (9th Cir. 1993). Specifically, the jury must resolve all the ultimate facts presented to it so that the Court need only draw conclusions of law from those ultimate facts. See Truitt v. Travelers Ins. Co., 280 F.2d 784, 789 (5th Cir. 1960). The shortcomings of this description have been noted, however, in that it is well known that questions of law and fact are not so neatly separated. Wright & Miller, Fed. Prac. and Proc., Vol. 9A, §2506. In any case, if a jury answers special interrogatories inconsistently and the answers cannot be reconciled, a new trial must be granted. Tanno v. S.S. President Madison Ves, 830 F.2d 991 (9th Cir. 1988).

Alternatively, a court may take a middle ground between the general verdict, which is used most commonly, and the special verdict procedure of Rule 49(a). Rule 49(b) allows a court to submit to the jury, together with appropriate forms for a general verdict, written interrogatories on one or more issues of fact. Wright & Miller, Fed. Prac. and Proc. Vol. 9A, §2511.

Defendants argue that verdict no. 11 constitutes a special verdict inconsistent with the prior general verdicts regarding fraud and conversion, in that the jury was instructed not to answer no. 11 unless it first found that the seizures of the chattel mortgage equipment were valid. The jury answered the question affirmatively, awarding damages to both Plaintiffs. Defendants contend that this conflict regarding the validity of the chattel mortgages evidences the jury's confusion regarding the law and issues of the case, which can be corrected only by a new trial. Additionally, Defendants point out that no. 11 ultimately directs the jury to award both Plaintiffs *all* damages caused by Defendant Souder, and that the amounts entered, purporting to encompass all damages, are in no way consistent with the other damage awards, by any calculation, and in fact total far less than the damage awards in the individual fraud, conversion, breach of fiduciary duty, and misappropriation of corporate funds claims combined.

The Court finds that what was submitted to the jury does not fit neatly into either the definition of a special verdict or an interrogatory accompanying a general verdict. Broken down into its three parts, verdict no. 11 contains what is best described as a condition precedent,

followed by an interrogatory, followed by a general verdict. The preliminary condition precedent "The jury should answer the following question only in the event that" [the jury determined the seizures were valid] does not direct the jury to make a specific finding of ultimate fact. Whether the seizures were valid is ultimately a mixed question of law and fact. Instead, it states a condition which must be satisfied before the jury is to answer the following question.

Under Gallick v. Baltimore and Ohio R.R. Co., 372 U.S. 108 (1963), courts have a duty to attempt to harmonize answers before finding inconsistency that might necessitate a new trial.

> But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd., 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in Arnold v. Panhandle & S.F.R. Co., 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889; McVey v. Phillips Petroleum Co., 288 F.2d 53 (C.A.5th Cir.); Morris v. Pennsylvania R. Co., 187 F.2d 837 (C.A.2d Cir.) (collecting authorities), before we are free to disregard the jury's special verdict and remand the case for a new trial.

Id. at 119. Exegesis as used by the Court means to interpret. See Websters Third New International Dictionary.

The Ninth and other federal circuits are in accord. See Toner v. Lederle Laboratories, 828 F.2d 510, 512 (1987) ("When faced with a claim that verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to disregard the jury's verdict and remand the case for a new trial"); Schaafsma v. Morin Vermont Corp., 802 F.2d 629, 634 (2d Cir. 1986) (courts "struggle" to reconcile seemingly inconsistent verdicts); City of Richmond v. Madison Management Group, 918 F.2d 438, 457-58 (4th Cir. 1990). Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 683-85 (11th Cir. 1983).

While the jury's implicit conclusion regarding the condition of validity is necessarily in conflict with large portions of the rest of the verdict, this is not the same as saying that this condition constitutes a special verdict in direct conflict with the rest of the verdict, such that a new trial is necessary.

The actual interrogatory in no. 11 addresses the issue of whether the equipment was seized in order to satisfy Souder's debt to PFC, as opposed to Plaintiffs' debt to PFC. The jury

answered "yes," indicating that they found that the debts were Souder's and not Plaintiffs'. Thus the interrogatory itself is not in conflict with the rest of the jury's verdict and findings of liability. Instead, only the implication contained within the condition to that factual finding is in conflict.

Plaintiffs seek to concede this indemnification award, labeling it surplusage and double recovery which they concede they are not entitled to, since they were already compensated under the fraud awards. Defendants point out that it is not the size of the award, less than one-seventh of the entire judgment, but the conflicting jury pronouncements on fundamental issues that should be the main concern. However, the Court finds that there is no fundamental conflict that would require a new trial. The jury found for the Plaintiffs, in whole or in part, against both PFC and Souder, on all of Plaintiffs' causes of action. The Court cannot say that such an overwhelming statement of liability against both Defendants should be eclipsed by this one implied conflict. Such an inconsistency does not indicate that the jury was confused such that a new trial is required. The conditional language preceding the interrogatory has an insignificant bearing on their actual specific finding that the debt was Souder's, and that both Plaintiffs should be indemnified.

However, Plaintiffs are correct in stating that the award constitutes surplusage or double recovery. Another way of characterizing the indemnity awards is that they are excessive, due to passion or prejudice. The Court finds that the jury displayed an unabashed enthusiasm for awarding damages, such that they readily accepted Plaintiffs alternative theories of redress, and applied them in ways that, while not easily understood by the Court, evince creative accounting. Such enthusiasm does not in any way cause the Court to question their findings on liability; the passion or prejudice appears limited to their damage awards. In redressing this surplusage or double recovery or excess, the Court notes that the jury already compensated Plaintiffs for all of their injuries by way of the jury's fraud awards, to be explained below. Accordingly, the Court finds the indemnification awards excessive, not inconsistent. As such the total awards in verdicts 12 and 13 should be remitted.

c. Despite the Fact that Awards Designed To Compensate for the Same Harm Award Different Dollar Amounts, the Verdicts are not Inconsistent.

PFC also argues that the jury's verdict was inconsistent, as illustrated in the two instances of double recovery. In the first instance, on the conversion of the chattel mortgage equipment claim, the jury awarded damages of about $383,000.00 in actual and punitive damages for harm that Plaintiffs concede was compensated for in the fraud awards. See Plaintiffs' Submittal of Proposed Judgment Form, at 2. The conversion claims were essentially an alternative theory by which the jury could have remedied the same harm. Since the fraud and conversion claims were to remedy the exact same harm, the verdict amounts should have been identical, or at least comparable, according to PFC. The fraud awards, however, totaled over $3.8 million.

The Court finds, however, that the better analysis to apply is one regarding excessive damages, as opposed to inconsistency. Since all the parties agree that the conversion of the chattel equipment claim is merely an alternative theory of recovery for the same harm as the fraud claims, the conversion award against PFC simply adds to the Court's analysis regarding the excess in the fraud awards. Thus the Court finds that in a new trial on damages, conversion need not be included as a cause of action, since liability is assumed under the fraud claim. This will further simplify the issues upon retrying the damages.

Again, the jury awarded damages against one or both Defendants on all but three of the thirteen general verdicts. That this Court cannot justify the exact dollar amounts of each verdict does not mandate a finding of inconsistency such that a new trial is required, and Defendants have provided no caselaw to the contrary. While the Court must be satisfied that all of the verdicts are supported by substantial evidence, or are not against the clear weight of the evidence, dollars that the Court cannot explain may be redressed by a finding of excess, and remittitur.

E. Punitive Damage Awards.

1. The Punitive Damage Awards against PFC do not Violate Due Process.

PFC argues that the punitive damages award violate due process in that Plaintiffs failed to present any evidence that PFC had any knowledge of, directed, or ratified Souder's conduct, citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). That case, however, does not *require* knowledge, direction, or ratification of, the agent's acts, in order to comport with due

process. In any case, the jury could have inferred Benito's knowledge of Souder's representations from the fact that Benito and Souder were friends, had previously worked together at PFC, and were both attempting to mitigate potential losses on Souder's original loans. Or, the jury could have found Benito's own acts, discussed above, sufficient to constitute fraud. Thus the Court finds no violation of Due Process.

2. The Punitive Damage awards Against PFC are not in Violation of Guam Law, Based on A Question of Souder's Authority at PFC.

PFC also argues that punitive damages cannot be awarded against a corporation for the action of any employee unless that employee held a superior management position sufficient to bind the corporation. PFC claims that the evidence was insufficient to find that Souder, if he was even still working at PFC, had the authority to bind the corporation. Again, there was substantial circumstantial evidence upon which the jury could decide that Benito and PFC were aware of Souder's actions and representations. Also, Benito's own actions in completing the blank chattel mortgages with false information—i.e. that the $576,000.00 had been loaned to SSI as opposed to Souder, could also constitute a fraud upon which the jury could award punitive damages against PFC. Thus the Court need not determine Souder's authority to bind PFC.

3. Plaintiffs' Failure to Introduce Evidence of Defendants' Financial Condition did not Result in Excessive Punitive Damages.

20 G.C.A. §2120 governs punitive damages.

§2120. **When Exemplary Damages Allowed.**

> In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Additionally, 20 GCA §2111 provides for interest where punitive damages are awarded. 20 G.C.A. §2120 has as its source California Civil Code §3294.

Jury Instruction No. 43 directed the jury on the issue of punitive damages and stated that if they found by clear and convincing evidence that Defendants were guilty of oppression, fraud or malice, they could award punitive damages. While noting that no fixed standard existed for the determination of such damages, the instruction did require the jury to consider 1) the

reprehensibility of the conduct of the Defendants; and 2) the amount of punitive damages which would have a deterrent effect on Defendants in light of their financial condition.

Defendant Souder contends that Plaintiffs' failure to present evidence at trial of Defendants' financial condition precludes any award of punitive damages. Plaintiffs do not claim to have presented such evidence, but argue that Defendants' failure to object at trial, at the motion for directed verdict, constitutes a waiver of the issue.

Under Guam Rule of Civil Procedure 50, a party moving for a directed verdict (judgment as a matter of law under the federal rules) must specify the law and facts on which it is entitled to judgment. Additionally, the Advisory Committee Note to the Rule makes clear that the trial court has an overlapping responsibility to inform the nonmovant of deficiencies in its proof and to afford the nonmovant an opportunity to correct any such deficiency. Waters v. Young, 100 F.3d 1437, 1441 (9th Cir. 1996).

> These obligations reflect a major purpose of the motion for judgment as a matter of law, which is "to call the claimed deficiency in the evidence to the attention of the court and to opposing counsel at a time when the opposing party is still in a position to correct the deficit." Lifshitz v. Walter Drake & Sons, 806 F.2d 1426, 1429 (9th Cir.1986) (emphasis added); see also Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1345-47 (9th Cir.1985).

Id. at 1441. See also Piesco v. Koch, 12 F.3d 332, 340 (2nd Cir. 1993).

However, California courts have held that evidence of a defendant's net worth is required for an award of punitive damages. Adams v. Murakami, 54 Cal.3d 105 (1991).

> The essential question therefore in every case must be whether the amount of damages awarded substantially serves the societal interest. In answering that question in Neal, we first explained the importance of the nature of the defendant's wrongdoing and the amount of compensatory damages. We then observed, "Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence (see fn. 13, ante), will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.... By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (21 Cal.3d at p. 928, 148 Cal.Rptr. 389, 582 P.2d 980.)

Id. at 110.

Plaintiffs point out that no Guam court has adopted this requirement regarding a showing of financial condition, and also argue that since Guam adopted its exemplary damages statute

from California long before Adams, that California case is of little precedential effect. Citing Hanley v. Lund, 218 Cal.App.2d 633, 645-46 (1963) and a host of cases from a myriad of jurisdictions, Plaintiffs state that no such showing of financial condition is necessary for an award of punitive damages. However, it is not clear from these cases whether the requirement of considering a defendant's financial condition was expressly included in the jury instructions as it was here. Notably, the jury instruction on punitive damages, no. 43, was submitted by Plaintiffs.

The Surpeme Court of Guam has addressed the issue of whether the failure to present evidence of a Defendant's net worth or financial condition precludes an award of punitive damages. See Guerrero v. DLB Const. Co., 1999 Guam 9 (Apr 30, 1999). In Guerrero, the Court held "that substantial evidence was presented to allow the jury to make the findings required under the statute." Id. at 7. In this case, the jury was presented with sufficient evidence to meet the standard set forth in the statute. For instance, evidence was presented indicating that Benito had filled in the chattel mortgages with false information and that Souder had misrepresented the sufficiency and validity of collateral. Based upon this evidence, the jury could have reached a reasonable conclusion that the conduct of the Appellants had reached the threshold allowing an award for punitive damages. Id.

In the end, however, the Court finds Plaintiffs' arguments regarding the waiver of the issue more persuasive. The law is clear regarding motions for JNOV or a new trial, and the necessity of objecting to issues, while at trial, such that all parties have a chance to examine or redress them while the jury is still present. To discover, after the jury has been dismissed, that an element of a claim or damages has not been met is an unfortunate circumstance for Defendants. However, unlike Defendants' failure to object to the inconsistencies in the verdict, all parties were given time, and indeed ordered to submit written briefs on the motions for directed verdict, allowing Defendants sufficient opportunity to present all deficiencies in Plaintiffs' case.

The Court also holds that at a new trial on damages, Plaintiffs may present evidence of financial condition. Since the Court has ruled that their failure at trial to present such evidence did not rule out the recovery of punitives as a matter of law, Defendants suffer no harm by

allowing the introduction of such evidence now. Additionally, the evidence pertains strictly to damages and not liability.

4. While The Jury Awards for Punitive Damages on the Conversion of the NPK Hammer and Breach of Fiduciary Duty Claims are not Precluded Based on the Failure for Award Actual Damages, these Awards are also Excessive, Due to Passion or Prejudice.

On Plaintiffs' Conversion of the NPK hammer and Breach of Fiduciary Duty claims, the jury gave no compensatory damages, but awarded exemplary damages of $198,000.00 against PFC. PFC argues that the jury verdict for exemplary damages regarding the NPK hammer cannot be sustained since the jury awarded no compensatory damages.

Punitive Damages, even in a fraud action, cannot be recovered unless there are "actual, substantial damages." Bezaire v. Fidelity and Deposit Co. of Maryland, 12 Cal.App.3d 888, 892 (1970). This is so because an award of exemplary damages is merely incidental to the cause of action and not a cause of action in itself. Brown v. Aditios Int'l., 938 F.Supp. 628 (S.D. Cal. 1996); Hilliard v. A.H. Boggins Co., 148 Cal.App.3d 374 (1983). However, punitive damages are recoverable if there is evidence of actual damage although the jury returns a verdict of zero dollars for compensatory damages. James v. Public Finance Corp., 47 Cal.App.3d 995, 999 (1975) (where jury entered general damages of $0 and punitive damages of $1,750.00, jury verdict was liberally construed as a general verdict covering all of plaintiff's damages, both actual and punitive, and was not negated because of a technical defect in form.) The requirement of "actual damages" is simply the requirement that a tortious act be proven even though there is no monetary damage. Esparza v. Specht, 55 Cal.App.3d 1, 6 (1975).

The jury could very well have concluded that Plaintiffs proved conversion of the NPK hammer, by reason of the fact that the hammer was seized along with all of the other equipment. In so doing, when the jury awarded the actual damages for the loss of the hammer, under the fraud or other conversion claims, it is quite reasonable to infer that the jury made a reasonable choice in not awarding damages for the hammer two or three times, under the fraud, conversion, and conversion of the NPK hammer claims.

A similar analysis applies to the jury's award of punitive damages, and no actuals, on Souder's breach of fiduciary duty verdict. The jury awarded $86,516.39 in punitive damages in

favor of SSI against Defendant Souder for breach of fiduciary duty, but no actual damages. Souder claims this award of punitive damages without an award of actual damages constitutes an excessive award resulting from passion or prejudice.

The Court agrees, based on the fraud analysis above. The harm suffered by Plaintiffs were fully compensated by way of the fraud awards or the misappropriation of corporate funds awards. Plaintiffs' punitive damages here are also a function of the same acts by Souder that were addressed in the fraud or misappropriation claims. That the breach is a different tort does not mean that Souder should be punished twice for the same act and the same harm caused, and the Court finds that these punitive damages are thus excessive. Though the elements of a breach of fiduciary duty claim differ from that of fraud, the harm suffered was the same: the loss of the chattel mortgage equipment under the fraud claim, or the loss of SSI money under the misappropriation of corporate funds claim. The jury found for the Plaintiffs and against Souder in both instances, awarding actual damages and punitives.

However, the Court notes that while conversion is a different tort than fraud, and breach of fiduciary duty a different tort than misappropriation of corporate funds or fraud, the acts committed by Souder were the same. This appears to be just another example of alternative theories by which Plaintiffs sought to remedy the same harm. Thus the Court finds that the punitive damage awards, while supported by substantial evidence and not against the clear weight of the evidence, are excessive. As such, the Court finds that a new trial on damages is the appropriate remedy for the excess.

F. Judgment Notwithstanding the Verdict Should be Entered on the Misappropriation Of Corporate Funds Verdict, Consistent with the Evidence at Trial.

The jury found Defendant Souder liable to SSI for $115, 000.00 in actual damages for misappropriation of corporate funds. Additionally, the jury awarded SSI $345,000.00 in punitive damages on this claim.

At trial, Plaintiffs presented evidence of a total of $40,154.00 in checks written that were allegedly not authorized by Santos. R.T. Nov. 17, 1998 146:3-149:10. This is the same amount requested by counsel for Plaintiffs in his closing argument. On cross-examination, counsel for

Souder elicited testimony from Santos to the effect that Santos had in fact authorized Souder to write checks on the Citizens' Security Bank account from which SSI funds were allegedly misappropriated. R.T. Nov. 24, 1998, 63:20-64:12. Thus for 51 days Souder was authorized by Santos to write checks on the account. R.T. Nov. 25, 1998 27:21-28:4. There was additional testimony that Souder deposited funds in the account, such that Souder argues that not only can Souder be held liable for no more that $40,154.00, but in fact the weight of the evidence supports a finding that he should be liable for less, based on his deposits.

The jury could well have found that the checks written by Souder were not in fact for SSI purposes, but were in some way for his own personal gain. Additionally, the jury need not have found that the deposits were in fact money that should have been credited against these checks, but perhaps were SSI funds that should have been deposited in the account anyway. However, the Court finds no evidence that any money beyond the $40,154.00 was misappropriated. Thus the Court will grant Souder's motion for judgment notwithstanding the verdict with respect to the misappropriation of corporate funds award, and reduce the amount of the jury's award to conform to the evidence at trial, $40,154.00. Additionally since the punitives were based on a tripling of the actual damages, the Court will further reduce the punitive damages award to $120,452.00.

IV. CONCLUSION

While the Court hereby orders that a New Trial on the issue of damages only is necessary, the Court recognizes that this case has stretched out for over 5 years now. In the interests of minimizing the costs and inevitable delays that occur in scheduling civil trials, the Court offers to act as the fact-finder on the issue of damages in the new trial. Additionally, having been present for the entire trial on the merits, the Court recommends that the parties simply submit on the basis of the evidence already presented at trial. This will further save the parties and the Court time and money and will serve to resolve the issues more quickly. In order to facilitate such a stipulation, the Court suggests that no objections be waived regarding liability or other issues, by virtue of the parties having consented to the Court acting as the fact-finder on the damages issue. An interlocutory appeal of this motion for a new trial being unavailable, see

J.J. Moving Services, 1998 Guam 19; Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 701 (2nd Cir. 1972), no appeal can be taken until final judgment in any case. Thus with all appeal issues preserved, the parties can simply advance the proceedings towards resolution.

Accordingly, Defendant Souder's Motion for Judgment Notwithstanding the Verdict is GRANTED with respect to the Misappropriation of Corporate Funds verdict. Souder's and PFC's Motion for Judgment Notwithstanding the Verdict are otherwise DENIED. Defendants' Motions for a New Trial, limited to the issue of damages, are GRANTED.

SO ORDERED this 22 day of October, 1999.

HONORABLE STEVEN S. UNPINGCO
Judge, Superior Court of Guam

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Superior Court, Guam
Dated at Agana, Guam
22 OCT 1999
Jacqueline S.C. Terlaje
Deputy Clerk, Superior Court of Guam

IN THE SUPERIOR COURT OF GUAM

S/S INDUSTRIES, INC.,
MICHAEL F. SANTOS

Plaintiffs

v.

PACIFIC FINANCIAL CORPORATION,
PAUL J. "BUDDY" SOUDER

Defendants

CIVIL CASE NO. CV1194

VERDICT FORM 1

We the jury find as follows:

1. On the first claim (FRAUD) plaintiff S/S INDUSTRIES, INC. is entitled to recover actual damages in the amount of $ 831,480.00 (may be $0 or more) against Defendant PACIFIC FINANCIAL CORPORATION and punitive damages in the amount of $ 639,600.00 (may be $0 or more).

2. On the first claim (FRAUD) plaintiff S/S INDUSTRIES, INC. is entitled to recover actual damages in the amount of $ 46,240.00 (may be $0 or more) against defendant BUDDY SOUDER and punitive damages in the amount of $ 138,720.00 (may be $0 or more).

3. On the first claim (FRAUD) plaintiff MICHAEL F. SANTOS is entitled to recover actual damages in the amount of $ 2,494,440.00 (may be $0 or more) against defendant PACIFIC FINANCIAL CORPORATION and punitive damages in the amount of $ 100,000.00 (may be $0 or more).

4. On the first claim (FRAUD) plaintiff MICHAEL F. SANTOS is entitled to recover actual damages in the amount of $ 500,000.00 (may be $0 or more) against defendant BUDDY SOUDER and punitive damages in the amount of $ 500,000.00 (may be $0 or more).

5. On the second claim (CONVERSION) plaintiff S/S INDUSTRIES is entitled to recover actual damages in the amount of $ Ø (may be $0 or more) against defendant PACIFIC FINANCIAL CORPORATION and punitive damages in the amount of $ Ø (may be $0 or more).

6. On the second claim (CONVERSION) plaintiff MICHAEL F. SANTOS is entitled to recover actual damages in the amount of

$ 76,666.64 (may be $0 or more) against defendant PACIFIC FINANCIAL CORPORATION and punitive damages in the amount of $ 306,666.64 (may be $0 or more).

7. On the third claim (BREACH OF FIDUCIARY DUTY) plaintiff MICHAEL F. SANTOS is entitled to recover actual damages in the amount of $ Ø (may be $0 or more) against defendant BUDDY SOUDER and punitive damages in the amount of $ Ø (may be $0 or more).

8. On the third claim (BREACH OF FIDUCIARY DUTY) plaintiff S/S INDUSTRIES is entitled to recover actual damages in the amount of $ Ø (may be $0 or more) against defendant BUDDY SOUDER and punitive damages in the amount of $ 86,516.39 (may be $0 or more).

9. On the fourth claim (CONVERSION OF THE NPK HYDRAULIC HAMMER) plaintiff MICHAEL F. SANTOS is entitled to recover actual damages in the amount of $ Ø (may be $0 or more) against defendant PACIFIC FINANCIAL CORPORATION and punitive damages in the amount of $ 198,000.00 (may be $0 or more).

10. On the fourth claim (CONVERSION OF THE NPK HYDRAULIC HAMMER) plaintiff S/S/INDUSTRIES is entitled to recover actual damages in the amount of $ Ø (may be $0 or more) against defendant PACIFIC FINANCIAL CORPORATION and punitive damages in the amount of $ Ø (may be $0 or more).

11. The jury should answer the following question only in the event that the jury determined that the seizures and sale of plaintiffs' equipment by PACIFIC FINANCIAL CORPORATION were valid. If you did not make that determination, do not answer the following question.

Question: Do you find that the equipment seizures and sale were performed to satisfy and exonerate Defendant BUDDY SOUDER'S debt to PACIFIC FINANCIAL CORPORATION, and not any debt of plaintiffs to PACIFIC FINANCIAL CORPORATION?
Answer "yes" or "no."

Answer: Yes

If you answer the above question "No," sign and return this verdict. If you answer the question with a "Yes," then Plaintiffs are entitled to be indemnified by defendant BUDDY SOUDER for all losses and damages sustained by plaintiffs. Enter the amounts in the spaces provided in paragraphs 12 and 13 below.

12. Plaintiff S/S INDUSTRIES is entitled to be indemnified by defendant BUDDY SOUDER in the amount of $ 314,500.00 .

13. Plaintiff MICHAEL F. SANTOS is entitled to be indemnified by defendant BUDDY SOUDER in the amount of $ 639,600.00 .

14. On the fifth claim (MISAPPROPRIATION OF CORPORATE FUNDS) plaintiff S/S/INDUSTRIES is entitled to recover actual damages in the amount of $ 115,000.00 (may be $0 or more) against defendant BUDDY SOUDER and punitive damages in the amount of $ 345,000.00 (may be $0 or more).

Foreperson Date