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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ARALIA

ACTION DOLLS LTD., Plaintiff, vs. MERCURY MEDIA and HELEN LEE, Defendants. _______________________________/	Case No. AA4321 DEFENDANTS' POST-TRIAL BRIEF

INTRODUCTION[1]

Defendants Mercury Media and Helen Lee, and plaintiff Action Dolls, Ltd. (ADL), agree as to the central issue in this case: Did ADL continue to use Mercury Media's media plan after June 20__? That is the central issue because ¶ 7 of the parties' Advertising Agency Agreement provides: "If Principal ends this agreement and continues with any plan or program of advertising with any media arranged by Agency, the compensation provided shall continue for the duration of the plan or program."

The parties do not dispute that the ad placements for which Mercury claims commissions were placed with ADL's authorization before it terminated their contract. Mercury has never claimed entitlement to any commissions if its plan was not in fact used. ADL admits that there would be clear written evidence of cancellation if ADL did

[1]In the interests of brevity, citations to the record have been deleted from this sample document.

not continue to use it. Thus ADL could have obviated the need for this trial simply by producing the purported written evidence of cancellation uniquely within its possession and control. Instead, ADL claimed that such evidence (cancellation of ads that Mercury placed!) is proprietary information constituting a trade secret, and refused to produce it in discovery or at trial. This refusal, together with affirmative evidence that ADL continued to use Mercury's plan, establishes that Mercury is entitled to prevail in this action.

ARGUMENT

1. The evidence shows that ADL did not cancel Mercury Media's plan, but continued to use it after January 20__.

ADL's then executive vice-president John Smith hired Mercury in April 20__, a time when even ADL's witnesses (including its CFO George Brown) admit that its advertising was disorganized. Under its agreement with ADL, Mercury redesigned ADL's broadcast and print advertising, including the creation of a new campaign theme and slogan, "We work harder than the average bear," and developed new strategies for its placement. One year later Smith wrote a testimonial stating that Mercury Media had prepared a market launch plan in record, low-cost time; that ADL had grown to rely on Mercury Media for all its creative advertising in TV, radio, print, and website creation; that Mercury had created a positive image with leads growing by 59.3% in the first year; that Mercury's work was always accurate, impressive, and affordable; and that many of ADL's competitors had either made positive comments or tried to copy ADL's approach.

In July 20__, ADL brought in a new vice-president for sales and marketing, Carla Frank, who soon started planning to replace Mercury Media with agencies she had previously worked with elsewhere. Frank originally planned for an "agency review" in November 20__, but it was delayed until December. On November 8, 20__, Lee emailed Frank asking about placement of ads for the first quarter of 20__, but had no response. On November 13, 20__, Lee again emailed Frank stating that she was still waiting for confirmation that Mercury would be placing ADL's advertising for the first quarter of 20__, and warning that the time to do so was getting short. That same day, November 13th, ADL's George Brown asked Frank at lunch if she had placed ADL's advertising for the first quarter, and Frank untruthfully stated that she had. Only at 4:30 p.m. on November 13th did Frank email Lee confirming that Mercury would be placing ADL's first quarter ads.

With Frank's written confirmation, Mercury placed ADL's first quarter ads. The insertion orders for that advertising, signed by Frank, are collected in Exhibit 84. Then, on January 2, 20__, Lee received a letter from Frank dated December 28, 20__, terminating the parties' agreement effective January 27, 20__. On January 3, 20__, Lee emailed Frank stating that Mercury would do whatever it could to make the transition as smooth as possible, but also noting that there were insertion orders approved to run beyond January 27th and that, under ¶ 7 of the parties' agreement, Mercury would be entitled to compensation for continued use of any plan or program of advertising arranged by Mercury.

On January 8, 20__, Mercury provided ADL with a list of all insertion orders placed on ADL's behalf, including the date on which each expired. The cover letter further stated that Mercury was willing to continue with the same billing process until the completion of each insertion order. But on January 9 and 10, Frank instructed Mercury to cancel all current broadcast and print placements. On January 14, 20__, Lee faxed a letter to ADL's president, Jane Jones, declining to carry out the cancellations because Mercury presumed ADL would continue with substantially the same media placements, and suspected that the instruction to cancel was merely for the purpose of substituting a new agency in Mercury's place to receive the commissions. The letter added that Mercury did not intend to take a hard position regarding the termination dates of the insertion orders, but requested that Jones assist in finding an amicable solution because of difficulties in dealing with Frank.

On that same date, January 14th, Lee had a telephone conference with Frank and Jones in which they said that ADL did not intend to honor ¶ 7 of the parties' agreement entitling Mercury to compensation at the agreed rate for continued use after January 27th of advertising arranged by Mercury. Jones also said that she was surprised to learn that Frank had authorized Mercury to place ADL's first quarter 20__ advertising.

On January 16, 20__, Lee faxed Jones a letter stating that, after the January 14th telephone conference, she learned that ADL's accounting department was instructed to stop payment of Mercury's January 2nd invoice for December services, and that this, together with ADL's earlier repudiation of any obligations after January 27th, indicated ADL did not intend to honor the parties' agreement. The letter added that, because of ADL's actions, Mercury would not provide materials ADL requested until Mercury had been paid in full, as authorized in ¶ 8 of the parties' agreement.

At the same time ADL was telling Mercury it would not honor the terms of the parties' agreement, it was also taking steps to insure that Mercury would not receive the commissions due it. ADL entered into an agency agreement with Sakura media in December 20__, before Mercury's contract was terminated. Sakura told the media vendors that it was ADL's new agency of record, and to make sure the vendors were convinced, Sakura asked ADL's Frank for a copy of the December 28th letter terminating Mercury. Even though the termination letter was addressed to Lee as "Confidential," Frank provided Sakura with a copy. On January 15, 20__, Sakura's Joe Kent, who received the copy, emailed Frank as follows: "Perfect. I will forward this letter to all print reps. They already have the letter stating that Sakura is the agency of record, so this should really make things clear that this is a new media plan from a new agency."

On January 28, 20__, Lee sent ADL's Jones a letter recounting ADL's actions to that date, including Frank' order to cancel all media placements even though ADL did not really intend to cancel; Frank's and Jones's indication on January 14th that ADL would not honor its obligation to compensate Mercury for continued use of Mercury's plan after

January 27th; failure to pay Mercury's invoices when due; sending copies of the termination letter to vendors even though it was confidential; taking unilateral action to divert media invoices affecting Mercury's January commissions; and improper attempts to obtain transfer of the website. The letter stated that, because of these actions, Mercury paid $100,800 of the present accounts due and the balance due and payable, and collected for itself $112,500 for commissions through the end of January plus $18,500 for miscellaneous projects ordered by ADL. Attached to the letter were information and instructions to assist ADL's accounting department in paying directly the vendors whom Mercury had not paid.

Throughout 20__, Mercury continued to assert its right to compensation for ADL's continued use of the plan Mercury arranged. For example, a May 2, 20__, letter from Mercury's counsel to ADL's counsel stated in part: "The facts are that all accounting between my client and yours has been accurate and if any funds are owed, it would be fees owing Mercury for ongoing placement agreements." Similarly, an October 22, 20__, letter from Mercury Media's counsel to ADL's counsel stated that, under ¶ 7 of the parties' agreement, "fees are due on all media placed by my client for the duration of the plan or program."

ADL never told Mercury that it had cancelled any of the media Mercury placed on ADL's behalf for 20__. Accordingly, on or about February 1, 20__, Mercury prepared two invoices for the commissions due Mercury for ADL's continued use of Mercury's plan or program. Commissions were sought for the first quarter of 20__ as to placements made for that period, but for the entire year of 20__ as to placements made "TFN" (until further notice). ADL claims that these invoices were never presented for payment, but Lee testified that she gave them to her then-counsel to be forwarded to ADL.

Substantial evidence established that ADL continued to run the ads Mercury placed after January 20__. First and foremost is the fact that the ads were placed and the vendors were contractually obligated to run them unless cancelled. From that fact alone it may be assumed that the ads ran, absent convincing evidence to the contrary.

Second, Mercury's January 20__ letters to ADL recounted Frank' and Jones's repudiation of ADL's obligation to pay for continued use of Mercury's plan after January 20__, and directly stated that ADL's intent was to continue using Mercury's plan but substitute another agency and thereby deprive Mercury of commissions it was due. Neither Frank nor Jones denied the statements in Mercury's letters, which conduct may be regarded as an adoptive admission.

Third, after Mercury secured the commissions due it through January 20__ and gave ADL information and instructions regarding vendors who had not been paid, ADL went to great pains to pay the vendors. George Brown testified that ADL paid the vendors, even though it caused something of a financial "crisis" for ADL, so that the ads placed by Mercury Media would **not** be cancelled.

Fourth, ADL's internal communications indicate an awareness that it was continuing to use the plan or program Mercury arranged, entitling Mercury to commissions for that use. A March 13, 20__ memorandum from Brown to Jones states in part:

> In the information she sent, it does not look like she has attempted to collect commission on future revenue, she would have been smarter to go that route than try to dupe us into thinking we did not pay past commission. I sent her a nice e-mail asking her how the commission was calculated (playing dumb for now).

Finally, there is direct evidence that some of the ads Mercury Media placed ran after January 20__. ADL's Frank admitted in her testimony that ADL continued to run some of the ads Mercury placed. Lee testified that she personally saw some of the ads Mercury placed run on television. Most significant is an invoice from Best-Best TV, which ADL apparently disclosed by mistake, showing that ads Mercury placed ran in February and March 20__. Column 13 of the invoice, under the heading "Product/Film No.," uses the code "M12345," which is Mercury Media's code. Moreover, no evidence was offered to show that ADL paid Sakura or anyone else a commission for those ads.[2]

ADL offered little or no evidence that Mercury's placements were cancelled. George Brown, ADL's CFO and supposedly its "person most knowledgeable," testified that he did not know if Mercury's placements were cancelled. ADL included a person from Ace Agency (another agency ADL retained) on its witness list, but then never called the person to testify. Neil Sakura of Sakura Media first testified that he did not know if ADL had asked Sakura Media to cancel Mercury Media's placements. Then, after being shown an email indicating that ADL wanted Sakura Media to cancel Mercury's placements, Sakura said he did not do so personally but "believed" that someone at Sakura Media did, although he could not say how he knew that. ADL also offered the testimony of Louise Meek, who said that Mercury's placements in the Daily Clarion were cancelled for nonpayment, and Betty Lucas of Dimes R Us, who denied that Mercury's plan was being run, but then admitted that she could not distinguish whose plan was being run.

This dearth of credible evidence of cancellation is striking since ADL's own witnesses admitted that any cancellation would have been in writing. But rather than simply end this controversy by producing what would be definitive proof, ADL refused to produce any such written evidence of cancellation in discovery on the purported ground that it is proprietary information constituting a trade secret, and then failed to produce any such evidence at trial. ADL's refusal to produce this evidence is a failure to meet its burden of producing evidence.

In *Nemeth v. Pankost* (1964) 224 Cal.App.2d 351, the defendant real estate broker argued on appeal that there was no substantial evidence to support a finding that the plaintiff agent was entitled to his share of a commission the broker allegedly received on resale of certain property. Another agent with a right to share in the commission if the

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[2]ADL asserts that the time Best could run the ads on any given day was expanded beyond that specified in Mercury's insertion order, and that that fact, together with the resulting reduced rate, made the ads a different "plan or program" within the meaning of ¶ 7 of the parties' agreement. Merely re-booking the same ads for the same days does not constitute use of a different "plan or program" within the meaning of the agreement.

broker received it offered testimony that was "susceptible of construction" that the broker had received the commission, and said that he "might have" received his share of it. The broker testified that he did not know if he received the commission, and admitted that, while he knew it was an item in dispute, he did not bring records to trial that would have settled the dispute. The appellate court rejected the broker's contention that there was not substantial evidence he had received the commission. Although the burden of proof was on the plaintiff,

> for practical reasons the burden of explanation or of going forward with the evidence is sometimes placed on a party-opponent who has information lacking to the one who asserts and seeks to establish a fact. [Citation.] The rule has application here. If defendant seriously disputed the fact of receipt of the commission on the resale to Wade, production of his records to show this would have been a simple matter of proof."
>
> *Ibid.* (internal quotation marks omitted).

ADL's failure to offer definitive evidence that could easily have been produced was not only a failure to meet its burden of going forward, but also requires that the meager evidence it did offer on the cancellation issue be distrusted. "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Evid. Code § 412. And Evidence Code § 413 provides that the trier of fact may consider willful suppression of evidence in determining what inferences to draw from the evidence or facts in the case against the suppressing party. These principles were applied in *Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660, where the plaintiff was injured in an automobile accident and sought to hold the other driver's corporate employer liable. The employer argued that it was not liable under the going-and-coming rule, but evidence suggested the other driver might have been on his way to the employer's premises for a board meeting at the employer's instruction. Thus that rule would not apply. An officer of the corporate employer testified that he did not remember when the board meeting was held, but did not produce corporate records that would have easily demonstrated whether the meeting was held on the day in question. The trial court read BAJI No. 2.02 to the jury, which sets forth the rule stated in Evidence Code § 412, i.e., that if a party offers weaker and less satisfactory evidence when it could have offered stronger and more satisfactory evidence, the evidence offered is to be viewed with distrust. The appellate court held that the instruction was properly given. *Id.* at 672.

The rationale behind the foregoing statutes and jury instructions was stated in *Breland v. Traylor Engineering and Manufacturing Co.* (1942) 52 Cal.App.2d 415, 426:

> A trial is not a game where one counsel safely may sit back and refuse to produce evidence where in the nature of things his client is the only source from which that evidence may be secured. A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse.

Here, Mercury produced substantial evidence that ADL continued to use the media plan arranged by Mercury Media after January 20__. ADL admitted that it would have definitive written evidence of cancellation if Mercury's placements were indeed cancelled, but instead of producing such evidence it offered extremely weak evidence barely worthy of the name. When that evidence is viewed with the requisite distrust, it can only be concluded that the preponderance of the evidence favors Mercury.

2. Mercury is entitled to recover $45,000 on its cross-complaint for breach of contract and open book account.

ADL claims that Mercury Media breached the parties' agreement by retaining as commissions funds that allegedly should have been paid to vendors, and thereby forcing

ADL to pay certain vendors twice. The reasons why defendant Lee cannot be held personally liable for ADL's claims are set forth in defendants' Motion for Judgment, which the court has taken under submission. Those arguments will not be repeated here. ADL's expert, Sam Brady, testified that the amount due ADL from Mercury Media by reason of these alleged double payments is $155,000.

ADL's contention that Mercury's retention of the commissions due it through January 20__ constituted a breach of contract is without foundation. It is elementary that one party's material breach of a contract excuses the other party's further performance. 1 Witkin, SUMMARY OF CALIFORNIA LAW (9th ed. 1987) "Contracts," § 797, at 719. Equally well-settled is the right of setoff, i.e., "the established principle in equity that either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference." *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 362. In the instant case, it was ADL that breached the contract by defaulting on payment of commissions due for December 20__ and January 20__, and by repudiating its obligation under ¶ 7 of the agreement to compensate Mercury for use of Mercury's plan after January 20__. Under those circumstances, any further performance by Mercury was excused and Mercury had every right to secure the commissions due it by retaining the amount due rather than paying it to vendors. Furthermore, Mercury's justifiable conduct in no way excused ADL from paying additional compensation for continued use of Mercury Media's plan after January 20__. Thus, ADL's claim that Mercury Media owes it $155,000 is incorrect because its expert's analysis totally ignored the commissions ADL owes Mercury.

Mercury's expert, Arnold Black, took account of the commissions still due Mercury as set forth in the February 20__ invoices, together with other items ADL's expert ignored or wrongly included. The latter items include an $11,000 invoice that Lee testified was for work ADL authorized and Mercury performed but that ADL's expert excluded from her calculations, and between $4,000 and $5,000 of alleged "double" payments by ADL for items that Mercury did not bill (e.g., overcharges by the vendor or added items that Mercury did not place and for which it claims no commission). Taking all these items into consideration, Mercury's expert concluded that a net sum of $46,300 remains owing from ADL to Mercury. ADL's expert acknowledged that Mercury's expert is an expert in Quickbooks, that his mathematics are correct, and that if Mercury's expert's assumptions are correct (i.e., that ADL in fact owes Mercury the sums set forth in the February 20__ invoices, the $11,000 invoice, etc.) then his conclusion that ADL owes Mercury Media $46,000 is also correct.

Because Mercury's expert's assumptions are correct, Mercury is entitled to judgment against ADL on its cross-complaint for breach of contract and open book account in the sum of $46,000.

3. ADL is not entitled to judgment on its claim for breach of the implied covenant of good faith and fair dealing.

ADL's claim for breach of the implied covenant is essentially the same as its claim for breach of contract. It seeks the same damages based on Mercury's allegedly wrongful failure to pay vendors, and Mercury's intent to frustrate the purpose of the agreement is supposedly shown by its purported failure to cooperate with ADL. This claim must fail for the same reasons as ADL's breach of contract claim. It was ADL that breached the parties' agreement by defaulting on commission payments and repudiating its obligation to pay for continued use of the plan Mercury arranged. ADL's breach excused any further performance by Mercury, and Mercury was entirely within its rights to offset the net sum due it for commissions.

4. ADL is not entitled to judgment on its claim for breach of fiduciary duty.

Whatever fiduciary duty Mercury may have owed ADL arose from the parties' agreement making Mercury ADL's agent. *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594. As discussed above, ADL's breach of the agreement excused Mercury from any further performance under the contract and justified Mercury's offset of the sums due it. ADL's claim for breach of fiduciary duty therefore must fail.

5. ADL is not entitled to judgment on its conversion claim.

ADL's claim for conversion seeks the same damages based on the same conduct as its other claims, i.e., Mercury's retention of funds that allegedly should have been paid to vendors. This claim must fail for two reasons. First, as ADL itself notes, a conversion claim must be based on the defendant's having wrongfully taken possession of property "owned" by the plaintiff. CACI 2100. Here, as discussed above, ADL's breach of the parties' agreement excused further performance by Mercury and justified its offset of the sums due it. Thus, the funds allegedly "converted" were not "owned" by ADL; they rightfully belonged to Mercury.

Second, as more fully discussed in defendants' Motion for Judgment, money generally cannot be converted. It may be the subject of a conversion claim only if a specific sum capable of identification is involved. *Farmers Insurance Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 452; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1589. Here, Mercury's invoices included multiple vendors, some of ADL's checks included partial payments, and ADL's Brown himself testified that there is no way to know what check or portion of an ADL check was for payment of a given vendor. This case involves a complicated accounting between the parties and simply is not the type of case in which money can be said to have been converted.

6. ADL is not entitled to recover on its claims for money had and received and open book account.

ADL's claims for money had and received and open book account must fail for the simple reason that no sum is due ADL. As discussed above in connection with the parties' breach of contract claims, when all sums involved are taken into account, including the commissions due Mercury for ADL's continued use of the plan Mercury arranged after January 20__, Mercury is entitled to a net recovery against ADL in the sum of $46,000.

7. ADL is not entitled to recover on its claims for intentional and negligent misrepresentation.

ADL's claim for intentional misrepresentation is based on Mercury's allegedly false representation that it would pay the media vendors from funds ADL provided in accordance with the parties' agreement. It is a claim of false promise fraud, i.e., an alleged misrepresentation as to future performance, and not a claim based on a misrepresentation of past or present fact. A necessary element of a claim of false promise fraud is proof that the defendant intended not to perform when the promise was made. *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 159. In the instant case, there is no evidence whatsoever that Mercury intended not to perform when the promise was made. Mercury paid the vendors in accordance with the agreement for more than 18 months, a fact that absolutely precludes a finding that it intended not to perform when the promise was made.

ADL's claim of negligent misrepresentation also must fail because there is no such thing as a negligent false promise. The specific intent requirement of false promise fraud (i.e., an intent not to perform at the time the promise was made) precludes any such claim. *Tarmann, supra.*

ADL argues that Mercury's "manufacturing" of invoices No. 123456 and No.

123457 in February 20__ constitutes an "additional count of fraud," but this contention too is completely without merit. Apart from the fact that Mercury did not fraudulently "manufacture" the invoices, they could not form the basis of a fraud claim in any event because ADL itself contends that they were never presented for payment and that it has not acted in reliance on them.

8. The evidence cannot support a finding that Mercury Media is defendant Lee's alter ego.

ADL argues that defendant Lee should be held personally liable for ADL's claims under the alter ego doctrine. The issue is moot because ADL is not entitled to recover on any of its claims, but even if that were not the case the facts simply would not support a finding of alter ego liability. Before a person may be held individually liable as a corporation's alter ego it must be shown: (1) that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality or separateness of the person and the corporation has ceased; and (2) that adherence to the fiction of the separate existence of the corporation would sanction a fraud or promote injustice. *Clejan v. Reisman* (1970) 5 Cal.App.3d 224, 238. The mere fact that a person is the corporation's sole shareholder does not make that person the corporation's alter ego. *Waters v. Superior Court* (1962) 58 Cal.2d 885, 898.

Lee is Mercury's sole shareholder, but the reasons ADL offers for holding her liable as Mercury's alter ego are either irrelevant or untrue. The first reason is that Mercury made no money for two consecutive years. Defendants are not aware of any authority (and ADL cites none) holding that a corporation's profitability or lack thereof has a bearing on the alter ego question. ADL next suggests that Lee has failed to respect corporate formalities, but without specifying which ones. ADL then states that Lee "admitted money she paid herself was taken from the trust account used to pay the vendors." This is simply untrue. The evidence showed that funds from the trust account were transferred to Mercury's general account, and that Lee took that action on Mercury's behalf in her capacity as president.

Another alleged reason for piercing the corporate veil is that Lee "could not verify the existence of regular elections for officers," which may be because officers are not elected. ADL next cites the fact that Lee's father, who regularly helps with Mercury's books, is a signatory on the trust account but is not an officer of the corporation. Again, ADL cites no authority requiring that such signatories be officers, but even if that were the case ADL offers no explanation as to how her father's signatory status shows that Mercury is Lee's alter ego. Lee did decide to secure Mercury's commissions and not pay certain vendors, but she made that decision on Mercury's behalf in her role as president. ADL also asserts that Lee made that decision without consulting other officers, and that no board of directors meeting was held to discuss the decision, but this is again untrue. Lee consulted both her husband (a director) and her mother (an officer and a director) before deciding. In short, the reasons ADL offers as to why Lee should be deemed Mercury's alter ego are insubstantial at best.

Nor is piercing the corporate veil necessary to avoid fraud or injustice. The actions of which ADL complains were taken in good faith and were entirely justified by ADL's prior breach of the parties' agreement.

9. Mercury Media is entitled to recover on its cross-complaint for fraud.

Mercury's fraud claim is also a false promise claim, but unlike ADL's it is amply supported by the evidence. ADL made the false promise when Carla Frank asked Mercury to place ADL's broadcast advertising for the first quarter of 20__ and print advertising for 20__ with no intention of paying Mercury's commissions as promised. Whether the defendant intended not to perform when the promise was made may be determined from all the circumstances, including the defendant's conduct before and after the promise was made. 3 Levy, et al., CALIFORNIA TORTS (rev. ed. 2004)

§ 40.03(1)(a)(I), at 40-18.3; BAJI No. 12.41.

The evidence shows that Frank was contemplating replacing Mercury Media with Sakura Media and/or Ace Agency well before she told Mercury to place ADL's 20__ ads. But when the agency review was pushed back from November to December 20__, Frank was forced to have Mercury place ADL's ads for the first quarter of 20__. Frank nevertheless proceeded with her plan to replace Mercury, and ADL in fact entered into a contract with Sakura Media in December 20__. Then, by letter dated December 28, 20__, Frank terminated Mercury effective January 27, 20__. In January 20__, ADL stopped payment of Mercury's invoices, and on January 14, 20__, Frank and Jones told Lee that ADL did not intend to honor its obligation to compensate Mercury for continued use of the plan arranged by Mercury after January 20__. As discussed in detail above, ADL carried out its stated intention by continuing to use Mercury's plan after January 20__ without paying Mercury commissions as required by the parties' agreement.

The foregoing evidence makes it clear that Frank had no intention of compensating Mercury in accordance with the parties' contract at the time she told Mercury to place the 20__ ads. This clear and convincing evidence of fraud not only entitles Mercury to compensatory damages, but to an award of punitive damages as well. Civ. Code § 3294.

CONCLUSION

The evidence and the law show that Mercury Media is entitled to judgment against ADL on its cross-complaint for breach of contract, open book account, and fraud in the sum of $46,300, plus an award of punitive damages that the court deems just after hearing evidence regarding ADL's wealth.

Dated:_____________, 20__

Respectfully submitted,

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Attorneys for defendant