Filed 6/29/06

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JAY FIRESTONE, Plaintiff and Respondent, v. PETER HOFFMAN, Defendant and Appellant.	B183184 (Super. Ct. No. BC 292795)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph R. Kalin and Irving S. Feffer, Judges. Reversed and remanded with directions.

Peter Hoffman, in pro. per.; Gipson Hoffman & Pancione, Kenneth I. Sidle and Corey J. Spivey for Defendant and Appellant.

Lord, Bissell & Brook, Jeffrey S. Kravitz, Keith G. Wileman; Silver & Freedman and Jeffrey S. Kravitz for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I (B) – I (D), II, and III of the Discussion.

In 1997, Peter Hoffman borrowed $375,000 from Jay Firestone, and drafted and executed a promissory note for the amount of the loan. Firestone sued Hoffman on the note, alleging that the loan was never repaid. At trial, Firestone persuaded the court to exclude nearly all of the evidence that Hoffman sought to introduce in his defense, and the jury returned a verdict for Firestone. In the published portion of our opinion, we hold that Firestone's Canadian tax returns are relevant and not privileged, and that the trial court abused its discretion when it concluded to the contrary. In the unpublished portion of our opinion, we conclude that this evidentiary error and others were sufficiently prejudicial to warrant reversal.

BACKGROUND

I. Firestone's Claim and Hoffman's Defenses

Hoffman borrowed $375,000 from Firestone and memorialized the loan in a promissory note (the Note) that Hoffman drafted himself and executed on June 6, 1997. The Note provides that "[t]he outstanding principal balance shall bear interest at the rate of Seven and one-half percent (7.5%) per annum . . . . All principal and interest shall be due and payable on the 31st day of July, 1997." The Note also provides that "[a]ll principal and interest not paid when due shall bear interest from such date until paid in full at a rate equal to the Federal short-term rate determined pursuant to section 1274(d) of the Internal Revenue Code of 1986 . . . ." In addition, the Note provides that "[a]ny extensions of time granted to the undersigned shall not release the undersigned nor constitute a waiver of the rights of the holder of this Note." And the Note includes the following attorneys' fees provision: "In the event the holder of this Note incurs any loss, cost, or expense in enforcing any of the terms hereof, the undersigned agrees to pay the costs and expenses so paid or incurred by the holder, including, without limitation, reasonable attorneys' fees and costs." "The provisions of [the] Note are to be governed by the laws of the State of California . . . ."

In 2003, Firestone sued Hoffman on the Note. Firestone alleged that on or about November 28, 2002, he had demanded that Hoffman pay the principal and accrued

interest under the Note, and that Hoffman had breached the Note by failing to pay. Firestone sought to recover the principal and interest due under the Note, as well as attorneys' fees and costs.

Hoffman's principal defenses, as developed in subsequent proceedings, were these: First, Hoffman claimed that he and Firestone had extinguished the obligations under the Note by means of a novation. Under the alleged novation, the Note was to be extinguished, Firestone was to write-off the Note as uncollectible on his Canadian taxes, and Hoffman was to arrange for a corporation under his direction to pay Firestone $750,000 from two tax shelter transactions in Ireland. Second, Hoffman claimed that Firestone was already paid on the Note by a third party, Can West Global Entertainment or one of its subsidiaries (Can West), when Can West purchased Firestone's company, Fireworks Entertainment, Inc. (Fireworks). Third, Hoffman claimed that any recovery by Firestone on the Note should be set off against any amounts that Hoffman recovers from Firestone on certain tort claims concerning their business dealings. Hoffman and a business entity with which he is associated have alleged those tort claims in a separate lawsuit filed in the superior court against Firestone (*Hoffman v. Firestone* (Apr. 20, 2004, BC 314040)). Hoffman's attempt to have the tort suit consolidated with this one failed when Firestone removed the tort suit to federal court, where it remained until after the jury returned its verdict in the instant case. On December 27, 2004, the federal district court entered an order remanding the tort suit to the superior court, where it is now stayed.

II. Summary Judgment Proceedings

On May 5, 2004, Firestone moved for summary judgment or, in the alternative, summary adjudication. Hoffman opposed on the basis of the defenses described above, among others.

In reply, Firestone argued that the novation was "void" because the alleged new contract, involving the Canadian tax write-off and the Irish tax shelters, was "illegal in numerous ways, including purported attempts to violate Canadian community property and tax laws at the very least." As regards the claim that Firestone has already been paid

on the Note by Can West, Firestone argued that the claim was conclusively disproved by the contract for Can West's acquisition of Fireworks from Firestone. Firestone did not introduce the contract but said he was willing to provide it to the court for in camera review, and he claimed that Hoffman's cocounsel had reviewed the contract and agreed that it "did not address" the Note. By way of supplemental declaration, Hoffman's cocounsel stated that he had said no such thing—rather, he had told Firestone's counsel that he "could not tell from the text of the agreement whether over $25 million in consideration paid to Mr. Firestone included reimbursement of the amounts" due under the Note. Finally, as regards Hoffman's set-off defense, Firestone acknowledged the existence of Hoffman's tort suit but nonetheless argued, without further explanation, that the set-off defense failed because Hoffman "has no demand for money against" Firestone, so "there are clearly NO mutual debts at issue."

The trial court denied Firestone's motion. The court determined that there were triable issues of fact concerning Hoffman's novation and reimbursement defenses. It further concluded that Firestone had not introduced a properly authenticated copy of the Note.

III. Discovery Proceedings

Hoffman deposed Firestone but was dissatisfied with the results because Firestone's counsel instructed Firestone not to answer numerous questions that, according to Hoffman, were relevant to Hoffman's defenses. The questions related, for example, to the Irish tax shelters, to prior business dealings between Hoffman, Firestone, and affiliated business entities, and to conversations between Firestone and Greg Gilhooly, an attorney who was an executive at Fireworks, concerning the Note. Hoffman moved to compel answers to the unanswered questions, and the trial court granted the motion in its entirety on June 2, 2004.

After prevailing on the motion to compel, Hoffman moved for a continuance of the trial date, then set for July 27, 2004, in order to complete discovery. He also moved for letters rogatory to compel witnesses in Canada, Ireland, and the United Kingdom to testify and produce documents. The court ultimately executed the letters rogatory and

continued the trial to November 23, 2004, but the court ordered Hoffman to pay Firestone's attorneys' fees and costs in connection with the discovery that was the basis for the continuance.

Further proceedings on the letters rogatory quickly broke down, however, because Hoffman refused to pay Firestone's estimated attorneys' fees in advance, despite the fact that the trial court had expressly ordered him to do so. Hoffman eventually took some sort of discovery from some of the foreign witnesses. Firestone's counsel did not participate, and the parties dispute whether the discovery complied with the terms of the letters rogatory and with applicable law.

IV. Motions in Limine and Trial

The parties appeared for trial on November 23, 2004, in Department 51 of the superior court before the Honorable Irving S. Feffer, who had presided over the case from its inception. Firestone announced ready, but Hoffman orally moved for another continuance. Judge Feffer denied Hoffman's motion and transferred the case to Department 30 for trial before the Honorable Joseph R. Kalin.

Firestone had previously filed several motions in limine, all of which were still pending when the case was transferred. After the transfer, Judge Kalin heard oral argument on the motions and ruled on them.

Firestone's motion in limine number 1 sought an order "forbidding any testimony relating to Firestone's tax returns during trial." Firestone's counsel confirmed at the hearing that the motion related exclusively to Firestone's Canadian tax returns.[1] In support of the motion, Firestone argued that the returns were "subject to the tax records privilege set forth in California Civil Code Section 1799.1a." He also argued that "California courts have interpreted state taxation statutes as creating a statutory privilege against disclosing tax returns." Previously, in his opposition to Hoffman's request for letters rogatory concerning the Canadian tax returns, Firestone had relied on a different

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[1] At oral argument on appeal, Firestone's counsel conceded that, to his knowledge, Firestone does not file California returns.

source for the alleged privilege: He argued that the returns were protected by Business and Professions Code section 17530.5, which makes it illegal for paid tax preparers to disclose information obtained in the course of their work. Noting that this statutory prohibition applies only to "federal or state income tax returns" (Bus. & Prof. Code, § 17530.5), Firestone had argued that "the Canadian returns in question are 'federal' as well." And in addition to the privilege claim, Firestone argued that the Canadian tax returns were irrelevant, because "Firestone's tax returns are not in any way germane to Hoffman's refusal to make good on his debt." Hoffman opposed the privilege claim and argued that the returns were relevant because if Firestone did write off the Note on his Canadian taxes, then that would be circumstantial evidence that the purported novation, which called for just such a write-off, was real. The trial court granted the motion, excluding the Canadian tax returns on the grounds that they were "privileged and not relevant."

Firestone's motion in limine number 2 sought an order "forbidding any testimony relating to Firestone's sale of his interest in Fireworks Entertainment, Inc. to Canwest." In support of the motion, Firestone argued that Hoffman "claims that Firestone sold his interest in the Promissory Note, but, as Firestone has stated in discovery, he has not done so." Firestone consequently sought to prevent Hoffman from bringing his "speculative fabulations" and "unadulterated speculation" before the jury, because they "could be severely prejudicial." In opposition, Hoffman argued that he wished to introduce testimony from Gilhooly, a former Fireworks executive, to the effect that Can West paid off the Note to Firestone as part of Can West's acquisition of Fireworks. The trial court granted the motion on the grounds that the evidence at issue was "not . . . relevant and would lead [the] jury to speculation."

Firestone's motion in limine number 3 sought an order "forbidding any testimony relating to the alleged novation and the 'Irish tax shelters.'" In support of the motion, Firestone argued that "the object of the novation would have been an illegal contract," and that "[w]here a novation is voidable or invalid, the original agreement is never actually extinguished, and is thus still enforceable." He further asserted that "the alleged

novating contract is illegal in numerous ways, including purported attempts to violate Canadian family and tax law at the very least[.]" And at the hearing on the motion, counsel for Firestone orally represented to the court that the Irish tax shelters had "been disallowed by the Irish tax authorities" and were "on appeal;" in a similar vein, he asserted that the "Irish tax deal" is "being considered by the Irish Court of Appeals, because the tax authority denied it." In opposition, Hoffman argued that the novation was not illegal and that even if it were, it would still serve to extinguish the parties' obligations under the Note.

The trial court evidently was persuaded by Firestone's argument that an illegal novation fails to extinguish the original contract and that the Irish tax shelters and the Canadian tax write-off were of doubtful legality. For example, at one point the court asked Hoffman, "But can you have a novation on an illegal situation? I mean, if in fact you can't write this off in Canada, you can't get tax credit for it in Ireland or the United Kingdom, then you're saying you have a valid—a valid novation?" Later, the court stated that if Hoffman were allowed to introduce evidence that the novation involved the Irish tax shelters, then Hoffman would "have to argue the validity of these other agreements that would allow [Firestone] to collect $750,000, because unless the agreements are valid, he's never going to get the $750,000." The court concluded that it would not allow the introduction of evidence "beyond the fact that these parties may have had some kind of an oral agreement[,]" but "I don't want to try the English tax laws or the Canadian tax laws to get there." The court ruled in its minute order that Firestone's motion in limine was "granted as to the exclusion of evidence regarding the Irish Tax Shelters. The motion is denied as to defendant arguing the issue of Novation, [and] the court will make rulings during the trial as to issues of Novation without trying the law and validity of Canadian, Irish and U.K. law." (Block capitals omitted.)

Firestone's motion in limine number 4 sought an order "forbidding any testimony relating to Can[W]est's advance of Plaintiff's legal fees." In support of the motion, Firestone argued that evidence that Can West was paying Firestone's "legal fees, with the understanding that [Firestone] would reimburse Can[W]est upon resolution of the suit[,]"

would be "irrelevant and highly prejudicial." In opposition, Hoffman argued that Can West's payment of Firestone's attorneys' fees should prevent Firestone from recovering attorneys' fees from Hoffman in this lawsuit. The trial court granted the motion on the ground that "[a]ttorney fees are an issue for the court post trial."

Firestone's motion in limine number 5 sought broadly to prohibit Hoffman from "commenting about or introducing" any witnesses or any expert opinions that were not disclosed in discovery. The only undisclosed potential witness whom Firestone originally identified was Marian Salas, an accountant, but Firestone later supplemented his motion to identify Hoffman's wife as well. In opposition, Hoffman argued that he did not intend to present any expert witnesses at all, that Salas is his bookkeeper and would testify as a percipient witness concerning the treatment of the Note in Hoffman's own financial records, and that any testimony of his wife should not be excluded either. The trial court denied the motion without prejudice.

Firestone's motion in limine number 6 sought an order "barring admission of any 'sworn statements' or other such narratives or declarations that [Hoffman] may offer from the witnesses identified in the British and Irish Letters Rogatory." In support of the motion, Firestone argued that Hoffman had obtained the evidence at issue in violation of the trial court's order that he first advance Firestone's attorneys' fees, and that the evidence was otherwise obtained in violation of applicable law and consequently inadmissible. In opposition, Hoffman argued that the evidence was properly obtained and admissible. The trial court granted the motion both because Hoffman "did not comply with the court's order concerning advancing costs and fees for [Firestone's] counsel to appear at the foreign depositions[,]" and because "[s]aid discovery was performed unilaterally and additionally raises issues of proper procedure and compliance with foreign law."

With the scope of admissible evidence thus circumscribed, the matter proceeded to trial. The court rigorously enforced its in limine rulings, prohibiting virtually all evidence and argument concerning the Irish tax shelters, Firestone's Canadian taxes, and

Can West's acquisition of Fireworks. The following examples of the court's evidentiary rulings at trial are by no means exhaustive.

Although the court permitted Hoffman to ask Firestone whether "anyone at any time ever reimbursed you for the funds you loaned, reflected in this note of $375,000[,]" the court prohibited any questioning about Firestone's deposition testimony concerning Hoffman's theory that Firestone was in fact reimbursed through Can West's acquisition of Fireworks. The court based its ruling on the ground that the testimony "deal[s] with other matters, and they're not directly related to this case."

The court likewise permitted Hoffman to testify in extremely general terms that, under the novation, Firestone would receive $750,000 instead of the $375,000 originally due under the Note. But the court prevented Hoffman from testifying in more detail concerning the terms of the novation or the transactions involved.

Again, on the basis of its narrow construction of the issues being tried, the court prohibited Hoffman from introducing a memorandum that, according to Hoffman, spelled out the terms of the novation. Firestone's counsel did not articulate a specific ground for objecting to the document, and the court's only stated basis for excluding it was that it was "a letter . . . to Mr. Firestone from Mr. Hoffman, and it indicates other business deals[.]" At the same time, the court permitted Firestone to introduce a document in which Hoffman told Firestone that "all my previous offers or acknowledgements are withdrawn." But the court prohibited Hoffman from explaining which "offers or acknowledgments" he was referring to, on the grounds that "[t]he document does speak for itself," so "the jury will have to decide what it means." Firestone's counsel then argued to the jury that, according to that document, Hoffman himself revoked his offer of a novation, which was never accepted.

The court excluded the testimony of Salas, though the precise ground for the exclusion was not clear. Hoffman declined to call Gilhooly to testify because he determined that Gilhooly's testimony would be excluded under the court's in limine rulings. Hoffman made offers of proof with respect to both witnesses. In the end, the only witnesses to testify were Firestone and Hoffman.

On December 2, 2004, the jury returned a verdict for Firestone.

V. Post-trial Proceedings

Firestone sought an award of attorneys' fees and prejudgment interest under the Note. He argued that he was entitled to interest at the rate of 7.5 percent from the time of the loan until he made formal demand for payment in late 2002, and at the federal short-term rate thereafter, through judgment. Firestone submitted both simple and compound interest calculations based on those rates.

Hoffman opposed Firestone's requests. He argued that the Note provides only for an award of attorneys' fees "paid or incurred" by Firestone, and that Firestone has "paid or incurred" none, because Can West paid all of Firestone's counsel's fees. As regards interest, Hoffman argued that Firestone could collect interest at the rate of 7.5 percent only through the Note's original due date (i.e., July 31, 1997), and at the federal short-term rate thereafter. Hoffman further argued that the Note provides for only simple interest.

The trial court rejected Hoffman's arguments. It awarded compound interest according to Firestone's calculation, in the amount of $211,270.91, and it awarded attorneys' fees of $360,703.08.[2]

Meanwhile, the federal district court entered its order remanding the tort suit against Firestone on December 27, 2004, roughly three weeks after the jury returned its verdict against Hoffman. Hoffman moved to stay enforcement of the judgment and to consolidate the tort suit with this case. The court denied the motion to stay enforcement. The record before us does not contain the ruling on the motion to consolidate, but it appears from our review of the dockets in this case and the tort suit that no consolidation occurred.

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[2] The interest award in the final, amended judgment appears to contain typographical errors. Firestone's compound interest calculation yielded an amount of $211,240.92, but the judgment awards interest of $211,270.91.

STANDARD OF REVIEW

We generally review the trial court's decisions admitting or excluding evidence for abuse of discretion. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.)

DISCUSSION

I. Exclusion of Evidence

Hoffman argues that the trial court abused its discretion in excluding evidence he sought to introduce in his defense, and that he was prejudiced thereby. We agree. We will confine our discussion to the rulings on Firestone's motions in limine numbers 1 through 3, because they are sufficient in themselves to warrant reversal.

A. Canadian Tax Returns

The trial court excluded evidence concerning Firestone's Canadian tax returns on the basis of Firestone's arguments that the returns were "privileged and not relevant." The relevance issue is straightforward. Hoffman alleges that the Note was extinguished because he and Firestone entered into a novation. One of the terms of the alleged novation was that Firestone would write off the Note on his Canadian taxes. If Firestone did write off the Note on his Canadian taxes, then the jury could infer that (1) Firestone did consider the Note extinguished, and (2) Firestone and Hoffman did enter into a novation providing for the write-off. Any evidence that Firestone knew Hoffman had more than sufficient personal wealth to pay off the Note would further support the inference that Firestone had voluntarily decided to treat the Note as extinguished. Firestone could, of course, urge the jury not to draw those inferences, but there is nothing unreasonable about them. " 'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Firestone's Canadian tax returns are therefore relevant.

As for the privilege claim, Firestone has offered multiple explanations of its basis. In the trial court, Firestone initially relied upon Business and Professions Code section 17530.5, which makes it illegal for paid tax preparers to disclose information obtained in the course of their work. The statute on its face does not purport to create or codify a

privilege shielding a litigant from discovery of *the litigant's own* tax returns or making those returns inadmissible at trial—it operates only to prevent persons in the business of preparing others' tax returns from voluntarily disclosing *their clients'* information.

Next, Firestone relied upon Civil Code section 1799.1a, and he renews the argument on appeal. That statute prohibits the disclosure of "information obtained from a federal or state income tax return or any information obtained from a tax schedule submitted with the return by a consumer in connection with a financial or other business-related transaction . . . ." (Civ. Code, § 1799.1a.) Thus, the statute on its face prohibits only the disclosure of tax information obtained *from a consumer in connection with a financial or other business-related transaction*. Like Business and Professions Code section 17530.5, it in no way purports to create or codify a privilege shielding a litigant from discovery of the litigant's own tax returns or making those returns inadmissible at trial.

Both statutes are inapplicable for an additional, independent reason: Both of them are expressly limited to "federal or state" income tax returns. (Bus. & Prof. Code, § 17530.5; Civ. Code, § 1799.1a.) Consequently, neither applies to foreign tax returns. In the trial court, Firestone argued that "the Canadian returns in question are 'federal[,]' " but he does not renew the argument on appeal.[3] The argument has no merit, for at least the following reasons: (1) Other statutory provisions indicate that when the Legislature wishes to refer to foreign taxes, it uses the word "foreign" (see, e.g., Civ. Code, § 731.15, subd. (b) ["Any tax levied by any authority, federal, state, or foreign . . ."]); (2) there is no policy reason of which we are aware for extending the coverage of the statutes in question to taxes in foreign countries whose governments are in some sense "federal" but excluding other foreign countries; and (3) there is no evidence in the record, and no request for judicial notice, that Canadian tax returns are, in any sense, "federal."

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3 In his motion in limine number 1, Firestone elided the issue by referring generically to "tax returns" without ever stating that the returns at issue were Canadian (though the motion does contain one unexplained reference to the "Canadian taxing authorities").

Finally, both in the trial court and on appeal, Firestone relies upon California case law that does create a privilege for tax returns. The problem, again, is that the privilege does not apply to foreign tax returns. Rather, the privilege arises from California statutes that generally prohibit *California* tax authorities from disclosing tax return information, subject to certain exceptions. (See *Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509, 512-514 (hereafter *Webb*); *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 6-7.) The Supreme Court has reasoned that the purpose of those statutes is "to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes[,]" and that this purpose would be defeated if "the information can be secured by forcing the taxpayer to produce a copy of his return[.]" (*Webb, supra*, 49 Cal.2d at p. 513.) The Court in *Webb* extended application of the privilege to federal tax returns merely as a means of protecting the privileged status of California returns, because "forcing disclosure of the information in the federal tax return would be equivalent to forcing disclosure of the state returns and would operate to defeat the purposes of the state statute." (*Webb, supra*, 49 Cal.2d at pp. 513-514.)

There is no legal authority for application of the privilege to foreign tax returns. As a matter of policy, California has no interest in devising means to ensure effective tax enforcement in Canada—that is exclusively the prerogative of the Canadian government.[4] And there is also no basis in this record for application of the privilege to Firestone's Canadian tax returns as a means of protecting the privileged status of his California returns, because there is no evidence that he files California returns or that, if he does, they overlap with his Canadian returns in any material respect. Indeed, Firestone's counsel conceded at oral argument that, to his knowledge, Firestone does not file California returns.

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4 Hoffman has consistently contended that Canadian tax returns are not privileged under Canadian law, and Firestone has never argued to the contrary.

On appeal, Firestone acknowledges that available legal authority applies the privilege only to California and (United States) federal tax returns. His entire argument for extension of the privilege to his Canadian returns consists of the following sentence: "There is no logical reason why the privilege should not extend to tax returns for other jurisdictions as well." For the reasons already stated, we disagree.

Firestone's Canadian tax returns are relevant and are not privileged. The trial court therefore abused its discretion when it granted Firestone's motion in limine number 1.

B. Can West's Acquisition of Fireworks

The trial court excluded evidence concerning Can West's acquisition of Fireworks on the basis of Firestone's argument that the evidence was irrelevant. Again, the issue is straightforward. Hoffman claims that Can West paid Firestone on the Note as part of Can West's acquisition of Fireworks. If Hoffman is right, then Firestone cannot prevail in his suit on the Note, because he has already been paid on the Note. And the record on appeal contains deposition testimony from Gilhooly (the Fireworks executive who negotiated the acquisition) indicating that Hoffman is right. Evidence concerning Can West's acquisition of Fireworks is relevant.

In support of the trial court's exclusion of the evidence, Firestone argues that Can West did not in fact pay Firestone on the Note when Can West acquired Fireworks, and Firestone adds that he has "informed Hoffman of this fact in discovery." Firestone's argument is properly directed to a jury, not to us; as an argument for the exclusion of evidence it has no merit. Firestone is free to contend that Can West did not pay him on the Note, Hoffman is free to make the opposite contention, and both parties are free to submit evidence in support of their respective contentions. If Firestone believes that the written agreement concerning Can West's acquisition of Fireworks conclusively demonstrates that Can West did not pay Firestone on the Note, he can introduce the agreement into evidence and submit the question to the jury. If Hoffman believes that the written agreement does not tell the whole story, and that Can West did pay Hoffman on the Note, then he can introduce his own supporting evidence (e.g., the testimony of

Gilhooly, who negotiated the agreement) and likewise submit the question to the jury. But the trial court cannot exclude Hoffman's evidence simply because Firestone asserts that Hoffman is wrong about the facts.

Evidence concerning Can West's acquisition of Fireworks is relevant and would not lead to speculation. The trial court therefore abused its discretion when it granted Firestone's motion in limine number 2.

C. Irish Tax Shelters

Firestone's motion in limine number 3 sought to exclude evidence "relating to the alleged novation and the 'Irish tax shelters.'" The trial court granted the motion in part but denied it in part, excluding "evidence regarding the Irish Tax Shelters" but allowing Hoffman to "argu[e] the issue of Novation," and the court indicated that it would "make rulings during the trial as to issues of Novation without trying the law and validity of Canadian, Irish and U.K. law."

The trial court's minute order does not indicate the basis for its exclusion of evidence regarding the Irish tax shelters. But the reporter's transcript reflects that the court was persuaded by Firestone's argument, presented both in his moving papers and orally at the hearing, that the alleged novation was illegal because the Irish tax shelters and the Canadian tax write-off were illegal, and that an illegal novation does not extinguish the original contract. In his papers, Firestone argued that "the object of the novation would have been an illegal contract," and that "[w]here a novation is voidable or invalid, the original agreement is never actually extinguished, and is thus still enforceable." He further asserted that "the alleged novating contract is illegal in numerous ways, including purported attempts to violate Canadian family and tax law at the very least[.]" And at the hearing on the motion, counsel for Firestone added that the Irish tax shelters had "been disallowed by the Irish tax authorities" and were "on appeal"; he likewise asserted that the "Irish tax deal" is "being considered by the Irish Court of Appeals, because the tax authority denied it."

On appeal, Firestone does not assert any of those arguments. Instead, he argues that the evidence was properly excluded under Evidence Code section 352 because (1)

"details of the Irish tax shelter would only confuse the jury and waste its time[,]" (2) Hoffman has not argued "that any component of the Irish tax shelter involved extinguishment of the $375,000 note[,]" and (3) "the tax shelter was an entirely separate transaction from the purported novation[.]" The first argument fails because it misrepresents the trial court's in limine ruling, which excluded *all* "evidence regarding the Irish Tax Shelters[,]" not merely certain "details." The second argument fails because it is irrelevant—Hoffman's point is not that extinguishment of the Note was a component of the Irish tax shelters, but rather that the Irish tax shelters were a component of the novation that extinguished the Note. The third argument fails because it is simply a denial of one of Hoffman's factual contentions. Hoffman contends that the Irish tax shelter was included in the terms of the novation and thus was not an "entirely separate transaction." Again, Firestone cannot exclude evidence in support of that contention by simply asserting that the contention is false.

Because Firestone's arguments on appeal all fail, we turn to the argument Firestone successfully advanced in the trial court, namely, that the novation was illegal and that "[w]here a novation is voidable or invalid, the original agreement is never actually extinguished, and is thus still enforceable." In support of the latter proposition, Firestone cited a single federal district court case, *Airs, Inc. v. Perfect Scents, Ltd.* (N.D. Cal. 1995) 902 F.Supp. 1141 (hereafter *Airs*). In that case, the court recognized that there is only one published California decision on point, *Producers Fruit Co. v. Goddard* (1925) 75 Cal.App. 737 (hereafter *Producers Fruit Co.*). (*Airs*, *supra*, 902 F.Supp. at pp. 1148-1149.) The federal court further interpreted *Producers Fruit Co.* as holding that when the parties enter a novation, the old contract is discharged even if the new contract is unenforceable. (*Airs*, *supra*, 902 F.Supp. at p. 1148.) The federal court expressly declined to follow *Producers Fruit Co.*, however, and ultimately reasoned that the continuing validity of the original contract is determined by the intentions of the parties: If the parties intended that the original contract be extinguished unconditionally, then it is extinguished regardless of the validity of the new contract; but if the parties intended that the extinguishment of the old contract be conditional upon the validity of the new

contract, then the old contract is extinguished only if the new contract is valid. (*Airs, supra*, 902 F.Supp. at pp. 1148-1149.)[5]

Firestone's argument based on *Airs* fails for multiple reasons. First, *Producers Fruit Co.* is a published decision of a California appellate court and is consequently binding on the superior court (but not binding on us). (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) *Airs*, a federal district court decision that expressly rejects *Producers Fruit Co.*, is not.

Second, *Airs* does not hold that, in the words of Firestone's counsel, "[w]here a novation is voidable or invalid, the original agreement is never actually extinguished, and is thus still enforceable." Rather, it holds that if the new agreement is voidable or invalid, then the continuing validity of the old agreement is determined by the parties' intentions, i.e., by whether they intended that the extinguishment of the old agreement be conditional upon the validity of the new one.[6] Thus, under *Airs*, Hoffman would, at a minimum, be entitled to an opportunity to prove that he and Firestone intended to extinguish the Note unconditionally.

Third, if Firestone's legal proposition—that an illegal novation never extinguishes the original agreement—were true, his argument for exclusion of evidence concerning the

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5 It is not clear that the federal court correctly interpreted the reasoning of *Producers Fruit Co.*, and it is consequently not clear that the federal court's own reasoning really does depart from the reasoning of *Producers Fruit Co.* But it is clear that the federal court believed it was departing from the reasoning of *Producers Fruit Co*. (*Airs, supra*, 902 F.Supp. at p. 1149 ["This Court . . . elects to disregard [*Producers Fruit Co.*] and the authorities which follow its reasoning."].)

6 We recognize that *Airs* contains the following sentence: "If the new contract is invalid, there is no novation and the parties' previous obligations are not extinguished." (*Airs, supra*, 902 F.Supp. at pp. 1148-1149.) We nonetheless conclude that the case cannot be read in the manner urged by Firestone, because in the paragraph immediately following the quoted sentence, the court expressly based its ruling on the finding that "[t]here is no evidence introduced on the instant motion that the parties intended to unconditionally rescind the [original] contract notwithstanding the validity *vel non* of the [new] contract[,]" and that "to the contrary, the express terms of the [new] contract . . . suggest[] that the validity *ab initio* of the [new] contract was an intended condition upon the relinquishment of rights under the [original] contract." (*Id.* at p. 1149.) If the court had held that an invalid new contract automatically leaves the obligations of the old contract intact, then the parties' intentions to rescind the old contract conditionally or unconditionally would have been irrelevant to the court's analysis. In fact, they composed the entirety of the court's analysis.

Irish tax shelters would fail nonetheless, because the record contains no evidence that the Irish transactions are in any respect illegal. "It is axiomatic that the unsworn statements of counsel are not evidence." (*In re Zeth S.* (2003) 31 Cal. 4th 396, 414, fn. 11.)

Fourth, if Firestone's legal proposition were true and Firestone had introduced competent evidence that the Irish transactions are in some respect illegal, that would still not be a basis for exclusion of evidence concerning the novation or its purportedly illegal components. Rather, Hoffman would be entitled to an opportunity to prove that, contrary to Firestone's contention, the novation is legal in its entirety. The record reflects that Hoffman has consistently contended that the novation is legal.

To summarize: Even if the sole case Firestone relies upon followed California authority rather than rejecting it (which it does not) or were authoritative in its own right (which it is not), and even if it stood for the proposition that Firestone attributes to it (which it does not), and even if there were evidence in the record to support Firestone's contention that the Irish tax shelters are illegal (which there is not), Firestone's argument would still fail, because Hoffman would still be entitled to put on his own evidence to prove his own contention that the novation is legal in all respects.

For all of the foregoing reasons, we reject Firestone's arguments in support of the exclusion of evidence concerning the Irish tax shelters, and we are aware of no possible alternative bases for excluding such evidence. The trial court therefore abused its discretion in granting, in part, Firestone's motion in limine number 3.

D. Prejudice

The trial court's erroneous exclusion of Hoffman's evidence was severely prejudicial. The exclusion of evidence concerning Can West's acquisition of Fireworks had the practical effect of eliminating Hoffman's defense that Firestone has already been paid on the Note and therefore cannot sue on it. The exclusion of evidence concerning the Irish tax shelters and Firestone's Canadian tax returns had the practical effect of eliminating Hoffman's novation defense—Hoffman was forced to say to the jury, in effect, "There was a novation, but I cannot tell you anything about it."

The exclusion of Gilhooly's testimony—to the effect that Firestone was in fact paid on the Note as part of Can West's acquisition of Fireworks—was sufficiently prejudicial in itself to warrant reversal. And we further conclude that the trial court's exclusion of evidence under Firestone's motions in limine numbers 1, 2, and 3 had the cumulative effect of denying Hoffman a fair hearing by preventing him from offering evidence in his defense. It is therefore reversible per se. (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677.) We cannot predict whether any of Hoffman's defenses will prevail upon retrial. But Hoffman must be afforded a full and fair opportunity to present evidence in support of them. We therefore reverse the judgment, vacate all of the trial court's rulings on motions in limine, and remand the case for further proceedings.[7]

II. Other Issues

Our resolution of the foregoing evidentiary issues makes it unnecessary for us to consider in detail Hoffman's arguments concerning omitted jury instructions. The omission of the instructions at issue was tied to the exclusion of Hoffman's evidence in support of his defenses. Upon retrial, Hoffman will be permitted to introduce evidence in support of those defenses, and he will consequently have a right to whatever instructions are warranted by the evidence he introduces.

Similarly, Hoffman argues that the trial court abused its discretion when it denied his request to continue the trial. Because we reverse on other grounds and remand for retrial, this argument is moot.

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[7] We have not addressed all of the trial court's individual rulings excluding Hoffman's evidence, or even all of the rulings that Hoffman mentions in his appellate briefs. For example, when Hoffman was testifying at trial, the court prevented him from explaining why the novation was not put in writing, apparently on the ground that such an explanation might "get into future business deals." That ruling was an abuse of discretion. Our silence on various other rulings shall not be construed, by either the parties or the trial court, as tacit approval of those rulings. We trust that on remand the trial court will not remain wedded to any prior evidentiary rulings solely on the ground that we have failed to address them, but rather will make its decisions to admit or exclude evidence afresh and in a manner consistent with the views expressed herein.

In connection with the denial of his request for a continuance, Hoffman further argues that he was wrongfully prevented from completing discovery. Although we express no opinion on the parties' specific arguments concerning, for example, the lawfulness of the foreign discovery Hoffman ultimately conducted in connection with the letters rogatory, we do believe that discovery was unjustifiably impeded by Firestone's unmeritorious arguments concerning relevance and privilege, among others. We therefore instruct the trial court to reopen discovery upon remand. Hoffman will then have an opportunity to take any appropriate discovery, consistent with our analysis, *ante*, of Firestone's arguments, and unencumbered by the trial court's previous order that Hoffman pay Firestone's discovery-related attorneys' fees and costs.

Hoffman also argues that the trial court abused its discretion when it refused to consolidate the instant case with the tort suit (case number BC 314040) that Hoffman and an affiliated business entity have brought against Firestone. When the trial court denied Hoffman's first motion for consolidation, the tort suit was pending in federal court, having been removed by Firestone from the superior court in Los Angeles, where it was originally filed. When Hoffman next moved for consolidation, the jury had already returned its verdict in this case. Under those circumstances, the trial court clearly did not err in denying Hoffman's requests for consolidation. But now the tort suit is back in the superior court, and our review of the superior court's docket indicates that the matter has been stayed. Consolidation might now be appropriate, because the two lawsuits appear to share common factual issues concerning Can West's acquisition of Fireworks, for example, and because consolidation will permit Firestone's and Hoffman's individual claims against one another to be tried in a single proceeding. But we leave this issue to be decided by the trial court in the first instance. We accordingly direct the trial court on remand to reconsider whether the instant case should be consolidated, either for trial or for all purposes, with case number BC 314040.

Two other issues have been briefed and may resurface upon retrial: interest and attorneys' fees. Firestone persuaded the trial court that he was entitled to interest at the rate of 7.5 percent from the time of the loan until he made formal demand for payment in

late 2002, and that the federal short-term rate applied thereafter, through judgment. Hoffman argued that Firestone could collect interest at the rate of 7.5 percent only through the Note's original due date (i.e., July 31, 1997), and at the federal short-term rate thereafter. Hoffman further argued that the Note provides for only simple interest. The trial court awarded interest at the rate advocated by Firestone, and the court appears to have awarded compound interest.

On appeal, Firestone concedes that the Note provides for only simple interest, and we agree. Regarding the determination of the appropriate interest rates, we agree with Hoffman. As we noted at the outset, the Note provides that "[t]he outstanding principal balance shall bear interest at the rate of Seven and one-half percent (7.5%) per annum . . . . All principal and interest shall be due and payable on the 31st day of July, 1997." The Note also provides that "[a]ll principal and interest not paid when due shall bear interest from such date until paid in full at a rate equal to the Federal short-term rate . . . ." That is, (1) the due date under the Note was July 31, 1997, (2) the unpaid principal bore interest at 7.5 percent through the due date (i.e., July 31, 1997), and (3) any principal and interest not paid by the due date (i.e., July 31, 1997) bore interest at the federal short-term rate thereafter.

Firestone's only contrary argument is that our reading of the interest provisions of the Note "would render meaningless the reservation-of-rights provision" in the Note. We disagree. The provision in question states that "[a]ny extensions of time granted to the undersigned shall not release the undersigned nor constitute a waiver of the rights of the holder of this Note." Our reading of the interest provisions gives full force and effect to that reservation of rights. Regardless of any extensions of time granted by Firestone, Hoffman was not released from his obligation to repay the principal, to pay interest of 7.5 percent on unpaid principal through July 31, 1997, to pay interest at the federal short-term rate on unpaid principal and on (pre-July 31, 1997) interest thereafter, and so forth.

The final issue is attorneys' fees. In the trial court, Hoffman argued that under the Note he was liable only for fees that Firestone "paid or incurred," and that Firestone has "paid or incurred" none, because Can West paid all of Firestone's counsel's fees. The

trial court adopted Firestone's argument that Can West has merely "advanced or guaranteed" Firestone's fees, subject to repayment by Firestone, and that such an advance or guarantee is irrelevant to Hoffman's liability for an award of attorneys' fees under the Note. The record on appeal does not contain a transcript of the hearing on Firestone's motion for attorneys' fees, which might give us a better understanding of the trial court's reasoning or the factual support for Firestone's position. On this record, we are reluctant to advise the trial court on how it should decide this issue if it arises again after retrial. Therefore, if the issue does arise again, we leave it to the trial court to interpret the applicable provision of the Note and decide the issue anew.

III. The Conduct of Firestone's Counsel

We are concerned about the conduct of Firestone's counsel in this litigation. We understand the importance of zealous advocacy and of an attorney's duty of loyalty to the client. But we are also mindful that for every member of the bar, zealous advocacy must be constrained by the member's duty to "employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth[,]" and by the duty not to "seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law[.]" (Rules Prof. Conduct, rule 5-200(A), (B).) At the same time, it is not improper to advocate a position that is "warranted by . . . a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." (Code Civ. Proc., § 128.7, subd. (b)(2).) All things considered, our review of the briefs and the record in this case leaves us concerned that Firestone's counsel failed in their duties.[8]

Regarding the purportedly privileged status of Firestone's Canadian tax returns, for example, Firestone's counsel initially acknowledged that the California privilege

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[8] Our failure to express concern about Hoffman's own conduct—both in discovery, at trial, and on appeal—must not be construed as approval of that conduct. Rather, our silence reflects the facts that (1) Hoffman is not a member of the bar and hence is not subject to the Rules of Professional Conduct, and (2) although some of Hoffman's conduct does appear to have been improper, we do not find it nearly as troubling as the conduct of Firestone's counsel.

applies only to state and federal returns but asserted, without argument, explanation, or evidentiary support, that Canadian returns are "federal." Later, in the relevant motion in limine, counsel concealed the issue by referring generically to Firestone's "tax returns" and to a California privilege covering "tax returns." The motion did not mention that the privilege applies only to state and federal returns or that the returns in question are Canadian (although the motion does contain one unexplained reference to the "Canadian taxing authorities"), but counsel's earlier filing showed that counsel knew that both of those facts were relevant to the court's application of the privilege. On appeal, counsel devotes two and one-half pages of Firestone's brief to defending the privilege, but the argument concerning application of the privilege to foreign tax returns consists of a single sentence, to the effect that there is "no logical reason" why the privilege should not apply.

Counsel's arguments for the exclusion of evidence concerning the Irish tax shelters also strike us as cause for concern. In the trial court, counsel supported the relevant motion in limine by arguing that an illegal novation never terminates the original contract. As support for that proposition, counsel relied on a single federal district court case, a case that expressly declines to follow the only published California decision on point. Counsel further argued, without presenting any evidentiary support, that the Irish tax shelters are illegal. And even if counsel's argument had been supported by legal authority and evidence, it still would not have been a basis for exclusion of evidence because Hoffman would have to be given a chance to prove that the tax shelters were legal. The trial court was nonetheless persuaded by counsel's arguments and on that basis excluded all evidence relating to the Irish tax shelters. But, having successfully advanced those arguments in the trial court, counsel omits them entirely on appeal—Firestone's appellate brief never cites the federal case, never mentions illegality, and represents that "Firestone never challenged the Irish transaction as not being a 'real' transaction, nor did he dispute that it would produce whatever sums of money that Hoffman said it would produce."

Taken individually or collectively, the foregoing arguments cannot, in our view, be plausibly described as warranted by existing law or as nonfrivolous arguments for the extension, modification, or reversal of existing law or the establishment of new law.

We also find cause for concern in the various material misrepresentations of the record that are contained in Firestone's appellate brief. The following examples are illustrative.

In discussing the alleged novation, the brief states, without citation of any support, that "Hoffman does not even contend that the original $375,000 obligation ceased to exist." In fact, the record amply confirms that Hoffman has consistently contended that the original obligation ceased to exist, referring repeatedly in his papers to " 'novation' or 'extinction' " of the Note.

As noted above, Firestone's brief states that "Firestone never challenged the Irish transaction as not being a 'real' transaction, nor did he dispute that it would produce whatever sums of money that Hoffman said it would produce." In fact, the record reflects that Firestone's counsel represented to the trial court that the Irish tax shelters had "been disallowed by the Irish tax authorities" and were "on appeal;" counsel also asserted that the "Irish tax deal" is "being considered by the Irish Court of Appeals, because the tax authority denied it."

Regarding the trial court's exclusion of Hoffman's attempt to explain why the novation was not put in writing, Firestone's appellate brief asserts that Firestone's counsel did not "make adverse comments to the jury on lack of a writing[.]" In fact, Firestone's counsel argued to the jury as follows: "You know, if there had been a change in this [i.e., the Note], don't you think that a Yale-educated lawyer[9] would have written something down? He was sure Johnny-on-the-spot when it came time to write the cover

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9 The record indicates that Hoffman has a law degree from Yale, but, when he drafted the Note, he "hadn't practiced law for many years[.]"

memo and the promissory note itself. He's fully capable of doing it. [¶] The reason he didn't write it is because it was never agreed to."[10]

DISPOSITION

The judgment is reversed and the superior court's in limine rulings are vacated. The superior court is instructed to reopen discovery and to reconsider whether this case should be consolidated with case number BC 314040.

Hoffman is awarded his costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

ROTHSCHILD, J.

We concur:

SPENCER, P. J.

VOGEL, J.

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10 When questioned on this point at oral argument, Firestone's counsel said that the statement in the brief was an error that he had intended to bring to our attention. He did not mention any other such errors.