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March 6, 2020

REQUEST TO PUBLISH OPINION
(Cal. Rules of Court, rule 8.1120)

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California Court of Appeal
Second Appellate District, Division Seven
Ronald Reagan State Building
300 South Spring Street
2nd Floor, North Tower
Los Angeles, California 90013

Re: **Request To Publish Opinion**
Chen et al. v. Bam Brokerage, Inc. et al.,
No. B286946

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Dear Honorable Justices:

The Association of Southern California Defense Counsel (ASCDC) writes to urge the Court to certify the opinion in *Chen et al. v. Bam Brokerage, Inc. et al.* (Feb. 18, 2020, B286946) (Opinion) for publication under California Rules of Court, rule 8.1105.

ORANGE COUNTY

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Interest of the Requesting Organization

ASCDC is the nation’s preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California’s civil defense bar. ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized

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continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

ASCDC has frequently appeared as amicus curiae in numerous cases before both the California Supreme Court and the Court of Appeal to express the interests of its members and their clients, a broad cross-section of California businesses and organizations. ASCDC's members have extensive experience with, and interest in, cases addressing the liability of current and former principals, agents, officers, and directors of close corporations; business tort and contract disputes; and cases implicating lost-profits claims and punitive damages. Its members frequently encounter lost-profits disputes at trial, in post-trial motions, and on appeal.

Why The Opinion Should Be Published

The Opinion cogently analyzes significant questions that frequently arise in commercial contract and tort litigation but are infrequently addressed:

- (1) How are lost-profits damages to be proven in cases involving closely-held businesses?
- (2) What quantum and type of proof is necessary to establish lost-profits damages?

Courts have recognized that making factual findings regarding close corporations' net profits and valuations is a "most difficult legal problem." (See *In re Marriage of Hewitson* (1983) 142 Cal.App.3d 874, 881.) Where, as here, the plaintiffs claim that a close corporation *lost* profits based on defendants' misconduct, the problem can be even more vexing, because "[t]he lost profit inquiry is always speculative" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 775 (*Sargon*)).

This is an extremely important issue to the defense bar. Plaintiffs often claim (and can be expected to claim) that absent the defendants' misconduct, the underlying business, operation, or (as here) set of patent rights would have been a multi-million-dollar boon. Defendants often face a difficult road

in countering such claims, either at trial or via post-trial motions or appeals. Factfinders may be disinclined to believe a “no harm, no foul” argument on damages from an alleged bad actor-defendant. And, the plaintiff claiming losses is often an economic underdog; factfinders can be “misled by their sympathies” in such cases. (*Masterson v. Sine* (1968) 68 Cal.2d 222, 227-228 & fn. 1 [discussing factfinders’ sympathies and the justifications for the parol evidence rule].)

The nature of close corporations creates special issues regarding the quantum and type of proof needed to establish lost profits. When a large corporation with extensive balance sheets and granular financial data has allegedly lost profits, parties and experts can be expected to have a credible basis for projecting the alleged “losses.” But close corporations have limited data. Generally, there is no open market for their shares—and thus no published “share price” or market capitalization readily available to the expert or factfinder that can be tracked before, during, and after the alleged harm occurred. None of that relieves plaintiffs from discharging their burden of proof, however, nor displaces the requirement that lost profits must be proven to a reasonable certainty. (See *Sargon, supra*, 55 Cal.4th at p. 775; Civ. Code, § 3359 [“Damages must, in all cases, be reasonable . . . ”].)

In order for plaintiffs to satisfy their burden when a close corporation is involved, and for defendants and reviewing courts to hold them to it, courts and litigants need clear rules demarcating what is—and isn’t—sufficient evidence of lost-profit damages. Only *published* precedent provides that guidance.

The Opinion, if published, will provide clear rules. It holds that plaintiffs cannot satisfy their burden to show they suffered lost-profits damages where they: (1) present limited records (tax returns) regarding a close corporation’s income; (2) omit documentary evidence for multiple years in which lost-profit damages are claimed; and (3) offer a principal’s otherwise-unsupported testimony that the corporation lost \$500,000 or \$600,000 in “total income” on an annual basis. (Opinion, pp. 7-12.) Just showing “lost gross income, standing alone, does not support an award of damages” for lost profits. (Opinion, p. 8.)

The Opinion further holds that where plaintiffs do not provide “any documentation of [a corporation’s] income, expenses, or profits” for multiple

years, it is entirely speculative for a factfinder to conclude that the corporation would have “continued to earn less revenue or may have earned less gross profits” during those unaccounted-for years. (Opinion, p. 11.)

The Opinion also makes clear that a plaintiff has not presented sufficient lost-profits evidence to support a judgment, where he or she just opines about claimed lost *income* without “explain[ing] how he calculated these numbers or whether his estimates were of lost gross income or lost profits.” (Opinion, p. 12.) Unadorned testimony about *income* is not a substitute for lost *profits* evidence. (*Ibid.*)

Beyond that, the Opinion helpfully explains that showing lost profits in the close-corporation context is not an insurmountable hurdle. While there may be difficulties of proof, parties should still present “the best evidence available in the circumstances” and where, applicable, they should “explain why they could not provide records” that describe the lost *profits* (as opposed to unadorned revenues/income figures) with some degree of specificity. (Opinion, p. 13, internal quotation marks and citations omitted.)

Publishing the Opinion will assist both plaintiffs and defendants in future litigation. There is relatively little case law contextualizing the principles of Civil Code section 3359, *Sargon*, and the substantial-evidence rule in this context. Existing authorities address specific, narrow factual situations—e.g., lost profits from an alleged unrealized dot-com business and lost profits damages in a franchise or chain-business context. (See *Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 884-888 [expert opinions comparing enterprise to “eToys venture” evaluating gains from “operation of (an) on-line business”]; *Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 285-287 [assessing restaurant businesses’ profits; plaintiff offered internal projections, market data regarding a chain of restaurants, comparable ice cream parlors, and other franchised restaurants].) But the Opinion addresses a straightforward failure of proof and a more readily generalizable context that can be analogized in a broader range of future lost-profits cases.

Lastly, the Opinion also provides guidance to courts and litigants regarding the type of financial-condition proof that a plaintiff must present to pursue punitive damages. (See, e.g., Opinion, p. 18 [“The listed value of these real estate properties was not meaningful evidence of BAM’s (or Horowitz’s)

ability to pay punitive damages because the Chens did not submit any evidence of the encumbrances and liabilities on the properties”].)

In sum, the Opinion:

- “[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions” (Cal. Rules of Court, rule 8.1105(c)(2)) by addressing damages rules (and substantial evidence principles) in the close-corporation context;
- “[i]nvolves” multiple “legal issue[s] of continuing public interest” and import (Cal. Rules of Court, rule 8.1105(c)(6)) for all cases where lost-profits damages are claimed; and
- “[r]eaffirms a principle of law not applied in a recently reported decision” (Cal. Rules of Court, rule 8.1105(c)(8)) by confirming that—even where a small company’s records may be spotty or limited in nature—the plaintiff’s case cannot rest on pure speculation, and income-streams alone are not indicative of *profits* gained or lost.

Publication will benefit both bench and the bar in future cases, and is entirely appropriate under California Rules of Court, rule 8.1105(c). ASCDC therefore respectfully requests that the Opinion be certified for publication.

Respectfully submitted,
ASSOCIATION OF SOUTHERN CALIFORNIA
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On March 6, 2020, I served the foregoing document described as: **REQUEST TO PUBLISH OPINION** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

() By Mail: By placing a true copy thereof enclosed in sealed envelopes addressed as above and placing the envelopes for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on March 6, 2020, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Valerie Worrell
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