S260226

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

DONGXAIO YUE,
Petitioner

v.

ATLAS RESOURCES, LLC, et al.,
Respondent

AFTER A DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION FIVE

Case No. **A154921**

PETITION FOR REVIEW

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ISSUES PRESENTED

This is a case arising from a failed gas & oil investment partnership. Respondent Atlas was the founder, organizer and managing partner of the partnership. MetLife Securities was the broker of the partnership investments. Plaintiff Dongxiao Yue was an investor. Defendants Atlas and MetLife were represented by the firm of Maynard, Cooper & Gayle. On the eve of the trial and during trial, Maynard Cooper accused MetLife of misconduct. The trial court denied Yue's motion to disqualify Maynard Cooper. The trial established that Atlas picked a few top-performing wells to derive the financial projections in its partnership investment literature, without disclosure to prospective investors. Affirming the trial court, the First District Court of Appeal found that Yue lacked standing to seek the disqualification of defense counsel because there was no attorney-client relationship between the two; it also found that Atlas owed no pre-investment fiduciary duty to Yue. The case raises the following legal questions for review:

Issue 1. Does a plaintiff have standing to seek the disqualification of defense counsel who concurrently represents multiple defendants in a case but takes adverse position against one of the defendants at trial?

Issue 2. Does the founder, organizer and managing general partner of an investment partnership owe a pre-investment fiduciary duty to an incoming partner?

INTRODUCTION

This case involves an investment made by Plaintiff Dongxiao Yue in a gas & oil partnership named Atlas Resources Series 30-2011 LP ("Series 30"). Defendant Atlas Resources, LLC ("Atlas") was the founder, organizer and Managing General Partner of Series 30. Defendant MetLife was the broker of the partnership investments. Prior to investing in and becoming a partner of Series 30, Yue reviewed and relied on the Private Placement Memorandum ("PPM") of Series 30 that was authored by Atlas.

On the eve of the trial, Yue and MetLife reached an agreement to settle, subject to the trial court's approval. Before the settlement was approved, Maynard Cooper accused MetLife of misconduct in its proposed jury instructions. Yue immediately submitted a motion to disqualify defense counsel. The trial court denied the motion on the ground that Yue lacked standing. At the trial, Maynard Cooper shifted the blame to MetLife, accusing MetLife of falsifying Yue's application for investment. The Court of Appeal affirmed.

Evidence at trial showed that Atlas grossly inflated the reserve estimates of the wells by about three times, by using very few top-performing wells to calculate the projected returns presented in the PPM while discarding the majority low performing wells. The trial court ruled that Atlas owed no pre-investment fiduciary duty to Yue. The Court of Appeal affirmed.

The Supreme Court should grant review for the following reasons.

The standing issue on seeking disqualification of opposing counsel raises an important question of law that needs clarification and guidance by the Supreme Court. Permitting a defense counsel to game the judicial process by betraying a concurrent client raises serious questions on the integrity of the bar, engenders unfair trials and discourages settlement with a jointly represented defendant in a multi-defendant case.

The question of whether a founder, organizer and managing general partner of an investment partnership owes a pre-investment fiduciary duty to an incoming partner is also an important question of law that needs guidance from the Court. Such guidance is necessary for the protection of California investors and the promotion of true business investments.

STATEMENT OF THE CASE

A. Relevant Factual Background

In October 2011, Yuda Jiang ("Jiang"), a MetLife representative, recommended a gas & oil investment partnership called Atlas Resource Series 30-2011 LP ("Series 30") to Yue. Jiang ordered an "Investor Kit for Atlas Resource Series 30-2011 LP" ("Investor Kit") from Atlas and forwarded it to Yue. (1App.640.) (Yue labelled his appellant's appendix with "App.NNN")

The Investor Kit that Yue received contained eight documents, including a Private Placement Memorandum ("PPM") (1App.150-491). Page 26 of the PPM contained the following warranty: "This private placement memorandum does not intentionally omit any material fact or contain any untrue statement of a material fact." (1App.184) The PPM stated that Atlas authorized six other documents as "sales material." (1App.294, PPM p.136.)

In the PPM, Atlas advertised "at least 12%" return for the first year. (1App.247, PPM p.89.) Atlas stated that the plan focused on two primary areas. It was to use $50.1 million to drill 135 vertical wells in the Niobrara reservoir in northeastern Colorado and western Nebraska (the "Niobrara Wells") and use $35.5 million to drill 4.5 net horizontal wells and 5.25 net vertical wells in the Marcellus Shale Formation in West Virginia (the

"Marcellus Wells"). (1App.231-2, PPM, p.73-4.) A PPM Supplement provided slightly higher rates of return (14% for the first year).

After reviewing the PPM, its supplemental materials and receiving advice from MetLife, Yue invested $335,000.00 in Series 30. (1App.640, 1App.751-762.)

In August to October 2012, after only receiving about 1/5 of the expected minimum monthly return, Yue noticed that the 2011 Annual Report for Series 30 (the "2011 Annual Report") he received in May 2012 stated that the total proved reserve value of Series 30 was only $14.39 million, but Atlas had collected a $100 million investment for it. (1App.764, 785.) Yue complained to MetLife and Atlas and eventually filed the underlying lawsuit in 2015.

Discovery and trial show that the annual returns Atlas represented in the PPM and PPM Supplement were based on very specific estimates on gas production volume, gas prices and costs. (2App.1523, Downs Depo.p.34:8-25 (read at trial in trial transcript vol.4 pp.24-144.); 2App.1864-1878, Atlas email with Financial Model attached (Trial Ex.36.)) These detailed estimates and calculations were contained in a Microsoft Excel file named "5. & 7. UPDATED Private 30 Model_vDiligence_v3.xls" that Atlas sent to MetLife for its due diligence (2App.1864-1878.) (the "Financial Model") (Trial Ex.36.). For the Niobrara area, Atlas used an Estimated Ultimate Recovery ("EUR") of 300,000 Mcf[1] for each of the 130 plus wells in the Financial Model. (2App.1894, 1908, Trial Ex.60.)

As revealed at the trial, Atlas derived the EUR of 300,000 Mcf for the Niobrara wells by picking a few top-performing wells while discarding the low performing ones which were the majority. The average EUR of the Niobrara wells was only 101694 Mcf. (2 App.1908, Trial Ex. 77; 6 Tr.

[1] Mcf stands for a thousand cubic feet.

72:1-6, 6 Tr.125:17-23, 6Tr. 128:14-129:5 (testimony by Randy Allen)) Thus, in the Financial Model Atlas sent to MetLife, Atlas inflated the EURs of the Niobrara wells by about three times.

B. Relevant Proceedings in the Trial Court

Yue commenced the action against Atlas and MetLife on April 28, 2015, asserting fraud by intentional misrepresentation, fraud by concealment, breach of fiduciary duty and unfair competition under California Business and Professional Code §17200 et seq. against Atlas for its conduct during the 2011 transaction.

Atlas and MetLife were jointly represented by Maynard, Cooper & Gayle ("Maynard Cooper" or "Defense counsel").

In pre-trial proceedings, the trial court dismissed the fraud by intentional misrepresentation and the unfair competition claims against Atlas. The trial court also dismissed part of the breach of fiduciary claim against MetLife that was based on the alleged falsification of Plaintiff's risk tolerance and net worth. (2App.1779, 1785 (MSJ Order).)

On April 26, 2018, the parties held a private mediation. MetLife and Atlas were represented by Maynard Cooper attorneys. Yue and MetLife reached an agreement to settle, under the condition to have the trial court approve the settlement in a good faith determination.

On May 15, 2018, MetLife and Atlas filed their motions in limine. Also on May 15, 2018, Atlas filed their proposed jury instructions and proposed verdict forms. (2 App.1798.) In these documents, defense counsel accused MetLife of misconduct.

On May 17, 2018, Yue emailed to the trial judge a motion to disqualify defense counsel, on the ground that defense counsel was taking a

position adverse to MetLife in violation of their ethical obligations. (2 App.1853-1859.)

On May 18, 2018, the trial court held a pre-trial hearing. The court approved the Yue-MetLife settlement and denied Yue's motion to disqualify defense counsel. (1 Tr. 10-15, May 18, 2018.)

At the close of Yue's presentation of evidence, Atlas brought an oral motion for nonsuit. During a very brief oral argument, Yue argued that 1) Atlas cherry-picked a few top-performing wells as the basis of its financial projections in the PPM, without disclosure, 2) Atlas owed him a pre-investment fiduciary duty because it was the "promoter" of the Series 30 partnership (citing *Eisenbaum v. Western Energy Resources, Inc.* (1990) 218 Cal.App.3d 314, 321 (*Eisenbaum*)), and 3) Atlas breached the duty by misleading Plaintiff with the PPM. The trial court granted Atlas's motion for nonsuit on the breach of fiduciary duty claim arising from Atlas's pre-investment conduct on the ground that Atlas was not a promoter and owed no fiduciary duty to Yue during the investment decision process. (6 Tr. 42:10-44:18; 2App.1927 (Minutes).)

C. The Court of Appeal Decision

The Court of Appeal found that Yue had no standing to seek disqualification of Maynard Cooper because there was no attorney-client or confidence relationship between him and Maynard Cooper. The Court of Appeal also found that Maynard Cooper's accusing MetLife of misconduct at trial violated no ethical rules.

The Court of Appeal found that Atlas owed no pre-investment fiduciary duty to Yue on the ground that Atlas was not a "promoter" under *Eisenbaum*, Yue failed to establish to scope of any fiduciary duty and there was no breach of any fiduciary duty by Atlas.

WHY REVIEW SHOULD BE GRANTED

Issue 1 Raises an Unsettled and Important Question of Law

A. Current standing requirement in disqualification of opposing counsel does not foresee the situation where a lawyer accuses his currently represented client of misconduct at trial

On the eve of trial, Maynard Cooper submitted a proposed jury instruction stating that "Defendant [Atlas] claims that it is not responsible for Plaintiff's harm because of the later misconduct of MetLife Securities, Inc. and/or Yuda Jiang." As attorneys for MetLife and Atlas, Maynard Cooper made similar accusations against MetLife on page 39, 42 and 43 of their proposed jury instructions. (2App. 1798-1851.)

Yue's motion to disqualify Maynard Cooper argued that "permitting a lawyer to take a position adverse to a client he once represented in the litigation would violate the lawyer's duty of loyalty and California Rules of Professional Conduct 3-310(E)" and Maynard Cooper's "accusing MetLife of misconduct for the defense of Atlas constitutes a fundamental violation of California Rules of Professional Conduct." (2App.1854, 1857) Yue's co-counsel, Mr. Ratner, argued before the trial judge that "The rules of professional conduct impose the duty of loyalty on lawyers" and "their jury instructions and jury interrogatories, intend to use to cast Met Life in some form of liability here. And that might affect Met Life's reputational damages. It could affect their standing in the community. " (1Tr. pp.11-13.)

There was no evidence that Maynard Cooper had obtained a written informed consent from MetLife to attack MetLife in the trial[2].

[2] The Court of Appeal states that "Yue's co-counsel assumed Maynard Cooper had obtained conflicts waivers from Atlas and MetLife" for acting in adverse to MetLife at trial. (Opinion, p.21.) The trial transcript does not capture the questioning tone of Mr. Ratner. (1Tr. p.14-15.) There was no

As the courts below found, for a motion for disqualify opposing counsel, current California case law requires the moving party to establish prerequisite standing by showing an attorney-client relationship with the attorney targeted for disqualification. *Civil Service Com. v. Superior Court* (1984) 163 Cal. App.3d 70, 76-77 [209 Cal. Rptr. 159] ("Before an attorney may be disqualified from representing a party in litigation because his representation of that party is adverse to the interest of a current or former client, it must first be established that the party seeking the attorney's disqualification was or is `represented' by the attorney in a manner giving rise to an attorney-client relationship.") `"The burden is on the party seeking disqualification to establish the attorney-client relationship."' [Citation.]" (*Coldren v. Hart, King & Coldren, Inc.* (2015) 239 Cal.App.4th 237, 245 (Coldren)).

However, California Supreme Court precedents do not read so restrictive. "A trial court's authority to disqualify an attorney derives from the power inherent in every court `[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' [Citations.]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371 (*SpeeDee Oil*).) "The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." (*Ibid.*; see also *Comden v. Superior Court* (1978) 20 Cal.3d 906, 915, 145 Cal.Rptr. 9, 576 P.2d 971. A trial court may disqualify a party's

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answer from defense counsel stating that they obtained a waiver from MetLife for accusing MetLife with misconduct. Even if they had, courts have held such actual conflict is not waivable.

counsel to enforce the ethical standards. (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371; Code Civ. Proc., §128, subd. (a)(5).)

Outside of California, in *Kevlik v. Goldstein* (1st Cir. 1984) 724 F.2d 844, the first circuit held that a party has the standing to disqualify opposing counsel because "[t]he Model Code of Professional Responsibility, DR 1-103(A) clearly requires that an attorney come forward if he has knowledge of an actual or potential violation of a Disciplinary Rule." (*Id*. at 847.) See also, *United States v. Clarkson* (4th Cir.1977) 567 F.2d 270, 271 n. 1 ("any member of the bar aware of the facts justifying a disqualification of counsel is obligated to call it to the attention of the court."); *Brown & Williamson Tobacco Corp. v. Daniel International Corp.* (5th Cir.1977) 563 F.2d 671, 673 ("Appellant has standing to seek disqualification even though it is not an aggrieved client because its attorneys are authorized to report any ethical violations in the case.")

The Court of Appeal rejected these out-of-state precedents on the ground that "the California Rules of Professional Conduct do not require an attorney to report another attorney's misconduct." (Opinion, p.20.) However, the absence of reporting obligation does not serve as a bar to reporting. In California, reporting another attorney's misconduct is certainly authorized, though not required. It then follows that a party may report the misconduct of the opposing counsel in an ongoing litigation and request the court to enforce the ethical standards of the legal profession. *SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1145.

Permitting defense counsel to shift liability from one concurrently represented client to another diminishes public trust in the administration of justice and the integrity of the bar. Unlike the usual situation in case law, this case is unique in that Maynard Cooper took adverse position against

their current client MetLife in the same ongoing litigation. Maynard Copper was listed as the attorneys for MetLife in all its court filings, including its proposed jury instructions which accused MetLife of misconduct. (2App. 1798-1851.) This distinction should serve to strengthen the necessity for disqualification.

B. A similarly-situated plaintiff suffers injury-in-fact from defense counsel's unethical tactics

Maynard Cooper even took positions contrary to their previous arguments made to the trial court. In their motion for summary judgment for MetLife, Maynard Cooper argued and the trial court agreed that alleged falsification or unauthorized modifications of Plaintiff's investment application documents by MetLife are "immaterial". (2App.1785.) Yet at trial, Maynard Cooper told the jury that MetLife altered the original forms, destroyed the original documents and violated MetLife's own internal policies. (5 Tr. 90:6-94:4, May 30, 2018).

Maynard Cooper's trial strategy was to put all the blame on their client MetLife and shift the liability away from their other client - Atlas. As the attorneys of MetLife, Maynard Cooper's accusation against MetLife amounts to the admission of guilt by MetLife, which a defendant would have naturally denied in any settlement agreement. The jury verdict was consistent with a total success of this blame-shifting strategy. If the jury believed Maynard Cooper and concluded that MetLife's share of liability was 100%, they would have produced the same verdict that was reached at trial. The jury would stop at finding Atlas not liable and would not proceed to write 100% liability for MetLife in the special verdict form.

Yue suffered from defense counsel's trial tactics for a simple reason – he would lose the trial against Atlas because of Maynard Cooper's misconduct. Had Maynard Cooper maintained their loyalty to MetLife, they

would have told the jury that the alleged MetLife conduct such as altering Plaintiff's applications were "immaterial" and caused no harm. Instead, Maynard Cooper focused on pointing the finger on MetLife, presenting the "immaterial" facts to the jury so the latter would find MetLife liable. There was no one to defend MetLife and tell jury the truth, because Maynard Cooper was still MetLife's lawyer in the case.

C. Requiring attorney-client relationship to confer standing for the disqualification of opposing counsel will discourage partial settlement in cases involving multiple defendants jointly represented by the same counsel

In the trial of this case, Maynard Cooper spent considerable time on MetLife internal disciplinary letter against the MetLife agent – Mr. Jiang. Defense counsel defended Jiang in his deposition and asserted attorney-client privilege with Jiang. That disciplinary letter had no relevance to the issue of whether MetLife was liable. It was only about Jiang's unauthorized communication with Atlas after Plaintiff complained about the investment. But it was effective to make him look bad on the stand and he was defenseless.

MetLife was even more defenseless. In the closing argument, Maynard Cooper told the jury that MetLife "inflated [Plaintiff's] income and net worth by as much as five -- four or five times. They had also altered his risk tolerance." (7 Tr. 58:8-11.) MetLife's own attorneys were accusing it of the misconduct of falsifying financial documents and it didn't even have a chance to respond to such charges.

If the law of this case stands, settling with one defendant would almost certainly mean losing the case to all other defendants – defense counsel only needs to shift the blame to the defendant that has settled. Because defense counsel also represents the settled-defendant, their accusation against the settled-defendant would be extremely effective, since they knew

the weakest points of the settled-client and there would be no one to defend the settled-defendant.

Allowing defense counsel to employ the strategy adopted by Maynard Cooper would greatly discourage settlement with one of the defendants in a multi-defendant case jointly represented by the same defense counsel.

For the above reasons, the Court should grant review on issue 1.

Issue 2 Raises an Important Question of Law that Impacts the Interests of California Investors

In opposing Atlas's motion for nonsuit, Yue argued that Atlas was the "promoter" of the partnership and stated:

> their projection of the 300,000 MCF [in the Financial Model] was based on three wells... They cherry-picked three wells out of 16 wells in the previous drilling activity of the Niobrara area, and they cherry-picked the top three [to make the proved reserve estimate for all wells].

(6 Tr. 40:15-25.)

The Court of Appeal focused on the issue of whether Atlas was the "promoter" of Series 30 within the meaning in the case of *Eisenbaum v. Western Energy Resources, Inc*. (1990) 218 Cal. App. 3d 314 (*Eisenbaum*), which Yue cited in opposing Atlas's motion for non-suit. Yue's understanding of the term "promoter" was based its use in the law of corporations, which defined "promoter" as the founder or organizer of a business venture. Both the trial court and the Court of Appeal ruled that MetLife was the promoter but Atlas wasn't.

Regardless of the definition of "promoter", the pertinent question is whether the founder, organizer and managing general partner of a partnership owes a pre-investment fiduciary duty to an incoming partner. If as the courts below found, that there is no such fiduciary duty, then anyone

can lawfully do what Atlas did: drill some wells, choose a few best wells as the representative wells to make a financial model of the whole field, then sell the whole field as partnership interests to investors --- without telling them that the financial projections were based on the few top-performing wells. Common sense tells us this is wrong. Investors lost close to $100 million in Series 30, an untold number of them were from California. If Atlas's scheme was condoned, more Californians may lose their investments to similar schemes, without legal remedy.

At trial, in Yue's case in chief, it was firmly established that Atlas was the founder, organizer and managing general partner of Series 30. The evidence included: the PPM admitted into evidence (trial Exhibit 4, 1 App.152-491.), the trial testimony of Yuda Jiang (3 Tr. 21:3-36:13.) and the trial testimony of Plaintiff (5 Tr. 12:10- 17:6.), the due diligence report commissioned by Atlas with a concise summary of Atlas's "organization" of Series 30 and "offering" of Series 30 partnership interests for purchase by investors. (RA247-298, Trial Exhibit 34 (admitted)). Although Atlas did not communicate directly with Yue during the investment decision process, it communicated to Yue through Jiang – Yue's agent - and through Atlas's investment seminars conducted by Atlas managers and the PPM documents, intending for Yue to rely on its representations and assurances. Neither MetLife nor Jiang was an expert in the oil & gas business, and they too relied on Atlas for information on the viability of the Series 30 partnership[3].

As Yue argued below, "A confidential relationship 'may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another.' [Citations.] And where the person in whom such

[3] The trial court, in a thorough summary judgment order, found MetLife failed to disclose to Yue the gas pricing impact to Series 30, which was communicated to MetLife by Atlas and a third party. And Atlas was not liable for the non-disclosure of the gas pricing information.(2App.1791-6.)

confidence is reposed, by such confidence obtains any control over the affairs of the other, a trust or fiduciary relationship is created." (*Eisenbaum*, supra, citing *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19, 31, 136 Cal.Rptr. 378). Courts in other jurisdictions recognize that General and managing partners "occupied a position of trust as to those they sought to attract to the venture as limited partners." (*Bartels v. Algonquin Properties* (D.Vt.1979) 471 F.Supp. 1132, 1147.)

Atlas founded and organized the Series 30 partnership, authored the Private Placement Memorandum and related partnership material and actively marketed the partnership interests to investors such as Yue. The PPM stated the following:

- "You should rely only on the information contained in this private placement memorandum in making your investment decision. No one is authorized to provide you with information that is different." (1App.294, PPM p.136.)
- "You must rely totally on the managing general partner and its affiliates to manage the partnership and its business." (1App.161, PPM p.3)
- "You must rely entirely on the managing general partner to select the prospects and wells for your partnership." (1App.175, PPM p.17.)
- "This private placement memorandum does not intentionally omit any material fact or contain any untrue statement of a material fact. No one has been authorized to give you any information or make any agreement that is not expressly stated in this private placement memorandum or authorized by the foregoing right to request additional information from the managing general partner." (1App.184-5, PPM pp.26-27.)

Yue relied on Atlas's representations made in the PPM and its supplemental materials. In fact, the Series 30 Subscription Agreement that Yue signed had a place for Atlas to counter-sign and it stated that Yue

relied on the PPM. This Subscription Agreement was executed by Atlas (counter-signed by Jack Hollander) (1App.144, 140.)

Yue relied on Atlas's integrity and fidelity so as to trust Atlas with control over Yue's investment. Accordingly, Atlas owed a pre-investment fiduciary duty to Yue[4]. The same analysis applies to the relationship between a founder, organizer and managing general partner on one hand and an incoming investment partner on the other. The latter places their investment in the trust of the former. Imposing a fiduciary duty on such founder, organizer and managing general partner serves to protect the interests of investors and promote business investments.

CONCLUSION

For the reasons explained above, this Court should grant this Petition for Review.

Respectfully submitted,

Dated: January 17, 2020

/s/ D. Yue

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Dongxiao Yue

[4] The Court of Appeal faults Yue for not asking Atlas for the production data prior to deciding to invest in Series 30. However, it was Atlas's duty to fully disclose material information, including its use of the few top-performing wells for EUR estimates. "The existence of a trust relationship limits the duty of inquiry. `Thus, when a potential plaintiff is in a fiduciary relationship with another individual, that plaintiff's burden of discovery is reduced and he is entitled to rely on the statements and advice provided by the fiduciary.'" (*Eisenbaum v. Western Energy Resources, Inc.* (1990) 218 Cal.App.3d 314, 324.) Plaintiff is entitled to rely on Atlas's assurances made in the PPM during the pre-investment period.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d)(1) of the California Rules of Court, I hereby certify that this brief contains 4903 words, including footnotes, in 13-point fonts. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: January 17, 2020

/s/ D. Yue

_____

Dongxiao Yue

PROOF OF SERVICE

I am over 18 years of age and not a party to the within legal action. I am a resident of or employed in the county where the mailing took place. My business address is: PO BOX 277084, SACRAMENTO, CA 95827 (SOLANO COUNTY #39411).

On January 17, 2020, I served true copies of the foregoing document(s) described as:

PETITION FOR REVIEW

(AFTER A DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION FIVE, **A154921**)

on the following by mail:

1. CLERK OF THE COURT
   FIRST APPELLATE DISTRICT, DIV. 5
   CASE NO. A154921
   350 McAllister Street
   San Francisco, CA 94102

2. CLERK OF THE SUPERIOR COURT
   FOR DELIVERY TO HON. JULIA SPAIN
   24405 AMADOR STREET
   HAYWARD, CA 94544

I mailed a copy of the document(s) identified above as follows: I enclosed a copy of the document identified above in an envelope and deposited the sealed envelope with the U.S. Postal Service, with postage fully paid.

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

Dated: January 17, 2020

Maurice Robinson
MAURICE ROBINSON

EXHIBIT A: COURT OF APPEAL OPINION

Filed: 12/9/19

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DONGXIAO YUE, Plaintiff and Appellant, v. ATLAS RESOURCES, LLC, Defendant and Respondent.	A154921 (Alameda County Super. Ct. No. HG15768190)

Dongxiao Yue appeals from a judgment entered after he was unsuccessful on all counts of his complaint. He contends the court erred by (1) granting respondent's motion for judgment on the pleadings as to his intentional misrepresentation claim; (2) granting respondent summary adjudication as to his unfair competition claim; (3) denying his motion for sanctions based on respondent's purported spoliation of evidence; (4) declining to admit certain evidence at trial; (5) granting respondent's motion for nonsuit as to his breach of fiduciary claim; and (6) allowing respondent's counsel at trial to accuse another of its clients, who had settled with Yue before trial, of wrongdoing, so as to shift the blame away from respondent. We will affirm.

I. FACTS AND PROCEDURAL HISTORY

In April 2015, Yue sued respondent Atlas Resources, LLC (Atlas), as well as MetLife Securities, Inc. and Metropolitan Life Insurance Company (collectively, MetLife), for fraud and breach of fiduciary duty in inducing him to invest $335,000 in "Atlas Resources Series 30-2011 LP" (Series 30), a Delaware limited partnership formed

for the purpose of drilling and developing oil and natural gas wells. Yue sought damages, interest, attorneys' fees, punitive damages, and injunctive relief.

In his verified complaint, Yue alleged that he was induced to invest in Series 30 based on oral representations by Yuda Jiang—a MetLife representative—that the return on investment from Series 30 would be about 12 percent per year, and Yue could expect to recover his full investment in seven years. Yue further alleged that MetLife was his agent in the Series 30 transaction, he trusted and relied on MetLife's representations and judgment regarding Series 30, and MetLife breached the standard of care by "failing to verify Atlas'[s] claims of return" and "the production and proven reserve data in Series 30." In addition, Yue alleged that "Atlas" represented to him that investing in Series 30 "could bring an average return of 12%" when "it already had production and other data which would show that the return was and would be substantially lower than 12%."

Yue thereafter filed his Verified First Amended Complaint, asserting claims against Atlas for intentional misrepresentation, fraud by concealment, and breach of fiduciary duty; a claim against Atlas and MetLife under the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200); and a new claim against MetLife for fraud. Yue alleged that, before he invested in Series 30, MetLife repeatedly represented to him that "(1) the investment in [Series 30] would generate an annual return of about 12%; (2) Atlas was a Chevron Company and thus could be trusted; [and] (3) the investment in Atlas would be safe." Yue asserted he would not have invested in Series 30 but for MetLife's misrepresentations.

A. Judgment on the Pleadings as to Intentional Misrepresentation Claim

In December 2016, Atlas and Metlife filed a motion for judgment on the pleadings, contending that the first amended complaint failed to allege facts sufficient to state a cause of action for (1) intentional misrepresentation, fraud by concealment, or violation of the UCL by Atlas, or (2) fraud or a UCL violation by MetLife.

In January 2017, the court granted the motion without leave to amend as to Yue's claim against Atlas for intentional misrepresentation, removing that claim from the case. The court also granted the motion with leave to amend as to both his claim against Atlas

for fraud by concealment and his fraud claim against MetLife. The court denied the motion as to the UCL claims.

B. Summary Judgment on UCL Claim; Yue's Motion for Sanctions

Yue filed a second amended complaint in February 2017, alleging a claim against Atlas for fraud by concealment (failing to disclose "production data and proven reserve data," which purportedly would have shown that the rate of return was going to be substantially lower than 12 percent), as well as claims against Atlas and MetLife for breach of fiduciary duty and violation of the UCL.

In February 2018, Atlas filed a motion for summary judgment or, in the alternative, summary adjudication as to each claim.

Yue thereafter took Atlas's deposition, during which an Atlas representative explained that some documents related to the reserves that had been established for certain wells, before Yue made his investment in 2011, would have been destroyed pursuant to Atlas's document retention policy.

In April 2018, Yue filed an opposition to Atlas's summary judgment motion. He also filed a motion for terminating sanctions against Atlas, on the ground that Atlas had spoliated evidence—namely, the documents purportedly destroyed pursuant to its document retention policy.

The court granted Atlas summary adjudication as to Yue's UCL claim, but otherwise denied its summary judgment motion. The court denied Yue's motion for sanctions.

C. Yue's Settlement with MetLife and Motion to Disqualify Atlas's Counsel

On April 26, 2018, Yue and MetLife entered into a settlement agreement, conditioned on a good faith settlement determination for which MetLife applied.

At 5:47 on the evening of May 17, 2018, Yue e-mailed the court and Atlas's counsel a motion to disqualify counsel for Atlas and MetLife—the law firm of Maynard Cooper & Gale PC (Maynard Cooper).

At the pretrial hearing the next day, the court approved MetLife's Application for Good Faith Settlement and denied Yue's motion to disqualify Maynard Cooper.

D. Nonsuit as to Breach of Fiduciary Duty; Jury Verdict on Other Claims

After Yue completed his case-in-chief, Atlas moved for a nonsuit on his claims for fraud by concealment and breach of fiduciary duty. The court granted a nonsuit as to Yue's breach of fiduciary claim to the extent it was predicated on pre-investment conduct; the court otherwise denied Atlas's motion.

The jury thereafter rendered a verdict for Atlas on all remaining claims—fraud by concealment and breach of fiduciary duty based on post-investment conduct. Using the special verdict form to which the parties had agreed, the jury found 11-1 that Atlas had not intentionally failed to disclose a fact Yue did not know and could not have discovered through reasonable diligence. It also found, by a 12-0 margin, that Atlas did not fail to act as a reasonably careful managing general partner would have acted under the same or similar circumstances.

The court entered judgment accordingly, and this appeal followed.

II. DISCUSSION

A. Judgment on the Pleadings as to Intentional Misrepresentation

"A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action." (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777; Code Civ. Proc. § 438(c)(3)(B)(ii).) "A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review. [Citation.] All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law." (*People ex rel. Harris*, at p. 777.)

Yue's first amended complaint alleged that Jiang—an employee of *MetLife*—told Yue that the return for Series 30 would be "about 12% per year." It also alleged that, through MetLife, Yue obtained a brochure about Atlas and Series 30. In his intentional misrepresentation claim, Yue incorporated these allegations and alleged, in a conclusory manner, that "Atlas represented to Plaintiff that the investing in Series 30-2011 could bring an average return of 12%" and that this representation was false.

In granting judgment on the intentional misrepresentation claim, the court explained that Yue's allegations "simply never refer to any *Atlas* representative making a representation—to [Yue], [MetLife's] Jiang, or otherwise—as to the level of return that the investment would bring." (Italics added.) The court denied leave to amend because, although Yue offered to allege that Vicki Burbridge was Atlas's Regional Marketing Director, Atlas's brochure was backed by top Atlas executives, and Atlas filed for bankruptcy in 2016, "[n]one of these proposed allegations involves an express representation by any Atlas representative as to the level of return that [Yue's] investment would or could bring."

The trial court did not err. "In California, fraud must be pled specifically; general and conclusory allegations do not suffice." (*Lazar v. Superior Court* (1991) 12 Cal.4th 631, 645 (*Lazar*).) To allege a fraud claim against an entity such as Atlas, the plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157 (*Tarmann*); *Lazar, supra,* 12 Cal.4th at p. 645.) Yue did not allege who at Atlas made a representation of a 12 percent return, when the representation was made, or how it was conveyed to him. Although he alleged obtaining a "brochure" about Atlas and Series 30, he did not identify the brochure, who authored it, or any specific misrepresentation. Even Yue's proposed amendments did not state with specificity that Atlas authored the brochure, what the brochure misrepresented, or how he reasonably relied upon any misrepresentation.

Yue contends his allegations were sufficient because he only had to "set forth in his complaint the essential facts of his case with reasonable precision and with particularity sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of action," and "need not particularize matters presumptively within the knowledge of the demurring defendant." (Quoting *Smith v. Kern County Land Co.* (1958) 51 Cal.2d 205, 209.) His argument is unavailing. "[T]he policy of liberal construction of the pleadings does not apply to fraud causes of action." (*Heritage Pacific*

Financial, LLC v. Monroy (2013) 215 Cal.App.4th 972, 989.) And while the specificity requirement may be relaxed when the allegations indicate that the defendant has greater knowledge of the facts than the pleading party, that rule does not apply where a defendant employer has no more reason to know than the plaintiff which of its employees purportedly made the mispresentation. (*Tarmann, supra*, 2 Cal.App.4th at p. 158.) Here, Yue's first amended complaint did not identify what employee purportedly promised a 12 percent return, and although there may be a finite number of Atlas employees who could have made a misrepresentation in the brochure, Yue does not identify any statement in the brochure that misrepresented a 12 percent return.

Yue also tells us that Atlas's private placement memorandum (PPM) stated: "The partnership is structured to provide you and the other investors with cumulative cash distributions, including all distributions from operations to you and the other investors before the first 12-month subordination period begins, based on a subscription price of $20,000 per unit regardless of the actual subscription price you paid for your units, equal to at least 12% of capital (which is $2,400 per $20,000 unit) in the first 12-month subordination period, 10% of capital (which is $2,000 per $20,000 unit) in each of the next three 12-month subordination periods, and 8% of capital (which is $1,600 per $20,000 unit) in the fifth 12-month subordination period."

However, Yue did not allege the PPM's representations in his first amended complaint. And even if he had leave to add them to his pleading, the passage he cites did *not* represent that Yue "could bring an average return of 12%" (as alleged in paragraph 27 of the first amended complaint) during the cumulative subordination period or annually throughout the investment: to the contrary, the average of the stated returns (12%, 10%, 10%, 10%, and 8%) is less than 12 percent. Moreover, the PPM explicitly warned that "even with subordination your cash flow may be very small and *you may not receive the return of capital described above* during the . . . subordination period." (Italics added.)

Finally, Yue argues that amendments to pleadings should be liberally allowed, and if he had been given leave to amend, "he could have added detailed facts such as the

representations in the Atlas sales materials and by Atlas persons." But Yue still fails to state precisely what facts he would allege or how they would cure the defects in his pleading. The court did not err in dismissing Yue's intentional misrepresentation claim without leave to amend.

B. Summary Judgment on UCL Claim

Atlas moved for summary judgment or adjudication on Yue's UCL claim, contending that an award of monetary damages, as sought by his claims for breach of fiduciary duty and fraud, would provide Yue with an adequate remedy at law. (See *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1249 [to obtain equitable relief, plaintiff must establish there is no adequate remedy at law]; *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1144 [relief under UCL is generally limited to equitable remedies of injunction and restitution].) In granting Atlas's motion, the court observed that Yue had failed to oppose Atlas's argument, "rendering his claims for relief under Business and Professions Code section 17200 superfluous."

Yue contends the court erred because he sought injunctive and equitable relief in his first amended complaint and, in his opposition to the summary judgment motion, said he "has no adequate remedy at law to compel [Atlas] to cease their wrongful acts, and therefore seeks injunctive relief and remedies in equity." However, Yue did not allege facts to support this conclusion or present evidence that a damage award would not suffice.

Yue now acknowledges that a damage award might compensate him for *his* losses, but he urges that this amount would not adequately protect the general public from Atlas's unlawful conduct, and that he was actually seeking *public* injunctive relief to prevent Atlas from defrauding other investors.

Yue's argument is unavailing. Neither Yue nor his pleading informed the trial court that he was seeking public injunctive relief. (*Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1185–1186 [affirming summary judgment on UCL claim where plaintiff cited the statute purportedly underlying her claim "for the first time on appeal"].) Moreover, the second amended complaint did not allege the factual predicate for public

injunctive relief—that Atlas was continuing to engage in fraudulent, unlawful, or unfair conduct impacting other investors or the general public. Nor did he allege facts or submit evidence showing that the stated fraud—misrepresenting the potential return or concealing production or reserves for the Series 30-*2011* wells—was continuing as of the time of the summary judgment proceeding in 2018.

The court did not err in dismissing Yue's UCL claim.

C. Yue's Motion for Sanctions Due to Spoliation

Based on a theory that Atlas intentionally destroyed "detailed documents supporting the reserve values of the Series 30 wells" before or as of the time of his November 2011 investment, Yue insists the court erred in denying his motion for terminating sanctions or issue sanctions. We disagree.

1. Background

In August 2015, Yue served Atlas with requests for documents such as Atlas's communications regarding Series 30, as well as all documents relating to the production volumes of Series 30, the financial value of Series 30, and Series 30 reserves.

Atlas produced thousands of pages of documents, but no detailed documents supporting the reserve values of the Series 30 wells. Atlas's attorneys allegedly told Yue that reserve-related information was contained in a software system called "OGRE."

In response to Yue's further discovery requests in April 2016, Atlas continued to assert that proved reserve calculations were performed with the OGRE software and Atlas did not know of any responsive documents. In an interrogatory response, Atlas stated: "The ATLAS 2011 PROVED RESERVE NUMBERS were calculated by inputting raw data into software developed and licensed by Oil and Gas Reserve Evaluation Systems, Inc. ("OGRE"). Atlas is not aware of any DOCUMENTS containing 'calculations' related to the ATLAS 2011 PROVED RESERVE NUMBERS, other than the 'Reserves and Economics' report (bates labeled ATL000598)." The Reserves and Economics report was a one-page document without information as to individual wells; however, Atlas's interrogatory response further explained that the report

"is the summary report *produced by OGRE/Wright & Co.* and *relied on by Atlas* when drafting 2011 NOTE 9." (Italics added.)

Atlas made clear elsewhere that the reserve calculations were prepared by or with the assistance of Wright & Company, Inc. Its April 2016 response to Yue's Special Interrogatory No. 3 stated that the proved reserve calculation in the 2011 Annual Report "was generated by a number of independent, third-party reserve engineers and support staff employed by Wright & Company Inc.," providing the company's address, phone number, and fax number.

Atlas later produced to Yue a spreadsheet listing the proved reserve value of each of the 115 wells as of December 31, 2011. Each row of the spreadsheet provided the summary reserve information for a particular well, totaling $14,392,300. After Yue sought discovery of documents supporting each individual well's value, Atlas produced an email dated October 17, 2011, with an attachment setting forth details for certain wells.

In February 2017, Yue took Atlas's deposition. Atlas's first representative, Trevor Mallernee, confirmed that Atlas contracted Wright & Company, Inc. (Wright) to perform a reserve analysis for Series 30. According to Mallernee, Atlas uploaded data files to a shared site, notified Wright to download the files, and communicated with Wright by phone and email.

Atlas's second representative for deposition, Mike Downs (Atlas's vice-president of operations), testified that Atlas received emails from Wright regarding the wells, with attachments like the one accompanying the October 17, 2011 email. Downs testified that such emails were provided to Yue in discovery to the extent they were still available, but Atlas would no longer have other such documents because of Atlas's two-year email retention policy. Under that policy, Downs explained, documents on the e-mail server were "wiped" (destroyed) after two years, and he did not believe Atlas had a back-up for the email server for the period. (Atlas's counsel later confirmed that no backup existed, and the data files Atlas shared with Wright were no longer available.)

In April 2018, Yue filed a motion for sanctions against Atlas for spoliation of evidence, claiming that Atlas destroyed documents that would have provided material information. Specifically, Yue claimed, emails and attachments predating Yue's November 2011 decision to invest in Series 30 would have shown what Atlas then knew about production levels and reserves for the individual wells included in Series 30. Yue sought terminating sanctions or, in the alternative, "an adverse inference ruling against Atlas to hold that Atlas knew that the proved reserve of Series 30 was only $14 million prior to Plaintiff's investing in Series 30."

Atlas opposed the motion and provided a declaration from its Director of Information Technologies, Richard T. Norton, attaching Atlas's Electronic Email Retention Policy (EERP) as an exhibit. The EERP document was dated December 15, 2015 and had a revision date of January 1, 2016, but stated that the retention policy was instituted on July 31, 2014. As averred in Norton's Declaration and stated in the EERP, emails three years or older were to be automatically purged on a rolling basis between August 1, 2014 and December 31, 2014, and emails two years or older were to be automatically purged on a rolling basis beginning January 1, 2015.

The court denied Yue's sanctions motion, finding that Yue presented "no evidence that, when Atlas instituted this policy in August 2014, it was motivated to do so by a threat to sue that Plaintiff had made in a letter from April 2013 on which he does not contend that he had followed up in any way of which Atlas was aware in the ensuing 15 months (a letter, moreover, written by a disgruntled individual investor on his own behalf, and not by litigation counsel retained by such an investor in anticipation of an imminent lawsuit)."

2. Law

Destroying evidence in response to a discovery request after litigation has commenced is a violation of the Discovery Act. There is no indication here, however, that Atlas destroyed any responsive Series 30 documents after litigation began in April 2015, let alone after an inspection demand was served in August 2015.

Destruction of evidence *in anticipation of* a discovery request may also constitute a misuse of the discovery process or otherwise give rise to sanctions. (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 (*Williams*) [spoliation includes the destruction of evidence or failure to preserve evidence in pending or future litigation]; *Reeves v. MV Transportation, Inc*. (2010) 186 Cal.App.4th 666, 681 (*Reeves*) [spoliation includes the destruction of evidence in pending or reasonably foreseeable litigation].) We therefore consider whether Atlas destroyed emails and attachments pertaining to Series 30 reserves in anticipation of a discovery request in future litigation and, if so, what sanctions might be appropriate. We review the trial court's ruling for an abuse of discretion. (*Williams, supra,* 167 Cal.App.4th at p. 1224.)[1]

3. Obligation to Preserve the Documents

The threshold inquiry is whether, at the time Atlas purportedly destroyed the documents pursuant to its document-retention policy, it had the obligation to preserve them. (*Reeves, supra,* 186 Cal.App.4th at p. 681.) That obligation arises if litigation was pending or reasonably foreseeable. (*Ibid*.)

Atlas began implementing its document retention policy in August 2014, and by January 2015 would have destroyed any emails dated January 2013 or earlier; by January 2015 at the latest, therefore, emails and attachments related to the Series 30 production and reserves before Yue's November 2011 investment would have been destroyed.

Substantial evidence supports the court's conclusion that Atlas had no obligation to preserve the documents as of the time it instituted its retention policy in August 2014, let alone by the time the documents were destroyed in or around January 2015. Yue had

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[1] Yue's reliance on cases decided under federal law and Nevada law is misplaced, because California law applies here. Moreover, a Nevada case he cites for the proposition that evidence is "willfully" destroyed even if purged pursuant to an established company policy—*Bass-Davis v. Davis* (Nev. 2005) 117 P.3d 207, 209—was withdrawn by the Nevada court. (*Bass-Davis v. Davis* (Nev. 2005) 133 P.3d 251.) A substituted en banc opinion holds contrary to Yue's argument. (*Bass-Davis v. Davis* (Nev. 2006) 134 P.3d 103, 106–108 ["Other courts have determined that willful or intentional spoliation of evidence requires the intent to harm another party through the destruction and not simply the intent to destroy evidence. We agree."].)

not filed his lawsuit by those dates, and the evidence does not suggest that Yue's lawsuit was reasonably foreseeable.

In this regard, Yue argues that assuming the retention policy was established in August 2014, it was instituted after he accused Atlas of fraud in November 2012, after he sent Atlas a letter accusing it of nondisclosure of production data and proven reserve data in March 2013, after Atlas's chief legal officer responded to his letter, and after Yue told Atlas that its nondisclosure would be the basis of a lawsuit.

Yue's purported November 2012 accusation of fraud was an email he sent to Jiang at MetLife and Rebecca Hood at Atlas, in which he complained about his monthly return but stated he did not "want to make open accusations right now." Yue's March 2013 letter to Hood requested the return of his investment on the ground it was induced by misrepresentation or non-disclosure of material facts, including production data and proven reserve data, and noted the "advertised 12% per annum return for seven years." In April 2013, Atlas declined to return his investment but replied to Yue's concerns, drawing Yue's attention to the PPM and noting that Atlas did not provide investment advice, the subscription agreement that Yue signed had disclosed the investment's high degree of risk, the partnership did not advertise a 12 percent per annum return, and the managing general partner's subordination was not a guarantee of Yue's return. In April 2013, Yue wrote to Atlas, stating that Atlas's letter had not explained the "non-disclosure of the available production data," and "[s]uch material non-disclosure will be the [basis] of a fraud action against [your] company and affiliates in a court of law." As the trial court observed, however, this letter was not sent by counsel. And after sending this letter in April 2013, Yue did not follow up with Atlas or take any legal action during the 16 months between his letter and Atlas's implementation of the email destruction policy.

From this evidence, it was reasonable for the court to conclude that Atlas had not enacted its August 2014 retention policy for the purpose of destroying emails germane to Yue's case. After all, the initial retention period was three years—meaning emails dating back to August 2011 were *not* initially purged as part of the EERP; that would make no sense if Atlas had wanted to destroy the evidence relating to Yue's threatened claims.[2]

Moreover, the record supports the court's conclusion that Yue's April 2013 letter did not obligate Atlas to preserve potential evidence relating to Series 30 as of the time any responsive documents were actually destroyed. By January 2015, *20 months had passed* since Yue's April 2013 threat to file a lawsuit, and most claims based on 2011 representations would have been time-barred. Under those circumstances, Yue's April 2015 lawsuit was not reasonably foreseeable when the documents were purportedly destroyed in January 2015.[3]

4. No Basis for Terminating Sanction

Even if Yue had established spoliation, he failed to establish entitlement to a terminating sanction. A terminating sanction is generally available under the Discovery Act only if the destruction (non-production) of documents is in violation of a court order. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1423–1424 (*New Albertsons*).) Otherwise, terminating sanctions may be imposed only in egregious cases of intentional spoliation or where it is reasonably clear a party would violate a production order. (*Id*. at pp. 1424–1426; *Williams, supra,* 167 Cal.App.4th at p. 1223.) Here, Yue

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[2] Yue argues that, since the lawsuit was filed in April 2015 and the EERP bears a footer with the date "12/15/2015," Atlas must have established the retention policy in December 2015 with the knowledge of impending legal action and "the unabashed purpose of defeating legal discovery." However, both Norton's Declaration (to which only now Yue belatedly objects) and the EERP stated that the retention policy was instituted back in *August 2014*. Yue also emphasizes that one of the stated purposes of the EERP was to "mitigate risk to the company during legal discovery actions." Assuming this was a motive behind Atlas's document retention policy, the threshold question is still whether documents were destroyed when they should have been preserved. The evidence supports the court's conclusion on this point, so Atlas's motive is immaterial.

[3] Atlas did not issue a litigation hold until August 2015, four months *after* the lawsuit was filed in April 2015. While this is concerning, emails purged pursuant to the retention policy during that period would have been from April 2013 through August 2013. As the trial court found, there was no reason to believe that those documents were relevant to Atlas's knowledge in November 2011 concerning Series 30 production or reserves, or reasonably calculated to lead to the discovery of such evidence. No relief is available for purported spoliation if the absence of the evidence was not prejudicial. (*Williams, supra*, 167 Cal.App.4th at p. 1227.)

never obtained an order compelling Atlas to produce the e-mails, and there was no indication that Atlas was refusing to comply with the court's orders. The question is therefore whether Atlas perpetrated an egregious case of intentional spoliation.

Ample evidence supported the conclusion that the purported destruction of emails and attachments was not sufficiently egregious to justify terminating sanctions. In the first place, the destruction of the documents was performed pursuant to a document retention policy in the ordinary course of business. Moreover, Atlas's discovery responses pointed to Wright as a potential alternative source of the documents Yue sought, but Yue never pursued Wright for the documents. Atlas's 2011 Annual Report, which Yue received in the spring of 2012, notified him that Series 30 "retained Wright & Company . . . to prepare a report of proved reserves" for the period ending December 31, 2011. Atlas's April 2016 response to special interrogatories informed Yue that the proved reserve calculation in the annual report was generated by Wright employees, told Yue that the summary report was produced by Wright, and gave Yue Wright's contact information. In Atlas's deposition in February 2018, Mallernee confirmed that Atlas contracted Wright to perform reserve analysis for Series 30. Even with all this information, and receiving the EERP two months before the close of discovery, Yue did not seek discovery from Wright.

Yue contends terminating sanctions would have been proper as they were in *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967. There, the defendant's flagrant discovery misconduct included failing to produce relevant and responsive evidence despite repeated court *orders*, to the severe prejudice of the opposing party, and lesser sanctions had not deterred the defendant's antics. (*Id*. at pp. 993–996.) Those circumstances are not present here.[4]

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[4] As an alternative to terminating sanctions, Yue's motion requested "an adverse inference ruling against Atlas to hold that Atlas knew that the proved reserve of Series 30 was only $14 million prior to Plaintiff's investing in Series 30." This is essentially an issue or evidence sanction. For the reasons Yue fails to establish the propriety of a terminating sanction, he also fails to show that an issue or evidence sanction would have been appropriate.

5. Yue Received an Adverse Inference Instruction

Aside from remedies under the Discovery Act, evidence of spoliation may warrant an instruction that the jury may draw an adverse inference from the intentional destruction of documents. CACI No. 204 informs the jury: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."

Despite Yue's failure to prove spoliation, he still received the benefit of the CACI No. 204 instruction.

After the court denied Yue's sanctions motion, Yue proceeded to trial on the continued theory that Atlas intentionally destroyed reserve and production data related to Series 30 wells. Yue proposed jury instructions on Willful Spoliation of Evidence (CACI No. 204) and Failure to Explain or Deny Evidence (CACI No. 205). The court revised CACI No. 204, without objection from Yue, and instructed the jury as follows: "Mr. Yue contends that Atlas Resources intentionally concealed or destroyed e-mails in order to make them unavailable for use in this litigation. [¶] Atlas Resources contends that if any e-mails were unavailable in this litigation, it is because they had been discarded in the ordinary course of business pursuant to its e-mail retention policy. [¶] If you decide that Atlas Resources intentionally concealed or destroyed e-mails in order to make them unavailable for use in this litigation, you may decide that the e-mails would have been unfavorable to Atlas Resources. [¶] However, if you decide Atlas Resources merely discarded e-mails in the ordinary course of business pursuant to its e-mail retention policy, then you may not draw any inference from that fact as to whether the e-mails would have been unfavorable to Atlas Resources." The court also instructed the jury pursuant to CACI No. 205, as Yue requested. In light of these jury instructions, Yue fails to establish prejudice from Atlas's purported spoliation of evidence.

D. Exclusion of EERP Document

After the parties had each rested their cases, Yue asked the court to admit Atlas's EERP document into evidence. The court denied his request. Yue contends this was error, claiming he had no chance to introduce the EERP document through Atlas because

Atlas decided not to call its president as a witness, and other Atlas witnesses were beyond the court's subpoena power.

Yue fails to establish an abuse of discretion. He does not demonstrate that he laid a proper foundation for admission of the EERP document—let alone move it into evidence—before the parties had rested their case. Nor does he establish that he needed testimony from Atlas employees to lay that foundation. And finally, he does not explain how the exclusion of the EERP document was prejudicial, in light of his opportunity to present other evidence and argument to the jury about Atlas's email retention policy and destruction of documents.

E. Nonsuit as to Yue's Claim for Breach of a Pre-Investment Fiduciary Duty

A nonsuit is proper where the plaintiff failed to present substantial evidence from which a jury might reasonably find in the plaintiff's favor. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 (*Nally*).) In making this determination, the court accepts as true the evidence most favorable to the plaintiff and disregards any conflicting evidence. (*Ibid.*)

After Yue rested his case, Atlas moved for nonsuit on his fiduciary duty claim, contending he failed to introduce sufficient evidence that Atlas owed him a fiduciary duty before he invested in Series 30, what that duty was, or how Atlas breached it. In response, Yue argued that Atlas owed him a pre-investment fiduciary duty because it was the "promoter" of the Series 30 partnership, relying on a statement in *Eisenbaum v. Western Energy Resources, Inc*. (1990) 218 Cal.App.3d 314, 321 (*Eisenbaum*) that a "promoter or insider or seller of a limited partnership interest owes a fiduciary duty to the prospective purchaser of such interest." The court granted Atlas's motion for nonsuit on "the breach of fiduciary duty cause of action" to the extent it was premised on a "pre-investment obligation." The record supports the court's ruling.

1. Fiduciary Duty

A claim for breach of fiduciary duty cannot survive unless, of course, the defendant owed a fiduciary duty to the plaintiff. Here, Yue argues that Atlas owed a pre-investment fiduciary duty to Yue under *Eisenbaum* as a prospective purchaser of Series

30 interests, because Atlas was the Series 30's promoter in that it founded and organized the Series 30 partnership and was its managing general partner.

Yue's argument is unavailing. In the first place, he fails to support his argument with record citations for his factual assertions. On that basis, his argument is waived.

In addition, Yue fails to demonstrate that *Eisenbaum* applies to the matter at hand. The court in *Eisenbaum* addressed whether the holding in *Sherman v. Lloyd* (1986) 181 Cal.App.3d 693 (*Sherman*) delayed the accrual of the plaintiff's statutory cause of action for rescission. (*Eisenbaum*, *supra,* 218 Cal.App.3d at pp. 322–324.) Assuming that delayed accrual required a fiduciary duty between the plaintiff (prospective buyer) and the defendant (promoter of the partnership, who made the misrepresentations), the court examined whether the facts in that case warranted a finding of a fiduciary relationship. (*Id*. at p. 321.) In concluding the evidence was sufficient, the court noted that "[a] promoter or insider, or a seller of a limited partnership interest, owes a fiduciary duty to the prospective purchaser of such an interest." (*Id*. at p. 322.)

Yue, however, did not introduce evidence from which the jury could reasonably conclude that Atlas *was* a promoter of the Series 30 partnership, such that a fiduciary duty arose. Although in *Eisenbaum* the managing general partner of the partnership was found to be a promoter under the facts of that case, *Eisenbaum* did not hold that all managing general partners are necessarily promoters. Indeed, the facts in *Eisenbaum* are distinctly different from the facts here. In *Eisenbaum*, the president of the managing general partner had *directly* solicited the plaintiff to invest in the partnership in several telephone conversations. (*Eisenbaum*, *supra*, 218 Cal.App.3d at p. 319.) But here, Yue learned about Series 30 not from Atlas, but from his friend and long-time investment advisor—Jiang—who was affiliated with MetLife and was not an Atlas corporate insider. Before investing in Series 30, Yue and Jiang had several conversations and exchanged e-mails about the Series 30 investment opportunity. Yue admittedly relied upon Jiang's (and MetLife's) recommendation to invest in Series 30 and Jiang's alleged representations regarding the Series 30 returns in deciding to invest in Series 30. Yue never spoke to any officer, director, employee, or any "insider" at Atlas before investing

in Series 30; he asked no questions of Atlas before investing in Series 30; and he requested no production or "proved reserve" information from Atlas before investing in Series 30. As the trial court observed, MetLife, not Atlas, was the promoter of Series 30.

In his appeal, Yue now relies on the following definition of "promoter" in Black's Law Dictionary: "A founder or organizer of a corporation or business venture; one who takes the entrepreneurial initiative in founding or organizing a business or enterprise . . . ." (Citing Black's Law Dict. (9th ed. 2009) p.1333).) He also tells us that the word "promoter" in securities law is defined to include "[a]ny person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer." (17 C.F.R. § 230.405.) However, Yue did not make this argument to the trial court in opposition to the nonsuit motion. He cannot establish that the court erred based on an argument he never made.

Because Yue failed to present evidence that Atlas was a promoter, he failed to establish that Atlas owed him a fiduciary duty under *Eisenbaum*.

2. Scope of Fiduciary Duty

Even if Atlas owed Yue a pre-investment fiduciary duty, Yue failed to offer evidence or argument that the scope of this duty encompassed the disclosure of reserve data or production data. Neither *Eisenbaum* nor *Sherman* held that a promoter had a fiduciary duty to disclose specific "proved reserve" or production data to prospective investors. Yue did not present evidence showing how managing general partners (or promoters) in the oil and gas exploration industry acted or would have acted under the same or similar circumstances. He presented no evidence of how Atlas acted under the same or similar circumstances regarding prior or subsequent oil and gas partnerships. And he presented no expert witness testimony regarding the nature or scope of Atlas's alleged duty to disclose to prospective investors either preliminary production volumes or proved reserves, when Atlas would have to disclose that information, why the information would be material, or how the disclosure should have been made.

3. Breach

Because Yue failed to demonstrate the scope of Atlas's duty, he necessarily failed to demonstrate that such a duty was breached. Moreover, even if Atlas had a duty to disclose proved reserve and production data, Yue failed to produce evidence that Atlas had such information yet failed to disclose it.

In fact, Yue's "pre-investment" breach of fiduciary duty claim rested on the same purported misconduct underlying his fraud by concealment claim. Because the jury found on his concealment claim that Atlas had not intentionally failed to disclose a fact Yue did not know and could not have discovered through reasonable diligence, Yue fails to demonstrate how he would have prevailed on his breach of fiduciary duty claim.

F. Yue's Motion to Disqualify Atlas's Attorneys

Both Atlas and MetLife were represented in this litigation by Maynard Cooper. After MetLife had entered into a settlement with Yue and a good faith settlement motion was pending, Maynard Cooper served a motion in limine on Atlas's behalf, indicating an intent to use a MetLife confidential internal disciplinary letter against Jiang at trial. Maynard Cooper also proposed, on Atlas's behalf, jury instructions to the effect that Atlas was not responsible for Yue's harm because of the misconduct of MetLife or Jiang.

Yue sought an order disqualifying Maynard Cooper from the case or, alternatively, prohibiting Maynard Cooper from acting adversely to MetLife and Jiang. After a hearing, the court denied Yue's motion on the ground that he lacked standing to challenge the representation, Maynard Cooper had no conflict of interest cross-examining Jiang because it never represented him in his individual capacity, and MetLife was not exposed to liability because the court had granted MetLife's motion for a good faith settlement determination.

We review an order denying a disqualification motion for an abuse of discretion. (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 585.)

1. Lack of Standing

Before seeking disqualification of another party's attorney, the moving party must establish standing—the invasion of a legally cognizable interest. (*Great Lakes Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1356–1357 (*Burman*).)

Typically, the moving party satisfies this obligation by showing a current or prior attorney-client relationship with the attorney targeted for disqualification. (e.g., *Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 352 (*Dino*).) Outside of the attorney-client relationship, standing may be present if the attorney whose disqualification is sought owes the moving party a duty of confidentiality and the disqualification motion is based on an actual or potential disclosure of confidential information. (*DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 832 (*DCH*); *Dino, supra,* 145 Cal.App.4th at p. 353.) In this regard, however, "a lawyer owes no general duty of confidentiality to nonclients." (*DCH, supra*, at p. 832.) More broadly, a nonclient may have standing to bring a disqualification motion based on the attorney's ethical violation, if the violation is manifest, glaring, and impacts the moving party's interest in a just and lawful determination of his or her claims. (*Burman, supra*, 186 Cal.App.4th at p. 1357.)

Yue's motion to disqualify Atlas's attorneys did not allege any attorney-client, confidential, or fiduciary relationship between Yue and Maynard Cooper. Instead, he based his motion on duties of loyalty and confidentiality Maynard Cooper purportedly owed to MetLife or Jiang. And as discussed *post*, he failed to establish that Maynard Cooper perpetrated a manifest and glaring breach of those duties that threatened to deprive Yue of a fair trial. The court correctly concluded that Yue lacked standing.

Yue points us to *Kevlik v. Goldstein* (1st Cir. 1984) 724 F.2d 844, in which the court held that a party has standing to disqualify opposing counsel because "[t]he Model Code of Professional Responsibility, DR 1-103(A) clearly requires that an attorney come forward if he has knowledge of an actual or potential violation of a Disciplinary Rule." (*Id*. at p. 847.) Here in California, however, the California Rules of Professional Conduct do not require an attorney to report another attorney's misconduct.

In his reply brief, Yue argues that he has standing based on *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1204. There, in a child custody dispute between a mother and father, the court granted the mother's motion to disqualify the child's paternal grandfather from representing the child's father. The mother had standing even though she had not been a client of the grandfather's law firm, because the attorney's continued

representation threatened an opposing litigant with cognizable injury and could undermine the integrity of the judicial process. (*Id*. at p. 1205.) Specifically, disqualification was appropriate because (1) the paternal grandfather might have acquired confidential facts about the mother and her family's situation, since his firm had represented the maternal grandfather in his own custody dispute, in which the mother had filed a declaration; and (2) the paternal grandfather would be a percipient witness in the dispute. (*Id*. at pp. 1205–1211.) Here, Yue does not show that confidential facts were acquired about Yue or that Maynard Cooper was going to be a material witness.

Yue also argues he has standing because "defense counsel was about to betray MetLife and Jiang to exonerate Atlas," so Yue was going to be "deprived of a fair trial." He does not explain how the trial was going to be unfair, and there is no indication that it was. Although Maynard Cooper impeached Jiang at trial with the confidential warning letter from MetLife, Yue was aware of the letter, since MetLife had produced it to Yue in discovery, and Yue marked it as an exhibit to his deposition of MetLife. Maynard Cooper's use of the disciplinary letter did not disclose any attorney-client communications and was consistent with the court's protective order regarding the use of documents produced in discovery.

Yue complains that Atlas's attorney elicited from him on cross-examination that he previously accused MetLife of wrongdoing based on confidential information provided in discovery. However, the questions were in line with the court's rulings about Atlas's use of Yue's verified pleadings and sworn declarations. Yue also argues that Maynard Cooper assigned blame in closing argument to MetLife and Jiang, convinced the court to instruct the jury that it could find Yue "was harmed by Yuda Jiang and/or MetLife's breach of fiduciary duty to use reasonable care," obtained a jury instruction that Atlas claimed "the negligence of Yuda Jiang and/or MetLife contributed to Mr. Yue's harm," and included three special interrogatories in the verdict form asking whether liability should be assigned to MetLife and Jiang. Yue, however, did not object to the court's proposed special verdict form. Moreover, none of these things prejudiced Yue, since the jury did not apportion responsibility to MetLife or Jiang.

2. No Proven Ethical Violation or Basis for Disqualification

Yue does not identify any specific ethical rule that Maynard Cooper violated. Nor did Yue produce any evidence that Maynard Cooper represented Jiang in his individual capacity. Although Maynard Cooper did represent MetLife in this litigation, Yue did not present any evidence that Maynard Cooper failed to comply with the applicable ethical rules, such as, for example, obtaining MetLife's informed written consent. As the trial court observed, Yue was not privy to the communications between Maynard Cooper, MetLife, and Atlas, and conflict waivers "happen[] all the time" in the context of joint representation. Indeed, Yue's co-counsel assumed Maynard Cooper had obtained conflicts waivers from Atlas and MetLife.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

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PROOF OF SERVICE

I am over 18 years of age and not a party to the within legal action. I am a resident of or employed in the county where the mailing took place. My business address is: PO BOX 277084, SACRAMENTO, CA 95827 (SOLANO COUNTY #39411).

On January 17, 2020, I served true copies of the foregoing document(s) described as:

PETITION FOR REVIEW

(AFTER A DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION FIVE, **A154921**)

on the following by mail:

1. CLERK OF THE COURT
   FIRST APPELLATE DISTRICT, DIV. 5
   CASE NO. A154921
   350 McAllister Street
   San Francisco, CA 94102

2. CLERK OF THE SUPERIOR COURT
   FOR DELIVERY TO HON. JULIA SPAIN
   24405 AMADOR STREET
   HAYWARD, CA 94544

I mailed a copy of the document(s) identified above as follows: I enclosed a copy of the document identified above in an envelope and deposited the sealed envelope with the U.S. Postal Service, with postage fully paid.

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

Dated: January 17, 2020

Maurice Robinson
MAURICE ROBINSON