COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

THIRD DIVISION

BASTEL WARDAK (an individual), Plaintiff-Appellant, Vs. WLOW PARTNERS, LLC (formed under California law); DWAINE K. DIRKS (an individual); and WEISS OMAR (an individual), Defendants-Appellees. RELATED CROSS-APPEAL	Appellate Case No. G061606 **APPELLANT'S OPENING BRIEF**

CALIFORNIA SUPERIOR COURT, ORANGE COUNTY
CASE NO. 30-2015-00811563-CU-OR-CXC

Presiding Judge at Trial: The Hon. Randall J. Sherman

Preceding Judges in Pre-Trial Proceedings:
The Hons. Sheila Fell; Vikki L. Vander Woude; and Thierry Colaw

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COURT OF APPEAL FOURTH **APPELLATE DISTRICT, DIVISION** Three

COURT OF APPEAL CASE NUMBER: G061606

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SUPERIOR COURT CASE NUMBER: 30-2015-00811563

APPELLANT/ PETITIONER: Bastel Wardak

RESPONDENT/ REAL PARTY IN INTEREST: Dwaine K. Dirks; WLOW Partners, LLC; Weiss Omar

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name*): Bastel Wardak

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 6, 2022

William Markham
(TYPE OR PRINT NAME)

William Markham
(SIGNATURE OF APPELLANT OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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TABLE OF CONTENTS

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Note: the link in each case title directs the reader to the case in the Westlaw online library.

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Plaintiff-Appellant, Bastel Wardak ("Wardak"), brings this appeal from a final judgment rendered below by the California Superior Court for Orange County (the "Superior Court"). This case concerns the parties' disagreements over their development of a parcel of real property in Orange County, California. It was tried below first by a jury, then by a judge in a short-cause, bifurcated bench trial.

The jury rendered special verdicts in favor of Wardak on all claims. By these verdicts, the jury determined that Defendants-Respondents Dwaine K. Dirks ("Dirks") and Weiss Omar ("Omar") must be deemed liable on Wardak's derivative claims, which he brought on behalf of nominal Defendant-Respondent WLOW Partners LLC ("WLOW"). The jury further determined that Omar must be held liable on Wardak's direct claims. The jury also returned predicate findings of punitive liability against Dirks and Omar and imposed punitive awards against both of them. (5AA 825-832.)

The jury's first special verdict was its answer to the central question in the case: was Dirks authorized under the parties' operative contact to dissolve the parties' company, WLOW, and take sole ownership of its assets? That question in turn depended on whether Wardak could be properly deemed in default under a joint-funding clause in the parties' operative contract. The jury's answer was "no." (5AA 825.)

Under this joint-funding clause, Wardak and Omar were each required to provide one-half of specified funding to WLOW

by a date certain. Wardak tendered his share of the funding, but Omar failed to do so. Wardak then tendered *Omar's* share of the funding, but Dirks refused it, asserting that Wardak could not perform the funding obligation because Omar had failed to provide one-half share of the funding. (*See* pp. 23-31, *infra*.)

According to Dirks, if either of them failed to perform, then neither could do so, but both must be deemed in breach of the joint-funding obligation. Dirks thus asserted that Omar's failure to fund meant that Wardak had breached the funding obligation and therefore the parties' operative contract, notwithstanding Wardak's tender of his own share of the funding and then Omar's share too. (*See* p. 44, *infra*.)

On this basis, Dirks invoked the contract's forfeiture provisions, which *inter alia* authorized him to (1) take 100% ownership of WLOW and its assets without paying compensation to Wardak or Omar; and (2) convert their secured, interest-bearing loan to WLOW into an interest-free, lowest-priority obligation payable only three years later. (*See* pp. 30-31, *infra*.)

Afterwards, Dirks had WLOW transfer all of its assets to a new company, Defendant LJS Placentia LLC ("LJS Placentia"), which *he and Omar* owned and controlled, and which they used to complete the very property development that WLOW was supposed to perform. Dirks and Omar then had LJS Placentia sell the property in question for more than $5 million and split between themselves the *net* proceeds in excess of $2.2 million, sharing nothing with Wardak. (*See* pp. 33-35, *infra*.)

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Wardak thus lost his 25% share of the profits generated by this venture and even lost a substantial part of his original principal by a related, fraudulent escrow payoff scheme orchestrated by Dirks and Omar. (*See* pp. 31-35, *infra*.)

The jury was specifically asked to decide whether Wardak had breached the parties' contract. Its answer was "no." (5AA 828). The jury was also asked to decide whether Dirks was authorized to invoke the contract's forfeiture provisions and thereby take 100% ownership of WLOW and its assets, which included the subject property that was later sold for more than $5 million. Its answer was likewise "no." (5AA 825.)

The jury further found that Dirks was liable to WLOW for three derivative torts: breach of fiduciary duty; intentional misrepresentation, and negligent misrepresentation. (5AA 826.) The jury also found that Omar had breached the parties' agreement and must pay derivative damages to WLOW, as well as direct damages to Wardak. (5AA 827-828.) It also imposed punitive damages against both Dirks and Omar after finding that both had acted with malice, oppression or fraud. (5AA 830-831.)

Throughout, Dirks insisted that Omar's failure to perform the joint-funding clause meant that both Omar and Wardak were in breach of the parties' operative contract, and that in consequence Dirks was authorized to invoke the contract's forfeiture provisions and thereby become the sole owner of WLOW and its assets. (3RT 560:23 – 561:2; 5AA 907:8-11.)

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According to Dirks, the joint-funding clause was an "all-or-nothing" provision, and Omar's breach of it was dispositive of this issue, no matter what steps Wardak took or attempted to take to cure Omar's breach. (3RT 560:23 – 561:2; 5AA 907:8-11.)

In contrast, Wardak argued that the joint-funding clause only obliged him to provide his own-half of the joint funding and was premised on the specific understanding that he and Omar each had the necessary funds in hand and would tender them at the same time. 1RT 148:23 – 149:3; 2RT 289:2-9, 289:26 – 290:22. The evidence showed that Wardak not only met this obligation (or attempted to do so), but also attempted in vain to furnish Omar's required part of the funding after Omar defaulted. (7AA 1173, 1182-1187, 1RT 163:7 – 166:4.)

On this very point, the Superior Court denied Dirks' demurrers and motion for summary judgment, twice ruling that it could not adopt either party's interpretation of the joint-funding clause as a matter of law. Rather, there was conflicting evidence as to its proper interpretation, so that the disputed meaning of the joint-funding clause was a disputed issue of material fact, which must be decided by the jury at trial. (2AA 262; 4AA 634-635.)

The jury then decided this issue in Wardak's favor. (5AA 825.) Then the Superior Court reversed the jury's finding by a grant of judgment notwithstanding the verdict ("JNOV"), finding as a matter of law that Dirks was authorized to invoke the contract's forfeiture provisions and take 100% ownership of WLOW and its assets. The Superior Court reasoned that *Omar*

had breached his funding obligation under the joint-funding clause, and that Dirks could therefore invoke the contract's forfeiture provisions against *Wardak* without regard to what Wardak did or offered to do. (6AA 1087.) When so ruling, the Superior Court disregarded evidence in the record and apparently construed other evidence in the light most favorable to Dirks. (*Id*.)

On this basis alone, the Superior Court granted JNOV to Dirks on Wardak's claim for breach of fiduciary duty. (6AA 1126.) That was the last of the jury's verdicts that held Dirks liable for a legal wrong, and the Superior Court therefore absolved Dirks of liability for compensatory and punitive damages. (6AA 1126-1127.)

During trial, the Superior Court nonsuited Wardak's claims against Dirks for intentional and negligent misrepresentation, but allowed the jury to render special verdicts on them to avert a re-trial if its ruling were reversed on appeal. The jury found for Wardak on these claims (5AA 826), but these verdicts never took effect (6AA 1126).

The Superior Court also granted JNOV to Omar on the issue of punitive damages, finding a lack of clear and convincing evidence to support the jury's predicate finding that Omar had acted with malice, oppression or fraud and must therefore pay punitive damages to Wardak. (6AA 1088, 1127.)

These rulings were erroneous: substantial evidence supported each of the jury verdicts that the Superior Court disallowed, and clear and compelling evidence supported the

jury's predicate finding of Omar's liability for punitive damages. (*See* pp. 19-35, 55-61, 67*, infra.*)

Notably, the Superior Court did *not* find that Wardak had failed at trial to present substantial evidence in support of his own interpretation of the joint-funding clause. It merely decided without explanation to adopt Dirks' interpretation after the jury had reached the opposite conclusion on the basis of substantial evidence. (6AA 1087.)

That was reversible error.

In addition, the contractual interpretation that the Superior Court adopted at Dirks' urging is contrary to law on two grounds. First, penalty provisions in a contract are invalid and cannot be enforced. Second, a party to a contract cannot prevent a counterparty's performance, then complain that the counterparty has failed to perform. (*See* pp. 61-64*, infra.*)

Here, Dirks and Omar prevented Wardak from performing the parties' operative contract, then invoked this circumstance to justify imposing unconscionable contractual penalties against him to accomplish an unjust enrichment. (*See* pp. 30-31, *infra.*) The Superior Court erroneously adopted a contractual interpretation that justifies this conduct and absolves Dirks of any liability for the legal wrongs that he committed by so acting.

Lastly, the Superior Court wrongly awarded Dirks prejudgment interest on his share of WLOW's damage award, even though Dirks never moved for such an award or argued for one in a bench memorandum on the form of the judgment,

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nor did he have any cause to request or receive prejudgment interest. (*See* pp. 69-71, *infra*.)

In this case, the ancient maxim on juries held true: a jury usually reaches the right findings in the one case before it. The jury's special verdicts disallowed by the Superior Court are easily supported by substantial evidence and should be given effect. In addition, the Superior Court's preferred interpretation of the disputed contractual provision is contrary to law.

Wardak therefore brings this appeal, which this Court should grant for the reasons stated fully below. Specifically, this Court should reverse the Superior Court's setting aside of the jury's special verdict nos. 1-5, 22, and 24, modify the judgment accordingly, strike its award of prejudgment interest to Dirks, and remand the case for a simple re-trial of the amount of punitive damages that Dirks and Omar must each pay.

STATEMENT OF APPEALABILITY

Wardak appeals from the Superior Court's amended final judgment, which incorporates its rulings on the above points. (6AA 1121-1129.) His appeal is therefore authorized under Code of Civil Procedure section 904.1(a)(1).

STANDARD OF REVIEW

By this appeal, Wardak challenges the Superior Court's grants of nonsuit and JNOV to Dirks, which can be made only in accordance with the following well-established principles:

> The trial judge's power to grant a judgment notwithstanding the verdict is identical to his power to grant a directed verdict. The trial judge cannot weigh the evidence, or judge the

> credibility of witnesses. If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.

Hauter v. Zogarts (1975) 14 Cal.3d 104, 110 (numerous internal citations omitted.)

On appeal, the standard is the same. *See Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 313–314 ("As in the trial court, the standard of review on appeal is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion. (....) When an appellate court reviews an order granting JNOV, it will resolve any conflict in the evidence and draw all reasonable inferences therefrom in favor of the jury's verdict.").

STATEMENT OF THE FACTS

Since Wardak's present appeal challenges the Superior Court's setting aside of jury verdicts in his favor, he now sets forth in detail the specific facts reasonably established by the evidence that support the verdicts in question. These facts are numbered for subsequent ease of reference.

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1. **The Parties' Original Agreement (the MOU)**. This case concerns a property development in Orange County, California that the parties first undertook in 2013. (2AA 265-294.)

2. By a contract entitled "Memorandum of Understanding" (hereafter, "MOU"), Dirks, Omar, and Wardak agreed in mid-2013 to form and co-own a company, WLOW, whose only purpose would be to own, redevelop, and sell a partly developed, abandoned property in poor condition that was located at 738 West La Jolla Avenue, Placentia, California (the "Property"). (7AA 1138-1141; 1RT 82:24 – 85:21; 3RT 496:4-18.)

3. Their essential plan was to redevelop the Property as a residential apartment complex, rent its units, then sell it for a profit at an opportune time. (7AA 1138, 1141; 1RT 89:6 – 90:16; 3RT 452:25 – 453:1, 497:17-23.)

4. All three men would be members of WLOW. (7AA 1141; 3RT 506:25 – 507:4, 507:14-20.) Dirks would own 50% of the company and act as its manager, while Omar and Wardak would each own 25% of it and act as its funders. (7AA 1141; 1RT 90:23 – 91:1, 101:12-20.)

5. Before this agreement was made, Dirks owned the Property (3RT 496:4-13), and it was encumbered by a hard-money loan of approximately $210,000 that Dirks owed. (1RT 104:20 – 105:4; 7AA 1227.)

6. In accordance with the MOU, Dirks conveyed the Property to WLOW and received a corresponding capital credit of $465,000. (7AA 1141.) He also assumed principal responsibility for procuring all required construction permits and then for

negotiating a construction contract with a professional builder. (1RT 84:2-19, 103:25 –104-4, 108:10-24; 3RT 505:20-25, 513:22 – 515-5; 529:7-19, 530:5-11.)

7. In August, 2014, Dirks obtained permission from local authorities to perform the development (3RT 427:25 – 428:5), and from April, 2014 onward he solicited bids to perform the development from different builders (3RT 513:22-25).

8. Under the MOU, Omar and Wardak agreed to provide the funding required to develop the Property. (7AA 1141; 1RT 123:11-18; 2RT 224:18 – 225:4; 3RT 505:20-25, 512:14-18.) To this end, they loaned $605,537.80 to WLOW at various times from mid-2013 to May 15, 2015 (7AA 1227), doing so under a promissory note (the "Note") secured by a trust deed (the "Trust Deed") recorded against WLOW's title to the Property (7AA 1227, 1242.)

9. WLOW, which Dirks alone managed, used Omar and Wardak's funding as follows: (1) to pay off the hard-money loan that Dirks owed, which until then continued to encumber the Property ($210,140.93); (2) to pay Dirks "draw-downs" of his capital contribution ($191,475.14), which included a lump-sum payment of $50,000 and recurring monthly payments; and (3) to reimburse Dirks permitting fees, construction costs, and other substantial costs that he claimed ($203,921.23). (7AA 1227; 1RT 104:16 – 106:4, 107:5-14, 188:21 – 189:10.)

10. Omar and Wardak each contributed one-half of the funding provided under the Note, and each was entitled to collect one-half of any payments that WLOW might make under the

Note. (1RT 116:14-24, 181:18-26, 183:17 – 186:24; 2RT 205:21 – 206:6, 295:10-24, 330:14-18; 3RT 395:3-22, 396:5 – 397:2, 397:11-16, 398:15 – 399:10, 413:15-23, 414:7-10.)

11. **The Parties' Revised Agreement (the Revised MOU).** The parties had disagreements over various matters as they performed their development project (1RT 122:14 – 123:3; 3RT 513:2-7, 518:8-19; 7AA 1150, 1235-37). In addition, Wardak and Omar had a complete falling out over unrelated business dealings. (1RT 78:12 – 80:1; 2RT 322:22-26; 3RT 423:20 – 424:11.) These matters led the parties to re-negotiate their original agreement. (1RT 118:15-21, 121:5 – 123:6.)

12. They first modified their agreement in early 2015, and their modification took effect as of January 1, 2015. (1RT 119:11-23, 125:2-6; 7AA 1150-1151.) By this modification, Omar and Wardak agreed to increase their ongoing payments to Dirks from $6,000 to $8,500 per month from January 1, 2015 onward. (7AA 1150-1151; 1RT 127:12-25). The parties also agreed to make specified adjustments of Dirks' capital account at WLOW, so that its restated amount was $389,475.14 (7AA 1150-1151). The parties further agreed to adjust their respective ownership interests in WLOW, so that each member would own one-third of the company. (*Id.*)

13. **WLOW's Final Operating Agreement**. In response to further disagreements, and in particular to Dirks' strong dissatisfaction with the modified arrangement (7AA 1235-1237; 3RT 519:21-24, 521:19 – 522:22, 525:8 – 527:3), the parties modified their agreement a second time in a document entitled

the "Second Amended and Restated Operating Agreement of [WLOW]" (hereafter, the "Final Operating Agreement"). (7AA 1211 – 1243.)

14. Dirks arranged to have an attorney to prepare the Final Operating Agreement, then presented it to Wardak for signing first on May 6, 2015 and then again on May 15, 2015 after having the attorney make minor revisions of it. (7AA 1203; 1RT 144:4-13; 145:24 – 146:8.)

15. Dirks, Omar, and Wardak executed The Final Operating Agreement on May 15, 2015. (7AA 1221.) Its essential terms and conditions appeared at first glance to resolve the longstanding differences between the parties and modify the terms and conditions on which they would complete the development of the Property. But it included an unusual joint-funding clause and draconian forfeiture provisions that almost immediately gave rise to the present controversy.

16. Here is a summary of the terms and conditions of the Final Operating Agreement.

a. Restoration of Prior Ownership Percentages.

Under the Final Operating Agreement, the parties restored their original ownership allocation: Dirks would own 50% of WLOW, and Omar and Wardak would each own 25% of it. (7AA 1215, § 11.)

b. The Modified Note.

Under the Final Operating Agreement, WLOW's debt to Wardak and Omar under the Note was rolled-over into a modified promissory note (the "Modified Note"), which took effect on May

15, 2015. (7AA 1242-1243.) The amount of the Modified Note was $2,359,447 and consisted of three sums: (1) $605,537.80, which was the sum of the funds that until then Omar and Wardak had jointly loaned to WLOW under the Note (7AA 1227); (2) $18,037.20, which was the interest that WLOW owed to Omar and Wardak under the Note as of May 15, 2015 (7AA 1243); and (3) $1,735,872, which was the amount of new funding that Omar and Wardak agreed to furnish to WLOW under the Final Operating Agreement. (7AA 1214 at § 11). The Modified Note was secured by the Trust Deed, which was recorded against WLOW's title to the Property. (7AA 1242.)

Omar and Wardak, having equally funded all money loaned under the Note, and having agreed each to provide one-half of WLOW's further funding, were each entitled to collect one-half of all payments that WLOW might make under the Modified Note. (1RT 116:14-24, 181:18-26, 183:17 – 186:24; 2RT 205:21 – 206:6, 295:10-24, 330:14-18; 3RT 395:3-22, 396:5 – 397:2, 397:11-16, 398:15 – 399:10, 413:15-23, 414:7-10.)

c. The Joint-Funding Clause and Related Forfeiture Provisions.

Under the Final Operating Agreement, Omar and Wardak assumed new funding obligations. Specifically, within seven days, or no later than May 22, 2015, each must send to WLOW one-half of $1,735,872 – a sum that WLOW would then use to pay a builder to perform the development from start to finish (the "Construction Loan").(7AA 1214, § 11; 3RT 542:23 – 543:8.) This

sum was added to the amount that WLOW owed to Omar and Wardak under the Modified Note. (7AA 1242-1243.) In addition, Wardak and Omar must continue sending monthly payments of $8,500 to Dirks. (7AA 1214, § 11; 1234.)

Of particular importance, Omar and Wardak were each required to provide one-half of the new funding and to do so "collectively and together on a 50/50 basis" (the "Joint Funding Clause.") (7AA 1214, § 11.) The specific clause was worded as follows: "... Omar and Wardak collectively and together on a 50/50 basis must provide the balance of the construction financing in the amount of $1,735,872.00 plus interest...." (*Id.*)

Dirks in turn agreed to have WLOW use this funding to hire a builder that had agreed to redevelop the Property into ten apartment units for a capped fee equal in amount to Omar and Wardak's Construction Loan (i.e., $1,735,872.) (7AA 1214-1215, § 11.)

If Omar and Wardak were to breach the Joint Funding Clause, Dirks could unilaterally invoke express forfeiture provisions against them (the "Forfeiture Provisions") and thereupon take the following steps: (i) cancel Wardak's and Omar's respective 25% ownership interests in WLOW; (ii) take 100% ownership of WLOW and its assets, including the Property; (iii) develop the Property on his own; (iv) dissolve WLOW; (v) cancel all interest that WLOW would otherwise owe to Wardak and Omar under the Modified Note; and (vi) treat their prior funding of $605,537.80 as an interest-free loan, which would fall due three years later (on May 15, 2018), and which would be

subordinate to Dirks' capital account at WLOW as well as all debt that WLOW or Dirks might later incur to develop the Property. (7AA 1214-1215 at § 11, 1218 at § 24, 1242.)

17. **Dirks and Omar's Misrepresentations; Wardak's Reliance**. At the time, Wardak was only 32 and far less experienced in real estate ventures than Dirks or Omar.[1] (1RT 58:14-23, 67:24-25, 71:10 – 72:3; 3 RT 448:11-17).

18. Even so, Wardak expressed misgivings about the Final Operating Agreement's Forfeiture Provisions and specifically asked Dirks to remove them. (7AA 1174; 1RT 144:14 – 145:23.)

19. Despite his misgivings, Wardak agreed to sign the Final Operating Agreement only because Dirks and Omar specifically represented to him, *in writing and orally*, that Omar had in hand one-half of the Construction Loan (i.e., $867,936) and would provide it to WLOW so long as Wardak timely provided the other half, and therefore the Forfeiture Provisions would never take effect. (7AA 1203-1204; 1RT 145:7 – 146:14, 150:3 – 152:14, 152:25 – 153:10, 155:20 – 156:3; 3RT 405:6 – 406:6, 409:24 – 410:10, 411:23 – 412:12, 471:13 – 474:18; 478:10 – 479:1.)

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1 Wardak testified that he was 38 at the time of trial, which was more than six years after Dirks elicited his assent to the Final Operating Agreement. (1RT 67:24-25.) Dirks and Omar were both much older than Wardak (1RT 58:14-23) and were very close friends (3RT 393:4 – 394:9). Both of them had substantial experience developing and selling real properties and had done several deals together (3RT 394:10-25). In addition, Omar was a licensed broker of real-estate loans. (1RT 71:10 – 72:3.)

20. When Dirks and Omar made and repeated this assertion, each knew that it was materially inaccurate, since Omar did not then have his share of the funds in hand. (3RT 405:6 – 406:6, 409:24 – 410:10, 411:23 – 412:12, 471:13 – 474:18.)

21. Wardak, who had the required funds, was sufficiently reassured by the foregoing written and oral representations, and he therefore signed the Final Operating Agreement and delivered his one-half share of funds to Dirks on May 15, 2015 (1RT 145:7 – 146:14, 150:3 – 152:14, 152:25 – 153:10, 155:3 – 156:3; 3RT 479:2-6; 7AA 1173.). Dirks and Omar executed the Final Operating Agreement at the same time. (7AA 1221).

22. **Wardak's Performance, Omar's Breach, and Dirks' Declaration That Both Were in Default**. Immediately after signing the Final Operating Agreement, Wardak tendered his one-half share of the Construction Loan by delivering a cashier's check to Dirks for $867,936. (1RT 156:1-16; 3RT 479:2-6; 7AA 1173.) By inadvertence, his check misnamed the payee as "WLOW LLC" rather than "WLOW Partners LLC" (7AA 1173; 1RT 156:13 – 157:11, 157:24 – 158:14), but Dirks did not return the misnamed check until June 2, 2015 (7AA 1177; 3RT 558:15-20), which was eleven days after Omar and Wardak's funding deadline (7AA 1214 at § 11) and more than two weeks after Wardak had delivered the check to Dirks (1RT 161:13-23).

23. In the meantime, Omar dishonored the express representation that he and Dirks had made to Wardak to induce his assent and breached his own funding obligation. Indeed, Wardak no sooner signed the Final Operating Agreement and

tendered his funds, than Omar disclosed that he did not have his own share of the funding (1 RT 158:21 – 159:10), and he thereafter defaulted on his payment obligation (3RT 557:5-26; 7AA 1186).

24. Dirks quickly seized upon this circumstance, asserting that *Omar's* failure to provide his share of the new funding meant that *Wardak* was in breach of the Final Operating Agreement, since the funding obligation was owed jointly by Omar and Wardak, and each was required to furnish one-half of the required funding. (3RT 557:5-26; 7AA 1181-1182).

25. **Wardak's Further Performance**. Wary of an apparent fraud, Wardak hired an attorney, John Gardner, to help him protect his investment and find a way to complete the development of the Property. (1RT 158:21 – 159:16, 162:21 – 163:8; 2RT 339:7 – 340:10; 3RT 558:21 – 559:15).

26. Proceeding in this manner, Wardak substantially performed his funding obligation under the Final Operating Agreement so far as practicable, and to this end he took the following steps:

a. On May 22, 2015, which was the funding deadline, Wardak wrote to Omar to demand that Omar comply with his funding obligation or explain his intentions. (7AA 1176.)

b. At various times from June to September, 2015, Wardak and his attorney wrote to Dirks to confirm that Wardak continued to hold his own one-half of the required funding and to give notice that Wardak was ready, willing, and able to perform and wished to proceed with WLOW's development of the Property. (7AA 1182-

1187; 1RT 163:7 – 166:4)

c. On June 15, 2015, Wardak sent a formal proposal to Dirks. (7AA 1184, appended to e-mail at 7AA 1182.) In this proposal, Wardak offered to provide *not only his own one-half share of the required funding, but also Omar's one-half share* if Omar were to fail to provide it after receiving a thirty-day notice to perform (*id*), and he further offered to deposit his funds in a standard escrow account for construction projects, by which the account administrator, Dirks, would pay for ongoing construction work in stages until all work was completed (*id*.)

d. While awaiting a reply, Wardak placed his one-half share of the necessary funding ($867,936.00) in a segregated bank account earmarked for WLOW's construction project on June 17, 2015. (7AA 1186-1187; 1RT 163:9 – 166:4.)

e. Wardak's attorney wrote to Dirks on July 14, 2015 to confirm that Wardak had placed the above funds in an earmarked account and to provide proof of the deposit. (7AA 1186). He also asked whether Dirks wished to have these funds transferred to a different account (*id*.), expressly confirmed that Wardak wished to perform the Final Operating Agreement with or without Omar's participation (*id*.), and asked Dirks for a response and a status report (*id*.) This letter made reference to prior correspondence along the same lines that Wardak's attorney had sent to Dirks on July 7, 2015. (*Id*.) Dirks' eventual reply on September 18, 2015 indicates that Wardak's attorney sent further correspondence along the same lines on September 4, 2015. (7AA 1188).

f. From June 2015 onward, Wardak kept his one-half share of the funding in the segregated account earmarked for developing WLOW's Property. (1RT 163:9 – 166:4.) Wardak withdrew these funds only after learning in July, 2016 that Dirks had formed a new company, LJS Placentia, and had transferred the Property from WLOW to LJS Placentia. (1RT 164:5-12; 2RT 351:15-22.)

27. **Dirks Prevented Wardak's Performance**. In response to Wardak's above efforts to perform the Final Operating Agreement, Dirks made various accusations against Wardak and argued that *Omar's* failure to fund by May 22, 2015 meant that *Wardak* had committed an incurable, material breach of the Final Operating Agreement. (7AA 1181-1182.)

28. Indeed, Dirks specifically maintained that Omar's failure to fund meant that Wardak could not perform the Final Operating Agreement and must suffer the consequences of its Forfeiture Provisions, unless all three parties agreed to modify their agreement. (3RT 560:23 – 561:2.) On this telling, the Final Operating Agreement required the participation of both Omar and Wardak and forbade the participation of only one or the other, even if one of them volunteered to provide all of the required funding upon the other's failure to do so. (*Id*.)

29. Dirks did not respond to Wardak's repeated offer to transfer his funds from the above account to some other account. (1RT 163:1 – 166:4.)

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30. **Dirks Used the Forfeiture Provisions to Exclude Wardak and Dispossess Him Without Compensation**. Ignoring Wardak's substantial performance and repeated efforts to furnish the required funding, Dirks formally invoked the Forfeiture Provisions on September 18, 2015. (7AA 1188-1189.) By this response, Dirks stated the following points:

a. Omar's failure to provide his one-half share of funding on May 22, 2015 meant that Omar and Wardak had committed an incurable material breach of the Final Operating Agreement. (*Id*.)

b. In consequence, Dirks had suspended the development of the Property and would dissolve WLOW in accordance with the Final Operating Agreement's Forfeiture Provisions. (*Id*.) That in turn meant the following: (1) Wardak would forfeit his 25% ownership interest in WLOW; (2) Dirks would assert "100% ownership" of WLOW and its assets, including the Property, WLOW's building permits, and its development plans; and (3) Omar and Wardak's loan under the Modified Note would be reduced to its principal sum and rendered an interest-free obligation payable years later (in May, 2018) and subordinated to all future debt used to develop the Property as well as Dirks' capital account. (7AA 1214-15 at § 11, 1218-1219 at § 24 (v).)

c. Dirks specifically confirmed that, in accordance with the Forfeiture Provisions, WLOW had unilaterally reduced WLOW's debt under the Modified Note from $623,575.02 to $605,537.80 (7AA 1188-1189), which was the mere principal sum that Omar and Wardak had loaned to WLOW from mid-2013 to May, 2015.

(7AA 1227.)

31. **Dirks and Omar's Fraudulent Payoff of WLOW's Debt Under the Modified Note**. Unexpectedly, WLOW initiated an escrow transaction in May, 2016 by which it announced its intention to pay off its debt to Omar and Wardak under the Modified Note. (7AA 1190-1195). Wardak understood at the time that Dirks had initiated this procedure to clear title to the Property so that it could serve as collateral for new financing needed to complete its development. (1RT 174:3 – 175:6, 176:25 – 177:7.)

32. This escrow transaction turned out to be a complicated sham, which proceeded as follows.

a. In May, 2016, WLOW opened an escrow account at First American Title Insurance Company in Glendale, California ("First American"), and shortly thereafter an escrow administrator at First American sent a formal "Demand for Full Payment" addressed to Wardak and Omar and mailed to Wardak's address on May 19, 2016. (7AA 1190-1195.)

b. On June 10, 2016, Wardak accurately completed and returned the payoff demand on behalf of himself and Omar ("Wardak's Payoff Demand"): it stated that WLOW's current debt under the Modified Note was $623,575.02, plus interest from May 15, 2015, as well as an additional outlay of $6,500 for further sums advanced. (7AA 1190; 1RT 179:2-20). At the same time, Wardak returned an executed deed of reconveyance of the Trust Deed (the "Reconveyance"). (7AA 1193.)

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c. On June 20, 2016, First American's notified Dirks that WLOW must place $635,665.78 in First American's escrow account to satisfy Wardak's Payoff Demand, whereupon he could remove the Trust Deed from WLOW's title to the Property by recording the Reconveyance. (7AA 1208.)

d. Two days later, on June 22, 2016, Omar provided the escrow administrator with a false, contradictory payoff demand without giving notice to Wardak ("Omar's Payoff Demand"). (7AA 1205-1206; 1RT 179:24 – 180:6.) By this demand, Omar formally represented that (1) he had personally provided $440,337.77 of the $630,075.02 stated in Wardak's Payoff Demand; (2) WLOW had fully paid him this sum outside of escrow; and (3) WLOW's remaining debt under the Modified Note was therefore only $194,555.01. (7AA 1205-1206.)

e. The statements in Omar's Payoff Demand were materially false. In fact, Wardak and Omar had each provided one-half of the funding and were each entitled to collect one-half of WLOW's debt under the Modified Note, as Omar conceded under cross-examination. (*Compare* 7AA 1205-1206 *with* 1RT 116:14-24; 181:18-26, 183:17 – 186:24; 2RT 205:21 – 206:6, 295:15-24, 330:14-18; 3RT 395:18:5 – 397:2, 397:11-16, 398:15 – 399:10, 413:15-23, 414:7-10). Moreover, WLOW did not pay $440,337.77 to Omar outside of escrow, or any sum at all, as Omar also conceded during trial. (3RT 421:26 – 422:8). The upshot was that Wardak's Payoff Demand rather than Omar's was the correct payoff demand in exchange for the Reconveyance.

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f. Nonetheless, First American's escrow administrator credited Omar's Payoff Demand, deducted $440,337.77 from the sum that WLOW must pay to retire the Modified Note, and reconciled the escrow account accordingly. (7AA 1209-1210.) Specifically, on June 23, 2016, the escrow administrator sent to Wardak a check for $193,837.47 as payment in full of WLOW's debt under the Modified Note, and in an accompanying letter he confirmed his understanding that the debt was retired by the payment, so that the Reconveyance could be recorded and WLOW's title cleared of Omar and Wardak's Trust Deed. (*Id*.)

g. In this manner, WLOW paid only $193,837.47 to Wardak on June 23, 2016 to clear its title of an encumbrance of $635,665.78. (*Compare* 7AA 1190 *with* 7AA 1209-1210.) Wardak, who was entitled to receive one-half of the balance, therefore lost approximately $123,900 owed to him under the Modified Note. (*Id*. *See also* 2RT 205:2-5, 205:21 – 206:6.)

33. **Using a New Company, Dirks and Omar Completed the Property Development, Sold the Property, and Split Substantial Profits**. Having cleared WLOW's title to the Property, Dirks promptly transferred it to a new company that he and Omar co-owned, proceeding as follows:

a. On June 23, 2023 (the very day when First American's escrow administrator sent the above payoff to Wardak), Dirks formed a new limited liability company, LJS Placentia, doing so without giving notice to Wardak. (7AA 1197; 1RT 174:14-19; 3RT 486:11-18.)

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b. On July 19, 2016, Dirks recorded two quitclaims. (7AA 1198-1199.) By the first, he acted as WLOW's manager and had WLOW convey its title to the Property to himself, and by the second he conveyed this title to the Property to LJS Placentia (7AA 1198). Dirks never argued or offered evidence that he had paid any sum to WLOW for its conveyance of this Property, whose value at the time he estimated to be more than $1 million (3RT 567:19-25). Dirks treated his transfer of the Property to LJS Placentia as his own capital contribution to it. (*id*.)

c. At around the same time, Dirks gave Omar a promissory note for $835,000 ("Omar's New Note"). According to Dirks, Omar's New Note was intended to repay the following sums to Omar: (1) the $440,337.77 that Omar had falsely claimed having alone provided to WLOW under the Note and Modified Note; (2) the sum of $193,837.47, which Omar had loaned to WLOW to fund its fraudulently reduced payoff of the Modified Note; and (3) Omar's continued payments of monthly draw-downs to Dirks of $8,500. (3RT 417:22 – 418:2, 459:6-12; 566:13 – 567:8.)

d. At some time in June or July, 2016, Dirks paid Omar's New Note by giving him 49% ownership of LJS Placentia (3RT 424:15-23, 567:1-18, 567:26 – 568:5).[2]

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[2] Tellingly, Omar alleged in his complaint-in-intervention that both he and Wardak had breached the Final Operating Agreement (1AA 61 at ¶ 14), so that Dirks was entitled to invoke its Forfeiture Provisions. (1AA 62 at ¶ 16, 63 at prayer no. 1). These allegations were contrary to Omar's apparent interest in protecting his ownership interest in WLOW, unless he and Dirks had already reached some sort of understanding about developing

i. Dirks and Omar thereafter used LJS Placentia to develop and sell the Property in the very manner that WLOW had contemplated, but without Wardak's participation. (3RT 417:22 – 418:2, 488:2 – 489:9, 567:26 – 568:21.)

34. This project proved to be successful for Dirks and Omar. Their company, LJS Placentia, completed the development of the Property (3RT 568:19-21), then sold it for slightly more than $5 million on February 8, 2019 (7AA 1201).

35. According to LJS Placentia's closing statements (7AA 1200-1201), LJS Placentia received *net* proceeds of **$2,215,407.90** by two final transactions: it collected an equity cash-out of $443,450.43 from a new refinancing loan taken against the Property on November 30, 2018 (7AA 1200); then five weeks later, on February 8, 2019, it received a payment of $400,000 for unspecified services as well as net proceeds of $1,371,957.47 from its sale of the Property after paying all debt that encumbered the Property as well as all closing costs and other charges. (7AA 1201).

36. Dirks and Omar thereafter split LJS Placentia's profits between themselves and paid no part of its proceeds to Wardak. (3RT 417:22 – 418:2, 488:2 – 489:9, 567:26 – 568:21.)

37. As for WLOW, Dirks filed a notice of its legal cancellation with the California Secretary of State on December

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the Property outside of WLOW – which both he and Dirks testified they agreed to do only in June, 2016 (3RT 424:15-23, 567:1-18, 567:26 – 568:5). But Omar moved for leave to file his complaint in April, 2016 (7AA 1323 at ROA No. 69).

13, 2019. (7AA 1153.) By this notice, Dirks certified that WLOW had dissolved itself, was canceled, and ceased to hold any power, right or privilege in California. (*Id*.)

What It All Meant. All of these transactions might seem confusing if not dizzying at first glance, but they made sense to their two proponents: by them, they completely excluded Wardak from their venture after having him provide one-half of $605,537.80, or $302,768.90, at various times from mid-2013 to May, 2015. In the bargain, they used a fraudulent escrow transaction to underpay his loan by $123,900 and never paid a dime of interest to him.

Wardak thus provided substantial funding for the venture in its early days, but he never saw any part of the more than $2.2 million in net proceeds that it generated for Dirks and Omar's new company. He even lost a substantial part of his capital, while Dirks and Omar split the profits only between themselves.

That was the sum and substance of these various transactions, as above citations to the record confirm.

On this basis of this evidence, the jury returned verdicts in Wardak's favor on all claims and cross-claims in the case. (5AA 825-832.)

PROCEDURAL HISTORY

Pleadings; Dirks' Demurrers.

Wardak filed this suit on September 24, 2015, seeking declaratory relief against Dirks and WLOW. (1AA 53-56.) On June 23, 2015, Omar filed a complaint-in-intervention for declaratory relief against Wardak after obtaining leave to do so.

(1AA 57-63.) On November 29, 2016, Wardak filed a first amended complaint to assert additional, related claims against all Defendants, including derivative claims on behalf of WLOW, which at all times has been a nominal defendant. (1AA 76-152.) On April 13, 2017, Wardak filed a second amended complaint (2AA 265-294) in response to the Superior Court's ruling (2AA 262-263) on Dirks' demurrers to his first amended complaint (1AA 153-172). On May 29, 2017, Dirks asserted cross-claims against Wardak and Omar (2AA 316-326), and the parties settled the pleadings by their respective answers, the last of which was filed on August 21, 2017. (1AA 64-75; 2AA 295-305, 306-315, 327-339; 3AA 343-354.)

Assignment and Re-Assignment of Case

This case was originally assigned to Judge Sheila Fell on September 24, 2015. (7AA 1320 at ROA No. 5.) Dirks' demurrers were specially assigned to Vikki L. Vander Woude on March 15, 2015. (2AA 261.) On June 29, 2017, the Superior Court designated this case "complex" and re-assigned it to Judge Thierry Patrick Colaw. (3AA 341.) On January 1, 2018, the case was re-assigned to Judge Randall J. Sherman (3AA 355), who thereafter presided over all remaining proceedings in the Superior Court, including the motion for summary judgment, the bifurcated trial, and post-trial motions (7AA 1332-1367 at ROA No. 289 *et seq*.).

Denial of Summary Judgment

On September 21, 2018, the Superior Court denied Defendants' motion for summary judgment. (4AA 634-635.)

In support of this ruling, the Superior Court specifically held that (1) the Joint Funding Clause was ambiguous; and (2) the ambiguity could not be decided as a matter of law, but must instead be resolved by the jury at trial. (4AA 634-635.)

The Superior Court further ruled that a trial was required to resolve the following additional issues of material fact: (1) whether Wardak had timely tendered his one-half share of the new funding; (2) whether Dirks had cooperated reasonably with Wardak so that he could perform his funding obligations under the Final Operating Agreement; (3) whether Omar had caused WLOW to underpay funds owed to Wardak under the Modified Note; (4) whether Dirks had properly transferred the Property from WLOW to himself and then to LJS Placentia – i.e., whether he properly took ownership of WLOW's assets under the Forfeiture Provisions; and (5) numerous material facts ancillary to these issues, as listed in the Superior Court's ruling on Dirks' motion for summary judgment. (4AA 635.)

The Bifurcated Trial

After a long interruption due in part to the Covid pandemic, the case was tried to a jury on seven non-consecutive days in June, 2021. (4AA 718-722; 5AA 732-737, 746-752, 820-824.)

On June 29, 2021, the Court entered the jury's special verdicts (5AA 825-832), which were as follows:

- Dirks was *not* authorized to take 100% ownership of WLOW and its assets (special verdict no. 1).
- Dirks breached his fiduciary duty to WLOW and also committed intentional and negligent misrepresentation against it

(special verdict nos. 2-4).

- Dirks must pay damages of $1.5 million to WLOW (special verdict no. 5).
- Omar must pay damages of $1.5 million to WLOW on Wardak's derivative claim for breach of contract (special verdict nos. 6-7).
- Omar must pay $123,900 to Wardak on Wardak's direct claims for breach of contract and conversion (special verdict nos. 10-13).
- Dirks acted with malice, oppression or fraud and must pay punitive damages of $600,000 to WLOW on Wardak's derivative tort claims (special verdict nos. 22-23).
- Omar acted with malice, oppression or fraud and must pay punitive damages of $600,000 to Wardak on Wardak's direct claim for conversion (special verdict nos. 24-25).
- Wardak was not liable on any of Dirks' cross-claims against him, which were for breach of contract, intentional misrepresentation, and negligent misrepresentation (special verdict nos. 14, 18, 20).
- Lastly, Omar must pay $870,000 to Dirks for breach of contract (special verdict nos. 16-17).

After the jury returned its verdicts, the Superior Court nonsuited Wardak's claims against Dirks for intentional and negligent misrepresentation, having previously taken the matter under submission. (5AA 820, 823-24.) Wardak appeals from this ruling.

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On July 26, 2021, the Superior Court conducted a short-cause bench trial and issued rulings (5AA 869-870), from which Wardak does not appeal.

The Superior Court's Grant of JNOV to Dirks and Related Rulings

On December 3, 2021, the Superior Court ruled on Dirk's and Omar's respective motions JNOV or a new trial (6AA 1083-1089). Most notably, the Superior Court made the following rulings:

First, substantial evidence supports a finding that WLOW suffered damages of $1.5 million, but not $3 million. (6AA 1087.) The jury's damage awards against Dirks and Omar on Wardak's derivative claims must therefore be construed to establish their joint and several liability to WLOW for $1.5 million in damages, not their cumulative liability for $3 million. (*Id.*) Wardak does *not* appeal from this ruling.

Second, Dirks is relieved of liability to WLOW and entitled to JNOV on the following ground: he was entitled to invoke the Forfeiture Provisions under the Final Operating Agreement because Omar breached his funding obligations under the Joint Funding Clause and without regard to whether Wardak also breached them. On this sole basis, JNOV must be given to Dirks on special verdict nos. 1-2, 5, and 22-23. (6AA 1087-1088, 1126-27.) Wardak appeals from this ruling.

Third, Omar is relieved of the jury's finding that he acted with malice, oppression or fraud (special verdict no. 24), since this

verdict is not supported by clear and convincing evidence. (6AA 1088.) Wardak also appeals from this ruling.

Fourth, the jury was not asked to consider Dirks' or Omar's net worth, which is a necessary criterion that it must have considered before awarding punitive damages. For this reason, it would be necessary to re-try the amount of the jury's awards for punitive damages if the above rulings were reversed. (6AA 1088.) Wardak does *not* appeal from this ruling.

Fifth, Omar is not otherwise entitled to relief from the jury's verdicts on any of Wardak's claims. (6AA 1087-1088.)

Sixth, there must be a re-trial of Dirks' damage award on his cross-claim against Omar. (6AA 1088-1089.)

Lastly, the Superior Court announced that it would reconsider its intended ruling on the allocation of WLOW's damage award (still owed by Omar) and gave the parties leave to brief the issue further. (6AA 1089.) Wardak does not appeal from this ruling or the Superior Court's final allocation of WLOW's damage award in its judgment. (6AA 1101, 1125.)

The Superior Court's Judgment; Wardak's Present Appeal

On May 20, 2022, the Superior Court severed Dirks' unresolved cross-claim against Omar (6AA 1100). On June 10, 2022, the Superior Court issued its final ruling on the allocation of WLOW's damage award (6AA 1101) as well as its judgment on all claims other than Dirks' severed cross-claim. (6AA 1102-1110).

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At the parties' stipulated request, the Superior Court amended the judgment *nunc pro tunc* on June 30, 2022 to correct its interest calculations. (6AA 1119-1129.) Wardak timely filed his notice of this appeal on July 21, 2022 (6AA 1130).

ARGUMENT

I. WITHOUT PROPER CAUSE, THE SUPERIOR COURT DIRECTLY CONTRADICTED THE JURY'S INTERPRETATION OF THE JOINT FUNDING CLAUSE AND ERRONEOUSLY GRANTED JNOV TO DIRKS ON THIS GROUND ALONE

Expressly contradicting the jury's finding that Dirks was not authorized to take 100% ownership of WLOW and its assets, the Superior Court granted JNOV to Dirks on special verdict no. 1 (6AA 1087), and on this ground alone it also granted him JNOV on special verdict nos. 2, 5, and 22 – i.e., the verdicts that established his breach of fiduciary duty to WLOW as well as his liability to WLOW for compensatory and punitive damages. (6AA 1087-1088.) The Superior Court thus absolved Dirks of all liability in the case. (*Id.*)

Wardak respectfully submits that this ruling was erroneous and reversible error because it expressly and directly contradicted the jury's finding on the same point, which was a disputed issue of material fact that the jury alone could decide. Once the jury decided this issue, its findings were binding upon the Superior Court, unless there was no substantial evidence in the record to support the jury's finding – which was not true, nor even a matter that the Superior Court considered when it granted JNOV on the issue.

More particularly, this issue concerned the parties' competing interpretations of the Joint Funding Clause and related Forfeiture Provisions – a topic on which each side introduced contradictory parol evidence (namely, trial testimony and e-mails concerning the proper meaning and application of these provisions). The proper interpretation of these contractual provisions was therefore a disputed issue of material fact reserved for the jury and properly decided by it on the basis of substantial evidence.

Without a finding that the jury's special verdicts lacked evidentiary support, the Superior Court lacked authority to reverse these verdicts and give JNOV to Dirks, but that is what it did by its ruling on this matter.

In addition, Dirks' preferred interpretation of Joint Funding Clause was contrary to law. According to Dirks' interpretation, Dirks was entitled to prevent Wardak's performance of the Final Operating Agreement, then invoke this circumstance as grounds for subjecting Wardak to invalid penalty provisions.

Finally, Dirks' interpretation depended upon an absurdity or open bad faith: namely, the Joint Funding Clause required Omar and Wardak to provide one-half of the new funding and forbade either of them from curing the other's default. In contrast, Wardak's interpretation was that the Joint Funding Clause required Omar and Wardak each to provide one-half of the new funding and did so on the specific understanding that each had his funds in hand and would tender them so long as the other

did so, but it did not forbid either to cure the other's default if any such default were to occur.

The jury was persuaded by this evidence and on this basis ruled for Wardak. (5AA 825.) Its verdict should not have been set aside by a grant of JNOV.

A. The Parties' Competing Interpretations of the Joint Funding Clause

Special verdict no. 1 asked whether Dirks was authorized to take sole ownership of WLOW and its assets. (5AA 825). It turned on the parties' competing interpretations of the Joint Funding Clause, which gave rise to a triable dispute of material fact reserved for the jury.

1. Dirks' Interpretation of the Joint Funding Clause.

Specifically, Dirks testified and his attorney argued that Omar's breach of the Joint Funding Clause placed Wardak in irretrievable default and thus authorized Dirks to invoke the Forfeiture Provisions against both Omar and Wardak and thereby take 100% ownership of WLOW and its assets. (3RT 560:23 – 561:2; 5AA 907:8-11.) Here specifically is how Dirks argued the matter to the Superior Court:

> [Dirks'] interpretation [of the Joint Funding Clause]... is grounded on the plain language of the [Final Operating Agreement.] Dirks understood the language to mean what it said – that Omar and Wardak would be responsible for the construction funding "collectively and together." If one of them defaulted, they both defaulted. (5AA 907:8-11.)

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2. Wardak's Interpretation of the Joint Funding Clause.

In contrast, Wardak argued that the Joint Funding Clause obliged him only to provide his own one-half share of the new funding (1RT 148:23 – 149:3, 152:25 – 153:18; 2RT 289:2-9, 289:26 – 290:22, 357:12 – 358:2; 4RT 671:19-22; 674:5 – 676:2). His evidence showed that he not only tendered and re-tendered his own one-half share (7AA 1173, 1184, 1186-1187, 1RT 163:7 – 166:4), but also *attempted to provide Omar's one-half share* shortly after Omar breached his obligation to do so (7AA 1184, attached to e-mail at 1182). By this tender of performance, Wardak did everything he reasonably could do to fulfill his obligations under the Final Operating Agreement.

If Dirks had accepted his performance, he and Dirks could have accomplished the essential purpose of this agreement, which was to redevelop the Property, rent its units, and then sell it at an opportune time (7AA 1138, 1141; 1RT 89:6 – 90:16; 3RT 452:12 – 453:1, 497:17-23).

3. The Superior Court Correctly Ruled on This Matter Until It Reversed Itself Without Explanation During Its Hearing of Dirks' Motion for JNOV.

Before finally deciding the question in Dirks' favor, the Superior Court ruled three separate times that these competing interpretations could not be resolved as a matter of law, and on summary judgment it specifically ruled that they gave rise to material disputes of fact that must be tried. (2AA 262; 4AA 634-635; 6AA 1084.)

Ruling on Demurrers. When ruling on Dirks' demurrers, the Superior Court rejected Dirks' contention that Wardak's claims must be dismissed on the pleadings because Omar's acknowledged failure to fund meant that Dirks unambiguously had authority under the Joint Funding Clause and Forfeiture Provisions to take 100% ownership of WLOW and its assets:

> The totality of the circumstances surrounding [Wardak's] attempt to tender under the [Final Operating Agreement], including whether [Wardak] substantially performed and whether [Wardak's] performance was excused and/or frustrated, raise issues that cannot be determined as a matter of law on demurrer. Defendants failed to establish with citation to legal authority that this court can decide based on the terms of the operating agreement and pleadings only, and without evidence of the totality of the circumstances, that the failure and refusal of one partner to perform a joint obligation results in a breach/non-performance by the other partner who attempted timely to perform. (2AA 262.)

Ruling on Summary Judgment. When ruling on Dirks' motion for summary judgment, the Superior Court determined that Wardak's evidence raised a triable dispute of material fact as to whose interpretation should be controlling:

> Triable issues of fact remain as to the intent of the parties who entered into [WLOW'S Final Operating Agreement], as to the meaning of 'collectively and together on a 50/50 basis' as applied to defendant Omar's acknowledged failure to pay his half of the promised $1,735,872 for additional construction funding. Defendant Dirks believes it meant one thing, while plaintiff Wardak believes it meant something else. (4AA 634-635.)

Tentative Ruling on Motions for JNOV. After the jury decided this issue in Wardak's favor (5AA 825), Dirks moved for JNOV on this very issue. (5AA 904-909.) In its tentative decision, the Superior Court repeated its earlier assessment and found that the jury had properly ruled in Wardak's favor on this issue on the basis of substantial evidence:

> This provision [the Joint Funding Clause] is unquestionably ambiguous, the trial testimony as to its interpretation was in conflict, and thus its interpretation was not a question of law for the court to decide, but an issue of fact that the jury could decide. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal. 4th 375, 395. The jury decided the issue in Wardak's favor, and it was entitled to do so, because that interpretation is a reasonable one.

6AA 1084 (internal citation preserved).

Ruling After Hearing on Motions for JNOV. It was only after oral argument that the Superior Court departed from its prior rulings, the above considerations, and the well-established law directly on point, doing so without explaining its departure from its prior rulings.[3] Here is the Superior Court's full statement of final decision on this issue.

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Of note, Wardak's trial attorney unexpectedly passed away at age 70 shortly before the hearing of Dirks' motions for JNOV or a new trial. (6AA 1091 at ¶ 3.) Another attorney in the same firm appeared for Wardak at the hearing and remained in the case for a brief time afterwards until being replaced by Wardak's present attorney. (6AA 1091-96 at ¶¶ 5, 9, 26.)

> Dirks argues there was insufficient evidence for the jury to conclude in Verdict Question #1 that he was not entitled to dissolve WLOW. He contends that the contractual language, 'Omar and Wardak, collectively and together on a 50/50 basis must provide the balance of the construction financing in the amount of $1,735,872.00 plus interest,' obligated both Omar and Wardak to put up the entire $1,735,872 if the other one of them failed to do so. (Exhibit 238, ¶11.) Wardak argued at trial, however, that '50/50 basis' means he only had to put up half the money. Even if Wardak were correct, ¶11 goes on to provide that if Omar and Wardak fail to provide the entire amount, Dirks may elect to dissolve WLOW and take over 100% of its ownership, and turn any advances by Wardak or Omar into secured loans. Since Wardak (arguably, but not actually) put up his half but Omar did not put up his half, Dirks was entitled to dissolve WLOW and take over 100% of its ownership. Thus, Dirks did not breach any fiduciary duty he owed to WLOW (or Wardak) by virtue of taking full ownership of WLOW and transferring the real property to another company of his, LJS Placentia Partners, LLC, and Dirks is entitled to JNOV on that issue. (6AA 1087.)

For the reasons given below, Wardak respectfully submits that this ruling was erroneous and should be reversed.

B. The Proper Interpretation of the Joint Funding Clause Was a Disputed Issue of Material Fact Reserved for the Jury

The controlling law on this matter is well-established. Its full statement is as follows.

1. General Principles of Contract Interpretation.

Under California law, a contract must be construed according to the parties' mutual intent as expressed in the

contract itself. *See Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 ("The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. If contractual language is clear and explicit, it governs.") (*citing* Civil Code §§ 1636 and 1638).

When the parties litigate a dispute over the meaning of a contract, the presiding court must first determine whether its proper meaning can be discerned from the contract language itself: if this language unambiguously expresses the parties' clearly stated mutual intention, the presiding court must interpret it accordingly. *See Bank of the West,* 2 Cal.4th at 1264; *see also Pardee Const. Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, 1352 ("The fundamental rules governing the interpretation of contracts apply.... They are premised on the primary goal of giving effect to the mutual intention of the parties at the time the contract is formed. That intent is to be inferred, if possible, solely from the written provisions of the contract."); *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 53 ("Where contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms and go no further.").

2. Ambiguous Contractual Provisions: Proving the Existence of an Ambiguity.

A contractual provision is deemed ambiguous only when (1) it is ambiguous or uncertain on its face; or (2) it is shown by extrinsic evidence to be ambiguous or uncertain in light of

surrounding circumstances. *See Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912 ("Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning.... Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning....").

This rule on contractual ambiguity is limited in reach: a party can urge only a *reasonable* interpretation of the disputed language, or, more specifically, an interpretation to which the disputed language is reasonably "susceptible" in light of the language itself or parol evidence concerning its proper meaning. *See Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1448 ("If the court decides the language is reasonably susceptible to the interpretation urged, the court moves to the second question: what did the parties intend the language to mean? Whether the contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself or from extrinsic evidence of the parties' intent."). *See also Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 38 ("[T]he intention of the parties as expressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to this intention by determining what the parties meant by the words they used. Accordingly, the exclusion of relevant, extrinsic evidence to explain the meaning of a written instrument

could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone.").

3. The Roles of a Trial Court and Jury In Resolving Ambiguous Contracts.

According to well-settled law, the trial court decides whether a contractual ambiguity exists, and, if so, it resolves any ambiguity that can be resolved by a review of the contract language itself or undisputed parol evidence. *See Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351 ("The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict.").

But when a contractual ambiguity has material importance and arises from conflicting, admissible parol evidence, it becomes a disputed issue of material fact that cannot be decided on summary judgment, but must be decided by a trial. *See Wolf* 114 Cal.App.4th at 1351; *see also Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC* (2020) 53 Cal.App.5th 807, 819 ("[I]f interpreting the contract involves deciding between conflicting extrinsic evidence concerning the meaning of contractual provisions, or divergent testimony about what the parties understood certain contractual provisions to mean, then it is a factual question, not a legal one.").

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In jury trials, it is the jury that must decide any such ambiguity, not the trial court:

> Where the interpretation of contractual language turns on a question of the credibility of conflicting extrinsic evidence, interpretation of the language is not solely a judicial function. As trier of fact, it is the jury's responsibility to resolve any conflict in the extrinsic evidence properly admitted to interpret the language of a contract.

Morey, 64 Cal.App.4th at 912–913 (*citing* Civil Code §§ 1647, 1649; Code Civ. Proc. §§ 1856, 1861; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1483; 1 Witkin, *Summary of Cal. Law* (9th ed. 1987), "Contracts," §§ 688–689, pp. 621–623.).

4. Conclusion: the Jury Rightly Heard and Alone Could Decide How to Interpret the Joint Funding Clause

The upshot is clear.

Before trial, and even in its tentative decision on Dirks' motion for JNOV, the Superior Court rightly determined that the parties had offered conflicting, admissible parol evidence on the proper interpretation and application of the Joint Funding Clause and related Forfeiture Provisions, and that these matters could not be decided as a matter of law because the contract language itself and surrounding circumstances gave rise to triable issues of material fact, which must be decided by the jury at trial. (2AA 262. 4AA 634-635, 6AA 1084.)

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Those rulings followed the law and were correct. *See Morey*, 64 Cal.App.4th at 912–913; *Oakland-Alameda County Coliseum Authority,* 53 Cal.App.5th at 819.

The jury decided these issues by its special verdict no. 1, specifically finding that Dirks was not authorized to take 100% ownership of WLOW and its assets (5AA 825 at special verdict no. 1). By this finding, the jury rejected Dirks' contention that he was authorized to invoke the Forfeiture Provisions against Wardak because of Omar's breach of the Joint Funding Clause. (*Id.*)

C. The Superior Court Exceeded Its Authority by Adopting Dirks' Disputed Interpretation of the Joint Funding Clause Despite the Jury's Substantiated Finding Directly to the Contrary

Disregarding its prior rulings and the controlling law, the Superior Court removed this issue from the jury and decided it as a matter of law, finding that Dirks was entitled to invoke the Forfeiture Provisions against Wardak because of Omar's breach of his funding obligations under the Joint Funding Clause. On this basis alone, the Court reversed the jury's answer in special verdict no. 1. (6AA 1087.)

Crucially, the Superior Court did *not* make this finding on the ground that there was no substantial evidence to support special verdict no. 1. (6AA 1087.) The Superior Court merely adopted Dirks' preferred interpretation of the Joint Funding Clause, which was that Omar's breach of the Final Operating Agreement's funding placed Wardak in default and authorized Dirks to invoke the Forfeiture Provisions and take sole ownership

of WLOW and its assets. (*Id.*)

By then, the Superior Court lacked authority to make such a ruling. It was a matter for the jury to decide, and the jury had already had its say. *See Morey*, 64 Cal.App.4th at 912–913;

1. Substantial Evidence Supported the Jury's Interpretation of the Joint Funding Clause

The jury's special verdict no. 1 was supported *inter alia* by Wardak's following trial testimony:

> Q. [By Mr. Mazzarella:] With respect to this document [the Final Operating Agreement], I want to have you look at paragraph 11.... that sentence says "Omar and Wardak collectively and together on a 50/50 basis must provide the balance of the construction financing in the amount of $1,735,872 plus interest." Did you ever discuss with Mr. Dirks the meaning of that language prior to this date?
>
> A. [Wardak]. No.
>
> Q. Did you discuss the meaning of that language this day, on the 15th [May 15, 2015]?
>
> A. No.
>
> Q. What was your understanding about the obligation you were taking on? It says "Omar and Wardak collectively and together on a 50/50 basis must provide the balance of the construction financing."
>
> A. That Mr. Omar was going to provide 50 percent and that Mr. Wardak was going to provide 50 percent of the $1.735 million.

1RT 148:4 – 149:3.

Q. [By Mr. Mazzarella:] Let me ask you – I am looking for your interpretation. I see that the document says what it says. But did you have any different understanding, based on this language, than you had described to us before: that you owed half and Omar owed half but you would not be responsible if he didn't pay?

A. I did not have a different understanding.

Q. That remained your understanding?

A. Yes.

Q. Did Mr. Dirks ever say anything to explain that that was not his understanding?

A. No.

(....)

Q. Did you ever suggest to Mr. Dirks that he use of that language collectively and together on 50/50 basis?

A. Absolutely not.

Q. That is not a term that you came up with?

A. No.

1RT 152:25 – 153:18.

Q. [By Mr. Fink:] You understood from that provision of the agreement that if both of you did not provide the funding necessary to meet the 1.735 million, that Mr. Dirks would have the right to take full ownership of the company?

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A. No. It was 50/50. We both had to bring our money in. We were both assured, both by Dirks and Omar, that the checks were there. I had my check there as well.

2RT 289:2-9.

Q. [By Mr. Fink.] Okay. and then it says, "In addition to that advance, Omar and Wardak collectively and together on a 50/50 basis must provide the balance of the construction financing in the amount of $1,735,872," right?

A. That is what it says.

Q. And together on a 50/50 basis was what you told Mr. Dirks in March as to how you provide the money, right?

A. You asked me that earlier as well. I said I absolutely did not say that. That "collectively and together" is not even in my vocabulary. I've never used that type of wording. It was not my statement. When I look at this, it was on a 50/50 basis that we were both bringing a cashier's check to build this project for the full amount.

Q. You understood that Mr. Dirks was saying he couldn't have a lull in the funding, right?

A. Which is why we both brought cashier's check is what I understood when we came to that meeting. That there were two cashier's checks that we described as being same as cash; that you would have to buy the cashier's check to be able to deliver it -- to give it to Mr. Dirks or to put in the escrow account.

2RT 289:26 – 290:22.

Q. [By Mr. Fink:] Wasn't it your understanding that he [Dirks] was guaranteeing this maximum construction price only if you and Mr. Wardak – Mr. Omar

collectively and together funded the full amount of the 1.735 construction costs?

(....)

A. The understanding was not from this whole – you mention this collectively and together on a 50-50 basis. This was not language that I came up with. This was the 50/50 deal that me and Mr. Omar were funding this on a 50-50. and this was in the contract, but it didn't start here. It started back with the bid from December and we went into the MOU that this was being fixed, so –

Q. [interrupted by next question.]

2RT 357:12 – 358:2.

Wardak presented the above-quoted evidence along with the substantial evidence that Dirks and Omar expressly represented to him that Omar had his funds in hand and would tender them if Wardak did the same upon the parties' signing of the Final Operating Agreement. (7AA 1203-1204; 1RT 145:7 – 146:14, 150:3 – 152:14, 152:25 – 153:10, 155:20 – 156:3; 3RT 405:6 – 406:6, 409:24 – 410:10, 411:23 – 412:12; 471:13 – 474:18; 478:10 – 479:1.) Indeed, substantial evidence of these representations comes from Dirks' and Omar's own e-mails and their trial testimony. (7AA 1203-1204; 3RT 405:6 – 406:6, 409:24 – 410:10, 411:23 – 412:12, 471:13 – 474:18; 478:10 – 479:1).

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2. How the Evidence Supported the Jury's Interpretation of the Joint Funding Clause.

Cumulatively, the above-cited evidence establishes that Wardak reasonably construed the Joint Funding Clause to mean the following: it stated the full amount of new funding that Omar and Wardak must provide; it obliged each of them to provide one-half of this funding; and it was premised on the mutual understanding that each would provide one-half of the funding at the meeting of May 15, 2015. But Wardak did not understand or agree that, if Omar failed to provide his own share of the funding, Wardak was powerless to protect his own position or forbidden to cure Omar's default, but must instead permit Dirks to invoke the Forfeiture Provisions against him to strip him of his entire interest in WLOW without compensation.

According to Wardak's evidence, the Joint Funding Obligation did not forbid Wardak to cure Omar's default or expose Wardak to the Forfeiture Provisions even if Wardak tendered his own funding as well as Omar's funding upon Omar's default.

The Specific Ambiguity Proven by Wardak's Evidence. That evidence easily sufficed to establish an ambiguity. Namely, did the Joint Funding Clause mean that Wardak and/or Omar must provide the full amount, and that they had in fact agreed to split the amount equally? (Wardak's interpretation). Or did it mean that each must provide one-half of the full amount, and neither could pay the other's share to cure a default? (Dirks' interpretation.) (*See* 1RT 148:4 – 149:3, 152:25 – 153:18; 2RT 289:2-9, 289:26 – 290:22; 357:12 – 358:2; *see also* 7AA 1203-1204;

1RT 145:7 – 146:14, 150:3 – 152:14, 155:20 – 156:3; 3RT 405:6 – 406:6, 409:24 – 410:10, 411:23 – 412:12, 471:13 – 474:18; 478:10 – 479:1.)

On the evidence presented, the jury fairly resolved the ambiguity in Wardak's favor and found that Dirks could not use Omar's default and his own refusal of Wardak's tender of the full amount as a basis for dispossessing Wardak of his ownership interest in WLOW without compensation. It answered special verdict no. 1 accordingly. (5AA 825.)

Since there was evidence of a contractual ambiguity and conflicting evidence concerning its proper interpretation, it was a question of fact for the jury, and on the basis of substantial evidence the jury found for Wardak. *See King v. U.S. Bank National Association* (2020) 52 Cal.App.5th 728, 699–700 ("Substantial evidence is evidence sufficient to deserve consideration by the jury, that is, evidence that a reasonable jury could find persuasive. It is evidence which is reasonable, credible, and of solid value. The testimony of a single person is substantial evidence. The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record.").

The Superior Court therefore lacked authority to remove the question from the jury after trial, adopt Dirks' preferred interpretation, and thus absolve Dirks of all liability in the case. *See Johnson & Johnson Talcum Powder Cases*, 37 Cal.App.5th at 313–314; Hauter, 14 Cal.3d at 110.

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D. Dirks and Omar Induced Wardak to Form His Interpretation of the Joint Funding Clause, Which On this Ground Alone Was the Proper Interpretation

There is a further principle of law that supports the jury's special verdict no. 1. Namely, a finder of fact can rightly resolve a contractual ambiguity in favor of the interpretation that the promisor induced the promisee to form. *See Linton v. County of Contra Costa* (2019) 31 Cal.App.5th 628, 636 ("If the language in the contract is ambiguous, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."); Civil Code § 1649.

By their express representations, Dirks and Omar induced Wardak to form his understanding of the Joint Funding Clause. (7AA 1203-1204; 1RT 145:7 – 146:14, 150:3 – 152:14, 155:20 – 156:3; 3RT 405:6 – 406:6, 409:24 – 410:10, 411:23 – 412:12, 471:13 – 474:18; 478:10 – 479:1.) The jury could therefore resolve the ambiguity on this basis alone. *See Linton*, 31 Cal.App.5th at 636; Civil Code § 1649.

Indeed, the jury's other verdicts seem to align with this view of the matter, particularly its special verdict nos. 3-4, 6, 14, 18, and 20. (5AA 825-830).

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II. THE SUPERIOR COURT'S POST-TRIAL INTERPRETATION OF THE JOINT FUNDING CLAUSE WAS CONTRARY TO LAW AND UNDERMINED THE STATED PURPOSE OF THE FINAL OPERATING AGREEMENT

Dirks' interpretation of the Joint Funding Clause, which the Superior Court finally adopted, was contrary to law and even absurd. This interpretation absolved Dirks of liability for having frustrated Wardak's performance of a contract, then used this circumstance to justify subjecting Wardak to onerous contractual penalties that were invalid under California law. It also frustrated the very purpose of the Final Operating Agreement.

First, there was no possible damage to WLOW if Omar failed to fund and then Wardak alone provided 100% of the funding. But according to Dirks, this circumstance justified the uncompensated forfeiture and Dirks' own appropriation of Wardak's 25% ownership interest in WLOW and its assets, including the Property, which Dirks and Omar's new company, LJS Placentia, subsequently sold for more than $5 million with net proceeds in excess of $2.2 million after developing it in the same manner that WLOW was supposed to do. *See* p. 44, *supra*.

That forfeiture, bearing no reasonable relationship to any possible harm occasioned by Wardak's alleged breach, was a penalty at law and therefore unenforceable. *See Ridgley v. Topa Thrift & Loan Ass'n* (1998) 17 Cal.4th 970, 977–78 ("A penalty provision operates to compel performance of an act and usually becomes effective only in the event of default upon which a forfeiture is compelled without regard to the damages sustained

by the party aggrieved by the breach. The characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract. In short, an amount disproportionate to the anticipated damages is termed a 'penalty.' A contractual provision imposing a 'penalty' is ineffective, and the wronged party can collect only the actual damages sustained."); *Better Food Markets v. Am. Dist. Tel. Co.* (1953) 40 Cal.2d 179, 184 ("An agreement for the payment of a penalty is invalid."); *see also* Civil Code § 3275 ("Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.").

Regardless, Dirks frustrated and prevented Wardak's performance by refusing his successive tenders of his own one-half funding and Omar's share too. *See* pp. 29-31, *supra*.

Dirks therefore could not invoke this circumstance to justify subjecting Wardak to the above contractual penalties. *See* Civil Code § 1511 (a counterparty cannot prevent or delay a party's performance, then complain of his alleged breach); § 1512 (when a counterparty prevents or delays performance, the hindered party "is entitled to all the benefits which he would have obtained if [the contract] had been performed by both parties."); *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal. App. 4th 455, 490 ("It is hornbook law that where one contracting party prevents the other's performance of a condition precedent, the party

burdened by the condition is excused from performing it, and the benefited party's duty of performance becomes unconditional.").

The jury imposed liability against Dirks for his role in this matter, but the Superior Court granted JNOV and absolved him on the basis of a disputed contract interpretation that afforded him leave to frustrate Wardak's performance, then use this circumstance to subject Wardak him to invalid contractual penalties. On these further grounds, the ruling was contrary to law.

Finally, the presumed purpose of the Joint Funding Clause was to ensure that WLOW would have sufficient, timely funding to develop the Property – not to ensure that Omar must participate in this funding, or else WLOW must be dissolved and the Property ceded to Dirks so that he and Omar could develop it without Wardak. (*See* 7AA 1211 at § 3.b.)

Dirks' interpretation of the Joint Funding Clause was therefore absurd, and it should not have been adopted after the jury reached a directly contrary finding on the basis of substantial evidence.

III. SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S OTHER SPECIAL VERDICTS AGAINST DIRKS

A. Dirks' Breach of Fiduciary Duty.

The jury specifically found Dirks, who was WLOW's sole manager, liable to WLOW for breach of fiduciary duty. (5AA 826 at special verdict no. 2.). The Superior Court set aside this verdict on the sole ground that Dirks was authorized to seize control of

WLOW's assets, then transfer them to himself without compensating WLOW. (6AA 1087.)

Since that ruling was erroneous, the setting aside of special verdict no. 2 was likewise erroneous. A managing member owes a fiduciary duty to the limited liability company entrusted to his care and also to its other members. *See* Corp. Code § 17704.09. He therefore cannot engage in self-dealing, misappropriate the company's assets, or divert them to his own use to the detriment of the company or its other members. Any such act constitutes a clear breach of the managing member's fiduciary duty. *See id*.; *see also Feresi v. The Livery, LLC* (2014) 232 Cal.App.4th 419, 425 ("The manager of an LLC has a fiduciary duty and owes to the members of the LLC the same duties of loyalty and good faith as a partner owes to the partnership and its partners. Thus, [he] is obligated to act with the utmost loyalty and in the highest good faith when dealing with any member of the LLC.... He may not obtain any advantage over [any other member of the LLC) by even the slightest misrepresentation or concealment.")

B. Dirks' Fraud and Negligent Misrepresentation

The jury found Dirks liable to WLOW for intentional and negligent misrepresentation (5AA 826 at special verdict nos. 3-4), but the Superior Court nonsuited both claims and never gave effect to these verdicts (5AA 820, 823-24).

This ruling was also erroneous, since substantial evidence supported the jury's verdicts, as is demonstrated below.

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For ease of reference, here is a succinct, recent statement of the necessary elements of both claims:

> The essential elements of a count for intentional misrepresentation are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage. The essential elements of a count for negligent misrepresentation are the same except that it does not require knowledge of falsity but instead requires a misrepresentation of fact by a person who has no reasonable grounds for believing it to be true.

Chapman v. Skype Inc. (2013) 220 Cal.App.4th 217, 230–231 (internal citations omitted).

Below is a table that shows the substantial evidence admitted in evidence that supported the jury's finding of each of these elements.

TABLE 1

REQUIRED ELEMENTS	SUBSTANTIAL EVIDENCE
Dirks made a false statement of material fact to a fellow member of WLOW, Wardak: namely, Omar had in hand his one-half share of the Construction Loan and would timely deliver it to WLOW so long as Wardak did the same.	(7AA 1203-1204; 1RT 145:7 – 146:14, 150:3 – 152:14, 155:20 – 156:3; 3RT 405:6 – 406:6, 409:24 – 410:10, 411:23 – 412:12, 471:13 – 474:18; 478:10 – 479:1.)
Dirks knew that this statement was false (or had no reasonable basis for making it).	3RT 471:13 – 474:18; *see also* 3RT 405:6 – 406:6, 409:24 – 410:10, 411:23 – 412:12. (con't...)

REQUIRED ELEMENTS	SUBSTANTIAL EVIDENCE
(con't) Dirks made the statement to induce Wardak accept the Forfeiture Provisions in WLOW'S Final Operating Agreement.	3RT 473:20 – 474:18.
Wardak justifiably relied on this statement and therefore assented to the Final Operating Agreement.	1RT 145:7 – 146:14, 150:3 – 152:14, 155:3 – 156:3.
The parties' company, WLOW, was harmed in consequence: Dirks invoked the Forfeiture Provisions because of Omar's failure to fund. On this basis, he took WLOW's assets and delivered them to LJS Placentia without compensating WLOW. LJS rather than WLOW earned net proceeds in excess of $2.2 million.	3RT 417:22 – 418:2, 488:2 – 489:9, 567:26 – 568:21; 6AA 1087; 7AA 1153, 1198-1201.

C. Clear and Convincing Evidence Supported the Jury's Verdict on Omar's Malice, Oppression or Fraud

The Superior Court appeared to give the benefit of every doubt to Omar when characterizing the evidence in support of its ruling that the jury lacked grounds to impose predicate liability for punitive damages on Omar.

But it should have done the reverse. If the evidence is construed in the light most favorable to the jury's verdict, it

clearly and convincingly showed the following points: to underpay Wardak's share of the Modified Note, Omar claimed to have contributed $440,337.77 of the funds that he and Wardak loaned to WLOW ((7AA 1205-1206), and to have collected these funds outside of escrow (*id.*); but at the time he knew that the both claims were false, since Omar and WLOW's company furnished all of the funds, and the two of them were equal co-owners of these funds (1RT 116:14-24; 181:18-26, 183:17 – 186:24; 2RT 205:21 – 206:6, 295:15-24, 330:14-18; 3RT 395:18:5 – 397:2, 397:11-16, 398:15 – 399:10, 413:15-23, 414:7-10), and WLOW had not paid any funds to Omar outside of escrow (3RT 421:26 – 422:8), but rather Dirks and Omar had secretly agreed to form a new company that would take WLOW's Property, develop it, and sell it for outsized profits – which is then precisely what they did (7AA 1197-1201 1RT 174:14-19; 3RT 417:22 – 418:2, 424:15-23, 486:11-18; 488:2 – 489:9, 567:1-25 - 568:21).

The jury also could have considered how Omar misled Wardak to induce him to enter into the Final Operating Agreement and subject himself to his and Dirks' dubious interpretation of its Joint Funding Clause (7AA 1203-1204; 1RT 145:7 – 146:14, 150:3 – 152:14, 152:25 – 153:10, 155:3 – 156:3; 3RT 405:6 – 406:6, 409:24 – 410:10, 411:23 – 412:12, 471:13 – 474:18; 478:10 – 479:1.) – an interpretation that Omar urged in his own pleadings in this case (1AA 61-62 at ¶¶ 13-14, 16).

That evidence fairly afforded a clear and convincing showing of Omar's fraud upon Wardak and intent to deprive him by fraud of his ownership interest in WLOW and right to collect

one-half of the funds that WLOW owed under the Modified Note. *See Conservatorship of O.B.* (2020) 9 Cal.5th 989, 998–999 ("Where clear and convincing proof is required, the proponent must convince the jury or judge, as the case may be, that it is highly probable that the facts which he asserts are true. He must do more than show that the facts are probably true.") (*quoting* "Comment, Evidence: Clear and Convincing Proof: Appellate Review" (1944) 32 Cal. L. Rev. 74, 75.)

IV. WITHOUT CAUSE, THE SUPERIOR COURT WRONGLY AWARDED PREJUDGMENT INTEREST TO DIRKS

The Superior Court awarded to Dirks an award of prejudgment interest on his share of WLOW's damage award. The amount of this award was $250,273.97. (6AA 1129:7-8). If there was any proper cause for such an award, it would have been a discretionary award on an unliquidated claim for contract damages. *See* Civil Code § 3287(b); *Lewis C. Nelson & Sons, Inc. v. Clovis Unified Sch. Dist.* (2001) 90 Cal. App. 4th 64, 69 (explaining that the award is discretionary and made or denied on the basis of a balancing test that weighs the judgment-creditor's loss of the use of money against the judgment debtor's avoidance of unfair surprise).

Unlike Wardak (7AA 1355 at ROA Nos. 827, 837), Dirks never brought a noticed motion for such an award, nor provided substantial briefing of the issue in a bench memorandum (*see* 7AA 1350-1367, *passim*). *See N. Oakland Med. Clinic v. Rogers*

(1998) 65 Cal. App. 4th 824, 831("[R]equests for prejudgment interest under [Civil Code] section 3287 by a successful plaintiff must be made by way of motion prior to entry of judgment.").

More importantly, Dirks lacked any proper cause for an award of prejudgment interest: unlike Wardak, he collected his share of the net proceeds when LJS Placentia took an equity cash-out loan in November, 2018, then sold the Property on February 8, 2019 (3RT 417:22 – 418:2, 488:2 – 489:9, 567:26 – 568:21).

Unlike Wardak, Dirks was not deprived of the use of this money for *any* period of time, yet it was this money on which the Superior Court granted the award at 10% interest from February 8, 2019 onward (6AA 1129:7-8) even though Dirks never brought a motion requesting that it do so.

On these facts, there was no cause for the Superior Court's discretionary award of prejudgment interest to Dirks in excess of $250,000 under Civil Code section 3287(b). *See Great W. Drywall, Inc. v. Roel Constr. Co.* (2008) 166 Cal. App. 4th 761, 767–68 ("The policy underlying authorization of an award of prejudgment interest is to compensate the injured party – to make that party whole for the accrual of wealth which could have been produced during the period of loss.").

Omar, who must pay this interest, is the party who should raise this issue, but Wardak is a rival judgment-creditor of Omar and therefore objects to this award.

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CONCLUSION

For the foregoing reasons, the Court should grant the present appeal, give effect to the jury's special verdict nos. 1-5, 22, and 24, strike the Superior Court's award of prejudgment interest to Dirks, and remand this case to the Superior Court for a re-trial of the amount of punitive damages that Dirks and Omar must pay.

Dated: November 15, 2022. Respectfully submitted,

By: *William Markham*

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CERTIFICATE OF COMPLIANCE

I certify that the computer program used to prepare this brief indicates that this brief contains 13,992 words, including footnotes, and excluding the certificate of interested parties, the table of contents, the table of authorities, the signature block, this certificate of compliance, and the certificate of service.

I further certify that font used in this brief is Roman-type (Century Schoolbook) and 13 points in size.

Dated: November 15, 2022. Respectfully submitted,

By: *William Markham*

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CERTIFICATE OF SERVICE

I, the undersigned, declare that I am over the age of eighteen years and am not a party in this civil action. My business address is 402 West Broadway, Suite 400, San Diego, CA 92101.

On the date indicated below, I served this document, which is entitled "Appellant's Opening Brief," on the attorneys for all parties in this action other than Plaintiff-Appellant, whom I represent. Their names, addresses, and other contact information are as follows:

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I accomplished this service by causing an officially approved provider of filings and services, TrueFiling, to serve this document on the above-listed attorneys by electronically transmitting it to each attorney's above-listed e-mail address.

I declare under penalty of perjury that the foregoing matters are true and correct. Executed at San Diego, California on November 15, 2022.

Dated: November 15, 2022. Respectfully submitted,

By: *William Markham*

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