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 REPLY 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

Submitted by: William A. Markham, S.B. No. 132970
wm@markhamlawfirm.com
LAW OFFICES OF WILLIAM MARKHAM, P.C.
402 West Broadway, Suite 400
San Diego, CA 92101
Tel: (619) 221-4400
Attorneys for Plaintiff-Appellate, Bastel Wardak

TABLE OF CONTENTS

//

//

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

I. INTRODUCTION

Plaintiff-Appellant, Bastel Wardak ("Wardak"), appeals from certain post-trial rulings made in a bifurcated trial by the California Superior Court for Orange County, the Hon. Randall J. Sherman presiding (the "Superior Court").

During this trial, the jury returned special verdicts on all disputed issues of material fact in Wardak's favor against Defendants-Respondents Dwaine K. Dirks ("Dirks") and his lifelong, close friend and co-investor Weiss Omar ("Omar").

The jury's findings established the required elements for all of Wardak's claims – namely, his direct claims against Omar, and his derivative claims against Dirks and Omar for the benefit of nominal Defendant-Respondent WLOW Partners LLC ("WLOW"). The jury also found against Dirks on each material fact that he required to prove any of his cross-claims against Wardak. (*See* 6AA 1123-24.)

The central question of the case was presented in special verdict no. 1. The jury answered it in Wardak's favor, finding that Dirks was *not* entitled to dissolve WLOW and take its assets. Wardak argued and the jury agreed that Dirks was not entitled to do so because Wardak had substantially performed on his own the joint-funding obligations set forth in the parties' modified operating agreement.

Dirks' interpretation, which the jury rejected, was that Wardak and Omar were each required to provide one-half of WLOW's funding, and that Wardak could not perform this

obligation on his own after Omar failed to provide his one-half share. Rather, Dirks was entitled to reject Wardak's tender of all required funding and invoke the contract's forfeiture provisions against Wardak, which Dirks did as follows: he canceled Wardak's ownership interest in WLOW, dissolved WLOW, took its assets, and gave them to a new company, Defendant LJS Placentia Partners LLC ("LJS Placentia"), which he and his longtime friend *Omar* established and thereafter used to complete WLOW's project without Wardak's participation.

The jury specifically rejected this interpretation by its special verdict nos. 1, 2, 5, and 14. The jury further found that Dirks and Omar had improperly diverted the project's profits of $1.5 million from WLOW to LJS Placentia, so that they could split these profits only between themselves and pay no part of them to Wardak. The jury further determined that Dirks and Omar were jointly and severally liable for repaying these profits to WLOW, and it made a number of related findings.

These special verdicts all turned on the jury's answer in special verdict no. 1, which adopted Wardak's interpretation of the disputed contract language and rejected Dirks' interpretation.

In addition, the jury found that Omar made misrepresentations to an escrow company in order to withhold from Wardak nearly $125,000 of Wardak's own capital outlay, which exceeded $300,000, so that Wardak lost not only his share of the profits, but also a substantial part of his investment.

//

After trial, the Superior Court reversed the jury's finding in special verdict no. 1 during a hearing at which Wardak was represented by an interim attorney who was brand new to the long-running case, and who briefly appeared in it only because Wardak's trial attorney died four days before the original hearing date. (*See* Wardak's Opening Brief, pp. 47-48, n. 3.).

On this occasion, the Superior Court was persuaded to adopt Dirks' interpretation of the at-issue funding clause as a matter of law and without regard to whether the jury's finding on this point was supported by substantial evidence. Before then, the Superior Court had repeatedly ruled that the disputed contractual language was ambiguous and must be decided by the jury after it considered the parties' conflicting extrinsic evidence on its proper interpretation. The Superior Court offered no explanation for its abrupt departure from its prior rulings on this point.

The Superior Court thus adopted Dirks' interpretation of the at-issue funding clause, and on this sole basis it set aside special verdict nos. 1, 2, and 5 and thereby absolved Dirks of all liability in this case. (*See* 6AA 1087.) Wardak appeals from these rulings.[1]

Wardak also appeals from the Superior Court's grant of JNOV on special verdict no. 22, by which the jury found that

---

[1] On further consideration, Wardak elects to withdraw his appeal from the Superior Court's setting aside of special verdict nos. 3 and 4.

Omar had acted towards Wardak with "malice, oppression or fraud" and should therefore pay some measure of punitive damages.

Lastly, Wardak appeals from the Superior Court's unrequested award of prejudgment interest to Dirks on profits that Omar never withheld from him even for a single day. Omar has been adjudged liable for this award, and Wardak objects because it interferes with his ability to enforce his judgment against Omar, which has become final and non-appealable.

Each of Wardak's appellate challenges observes the applicable standard of review, is premised on an accurate recitation of facts established by evidence admitted during trial, and is supported by sound and compelling legal arguments. Wardak's appeal, moreover, will restore the equities in this case, which went badly askew during the post-trial hearing mentioned above. (*See* Wardak's Opening Brief, *passim*).

To oppose Wardak's appeal, Dirks has *demonstrably* misstated the appellate record on key points (*see* pp. 30-34, *infra*). He has also invited this Court to conduct an improper *de novo* review of the evidence and otherwise disregarded the standards of review that govern Wardak's appeal. Lastly, he has made unavailing arguments as to why the Superior Court improperly handled Wardak's derivative claims for the benefit of the parties' original company, WLOW. These efforts fail to rebut

any part of Wardak's appeal.[2] (*See* pp. 26-58, *infra*.)

Omar for his part opposes only Wardak's request to reinstate special verdict no. 22, but he devotes most of his limited effort to addressing an appellate challenge that Wardak has not made: Omar thus explains why the *amount* of the jury's award of punitive damages was rightly disallowed – a point that Wardak has not challenged on appeal.

But Omar offers only a threadbare, formulaic opposition to Wardak's appellate challenge, which is that clear and convincing evidence supports the jury's finding in special verdict no. 22 (namely, Omar acted against Wardak's interest with "malice, oppression, or fraud"), so that the Superior Court erred by granting JNOV on this verdict. Omar offers no meaningful, substantive refutation of Wardak's specific points in support of this part of the appeal, which should therefore be granted. (*See* pp. 59-63, *infra*.)

Tellingly, Omar has not joined in Wardak's appeal from the Superior Court's ruling that Omar must pay more than $250,000

---

[2] Dirks also requests that this Court affirm the Superior Court's judgment on Wardak's claims against WLOW and LJS Placentia. The purpose of this request is not entirely clear to Wardak. At all events, Wardak litigated derivative claims for *WLOW's benefit*, and WLOW has always been only a nominal party. As for LJS Placentia, the Superior Court dismissed it from the case on the sole ground that Wardak's claims against it had become moot by the time of trial. (*See* 6AA 1125.) For a time, Dirks tried to assert that LJS Placentia should be designated a prevailing party, but he dropped this contention in the proceedings below. (*See* 1ARA 27).

in prejudgment interest to Dirks. Omar's studied silence on this point speaks volumes and is part of an ongoing pattern in this case.

Namely, Omar and his lifelong friend/co-investor Dirks have acted in lockstep from the start. After Omar and his distant cousin Wardak had a falling out over an unrelated business matter, Omar and Dirks turned against him and employed the unscrupulous business practices that the jury condemned. That indeed was Wardak's principal case theme at trial. The jury was persuaded. (*See* pp. 34-36, *infra*.)

The Superior Court made many correct rulings in this long-running case, but Wardak respectfully submits that it misruled on the points that he has challenged by his appeal. The jury for its part made astute findings that were amply supported by the evidence. It got its one case right, as so often occurs in jury trials.

Directly below, Wardak offers a brief summary of his appeal, then explains why Dirks and Omar have each failed to rebut his points. This Court should grant Wardak's requested relief (*see* p. 68, *infra*) and remand the case to the Superior Court for further proceedings.

II. SUMMARY OF WARDAK'S APPEAL

Dirks' recitation of the "facts" in his Opposition Brief (at pp. 10-20) strays so far from the confines of the present appeal and misstates the record so brazenly that Wardak here offers a concise summary of his actual appellate challenge. This summary

takes care to correct Dirks' misstatement of the record and complete disregard of the applicable standard of review.

The present appeal, like the trial below, largely turns on the proper interpretation of a joint funding clause (the "Joint Funding Clause") and related forfeiture provisions (the "Forfeiture Provisions") set forth in the parties' final operating agreement (the "Final Operating Agreement").

The Joint Funding Clause obliged Wardak and Omar each to provide by a stated deadline one-half of construction funding required by WLOW, on whose behalf Wardak asserted derivative claims in addition to his own direct claims. The Forfeiture Provisions authorized Dirks to dissolve WLOW, seize its assets, and complete the property development on his own if Omar and Wardak defaulted on their funding obligation under the Joint Funding Clause. (*See* Wardak's Opening Brief, pp. 23-25.)[3]

After the parties executed the Final Operating Agreement, Wardak timely tendered his one-half share of the funding, but Omar balked at doing so, even though shortly before then he and Dirks had each represented to Wardak that he (Omar) had in hand his one-half share of the funding and would timely provide it, so long as Wardak did the same. (*See* Wardak's Opening Brief, pp. 25-27.)

---

[3] All references to "Wardak's Opening Brief" refer to Appellant's Opening Brief. Crucially, all references to specific pages in Wardak's Opening Brief *include* citations to the record set forth at those pages.

After Omar defaulted, Wardak promptly tried to furnish all the funding that WLOW required to complete its property development – both his own one-half share and Omar's one-half share of this funding. Wardak unequivocally offered to do so in writing. Dirks did not respond substantively to this offer.

Wardak therefore kept open his tender of his own share of the funding and repeatedly wrote to Dirks to ask where he should send his funds and how he and Dirks could proceed with performance of the Final Operating Agreement despite Omar's default.

From the start, and despite paying occasional lip-service to negotiating a resolution, Dirks was determined to prevent Wardak from performing his funding obligations, as was made clear by the evidence that persuaded the jury. (*See* Wardak's Opening Brief, pp. 27-31, ¶¶ 24, 27-30; *see id*., pp. 33-36, ¶¶ 33-37.)

Footnote 4 below sets forth the exact sequence of events, which Dirks has misstated in his Opposition Brief.[4] (*See* Wardak's

---

[4] At trial, Dirks unsuccessfully argued that Wardak never tendered his one-half share. The evidence showed that on May 15, 2015 Wardak timely handed to Dirks a cashier's check for his one-half share of the required funding, but by inadvertence this check was made to the order of the wrong payee – "WLOW, LLC" rather than "WLOW Partners LLC." (*See* 7AA 1173; 1RT 152:4-9, 155:13-19, 156:1 – 157:11.) Dirks indicated at first that he did not foresee any difficulty in negotiating the cashier's check (*see* 1RT 159:17 – 160:20; 7AA 1179-80), and he returned it to Wardak only on June 2, 2015, which was more than two weeks after Wardak

(continued...)

Opening Brief, pp. 27-29.)

Dirks thus took the position from the outset that Wardak could not cure Omar's default no matter what he might do. According to Dirks, Omar's default under the Joint Funding Clause meant that Wardak had also defaulted on his funding obligations and could not cure this default even by tendering both his own and Omar's share of the funding – i.e., all of the funding required by WLOW to complete its contemplated property development. (*See* Wardak's Opening Brief, pp. 27-31, ¶¶ 24, 27-30 *see id*., pp. 44-48.)

//

---

[4](...continued)
tendered it and eleven days after Wardak's funding deadline of May 22, 2015. (1RT 161:13-15; 3RT 558:15-20; 7AA 1177.) By then, Omar had confirmed that he would not provide his share of the funding (1 RT 158:21 – 159:10; 3RT 557:5-26; 7AA 1186), and Dirks had asserted that Omar's default placed Wardak in default (3RT 557:20-26; 7AA 1181-1182), so that Wardak came to suspect a fraud and hired an attorney to represent him (1RT 162:21 – 163:8). Two weeks after Dirks returned the cashier's check, and shortly after it cleared Wardak's bank account, Wardak re-tendered his one-half share of the required funding and also tendered Omar's share of the funding. (7AA 1182-83; 1RT 161:13 – 162:8.) After Dirks disregarded Wardak's tender of performance, Wardak placed his share of the funding in a separate bank account, asked Dirks where he should send the funds, and he repeatedly asked Dirks how he could perform the funding requirement so that the property development could proceed despite Omar's default. (7AA 1186-1187; 1RT 163:7 – 166:4). The jury was satisfied of these points and determined that Wardak had fulfilled the at-issue funding requirements by his substantial performance of them. (6AA 1123-24.)

That is what Dirks specifically means when he calls the Joint Funding Clause an "all-or-nothing" obligation. (*See* Wardak's Opening Brief, pp. 44-48.)

Here is how Dirks explained this very point during trial:

> Q.: OKAY. WERE YOU PREPARED AT THIS TIME [JUNE 3, 2015] TO JUST GO FORWARD WITH MR. WARDAK IF HE HAD BROUGHT FORWARD THE MONEY?
>
> A.: NO, I COULDN'T JUST GO FORWARD WITH ONE PARTY.
>
> Q. WHY NOT?
>
> A. THE AGREEMENT DOESN'T PROVIDE FOR THAT.

(3RT 560:23 – 561:2.)

Here is what Dirks' attorney stated on this very point in a submission 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. Indeed, the language makes clear that Omar and Wardak were both on the line since Dirks had the right to take 100% ownership of the company. There is no provision whereby Dirks is entitled to take 75% ownership interest in the company should one of [sic] Wardak or Omar fail to make their financial contribution. The [Final Operating Agreement] was an "all or none" offering.

(5AA 907:8-14.)

Insisting on this interpretation, Dirks *disregarded* and *rejected* Wardak's well-documented, timely tender of all required funding, and he asserted that *Omar's* failure to provide his one-half share of the funding meant that *Wardak* had committed an incurable default under the Joint Funding Clause. On this basis, Dirks enforced the Forfeiture Provisions *only against Wardak* as follows: Dirks canceled Wardak's interest in WLOW without compensation, even though by then Wardak had invested more than $300,000 in the venture, and Dirks claimed sole ownership of WLOW's property and other assets, then gave these assets to a new company that he and his lifelong friend *Omar* had formed to complete the property development without Wardak – Defendant LJS Placentia Partners LLC ("LJS Placentia"). Dirks and Omar thereafter split the property development's substantial profits only between themselves.[5] (*See* Wardak's Opening Brief, pp. 29-

---

5

In his Opposition Brief, Dirks alludes to an e-mail that he wrote to Wardak on June 3, 2015 (*see* 1RA 000015-16) in which Dirks suggested that he might entertain any reasonably definite proposal to cure Omar's default that Wardak might make. He also alludes to inconclusive correspondence by which the parties discussed convening a mediation. (*See* 1RA 000012-13.) But Dirks omits all discussion of his actual *conduct*: despite paying occasional lip-service to negotiating a settlement, Dirks essentially *ignored and then rejected* Wardak's unequivocal proposal to provide *all* of WLOW's required funding and repeated, insistent efforts to perform the Joint Funding Clause from June to September, 2015. (*See* Wardak's Opening Brief at pp. 29-30, ¶¶ 27-29.) Finally, Dirks evoked Omar's failure to fund in May, 2015 as sufficient cause to enforce the Forfeiture Provisions, which he

(continued...)

31, 33, ¶¶ 30, 33-37.)

Wardak's interpretation of the Joint Funding Clause was simpler. According to Wardak, the Joint Funding Clause obliged Wardak and Omar each to provide one-half the required funding to WLOW, and it was premised on an express understanding that Omar and Dirks encouraged Wardak to form: namely, Omar had in hand his own share of the funding and would timely provide it, so long as Wardak did the same. (*See* Wardak's Opening Brief, pp. 45, 58.)

Crucially, the Joint Funding Clause does *not* include a proviso, express or implied, that forbade either Wardak or Omar to cure the other's default, and Wardak never agreed that, if Omar defaulted on his share of the funding, he (Wardak) could not timely cure it, but must instead permit Dirks to enforce the Forfeiture Provisions against him because of Omar's default. (*See* Wardak's Opening Brief, p. 58.)

Instead, the Joint Funding Clause must be interpreted in accordance with well-settled contract principles, one of which is that an obligation to perform an act is extinguished by a *bona fide* tender to perform the act. *See* Civ. Code, § 1485 ("An obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with intent to extinguish the

---

[5](...continued)
thereafter did only against Wardak. (*See id.,* pp. 26-31, ¶¶ 22-30; *see also id*. pp. 33-36, ¶¶ 33-37.) On the basis of substantial evidence, the jury was convinced of these points and made corresponding findings in its special verdicts. (*See* 6AA 1123-24.)

obligation"); *Saldate v. Wilshire Credit Corp*. (E.D. Cal. 2010) 686 F.Supp.2d 1051, 1059 ("A tender is an offer of performance made with the intent to extinguish the obligation. A tender must be one of full performance and must be unconditional to be valid.").

A related, applicable principle of is that *substantial performance*: namely, Wardak can be said to have performed his obligations under the Joint Funding Clause by timely tendering his own share and then timely tendering Omar's share shortly after Omar defaulted. *See Magic Carpet Ride LLC v. Rugger Investment Group, L.L.C.* (2019) 41 Cal.App.5th 357, 364 ("What constitutes substantial performance [sufficient to constitute performance of a contract] is a question of fact, but it is essential that there be no wilful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for.") (*citing* 1 *Witkin, Summary of Cal. Law* (11th ed. 2017) "Contracts," § 843, p. 894.).[6]

//

6

Of note, the "time is of the essence" provision to which Dirks refers in his Opposition Brief concerned only the parties' *execution* of WLOW's Final Operating Agreement. *See* 7AA 1230, § 7. Regardless, Wardak timely provided his one-half share of the funding and timely offered to furnish Omar's one-half share of the funding after Omar defaulted. (*See* Wardak's Opening Brief, pp. 26-29.) To the extent there was any lag, it was because Dirks took took longer than two weeks to return Wardak's cashier's check, which Wardak then had to deposit into his bank account so that he could re-tender the same funds as well as Omar's funds. (*See* n. 4, *supra*.)

On the basis of substantial evidence, the jury agreed with Wardak's interpretation and therefore answered special verdict no. 1 in his favor, finding that Wardak had substantially performed the Joint Funding Clause, so that Dirks was not authorized to exercise the Forfeiture Provisions as he chose to do -- i.e., he was not authorized to dissolve WLOW and take sole ownership of its assets. (*See* 6AA 1123-1124; *see also* Wardak's Opening Brief, pp. 19-36, 54-60, 63-64.)

On the basis of this finding, the jury found in special verdict no. 2 that Dirks had breached his fiduciary duty to WLOW by invoking the Forfeiture Provisions, transferring its assets to LJS Placentia, diverting its profits to LJS Placentia, then splitting these profits only with Omar. (*See* 6AA 1123; *see also* Wardak's Opening Brief, pp. 54-60, 63-64.) On this basis, the jury concluded in special verdict no. 5 that Dirks was jointly and severally liable along with Omar for repaying LJS Placentia's profits of $1.5 million to WLOW. (*See* 6AA 1123). The jury also established Omar's joint and several liability for these same damages on a related derivative claim (special verdict nos. 6-7). (*See id*.)

Finally, the jury's finding on special verdict no. 1 informed its decision on special verdict nos. 14, 18, and 20, by which it rejected Dirks' cross-claims against Wardak for breaching the Joint Funding Clause (no. 14) and for intentional and negligent misrepresentation (nos. 18 and 20). (*See* 6AA 1123-1124).

//

These verdicts are all supported by substantial evidence, as Wardak has demonstrated in his Opening Brief.[7] (*See* Wardak's Opening Brief, pp. 19-36, ¶¶ 1-37; *see id*. pp. 54-60, 63-64.)

After the trial, however, the Superior Court granted Dirks' motion for JNOV on special verdict no. 1, having been persuaded during oral argument to adopt Dirks' interpretation as a matter of law. (*See* 6AA 1087). At this hearing, Wardak was represented by interim counsel, who briefly entered the case after Wardak's trial attorney unexpectedly died shortly before the hearing. (*See* Wardak's Opening Brief, p. 47, n. 3.)

When so ruling, the Superior Court did *not* find that special verdict no. 1 lacked support from substantial evidence. It merely adopted Dirks' construction of the Joint Funding Clause and Forfeiture Provisions on the basis of their wording and without regard to the conflicting extrinsic evidence that it had previously ruled a jury must consider in order to interpret these provisions. (*See* 6AA 1087; *see also* Wardak's Opening Brief pp. 45-48).

Wardak challenges this ruling on the following grounds: (1) the proper interpretation of the Joint Funding Clause and Forfeiture Provisions was a matter for the jury to decide because it turned on conflicting extrinsic evidence, as the Superior Court rightly ruled before trial; (2) the jury's adoption of Wardak's

---

7

Unlike Dirks, Wardak has accurately characterized the record to this Court, and, also unlike Dirks, he has observed the proper standard of review when arguing his points. (*See* Wardak's Opening Brief, *passim*.)

interpretation and corresponding answer in special verdict no. 1 were amply supported by substantial evidence; and (3) Dirks' competing interpretation is inequitable, contrary to his own purported rationale for the contract language in question, and contrary to law on two independent grounds. (*See* Wardak's Opening Brief, pp. 42-64.)

None of Dirks' opposition arguments rebuts any of these points. (*See* pp. 26-58, *infra*.)

Indeed, Dirks' preferred interpretation contradicts his own stated rationale for the Joint Funding Clause and related Forfeiture Provisions: if their purpose had been to ensure that WLOW would timely receive its required construction funding, as Dirks himself asserts, then Dirks would not have refused Wardak's tender of all required funding shortly after Omar defaulted, nor insisted that he (Dirks) could not perform the property development only with Wardak, but must instead enforce the Forfeiture Provisions against Wardak, then complete the property development with Omar. *(See* p. 40, *infra*.)

More fundamentally, Dirks' preferred interpretation of the Joint Funding Clause flouts two fundamental principles of contract law, both of which are codified in California's Civil Code. First, a party cannot frustrate his counter-party's performance of a contractual obligation, then complain that the counter-party has failed to perform the obligation or seek on this purported ground to be excused from performing his own obligations under the contract. (*See* Civil Code, §§ 1511, 1512.) Second, a penalty

provision in a contract is invalid and therefore unenforceable. (*See* Civil Code § 3275.)

Dirks' interpretation of the Joint Funding Clause violates both principles. It authorizes Dirks to (1) prevent Wardak's performance of the Joint Funding Clause; and (2) subject Wardak to oppressive contractual penalties because of this purported non-performance. (*See* Wardak's Opening Brief, pp. 61-63.)

Indeed, Dirks' interpretation presents a textbook example of an invalid penalty provision: if Dirks had accepted Wardak's tender of all required funding, WLOW would have suffered *no* harm. Instead, it would have timely proceeded with its contemplated property development. But the penalty that Wardak paid because of Dirks' interpretation was that he lost 25% of the venture's profits, or $375,000. (*See* Wardak's Opening Brief, pp. 61-62.)

The Superior Court never should have adopted Dirks' interpretation, much less done so after correctly ruling that the Joint Funding Clause was ambiguous, and that the parties' dispute over its proper interpretation could be resolved only by the jury after it considered the parties' conflicting extrinsic evidence. The jury, having been rightly entrusted with this task, decided the issue in Wardak's favor on the basis of substantial evidence. (*See* Wardak's Opening Brief, pp. 42-63.)

Wardak therefore asks this Court to reinstate special verdict no. 1 as well as special verdict nos. 2 and 5, which the Superior Court overturned only because it overturned special

verdict no. 1, and which are both supported by substantial evidence. (*See* Wardak's Opening Brief, pp. 42-63,)

As shown below, Dirks and Omar have failed to oppose any part of Wardak's appeal, which this Court should therefore grant. Wardak's specific request for relief appears at the conclusion of this brief.

III. DIRKS WRONGLY ASKS THIS COURT TO CONDUCT A *DE NOVO* REVIEW OF THE TRIAL EVIDENCE, WHICH HE HAS MISSTATED IN SEVERAL KEY RESPECTS

A. Dirks Implicitly Urges This Court to Observe an Improper Standard of Review

In his Opposition Brief, Dirks presents the same summation of the evidence and conclusions of fact that the jury rejected by its special verdicts. (*See* Dirks' Opposition Brief, pp. 10-20.)

That is an improper approach. *See Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 313–314 ("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."). *See also Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, 743 ("The purpose of a motion for judgment notwithstanding the verdict is not to afford a review of the jury's deliberation but to prevent a miscarriage of justice in those cases where the verdict rendered is without foundation. The scope of appellate review is to determine whether

there is any substantial evidence, contradicted or uncontradicted, supporting the jury's conclusions...."); *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284 ("Ordinarily, when reviewing a JNOV, an appellate court will use the same standard the trial court uses in ruling on the motion, by determining whether it appears from the record, viewed most favorably to the party securing the verdict, that any substantial evidence supports 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.").

1. None of Wardak's Appellate Challenges Entails a *De Novo* Review of the Evidence

In these proceedings, the Court is not embarked upon a *de novo* review of the evidence, but rather is considering the issues raised by Wardak's appeal, which are as follows:

- Were the Joint Funding Clause and Forfeiture Provisions ambiguous because of their wording and/or extrinsic evidence offered to show each side's understanding of these provisions? Did each side offer competing extrinsic evidence in support of its preferred interpretation? If so, was the jury's resolution of the ambiguity supported by substantial evidence? Relatedly, were special verdict nos. 1, 2, and 5 each supported by substantial evidence? (*See* Wardak's Opening Brief, pp. 42-60).

- Was the Superior Court's interpretation of the Joint Funding Clause and Forfeiture Provisions contrary to law and therefore erroneous as a matter of law? (*See* Wardak's Opening

Brief, pp. 61-63).

- Was special verdict no. 22 supported by clear and convincing evidence? (*See* Wardak's Opening Brief, pp. 66-68.)

- Did the Superior Court abuse its discretion or commit a manifest error of law by awarding prejudgment interest to Dirks on his share of the property development's profits? (*See* Wardak's Opening Brief, pp. 68-69).

When deciding these questions, this Court should disregard Dirks' invitation to conduct a *de novo* review of the evidence. This point is fundamental. *See Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465 ("Arguments should be tailored according to the applicable standard of appellate review. Failure to acknowledge the proper scope of review is a concession of a lack of merit."); *see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2021) ¶ 8:32 ("The appropriate standard of review also has significant consequences for the parties in preparing for appellate review: They must confine their written and oral argument within the context of the applicable standard; and that is far different from the manner in which a case is prepared for and presented at trial.").

To oppose Wardak's appeal, Dirks has presented his preferred version of the facts, which the jury rejected. But the question is not whether Dirks can successfully re-argue the evidence to this Court, but whether the jury's special verdicts against Dirks (nos. 1, 2, and 5) are supported by substantial

evidence. *See Johnson & Johnson Talcum Powder Cases,* 37 Cal.App.5th at 313–314 ("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."); *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110 ("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."); *see also People v. Bradford* (1997) 15 Cal.4th 1229, 1329 ("The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on isolated bits of evidence.").

Dirks has not even pretended to observe this standard of review. He has merely offered the very version of events that the jury decisively rejected at trial. (*See* Dirks' Opposition Brief, pp. 10-20.)

Regardless, Wardak has demonstrated in his Opening Brief how substantial evidence easily supports special verdict nos. 1, 2, and 5, and he has taken painstaking care to furnish accurate characterizations of the evidence and exact citations to the appellate record. (*See* Wardak's Opening Brief, pp. 18-36, 42-61.) Dirks has not even *attempted* to oppose this showing.

//

B. Dirks Has Mischaracterized Key Points of Evidence

Regrettably, Dirks' presentation of the evidence is *demonstrably* inaccurate on critically important points. Wardak does not make this charge lightly.

Table 1, which appears directly below, sets forth the key points that Dirks has misstated. Wardak objects to these clear mischaracterizations of the evidence. *See Pappas v. Chang* (2022) 75 Cal.App.5th 975, 985 (An appellate brief "should accurately and fairly state the critical facts (including the evidence), free of bias; and likewise as to the applicable law. Misstatements, misrepresentations, and/or material omissions of the relevant facts or law can instantly 'undo' an otherwise effective brief, may draw sanctions, and may well cause you to lose the case.") (*quoting Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2021) ¶ 9:27).

//

//

//

//

//

//

//

//

//

//

TABLE 1: DIRKS' MISSTATEMENTS OF THE RECORD

Dirks' Misstatement	What the Evidence Discloses
"On behalf of WLOW, Dirks deposited $635,665.78 with a well-respected escrow company, First American Title Company ("FATCO"). FATCO obtained payoff demands from both Wardak and Omar. FATCO then paid off Omar and Wardak, consistent with their demands for full reconveyance." Dirks' Opposition Brief, p. 17 (purported citations to the record provided.)	Dirks never deposited *any* funds into the escrow account. Rather, Omar deposited $194,555.00 and falsely represented to the escrow company that WLOW had repaid him the remainder, $440,337.77, outside of escrow, and that he was entitled to keep these funds himself. At trial, Omar conceded the following points: when he communicated these matters to the escrow company, WLOW had not sent *any* funds to him outside of escrow; and he and Wardak were co-equal contributors of the funds ($605,537.80) that they had provided to WLOW, and they were each entitled to receive one-half of the money that WLOW owed to them ($635,665.78, which was $605,537.80, plus interest). Wardak was therefore entitled to receive $317,832.89 from the escrow account, but received only $193,837.47 (Omar's above remittance, less the escrow company's fees). The jury thus found that Omar had misappropriated and converted to his own use $123,900 that was owed to Wardak. Wardak's Opposition Brief, pp. 31-33 (at ¶¶ 31-32) (exact citations to the record provided).

Dirks' Misstatement	What the Evidence Discloses
"For several months, Dirks sought to resolve the dispute and obtain the construction financing in order to proceed with the project. An [sic] no time did Wardak ever offer to perform all of the obligations due by he and Omar. Rather, Wardak made several alternative offers to change the parties' agreement once again. At one point, Wardak offered that he and Dirks would give Omar an additional 30 days to pay $867,936.50, after which time Dirks and Omar would either obtain a bank loan or Omar would guarantee the funding. But Wardak never actually cured the default by Omar and Wardak, or even made an unconditional offer to cure the default." Dirks' Opposition Brief, p. 16 (purported citations to the record provided.)	Wardak timely provided his one-half share of the funding on May 15, 2015 by giving Dirks a cashier's check for his one-half share of the funding, but by inadvertence the check misnamed the payee, stating "WLOW, LLC" rather than "WLOW Partners LLC." Dirks, who initially believed he could negotiate the check as written, returned it to Wardak only on June 2, 2015, which was eleven days after the funding deadline of May 22, 2015. After further exchanges with Dirks on this matter, and shortly after the returned cashier's check cleared Wardak's bank account, Wardak made the following offer to Dirks in writing on June 15, 2015: "I [Wardak] will reissue the cashier's check or wire funds in the amount of $867,936 for purposes of funding the construction. (....) We will give Weiss [Omar] an additional thirty (30) days to fund his capital contribution into the escrow account. If he is unwilling or unable to do so, we agree to take the following actions: I will either fund the remaining $867,936, bring in another investor, or guaranty [sic] an institutional loan for that amount." *See id*.; 7AA 1182-83. Dirks did not acknowledge or respond substantively to this offer. Wardak's Opposition Brief, pp. 26-29 (at ¶¶ 22-26) (exact citations to the record provided).

Dirks' Misstatement	What the Evidence Discloses
"After several months of non-performance, Dirks took the only action available to him; on September 18, 2015, he exercised his rights under the Dissolution Provision and took 100% ownership of the Company." Dirks' Opposition Brief, p. 16 (purported citations to the record provided.)	Dirks disregarded Wardak's offer to provide both his own share and Omar's share of the required funding and his repeated request for bank wiring instructions. Wardak therefore placed his required share of the funding in a dedicated bank account, and his attorney gave notice of this deposit to Dirks, along with confirming bank statements. Wardak's attorney also asked where Dirks wished to have Wardak send the funds and how Wardak could fulfill the Joint Funding Clause on his own. Dirks did not acknowledge or respond substantively to these queries, which Wardak and his attorney repeatedly made in formal correspondence in June, July, August, and September, 2015. Finally, Dirks invoked the Forfeiture Provisions against Wardak on September 18, 2015, citing Omar's default, and disregarding Wardak's efforts to perform the funding obligation. Dirks and Omar thereafter completed the property development without Wardak and split its profits only between themselves. Wardak's Opposition Brief, pp. 26-30, 33-36 (at ¶¶ 22-30, 33-37) (exact citations to the record provided).

Having thus mischaracterized the record, Dirks relies on his own mischaracterizations to assert various arguments at different parts of his Opposition Brief. *See, e.g.*, Dirks' Opposition Brief, p. 9 ("[E]ach of the parties' investments were returned to them. The cash contributed by Wardak and Omar was returned to them, and Dirks ended up controlling the Property."); p. 38 ("Wardak never even cured his own default, having provided a cashier's check that Dirks could not negotiate and never providing a replacement. But to be clear, Wardak never provided the entire $1,735,872 construction financing, never tendered the entire funding, and never even offered to tender the entire funding.").

C. The Evidence Further Discloses That Dirks and Omar Have Long Been Close Friends and Veteran Co-Investors

In his Opposition Brief, Dirks characterizes the dynamic between the parties in a manner that the jury apparently rejected by its special verdicts. According to Dirks, WLOW's three members – Dirks, Omar, and Wardak – were three sophisticated property developers who came together to form WLOW. Omar and Wardak were related and had a falling out over an unrelated matter. Their quarrels ultimately interfered with their funding of a project that Dirks had been first to conceive, so that in frustration he sought other funding. (*See* Dirks' Opposition Brief, pp. 10-12.)

//

But the jury apparently rejected this characterization (*see* 6AA 1123-24) after Dirks and Omar had invoked it as an underlying theme in their opening statements. (*See, e.g.*, 1RT 36:4-17, 61:4-20).

Most notably, Dirks' preferred characterization entirely omits the core facts that underlie the parties' controversy: namely, Dirks and Omar are unusually close, lifelong friends, whose friendship survived Dirks' divorce and re-marriage. They also did several property deals together before the WLOW venture. They lived very close to one another and often took trips together, including vacations. They and their wives frequently socialized. They were both much older and far more experienced in real estate transactions than was Wardak, who was only 32 when they first approached him in 2013. (*See* Wardak's Opening Brief, p. 25, n. 1; *see also* 1 RT 81:13-17, 3RT 393:2 – 394:22; 420:10 – 20.)

To be certain, Wardak and Omar are relatives: Wardak is Omar's first cousin once removed (Omar and Wardak's father are first cousins). But Wardak is much younger than Omar and never had a social relationship or close friendship with him. (1 RT 58:9-23, 71:10-20, 77:23 – 78:11). Wardak and Omar also had a bitter falling out over an unrelated business dispute. That is part of the story. (*See* 1RT 78:12 – 80:1; 3RT 423:16 – 424:11.)

Wardak pointedly clarified this dynamic to the jury. At the very beginning of his closing argument, Wardak's attorney explained how Dirks and Omar had apparently ganged up on

Wardak (possibly deciding to do so after Wardak and Omar had a falling out over an unrelated matter). For this purpose, Dirks and Omar used the unscrupulous business practices that the jury condemned by its special verdicts. (*See* 4 RT 656:12 – 657:19).

In his Opposition Brief, Dirks makes no mention of this dynamic, but instead insists on his above characterization (*see* Dirks' Opposition Brief, pp. 10-20), even though on this appeal all evidence and all reasonable inferences supported by it must be construed to support the jury's special verdicts. *See Johnson & Johnson Talcum Powder Cases,* 37 Cal.App.5th at 313–314.

IV. THE SUPERIOR COURT ERRONEOUSLY ADOPTED DIRKS' ABSURD, INEQUITABLE INTERPRETATION OF THE JOINT FUNDING CLAUSE

A. The Central Issue in the Case

The proper meaning of the Final Operating Agreement's Joint Funding Clause lies at the heart of this case. If Omar and Wardak breached it, then Dirks was entitled to enforce the Forfeiture Provisions; but if not, and if instead Wardak substantially performed the funding requirements on his own, then Dirks wrongly enforced the Forfeiture Provisions, as Wardak alleged and proved to the jury. (*See* Wardak's Opening Brief, pp. 42-64.)

//

//

B. The Joint Funding Clause

The Joint Funding Clause stated the following: "...*Omar and Wardak collectively and together on a 50/50 basis must provide [to WLOW] the balance of the construction financing in the amount of $1,735,872.00 plus interest*...." (7AA 1214-15, § 11.) It also required Omar and Wardak to provide these funds no later than May 22, 2015 (i.e., it required them to provide their funds within seven days of the effective date of the Final Operating Agreement, which was May 15, 2022). (*See id*.)

C. Wardak's Interpretation of the Joint Funding Clause

According to Wardak, the Joint Funding Clause obliged Wardak and Omar each to provide one-half the required funding in timely manner, and it was premised on an express understanding that Dirks and Omar had encouraged Wardak to form: namely, Omar already had in hand his own one-half share of the funding and would timely remit it to WLOW, so long as Wardak did the same. Wardak, who had his own one-half share and was willing to provide it, thus understood that he and Omar would each timely perform the Joint Funding Clause.
(*See* Wardak's Opening Brief, pp. 45, 58-60.)

A necessary corollary is that, if either Omar or Wardak proved unwilling or unable to furnish his one-half share of the funding, the other could timely furnish all required funding, thereby ensuring that WLOW would receive its required funding in timely manner, which according to Dirks was the sole purpose

of the Joint Funding Clause and related Forfeiture Provisions. *See Pacific Freight Lines v. Pioneer Express Co.* (1940) 39 Cal.App.2d 609, 614 ("Where two or more persons are jointly liable upon an obligation and one of them makes payment of the whole, that obligation is thereby extinguished, and the one paying has a new obligation against the others for their proportion of what he paid for them."); *see also Morgan Creek Residential v. Kemp* (2007) 153 Cal.App.4th 675, 684 ("In situations where two or more parties are jointly liable on an obligation and one of them makes payment of more than his share, the one paying possesses a new obligation against the others for their proportion of what he has paid for them.").

Wardak met this standard by his timely tender of his own one-half share of the funding and then his timely tender of Omar's one-half share after Omar defaulted. (*See* Wardak's Opening Brief, pp. 26-29, ¶¶ 22-26.)

D. Dirks' Interpretation of the Joint Funding Clause

After the parties executed the Final Operating Agreement, Dirks insisted on a starkly different interpretation. According to Dirks, the Joint Funding Clause was an "all-or-nothing" provision: if Omar failed to perform it on time, then he and Wardak both committed an incurable breach of the Final Operating Agreement, and Dirks could therefore disregard Wardak's tender of the full amount of required funding, choose

instead to invoke the Forfeiture Provisions only against Wardak, then complete the property development with his good friend Omar, cutting off Wardak entirely from the profits. (*See* Wardak's Opening Brief, pp. 44; *see also* p. 18, *supra*.)

On the basis of this interpretation, and despite Wardak's repeated efforts to perform the entire funding obligation, Dirks invoked the Forfeiture Provisions only against Wardak in order cancel his membership interest in WLOW without compensation, dissolve WLOW, take sole ownership of the Property and WLOW's other assets, and give them to a company that he and Omar owned (LJS Placentia) without paying any compensation to WLOW. Dirks and Omar then had LJS Placentia complete the property development, and they split its substantial profits only between themselves. (*See* Wardak's Opening Brief, pp. 29-31, 33-3, ¶¶ 30, 33-37).

1. Dirks' Interpretation Is Not Supported by the Disputed Contract Language

Crucially, Dirks' interpretation is not supported by the contract language itself: the Joint Funding Clause did not specify that, if either Wardak or Omar failed to perform, the other could not furnish the required funding to cure the default and avert the Forfeiture Provisions. (*See* 7AA 1214-15, § 11). Dirks' argument on this point therefore fails: the Joint Funding Clause established Wardak and Omar's joint and several liability, which by law Wardak could timely perform on his own if Omar defaulted, *See*

Pacific Freight Lines, 39 Cal.App.2d at 614; *see also Morgan Creek Residential*, 153 Cal.App.4th at 684.

2. Dirks' Interpretation Is Contradicted by His Own Rationale for the Disputed Contract Language

Dirks' interpretation of the Joint Funding Clause and related Forfeiture Provisions is directly contradicted by his own statement of their purpose.

According to Dirks, their only purpose was to ensure that WLOW would timely receive its required funding from its funders, Wardak and Omar; but if not, Dirks would have a free hand to find other funding to develop the Property. (*See* Dirks' Opposition Brief, pp. 9, 11-12.)

If this rationale had genuinely animated Dirks, he would have accepted Wardak's tender of the full amount of required funding (exactly described in Wardak's Opening Brief at pp. 26-29, ¶¶ 22-26; *see also* n. 4, *supra*).

Dirks' actual use of the Joint Funding Clause and Forfeiture Provisions thus contradicts his stated rationale for including them in the Final Operating Agreement.

E. The Jury Rightly Adopted Wardak's Interpretation on the Basis of Substantial Evidence

After considering the wording of the disputed contractual language and the parties' conflicting evidence concerning its proper interpretation, the jury adopted Wardak's interpretation

of the Joint Funding Clause and related Forfeiture Provisions, and it therefore rendered special verdict nos. 1, 2, 5-7, and 14, 18, and 20 in favor of Wardak.

There was ample and substantial evidence in the record to support these findings. (*See* Wardak's Opening Brief, pp. 21-31, 33-36, ¶¶ 13-30, 33-37; *see also id*., pp. 42-60.)

The Superior Court therefore lacked proper cause to overturn special verdict nos. 1, 2, and 5 (while incongruously leaving in place special verdict nos. 6, 7, 14, 18, and 20). *See Hauter*, 14 Cal.3d at 110.

F. Wardak, Having Been Induced, Was Entitled to Rely on His Interpretation of the Joint Funding Clause

The jury's adoption of Wardak's interpretation was further supported by a well-settled principle of contract interpretation: if a promisor (e.g., Omar and Dirks) induces a promisee (e.g., Wardak) to form a specific understanding of ambiguously worded contractual language (as happened here), the language should be construed as the promisee was induced to believe it would be construed. *See* Civil Code, § 1649*; 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."); *Johnston v. Joint Highway Dist. No. 12* (1934) 138 Cal.App. 450, 453 (To interpret an ambiguous contractual provision, "[w]e may consider how one party knew the

other party understood the agreement.").

Substantial evidence shows that Dirks and Omar induced Wardak to form his above-stated understanding of the Joint Funding Clause. This evidence includes the parties' contemporaneous written correspondence and trial testimony given by Dirks and Omar, as well as Wardak's own trial testimony. (*See* Wardak's Opening Memorandum, pp. 25-26, ¶¶ 17-21; *see also id*., p. 60.)

G. Dirks' Interpretation Is Contrary to Law

If either side's interpretation could be adjudicated as a matter of law, it would be the one offered by Dirks, since it was contrary to two codified principles of contract law:

- First, a party cannot frustrate his counter-party's performance of a contractual obligation, then complain that the counter-party has failed to perform the obligation or seek on this ground to be excused from performing his own obligations under the contract. Rather, the party who frustrates his counter-party's performance remains obliged to perform his own obligations under the contract. *See* Civil Code, § 1511 (a counterparty cannot prevent or delay a party's performance, then complain of his alleged breach); Civil Code, § 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 benefitted party's duty of performance becomes unconditional.").

• Second, penalty provisions in a contract are invalid and therefore unenforceable. A penalty provision in turn refers to stipulated damages that are excessive or disproportionate; or, more specifically, a stipulated sum or forfeiture that a counter-party agrees to cede if he fails to perform a stated obligation, but only if the stipulated sum or forfeiture, when made, bears no reasonable approximation to likely harm that might be caused by non-performance of the stated obligation. *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.").

Applying the rule against contractual penalties is simple in this instance.

On Dirks' telling, *Omar's* non-performance triggered *Wardak's* forfeiture of his own 25% stake in WLOW's property development, even if Wardak tendered Omar's one-half share of the funding in addition to his own. That is practically a textbook example of a contractual penalty: if Wardak were permitted to tender his own and Omar's share of the funding, WLOW would suffer *no* harm at all, yet Wardak must still forfeit his 25% stake in it. (*See* Wardak's Opening Brief, pp. 61-63.)

Dirks' interpretation thus renders the contract's Forfeiture Provisions invalid penalties, which are voidable and unenforceable. *See Ridgley*, 17 Cal.4th at 977–78; *Better Food Markets*, 40 Cal.2d at 184; *see also* Civil Code § 3275.

Dirks' interpretation, unlike Wardak's, can therefore be rejected as a matter of law: it permits Dirks to frustrate Wardak's performance, then invoke Wardak's purported non-performance as grounds for enforcing invalid penalties only against Wardak, so that Dirks can complete performance with Omar, who is the party who failed to perform. (*See* Wardak's Opening Brief, pp. 61-63.)

//

1. This Court May Properly Consider the Issue of Invalid Contractual Penalties

Dirks further argues that Wardak failed to raise the issue of contractual penalties in the proceedings below and therefore cannot assert the issue in his present appeal. (*See* Dirks' Opposition Brief, p. 35, n. 9).

Wardak respectfully disagrees. Rather, he addressed the issue of invalid penalties in a bench memorandum on the form of the judgment (*see* 1ARA 22-23), which he submitted after the Superior Court had ruled on Dirks' motion for JNOV (*see* 6AA 1083-1089), but before it issued its judgment (6AA 1101-1110, 1121-1129) and in response to its express invitation to the parties to submit bench memoranda on the proper allocation of WLOW's damage award (6AA 1089). By then, it was too late for Wardak to request a reconsideration of the Superior Court's grants of JNOV, but nevertheless he pointedly directed this issue to the Superior Court's attention while the form of the judgment and the allocation of WLOW's damage award remained vigorously contested.

Regardless, Wardak's arguments about penalty clauses raise pure questions of law concerning (1) the Joint Funding Clause and Forfeiture Provisions, whose language is not subject to any dispute; and (2) Dirks' own interpretation of these provisions, which likewise is not subject to dispute. This Court may therefore consider Wardak's argument that Dirks' interpretation of these provisions renders them unlawful

penalties. *See Ward v. Taggart* (1959) 51 Cal.2d 736, 742 ("[A change in theory is permitted on appeal when 'a question of law only is presented on the facts appearing in the record."); *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167 ("As a general rule, failure to raise a point in the trial court constitutes of waiver and appellant is estopped to raise that objection on appeal. An exception to the general rule may be presented, however, where the theory presented for the first time on appeal involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence.").

H. This Court Should Reinstate the Jury's Central Finding

For the above reasons, this Court should reinstate the jury's interpretation of the disputed contractual language (special verdict no. 1) and its corollary findings that Dirks breached his fiduciary duty to WLOW and therefore is jointly and severally liable along with Omar for its losses (special verdict nos. 2 and 5). (*See* Wardak's Opening Brief, pp. 42-64.)

V. WARDAK HAD STANDING TO LITIGATE DERIVATIVE CLAIMS FOR WLOW'S BENEFIT

In his Opposition Brief, Dirks argues that Wardak's derivative claims for WLOW's benefit should have been barred below because Wardak could not satisfy the requirement of

"continuous ownership," which according to Dirks was an absolute prerequisite to litigating a derivative claim on WLOW's behalf. Dirks therefore asserts that the Superior Court erred by permitting Wardak to litigate his derivative claims. (*See* Dirks' Opposition Brief, pp. 23-25.)

The Superior Court previously rejected this argument. (*See* 4AA 635; 5 RT 760:25 – 761:5, 862:8-10.) This Court should do the same, since the argument depends on an *incomplete statement of the law* and overlooks a recognized, applicable exception to the requirement of continuous ownership: namely, the requirement can be excused on "equitable grounds," which can arise when, as here, a plaintiff brings derivative claims against a company from which he claims to have been fraudulently excluded. The requirement can also be waived when, as here, a member of a dissolved limited liability company brings derivative claims on its behalf. These points are fully explained directly below.

A. The Doctrines of Contemporaneous and Continuous Ownership in a Derivative Case

Under California law, a member of a limited liability company (an "LLC") ordinarily can assert a derivative claim on the LLC's behalf only if he can meet the following two requirements: (1) he must have been a member of the LLC when the challenged transaction occurred ("contemporaneous ownership"); and (2) he must continuously remain a member of the LLC until the derivative claim is tried ("continuous

ownership"). *See Sirott v. Superior Court of Contra Costa County* (2022) 78 Cal.App.5th 371, 381–382 (the doctrines of contemporaneous ownership and continuous ownership apply to derivative claims made by a member of a limited liability company); *see also Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1119 ("California law, like Delaware law, generally requires a plaintiff in a shareholder's derivative suit to maintain continuous stock ownership throughout the pendency of the litigation. Under this rule, a derivative plaintiff who ceases to be a stockholder by reason of a merger ordinarily loses standing to continue the litigation.").

1. The Judicial Policies Behind These Doctrines

The above two requirements are not arbitrary, but rather promote a sound judicial policy: they are supposed to prevent abusive derivative suits filed by opportunistic plaintiffs, and in particular they are intended to prevent "strike suits" by plaintiffs who might otherwise buy shares of a company's stock, assert derivative claims that challenge the company's prior merger or some other prior transaction, then sell or short the company's stock after the derivative litigation has somehow affected its value. *See Grosset*, 42 Cal.4th at 1109 (the requirement of contemporaneous ownership prevents a plaintiff from purchasing a company's stock "for the sole purpose of prosecuting a derivative action to attack transactions that occurred before the stock purchase," and the requirement of continuous ownership affords further protection from such abuses and also ensures that the

plaintiff has a sufficient, proper incentive to litigate derivative claims for the benefit of the company on whose behalf he asserts them.)

B. The Doctrine of Continuous Ownership Can Be Excused on Two Separate Grounds

There is a significant exception to the requirement of continuous ownership, which is plainly applicable to Wardak's derivative claims.

Namely, a trial court can properly excuse the requirement of continuous ownership on *equitable grounds*, most notably when the plaintiff alleges or shows that he was wrongly or fraudulently excluded from the LLC or corporation on whose behalf he has asserted a derivative claim. *See Sirott*, 78 Cal.App.5th at 385 ("We recognize that equitable considerations may warrant an exception to the continuous ownership requirement...") (quoting *Grosset*, 42 Cal.4th at 1119); *Haro v. Ibarra* (2009) 180 Cal.App.4th 823, 836–837 (in a derivative case, "equitable considerations" can excuse the requirement of continuous ownership "if the plaintiff was deprived wrongfully of standing" by a fraudulent machination).[8]

//

---

[8] Dirks omitted to mention this exception in his Opposition Brief, even though the exception is set forth in the very cases that he cites to support his position. (*See* Dirks' Opposition Brief, pp. 23-25.*)*

There is also a second, equally applicable exception to the doctrine of continuous ownership: the doctrine can be excused when a shareholder of a *dissolved corporation* asserts a derivative claim on the corporation's behalf. *See Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 215 (on policy grounds, the doctrine of continuous ownership does not bar a shareholder of a dissolved corporation from litigating a derivative claim on its behalf).[9]

C. The Superior Court Properly Excused Wardak from the Requirement of Continuous Ownership

Dirks repeatedly argued below that Wardak could not litigate derivative claims on WLOW's behalf because he ceased to be a member in WLOW in September, 2015, which is when Dirks purported to cancel his membership interest and claimed the right to take all of WLOW's assets without compensation because of Omar's breach of the Joint Funding Clause. (*See* 3AA 368-371, 377-378; 4AA689-698; 5AA 903-904.)

The Superior Court rejected this argument each time, permitted Wardak to try his derivative claims in a bifurcated trial, and declined to give JNOV to Dirks on this issue. (*See* 4AA 635; 5 RT 760:25 – 761:5, 862:8-10.; 6AA1087.)

9

Dirks also omitted to mention this second exception, even though the Superior Court expressly invoked it to reject Dirks' argument on this point. (*See* 6AA1087.)

That ruling was permissible on two independent grounds.

First, on *equitable grounds* the Superior Court could excuse Wardak from the requirement of continuous ownership, since the gravamen of Wardak's derivative claims was that Dirks had wrongly cancelled his ownership interest in WLOW, wrongly elected to dissolve WLOW, wrongly given away all of WLOW's assets to Dirks and Omar's new company, and wrongly diverted profits from WLOW to this new company (LJS Placentia). *See Sirott*, 78 Cal.App.5th at 385; *Grosset*, 42 Cal.4th at 1119); *Haro*, 180 Cal.App.4th at 836–837.

Second, the Superior Court correctly stated in one of its rulings (6AA1087) that Wardak could properly try his derivative claims because shareholders of a *dissolved corporation* can bring derivative claims on its behalf. *See Favila,* 188 Cal.App.4th at 215.

Dirks' argument on this point is therefore unavailing.

Indeed, the absolute rule advocated by Dirks would establish a poor judicial policy, since it would permit a controlling owner of a closely-held company to misuse his control to divert the company's assets, exclude a minority owner, and dissolve the company, then argue that the minority owner, having been excluded, could not bring a derivative claim to seek redress for the diversion of assets and wrongful dissolution of the company.

//

//

//

VI. THE SUPERIOR COURT PROPERLY BIFURCATED THE TRIAL AND SET THE SEQUENCE OF PROOFS AND ISSUES

Dirks argues here, as he did below, that the Superior Court wrongly permitted a jury to try Wardak's derivative claims, and that in consequence it should be construed to have treated the jury's verdicts as non-binding findings recommended by an advisory jury in an equitable proceeding. (*See* Dirks' Opposition Brief, pp. 25-26.)

Dirks' proposed procedure, which the Superior Court never adopted, would have been proper only if the Superior Court had tried Wardak's equitable claims *before* his legal claims.[10]

But that is not how the Court chose to order the sequence of proof and issues in the bifurcated trial of this case. On the contrary, the Superior Court rejected Dirks' argument that Wardak's derivative claims must be separately tried in a bench trial, and instead it charged the jury with deciding *all* disputed issues of material fact raised by Wardak's claims and Dirks' related cross-claims. (*See* 4AA 635; 5 RT 760:25 – 761:5, 862:8-10; 6AA1087.)

//

10

In equitable proceedings, a trial court can properly empanel an advisory jury, whose findings constitute recommendations that the trial court can review, adopt, modify, or reject as it deems fit to do. *See Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156; *A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 473–474.

Crucially, *all* of these claims turned on the same disputed issues of material fact, which could not have been reasonably segregated for separate trials. Equally important, some of Wardak's operative claims and all of Dirks' operative cross-claims were jury claims. (*See* 2AA 265-294; 2AA 316-326.)

The Superior Court therefore had broad discretion to schedule a bifurcated trial, charge the jury with deciding common issues of material fact, rule on remaining equitable issues after the jury trial, then issue its final judgment. *See* Code of Civil Procedure, §§ 598, 1048(b); Evidence Code, § 320; *see also Grappo v. Coventry Financial Corp*. (1991) 235 Cal.App.3d 496, 504 ("[A] trial court may, on its own motion, make an order setting the precedence of issues for trial at any time. (....) Under [sections 598, 1048(b) of the Code of Civil Procedure and section 320 of the Evidence Code], trial courts have broad discretion to determine the order of proof in the interests of judicial economy.").

The jury's findings of fact, being necessary to its findings on all jury claims, became binding on the Superior Court during the second stage of the bifurcated trial:

//

//

//

//

//

//

//

> The order of trial, in mixed actions with equitable and legal issues, has great significance because the first factfinder may bind the second when determining factual issues common to the equitable and legal issues. (....) There are few California cases where legal issues were tried before equitable ones (as was done here), but it is equally clear that a jury's determination of legal issues may curtail or foreclose equitable issues. (....) Where legal claims are first tried by a jury and equitable claims later tried by a judge, the trial court must follow the jury's factual determinations on common issues of fact.

Hoopes v. Dolan (2008) 168 Cal.App.4th 146, 156-58). *See also Darbun Enterprises, Inc. v. San Fernando Community Hospital* (2015) 239 Cal.App.4th 399, 409, n. (In bifurcated trials, "it is fully within a trial court's discretion to have a jury try the legal issues first. A jury's determination of legal issues may foreclose a subsequent bench trial on equitable claims."); *but cf. Orange County Water Dist. v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 354 ("A trial court handling such a combined action could, and in many cases should, hold a bench trial on any equitable issues first.").

During the first stage of the bifurcated trial below, the jury issued a series of special verdicts that resolved the key issues of fact in dispute. By these verdicts, the jury established *all* of the facts that Wardak required to prove his direct and derivative claims, and it rejected each proposition of fact that Dirks needed to prevail on any of his cross-claims against Wardak. The jury

also found that Dirks and Omar had each acted with "malice, oppression or fraud" and therefore should pay punitive damages. (6AA 1123-1124.)

That is why Superior Court received no evidence during the bench trial. By then, all disputed issues of material fact had been decided by the jury and set forth in its special verdicts. (6RT 887:8-10; 5AA 869-870.) The Superior Court was bound by these findings of fact, save to the extent that any of them lacked sufficient evidentiary support. *See Hoopes*, 168 Cal. App. 4th at 156 ("[A] judge is bound by a jury's verdict rendered on legal causes of action."); *see id.* 168 Cal. App. 4th 158 ("Where legal claims are first tried by a jury and equitable claims later tried by a judge, the trial court must follow the jury's factual determinations on common issues of fact.").

This rule on fact-finding in bifurcated trials is fundamental: it promotes judicial economy and averts "second bites of the apple" as well as inconsistent adjudications in the same case. *See Hoopes*, 168 Cal.App.4th at 158 ("[T]here are solid policy reasons for giving one factfinder's determinations binding effect in a mixed trial of legal and equitable issues. The rule minimizes inconsistencies, and avoids giving one side two bites of the apple. The rule also prevents duplication of effort."); *see also Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 487 ("Issues adjudicated in earlier phases of a bifurcated trial are binding in later phases of that trial and need not be relitigated. No other rule is possible, or bifurcation of trial

issues would create duplication, thus subverting the procedure's goal of efficiency."); *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 888 ("[D]uplication of effort is the very opposite of the purpose of bifurcated trials.").

Indeed, the Superior Court arguably would have abused its discretion had it tried to segregate and separately try disputed issues of fact that underlay Wardak's derivative claims, since these same issues of fact were also essential to a proper adjudication of Wardak's and Dirks' jury claims. *See Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086 (trial court properly exercised its broad discretion to deny motion for separate trials of distinct issues because these issues depended on the same disputed facts, which were properly decided by a jury); *Cohn v. Bugas* (1974) 42 Cal.App.3d 381, 385–386 (a trial court cannot order separate trials on liability and damages when it is not feasible to resolve one issue entirely before proceeding to the next issue).

Dirks is therefore mistaken when he asserts that the Superior Court wrongly permitted Wardak to try his derivative claims to a jury. The Superior Court rightly exercised its broad authority to bifurcate the trial and have a jury first rule on disputed issues of material fact that were common to all claims, including Wardak's and Dirks' jury claims.

//

//

//

VII. DIRKS, BEING A RESPONDENT, CANNOT COMPLAIN OF JUDICIAL ERRORS, WHICH, IF DEMONSTRATED, WOULD REQUIRE A REVERSAL OR MODIFICATION OF THE JUDGMENT BELOW

There is an independent reason to reject Dirks' objections to the Superior Court's adjudication of Wardak's derivative claims: there is no pending cross-appeal, and Dirks appears before this Court solely as a respondent. He therefore lacks standing to complain that the Superior Court committed alleged errors, whose correction would entail a reversal or modification of its judgment. *See Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 665 ("As a general matter, a respondent who has not appealed from the judgment may not urge error on appeal. To obtain affirmative relief by way of appeal, respondents must themselves file a notice of appeal and become cross-appellants.")

There is one exception to this rule, but it is inapplicable. Namely, a respondent can argue in *support* of a challenged judgment on any ground that appears in the record, such as reference to a matter that renders a trial court's error harmless. *See* Code of Civ. Proc., § 906.

But a respondent cannot challenge alleged errors where its challenge, if approved, would oblige the appellate court to reverse or modify the trial court's judgment. In any such instance, a respondent *must* bring a cross-appeal. *See Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 585 (clarifying the limited reach of section 906 of the Code of Civil Procedure, which only

permits a respondent to argue harmless error); *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1121 ("The purpose of [Code of Civ. Proc., § 906] is to allow a respondent to assert a legal theory which may result in affirmance of the judgment.").

Dirks therefore cannot complain of the Superior Court's handling of Wardak's derivative claims. If this Court were to adopt either of Dirks' arguments on this matter, it would be obliged to *reverse or modify* the following parts of the Superior Court's judgment below: (1) its judgment in favor of Wardak's derivative claim against Omar, by which it adjudicated Omar liable to WLOW for a damage award of $1.5 million; and (2) its equitable allocation of this damage award, by which Omar must pay WLOW's damage award directly to WLOW's three members according to their ownership interests when he breached his funding obligation. (*See* 6AA 1126-1129; *see also* 6AA 1101.)

If Dirks wished to assail the Superior Court's adjudication of Wardak's derivative claims and argue that the jury could not decide the facts that underlay them, or that Wardak could not present the claims at all, he must have filed a timely notice of cross-appeal, then briefed these issues on a cross-appeal. He chose not to do so and therefore has waived this challenge. *See* Code of Civ. Proc., § 906; *Preserve Poway*, 245 Cal.App.4th at 585; *Prakashpalan*, 223 Cal.App.4th at 1121.

//

//

VIII. OMAR HAS FAILED TO REBUT WARDAK'S REQUEST TO REINSTATE SPECIAL VERDICT NO. 22

Omar's Opposition Brief fails to rebut Wardak's appeal from the Superior Court's grant of JNOV on special verdict no. 22.

When ruling on Omar's request for this JNOV, the Superior Court was required to give all benefits of the doubt and draw all reasonable inferences in support of the jury's special verdict. *See Johnson & Johnson Talcum Powder Cases,* 37 Cal.App.5th at 313–314.

Had the Superior Court done so, rather than the reverse, it easily would have concluded that the evidence needed to prove Omar's "malice, oppression or fraud" was plain as day and conceded on all essential points by Omar himself from the stand, so that special verdict no. 22 was supported by clear and convincing evidence. (*See* Wardak's Opening Brief, pp. 21-36, ¶¶ 13-37; *see id*. pp. 66-68.)

This special verdict specifically concerned whether Omar should pay punitive damages to Wardak because of Omar's role in the escrow transaction by which Wardak was shortchanged of $123,900 of his original capital outlay in excess of $300,000, so that Wardak lost not only his 25% share of the property development's profits, but also a substantial part of his original outlay. (*See* Wardak's Opening Brief, pp. 31-33 ¶¶ 31-32; *see id*. pp. 66-68.)

//

The jury was persuaded by the evidence to find Omar liable to Wardak for conversion of the withheld money (6AA 1123), and it further found that, in his dealings with Wardak, Omar had acted in a manner that was "malicious, oppressive or fraudulent," and therefore must pay punitive damages directly to Wardak (6AA 1124).

This last finding is set forth in special verdict no. 22 (6AA 1124). It is supported by clear and convincing evidence that Omar specifically misrepresented the following matters to an escrow company and thereby succeeded at converting to his own use $123,900 that belonged to Wardak:

(1) Omar falsely stated he had received $440,337.77 from WLOW outside of escrow, so that WLOW's debt to Omar and Wardak of $635,665.78 had been reduced accordingly;
(*See* Wardak's Opening Brief, pp. 31-33 ¶¶ 31-32.)

(2) Omar falsely maintained that he was personally entitled to collect $440,337.77 of WLOW's debt to Omar and Wardak, and that Wardak should receive only the remainder, which was $193,837.47 after the deduction of escrow fees. (*See id*.)

(3) Wardak thus received only $193,837.47 from this escrow transaction rather than one-half of $635,665.78, which would have been $317,832.89 – i.e., a return of his capital outlay of $302,768.90, plus interest from mid-2013 until mid-2016. (*See id*.)

(4) During cross-examination at trial, Omar conceded that he and Wardak were each entitled to collect one-half of WLOW's

debt to them in the amount of $635,665.78, and that in fact WLOW had not sent him any part of this debt when he affirmed to the escrow company having received $440,337.77 from WLOW. (*See id*.)

(5) In this manner, Omar clearly and plainly converted to his own use approximately $123,900 that belonged to Wardak, then claimed it as part of his own investment in LJS Placentia. (See *id*.; *see also id*. pp. 66-68.)

On this basis, the jury found that Omar had acted towards Wardak in a manner that was "malicious, oppressive or fraudulent" and should therefore pay punitive damages to him. (6AA 1123.)

When reaching this finding, the jury likely considered the substantial evidence of the following circumstances: (1) Omar and Dirks wrongly diverted to their own company, LJS Placentia, profits that should have been earned by WLOW and distributed to its three members according to their ownership interests (i.e., 50% to Dirks, 25% to Omar, and 25% to Wardak); (2) in an escrow transaction that Dirks initiated, Omar made false representations to an escrow company to withhold from Wardak a substantial sum, which he then claimed as part of his own investment in LJS Placentia; (3) in April, 2016, Omar *intervened* in this case to assert that Dirks had the right to cancel Wardak's and Omar's own ownership interest in WLOW and take all of WLOW's assets, even though Omar and Dirks both testified at trial that they did not agree to form a new company to complete

WLOW's project until mid-June, 2016; and (4) Omar and his close friend Dirks were experienced operators who abused Omar's much younger cousin Wardak by inducing him to enter into the Final Operating Agreement in order to manipulate its unusual terms against him in an oppressive manner, so that they could keep all the profits to themselves and even shortchange Wardak $123,900 of his original outlay. (*See* Wardak's Opening Brief, pp. 19-36, ¶¶ 1-37; *see also id.*, pp. 66-68.)

Bearing these points in mind, as well as the full sequence of events proven by the evidence, the jury could have concluded that Omar acted with the requisite degree of malice, oppression or fraud to be held liable to Wardak for punitive damages.

Indeed, Wardak met his burden by making a clear demonstration that Omar had made material misstatements of fact to convert Wardak's funds to his own use, thereby causing certain injury to Wardak. *See* Civ. Code, § 3294 (for purposes of punitive damage awards, "'[f]raud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."); *see also Notrica v. State Compensation Ins. Fund* (1999) 70 Cal.App.4th 911, 947–948 (For an award of punitive damages on the ground of fraud, "[a]ll that is required is that the fraud must equate to the conduct which gives rise to liability—in this case bad faith.").

//

When ruling on Omar's motion for JNOV on this matter, the Superior Court appears to have given Omar the benefit of all doubts (*see* 6AA 1088), but it should have done the reverse. *See Johnson & Johnson Talcum Powder Cases,* 37 Cal.App.5th at 313–314; *see also Sukoff*, 202 Cal.App.3d at 743 (the purpose of a motion JNOV is not to conduct a *de novo* review of the evidence, but only to determine whether a jury's verdict lacks requisite evidentiary support after construing in support of its verdict all evidence and reasonable inferences supported by the evidence).

Omar made no submission below, nor offers any rebuttal here, that can overcome these points.

He devotes most of his short opposition to explaining why the Superior Court correctly ruled that there must be a new trial of the *amount* of Wardak's award of punitive damages (*see* Omar's Opposition Brief, pp. 13-15). But Wardak has *not* appealed from this ruling.

What Omar has omitted to do is rebut Wardak's appeal, whose central points are summarized above and fully stated in his Opening Brief. (*See* Wardak's Opening Brief, pp. 19-36, ¶¶ 1-37; *see id.*, pp. 66-68.)

The Court should therefore reinstate the jury's special verdict that established Omar's predicate liability for punitive damages (special verdict no. 22).

//

//

//

IX. THE SUPERIOR COURT ABUSED ITS DISCRETION AND COMMITTED A CLEAR ERROR OF LAW BY AWARDING UNREQUESTED PREJUDGMENT INTEREST TO DIRKS ON MONEY WHOSE USE HE NEVER LOST

Wardak also appeals from the Superior Court's unsolicited award of prejudgment interest of approximately $250,000 to Dirks. The Superior Court granted this award when it equitably allocated Omar's liability of $1.5 million to WLOW. (*See* 6AA 1129.)

At Wardak's request, the Superior Court properly granted prejudgment interest on Wardak's 25% share of WLOW's damages (i.e., the property development's profits). Wardak could properly obtain this award because he was deprived of his share of the property development's profits from the time they were earned (February 8, 2019) until the time the Superior Court adjudged Omar liable for paying 25% of them directly to Wardak (June 10, 2022). (*See* Wardak's Opening Brief, pp. 68-69).

Unasked, the Superior Court also granted prejudgment interest on Dirks' 50% share of these same profits, even though Dirks was *never* deprived of his share of these profits: he received them from LJS Placentia when Omar did – in early 2019. Dirks thus never lost the use of this money for any duration. (*See* Wardak's Opening Brief, pp. 33-36, ¶¶ 33-36; *see id*. pp. 68-69).

Under section 3287 of the Civil Code, which governs this matter, prejudgment interest can be awarded only to compensate

for the loss of use of money. (*See Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958 ("An award of prejudgment interest is intended to make the plaintiff whole for the accrual of wealth which could have been produced during the period of loss.")

Accordingly, there was *no* basis for the Superior Court's award to Dirks of prejudgment interest on money that he had already received. *See id.*

Nor did Dirks request this prejudgment interest, much less bring a noticed motion for this purpose, so that Wardak had no occasion to object to the award. That is why prejudgment interest can be awarded only in response to a properly noticed motion. (*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.").

The Superior Court's award of prejudgment interest to Dirks should therefore be reversed.

Lastly, Wardak has standing to complain of the matter because he is a judgment-creditor of Omar, who is harmed by Omar's ability to use Dirks' judgment as a shield that protects him from Wardak's judgment. (*See* Code Civ.Proc, § 902; *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736–737 ("Any aggrieved party may appeal from an adverse judgment. (....) One is considered aggrieved whose rights or interests are injuriously affected by the judgment."); *Bratcher v. Buckner* (2001) 90

Cal.App.4th 1177, 1184 ("Parties have standing to appeal only if legally aggrieved by the judgment or order appealed from. A party is considered legally aggrieved such that he or she has standing to appeal only if his or her rights or interests are injuriously affected by the judgment. Further, the rights or interests injuriously affected must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment.").

This last point raises a substantial concern and ongoing theme, which Wardak briefly addresses directly below.

A. Omar's Telling Silence on Dirks' Award of Prejudgment Interest

It is dismaying, but hardly surprising, that Omar declined to join in this part of Wardak's appeal, which if granted would relieve Omar of a debt in excess of $250,000, plus postjudgment interest on this sum. (*See* Omar's Opposition Brief, *passim*.)

Omar's silence on this issue is part of an ongoing pattern in this case, as is made clear from the following points.

Omar and Dirks are uncommonly close, lifelong friends and experienced real-estate investors who have collaborated on various deals over the years. (*See* pp. 34-36, *supra*.)

//

//

//

//

In this case, they have acted in lockstep at every stage. Here are a few noteworthy examples of this pattern of conduct:

- In April, 2016, Omar sought leave to *intervene* in this lawsuit (7AA 1323, ROA Nos. 69-72) so that he could assert that Dirks could properly cancel Wardak's and his own ownership interests in WLOW and seize its assets (*see* 1AA 57-63; 7AA 1323 at ROA No. 69). Omar asserted this position approximately two months *before* the date (mid-June, 2016) when he and Dirks say they agreed to form a new company to complete WLOW's property development without Wardak. (*See* 3RT 424:15 – 425:7; 4RT 609:6-21.)
- Omar's and Dirks' testimony throughout trial appeared coordinated, but ultimately unconvincing to the jury. (*See generally* 3RT 393-489, 495-581; 4RT 595-626 (numerous examples of convergent testimony). Wardak's trial attorney even observed during closing argument how Dirks and Omar appeared aligned during trial, and how their attorneys huddled with one another to confer about the progress of the trial. (*See* 4 RT 656:12 – 657:19.)

Now Omar has declined to object, or even join in Wardak's objection, to an unrequested, unjustifiable award for prejudgment interest in excess of $250,000, which he has been ordered to pay to his close friend Dirks, along with postjudgment interest at 10% per year. His studied silence on the matter has a likely explanation: Omar can try to use his liability to Dirks as a shield to protect himself from his liability to Wardak.

As Omar's aggrieved judgment-creditor, Wardak asks this Court to set aside the Superior Court's unrequested award of prejudgment interest to Dirks on a sum that Omar never withheld from him. (*See* Wardak's Opposition Brief, pp. 68-69.)

X. CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons as well as the reasons given in Wardak's Opening Brief, the Court should grant the present appeal, reinstate special verdict nos. 1, 2, 5, and 22, reverse the Superior Court's grant of prejudgment interest to Dirks, and remand the case to the Superior Court for further proceedings, including a ruling on Dirks' motion for JNOV on special verdict no. 24 (which the Superior Court deemed moot only because of its ruling on special verdict no. 1).

The Court should also award costs of appeal to Wardak.

Lastly, this Court should sanction Omar for his dilatory practices, which he has been unable to explain or justify in a reasonable or plausible manner in his curt response to this Court on the matter.

Wardak's appeal should be thus granted.

Dated: July 25, 2023 Respectfully submitted,

By: *William Markham*

William A. Markham,
LAW OFFICES OF
WILLIAM MARKHAM, P.C.
Attorneys for Plaintiff-Appellant,
Bastel Wardak

CERTIFICATE OF COMPLIANCE

I certify that the computer program used to prepare this brief indicates that this brief contains 13,845 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: July 25, 2023. Respectfully submitted,

By: *William Markham*

William A. Markham,
LAW OFFICES OF
WILLIAM MARKHAM, P.C.
Attorneys for Plaintiff-Appellant,
Bastel Wardak

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 Reply 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:

Lee K. Fink, Esq. (*Lee@BrowerLawGroup.com*)
Jason Brower, Esq. (*Jason@BrowerLawGroup.com*)
BROWER LAW GROUP
23601 Moulton Pkwy, Suite 220
Laguna Hills, CA 92653

Bobby Samini, Esq. (*bsamini@saminilaw.com*)
THE SAMINI FIRM APC
650 Town Center Drive, Suite 1700
Costa Mesa, CA 92626-7025

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 e-mail address of record in this case.

//

//

//

//

I declare under penalty of perjury that the foregoing matters are true and correct. Executed at San Diego, California on July 25, 2023.

Dated: July 25, 2023 Respectfully submitted,

By: *William Markham*

William A. Markham,
LAW OFFICES OF
WILLIAM MARKHAM, P.C.
Attorneys for Plaintiff-Appellant,
Bastel Wardak