2d Civil No. B231109
(Consolidated with B232645, B234103,
B235534 [all purposes] and
B226933 [argument/decision only])

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CORONA SUMMIT, LLC
and U.S. BANK NATIONAL ASSOCIATION,

Plaintiff and Plaintiff-in-Intervention and Respondents,

vs.

SPUSO5 CORONA SUMMIT, L.P., et al.,

Defendants and Appellants.

Appeal from Los Angeles Superior Court, No. BC410168
Honorable Richard L. Fruin, Jr.

APPELLANT FUND V'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL APP-008

COURT OF APPEAL, Second APPELLATE DISTRICT, DIVISION Four	Court of Appeal Case Number: B235534
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Kent L. Richland (51413); Edward L. Xanders (145779); Gary D. Rowe (165453) Greines, Martin, Stein & Richland LLP 5900 Wilshire Blvd., 12th Floor Los Angeles, California 90036 TELEPHONE NO.: 310-859-7811 FAX NO. (Optional): 310-276-5261 E-MAIL ADDRESS (Optional): growe@gmsr.com ATTORNEY FOR (Name): CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.	Superior Court Case Number: BC410168 FOR COURT USE ONLY
APPELLANT/PETITIONER: CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P. RESPONDENT/REAL PARTY IN INTEREST: Corona Summit, LLC and U.S. Bank successor to California National Bank	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] 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) See attachment 2	
(2)	
(3)	
(4)	
(5)	

[X] 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 7, 2011

Gary D. Rowe ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use Judicial Council of California APP-008 (Rev. January 1, 2009)

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488

Certificate of Interested Entities or Persons
Attachment 2

The following entities or persons have (1) an ownership interest of 10 percent or more in the party or parties filing this certificate, or (2) a financial or other interest in the outcome of the proceedings that the justices should consider in determining whether to disqualify themselves.

CBRE Strategic U.S. Opportunity 5 REIT Operating, L.P., a Delaware limited partnership	Sole Limited Partner of Appellant, SPUSO5 Corona Summit L.P.
SPUSO5 Corona Summit GP, LLC	Sole General Partner of Appellant, SPUSO5 Corona Summit L.P.
CBRE Strategic U.S. Opportunity 5 REIT Operating GP, LLC, a Delaware limited liability company	General Partner of CBRE Strategic U.S. Opportunity 5 REIT Operating, L.P.
CBRE Strategic U.S. Opportunity 5 Holdings, LLC	Member of CBRE Strategic U.S. Opportunity 5 REIT Operating GP, LLC, a Delaware limited liability company
California State Teachers' Retirement System	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
Treasurer of the State of North Carolina	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
Teacher Retirement System of Texas	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
Common Pension Fund E	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.

New York State Teachers' Retirement System	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
Arizona State Retirement System	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
Arkansas Teachers Retirement System	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
School Employees Retirement System of Ohio	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
Nebraska Investment Council	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
Allstate Insurance Company	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
Allstate Life Insurance Company	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
Missouri Local Government Employees Retirement System	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
CB Richard Ellis Partners U.S. Opportunity 5 GP, LLC	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.
Allstate Plans' Master Trust	Limited Partner of CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P.

Armstrong-Butcher Properties, LLC	Sole member of Plaintiff Corona Summit, LLC
Gregory L. Butcher	Sole members of Armstrong-Butcher Properties, LLC
William Blair Armstrong	Sole members of Armstrong-Butcher Properties, LLC
US Bank National Association	Intervenor

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INTRODUCTION

Given the societal benefits of limiting business risk via the corporate form, "[a]lter ego is an extreme remedy, sparingly used" that must "be approached with caution." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 539; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249.)

Far from proceeding cautiously, the trial court here used alter ego liability to destroy the legitimate attempts of appellant CB Richard Ellis Strategic Partners U.S. Opportunity 5, L.P. (Fund V)—a real estate investment fund—to use negotiated contractual remedy limitations and legitimate limited-liability business structures to protect its investors from the vagaries of the real estate market. The result: A gargantuan $82+ million specific-performance judgment against Fund V, even though Fund V never participated in the underlying trial (it was never sued) and never executed or guaranteed the real estate purchase contract that the court ordered to be specifically performed. Absent reversal, the judgment will be borne by the teachers, police officers and firefighters who participate in the state-employee retirement funds that comprise Fund V's investors.

This shouldn't have happened. Fund V properly limited its investors' business risk.

There were two concurrently-executed contracts: (1) a forward-purchase contract between respondent Corona Summit, LLC and appellant SPUSO5 Corona Summit, LP (SPUSO5), under which Corona Summit was to construct shell buildings on certain property within two years and

SPUSO5 could purchase the improved property for $68 million; and (2) a tri-party agreement between those two parties and Corona Summit's construction lender that gave the lender certain rights to protect its loan. SPUSO5 is a limited-liability entity that Fund V created for the purpose, if the sale closed, of taking title to the property and then leasing it to stabilization and re-selling it.

Since its investors are state-employee retirement funds, Fund V is conservative about risk, particularly with forward-purchase contracts. Consistent with Fund V's standard approach, the purchase agreement here expressly limited Corona Summit's remedy for breach by SPUSO5 of the purchase agreement to retaining a $13 million escrow deposit.

That substantial escrow deposit was the only pre-closing financial commitment imposed on SPUSO5 or its affiliates. Although Corona Summit and its lender knew SPUSO5 had no assets and depended entirely on Fund V for funding, they never required Fund V to sign the contracts or to guarantee any obligations and never required SPUSO5 or Fund V to set aside any purchase-price reserve. The transaction's entire structure mirrored the purchase agreement's remedy-limitation—Fund V's maximum exposure would be forfeiture of the $13 million escrow deposit.

The trial court obliterated that understanding, on two separate fronts:

- It impermissibly re-wrote the contracts by ruling Corona Summit and its lender could compel specific performance of the entire purchase price, effectively reading the escrow-deposit remedy limitation out of existence.

- Eight months later, it dragged non-party Fund V into the case as a judgment debtor under an alter ego theory, effectively making Fund V an after-the-fact, involuntary guarantor of the re-written contracts. It did so even though (a) Fund V is five corporate levels removed from SPUSO5, and respondents presented no evidence regarding the intermediaries; (b) Fund V's Investment Committee controls Fund V but had no involvement in the SPUSO5 litigation; (c) Fund V and SPUSO5 have different litigation interests, and discovery and the trial would have looked very different had respondents sued Fund V; (d) respondents knew before trial the basis for their alter ego claim, yet purposely delayed until after judgment; (e) respondents delayed their alter ego motion until after expiration of a 20-day specific-performance deadline for SPUSO5 to purchase the property; (f) the undisputed evidence showed that SPUSO5 was not a "sham" entity but rather a single-purpose entity (a common real estate vehicle) whose purpose was never achieved; and (g) the court improperly imposed alter ego liability not to redress bad faith, but simply to ensure the judgment was satisfied.

As shown below, the post-judgment imposition of alter ego liability violated due process; respondents failed to meet the stringent standards for proving an alter ego relationship; and irrespective of the alter ego ruling, the trial court violated controlling contract-construction rules in failing to limit contract liability to forfeiture of the $13 million escrow deposit. The judgment against Fund V must be reversed.

STATEMENT OF FACTS[1]

A. Parties.

1. Plaintiff/Respondent Corona Summit.

Plaintiff/respondent Corona Summit LLC (Corona Summit) is a California limited liability company (LLC). (1JA:1.)[2] Ironically, like defendant/appellant SPUSO5, Corona Summit is a single purpose entity (SPE)—a limited-liability entity formed to buy and manage a specific real estate property. (13RT:2855-2856; 29JA:6764; pp. 57-58, *post.*) Its sole member is a development company, Armstrong Butcher Properties, LLC (AB Properties), whose sole members are Blair Armstrong and Greg Butcher. (5RT:317-318, 495; 29JA:6764; 11AA:2716.)

Armstrong and Butcher created Corona Summit to hold title to, manage and ultimately sell the property at issue here (Property). (5RT:318, 494-495; 29JA:6764; 11AA:2719.) The Property is Corona Summit's only asset. (5RT:494; 13RT:2855-2866; 11AA:2716.)

2. Intervenor/Respondent U.S. Bank.

Intervenor/respondent U.S. Bank National Association is the successor-in-interest to the receiver for California National Bank (Cal National), Corona Summit's construction lender for the Property.

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[1] We recite uncontroverted evidence and express contractual language.

[2] *Appendices*: "[volume]JA:[page]" refers to the 38-volume joint appendix previously filed in B226933; and "[volume]AA:[page]" refers to the 15-volume appellants' appendix submitted with this brief.

Transcripts: "[volume]RT:[page]" refers to the 16-volume transcript previously filed in B226933; and "AERT:[page] refers to the 102-page transcript for the alter ego hearings, filed in B232645 on 8/30/2011.

(8RT:1378-1379; 7JA:1257, fn.1; 33JA:7609-7906.) U.S. Bank intervened in this lawsuit after acquiring Cal National's loan. (*Ibid.*)

3. Defendant/Appellant SPUSO5.

Defendant/appellant SPUSO5 Corona Summit LP (SPUSO5) is a Delaware limited partnership and an SPE that Fund V created to purchase and take title to the Property via a transfer from Corona Summit; if that sale transaction closed, SPUSO5 would then lease the property to stabilization and sell it. (6RT:732-733; 7RT:940; 8RT:1272-1273; 27JA:6195.)

4. Alter Ego Judgment Debtor/Appellant Fund V.

Fund V is a real estate investment fund managed by CB Richard Ellis Investors, LLC (CBREI), an independent registered investment advisor that serves as fiduciary to Fund V. (26JA:5908-5909; 6RT:744-745; 8RT:1203-1204.)

Fund V is a Delaware limited partnership; its general partner is CB Richard Ellis Partners U.S. Opportunity 5, GP, LLC, a Delaware LLC. (26JA:5912.) Fund V's limited partners are mostly state-employee pension/retirement funds, and their teacher, firefighter, police and other state-employee participants. (7RT:944-946; 28JA:6437.) Its investment strategy is "to purchase, reposition, develop, hold for investment and sell institutional real estate assets in the United States." (26JA:5915; 8RT:1206.)

As an investment fund, Fund V does not engage in day-to-day management of properties; instead, limited-liability SPEs hold title to and manage them. (14AA:3670.) Although some overlap exists between SPE

and Fund V officers, SPE officers manage the SPEs independently of Fund V. (*Ibid.*; 7RT:973; 9AA:2236, 2286-2287.) If the SPE is a limited partnership, the general partner makes funding requests to Fund V and Fund V's Investment Committee independently resolves them. (14AA:3670; 26JA:5947-5949.)

Accordingly, Fund V is not SPUSO5's limited or general partner and does not conduct its day-to-day management. (14AA:3670; 7RT:973.) The officers and directors of SPUSO5's general partner are in charge of managing SPUSO5, including its president Vance Maddocks and vice-president Phil Hench. (26JA:5895-5896; 6RT:678; 7RT:973; 14AA:3670.)[3]

Fund V is five corporate levels upstream from SPUSO5:

Level One: SPUSO5's sole general partner is SPUSO5 Corona Summit GP, LLC., a Delaware LLC.

Level Two: That LLC's sole member is CBRE Strategic U.S Opportunity 5 REIT Operating L.P., a Delaware limited partnership.[4]

Level Three: That limited partnership's general partner is CBRE Strategic U.S. Opportunity 5 REIT Operating GP, LLC, a Delaware LLC.

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[3] Hench is also a senior managing director of CBREI and a Fund V principal and vice president. (6RT:678; 26JA:5901.) Maddocks is also an executive managing director of CBREI and the president and a principal of Fund V. (8RT:1202-1204.)

[4] That entity is also SPUSO5's sole limited partner. (9AA:2239; 11AA:2592.)

Level Four: That LLC's sole member is CBRE Strategic U.S. Opportunity 5 Holdings, LLC, a Delaware LLC.

Level Five: That LLC's managing member is appellant Fund V.

(9AA:2239; 11AA:2592; 26JA:5894, 5898.)

B. The Transaction.

1. The Purchase and Sale Agreement (PSA).

a. Corona Summit agrees to build shell buildings within two years and SPUSO5 agrees to buy the improved Property for $68 million if the transaction closes.

In December 2007, Corona Summit and SPUSO5 entered a purchase and sale agreement (PSA), under which Corona Summit agreed to construct three shell buildings on the Property and SPUSO5 agreed to a $68,103,882 purchase price for the improved Property. (18JA:3821-3822.)

Corona Summit would construct the buildings within two years, and SPUSO5 would market and lease the Property. (5RT:341, 344; 12RT:2442; 18JA:3852, 3857.)

b. Corona Summit agrees in PSA §10(a) that a $12.3 million escrow deposit as liquidated damages is its sole and exclusive remedy if the sale is not consummated because of a SPUSO5 breach.

Because of the time-lag between Corona Summit completing construction and the transaction closing, the PSA gives SPUSO5 multiple

termination rights for interim contingencies—for example, changes in the Property's physical condition or events/circumstances adversely affecting its value (§11(g)), damage to improvements exceeding $250,000 (§12), eminent domain (§13), and new entitlement conditions (§19(a)). (18JA:3845-3847, 3852-3853.)

Where SPUSO5 lacked a termination right, it still could refuse to consummate the sale in exchange for forfeiting a large escrow deposit. Section 10(a)—entitled "REMEDIES FOR BUYER'S BREACH" and prominently recited in capital letters and initialed by Corona Summit—states in pertinent part:

> [I]N THE EVENT THE SALE OF THE PROPERTY IS NOT CONSUMMATED ON THE CLOSING DATE BECAUSE OF A DEFAULT UNDER OR BREACH OF THIS AGREEMENT ON THE PART OF BUYER (ALL CONDITIONS TO BUYER'S OBLIGATIONS UNDER THIS AGREEMENT HAVING BEEN SATISFIED OR HAVING BEEN WAIVED BY BUYER), BUYER AND SELLER AGREE THAT IT WOULD BE IMPRACTICABLE AND EXTREMELY DIFFICULT TO FIX THE ACTUAL DAMAGE TO SELLER. BUYER AND SELLER THEREFORE AGREE THAT . . . IF BUYER FAILS TO COMPLETE THE PURCHASE OF THE PROPERTY ON THE CLOSING DATE AS HEREIN PROVIDED BY REASON OF BUYER'S BREACH OR DEFAULT (ALL CONDITIONS TO BUYER'S OBLIGATIONS UNDER THIS AGREEMENT HAVING BEEN SATISFIED OR HAVING BEEN WAIVED BY BUYER), THE AMOUNT OF THE DEPOSIT IS A REASONABLE ESTIMATE OF SELLER'S DAMAGES AND THAT **SELLER SHALL BE ENTITLED TO SAID SUM AS LIQUIDATED DAMAGES, WHICH SHALL BE SELLER'S SOLE AND EXCLUSIVE REMEDY, EITHER AT LAW OR IN EQUITY**. . . .

(18JA:3842-3843, bold added; see also 18JA:3822-3824, §2(a)(1)(i)(vii) [buyer must deposit in escrow $12.3 million that shall constitute liquidated damages under §10(a)].)[5]

In contrast to this "exclusive remedy" provision, §10(b) provides that if the sale is not consummated because of a *seller* breach, SPUSO5 can either (a) terminate the PSA and sue for certain expenses; or (b) continue the PSA and "seek the equitable remedy of specific performance," with Corona Summit exempted from liability for certain damages. (18JA:3843-3844.)

c. The PSA requires that any tri-party agreement with a lender must preserve SPUSO5's PSA rights.

PSA §22 provides that SPUSO5's rights under the PSA will remain effective despite any tri-party agreement with a construction lender:

> [I]n connection with Seller's obtaining of an acquisition/grading or construction loan for the improvements . . ., Buyer shall subordinate this Agreement to such Construction Financing provided that, as a condition thereto, Seller and such Construction Lender execute and

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[5] Significantly, Armstrong and Butcher (Corona Summit's sole members) negotiated the same protection for themselves when buying the Property: Their agreement specified, just like the PSA here, that "SELLER SHALL BE ENTITLED TO THE DEPOSIT(S) AS LIQUIDATED DAMAGES AS SELLER'S SOLE REMEDY AT LAW OR IN EQUITY ON ACCOUNT OF BUYER'S DEFAULT IN ANY OF ITS OBLIGATION(S) UNDER THIS AGREEMENT." (20JA:4619; see 6RT:625-628; 12RT:2587-2588; 11AA:2749-2750.) The same lawyers that negotiated the PSA for Corona Summit also negotiated this agreement. (9RT:1626-1627; 12RT:2587.) Armstrong and Butcher construed the language as meaning the escrow deposit would be the seller's only remedy for buyer breach. (6RT:627-628; 12RT:2587.)

> deliver to Buyer a tri-party agreement . . . pursuant to the terms of which *such Construction Lender agrees to recognize all of Buyer's rights under this Agreement notwithstanding any exercise of remedies in connection with such Construction Financing. No such subordination or Tri-Party Agreement shall limit Buyer's rights or Seller's obligations under this Agreement.*

(18JA:3861, italics added.)[6]

2. The Tri-Party Agreement (TPA).

a. The TPA incorporates and supplements—not supersedes—the concurrently-executed PSA's terms.

Corona Summit and SPUSO5 concurrently executed the PSA and a tri-party agreement with Corona Summit's construction lender, Cal National (TPA). (18JA:3821; 20JA:4399; 12RT:2442-2443.)

Hench and Ming Lee signed both agreements for SPUSO5 as, respectively, Vice President and Assistant Vice President of SPUSO5's general partner. (18JA:3864; 20JA:4418.) Armstrong and Butcher signed both agreements as Corona Summit's managing members. (18JA:3863; 20JA:4417.) John Houten signed the TPA for Cal National. (20JA:4419.)

The TPA's recitals state that the PSA is "made a part hereof *for all purposes*" and that Cal National was willing to make a construction loan only if Corona Summit and SPUSO5 entered into both the PSA and the

---

[6] The PSA is integrated: "This Agreement and the schedules and exhibits thereto constitute the entire agreement between the parties and supersede all prior agreements and understandings between the parties relating to the subject matter hereof, including without limitation, any letter of intent . . . ." (18JA:3850, §17(g).)

TPA. (20JA:4399, italics added.) Cal National required Corona Summit and SPUSO5 to each represent and warrant in the TPA that the PSA "is in full force and effect." (20JA:4404, §§6(a), 6(b).)

Section 2 of the TPA states that SPUSO5 "agrees to purchase and pay the purchase price set forth in the [PSA] (the 'Purchase Price') for the Property, *subject to and in accordance with the terms, provisions and conditions contained in the [PSA]*, as the same may be modified hereby . . . ." (20JA:4399-4400, italics added.) Other purchase-related TPA provisions similarly state that Corona Summit's and SPUSO5's performance remains "subject to and in accordance with the terms, provisions and conditions contained in the [PSA]." (20JA:4400 [§§3, 4].) The TPA's purpose is not to trump the PSA or the construction loan, but rather to provide supplemental loan-related rights since Cal National was not a party to the PSA and SPUSO5 was not a party to the construction loan.

The TPA therefore provides Cal National rights such as: directing SPUSO5 in a closing to pay the lender "such portion of the Purchase Price as is necessary to satisfy the Construction Loan in full" (§2), requiring the lender's consent to any modification of the PSA (§4), providing the lender an assignment of, and security interest in, all of Corona Summit's rights under the PSA, including any right to the security deposit (§5(a)), giving the lender the right to complete construction after obtaining the Property in foreclosure (§5), giving the lender certain cure rights if Corona Summit defaults on its PSA obligations (§11), allowing the lender to enforce Corona

Summit's PSA rights after a loan default (§15), and giving the lender additional indemnities from Corona Summit (§16). (20JA:4399-4409.)

The TPA also provides SPUSO5 with rights in case Corona Summit defaults on its construction loan, such as certain cure and loan-purchase rights and rights to the escrow deposit if the lender terminates the sale. (20JA:4402, 4412-4413.) It also gives Corona Summit the right to compel SPUSO5 to provide certain reports and, if the sale closes, to compel SPUSO5 to pay off the construction loan and to compel Cal National to provide certain lien reconveyances and financing-statement terminations. (20JA:4399-4400 [§2], 4406 [§10].)

b. The TPA explicitly preserves PSA §10(a).

Not only does the TPA repeatedly state that the purchase remains "subject to and in accordance with" the PSA's terms (20JA:4399-4400), it twice expressly preserves SPUSO5's rights under PSA §10(a):

- Section 5(a) states, in pertinent part, that if Corona Summit defaults on the construction loan and Cal National obtains title to the Property, Cal National can elect to complete the construction but it "shall be deemed to have assumed the obligations of Seller under the [PSA]" and it "shall be subject to the terms of the [PSA], *including without limitation, Section 10(a) thereof.*" (20JA:4402, italics added.)

- Section 5(f)(ii) states, in pertinent part, that *"Nothing contained in this Agreement shall limit or affect* the return or delivery of any Letter of Credit or Deposit to Purchaser in accordance with the terms of the Purchase

Agreement, or *the liquidated damages payable to Seller to the extent provided in Section 10(a) of the [PSA]*." (20JA:4403, italics added.)

TPA §9 likewise indicates that SPUSO5 (consistent with PSA §10(a)) can breach its purchase obligation without being liable for the entire purchase price. The TPA defines "Purchaser" as SPUSO5 and defines "Purchaser's Net Worth" as "Purchaser's parents' and affiliates' consolidated capital plus such parties' unfunded capital commitments as shown on such parties' financial statements." (20JA:4399, 4406.) TPA §9 then states that, "In the event that Purchaser's Net Worth at any time while the amounts under the Construction Loan are outstanding is less than the Purchase Price, an Event of Default shall exist under the Construction Loan Documents with respect to Seller, but *Purchaser shall have no liability, nor shall Construction Lender or Seller have any rights against Purchaser for the same*." (20JA:4406, italics added.)

The TPA's only remedies provision—TPA §22—does not state that it trumps PSA §10(a). It states that, "Each of the parties hereto recognizes and agrees that remedies at law for breach of *this Agreement* by Seller, Purchaser or Construction Lender may be inadequate and that each party hereto shall be entitled to the remedy of specific performance, in addition to any other remedy each party may have." (20JA:4416, §22, italics added.) The TPA defines "Agreement" as "[t]his Tri-Party Agreement." (20JA:4399, capitalization normalized.)

3. SPUSO5 demands PSA §10(a)'s remedy limitation and actively protects it throughout the contract negotiations.

It was undisputed that SPUSO5's counsel insisted on PSA §10(a)'s remedy limitation from the very beginning and actively protected it throughout the PSA and TPA negotiations.

a. PSA negotiations.

Overview: In 2006, Armstrong and Butcher spoke with Hench, as a CBREI representative, about CB Richard Ellis Strategic Partners IV, L.P. (Fund IV) purchasing the Property after a build-out. (5RT:320-321; 12RT:2429-2438; 20JA:4625-4627.) The parties' attorneys, Lori Lazarus for Fund IV and Bob Sykes for Corona Summit, negotiated a purchase agreement that Corona Summit and Fund IV executed in February 2007. (9RT:1599, 1630; 12RT:2565-2566; 13RT:2855; 18JA:3967-4098.)

Later that year, given concerns that Fund IV's investment window was closing, Fund IV and Corona Summit terminated their agreement and the buyer was changed to SPUSO5. (8RT:1389, 1410-1411; 11RT:2135-2136; 14RT:3051; 19JA:4395-4398.) Corona Summit and SPUSO5 executed the PSA that December. (18JA:3821.)

Lazarus and Sykes negotiated both purchase agreements. (9RT:1599, 1630.) They negotiated PSA §§10(a) and 22 to finality in the February agreement and carried them into the December PSA without change. (18JA:3992-3993, 4014-4015; 10RT:1807-1809; 14RT:3070-3071.) Other than the changed buyer, the agreements were substantively

identical except the PSA has a higher purchase price and later completion date. (Compare 18JA:3968-4018 with 18JA:3821-3864.)

Section 10(a): Because Fund IV and Fund V invest primarily for state-employee retirement plans, they employ conservative strategies, including using liquidated-damage provisions to cap exposure in all forward-purchase contracts. (7RT:944-948, 969-971.) Since buyers in forward-purchase contracts lack control over the Property until a sale closes, they typically take fewer risks the higher the purchase price. (13RT:2832-2834.) Here, the PSA's purchase price was not discounted; it was based on the Property's full projected improved value at closing. (27JA:6194; 29JA:6750-6752, 6773-6774; 7RT:963; 10RT:1912-1916.) Lazarus knew the Funds' standard language for forward-purchase contracts, having represented CBREI in such negotiations for over fifteen years. (7RT:972.)

In negotiating with Sykes, Lazarus successfully insisted—in the very first draft purchase agreement and all subsequent drafts—on a provision limiting the seller's remedy for buyer breach of the purchase obligation to the "sole and exclusive remedy, either at law or in equity" of retaining the escrow deposit as liquidated damages. (See 20JA:4628, 4646; 21JA:4715-4716, 4789-4790; 22JA:4869; 23JA:5022-5023; 24JA:5266-5267; 18JA:3842-3843, 3992-3993; 9RT:1599, 1606-1609, 1633, 1666; 10RT:1804-1805; 13RT:2856-2857, 2862-2863; 14RT:3163.)

Although Sykes knew specific performance was an equitable remedy, he never asked Lazarus to delete the exclusive-remedy language,

never asked for a specific-performance remedy, and never expressed to her any belief that the provision might not bar specific performance. (9RT:1610-1611, 1666-1667; 10RT:1804-1806, 1856, 1860; 13RT:2862-2863; 14RT:3171-3173; see also 21JA:4692, 4715-4716; 22JA:4847, 4944.)

Section 22: Lazarus also insisted from the very first draft that §22 provide that no construction-financing agreement with a lender "shall limit Buyer's rights or Seller's obligations" under the purchase agreement and that any lender must agree to "recognize all of Buyer's rights under this Agreement notwithstanding any exercise of remedies in connection with such Construction Financing." (20JA:4628, 4663-4664; see 10RT:1813.)

Sykes proposed deleting some of the language, but Lazarus rejected his attempt. (9RT:1638-1639, 1667; 14RT:3044-3046, 3067-3068; 21JA:4692, 4736, 4767-4810.) Every subsequent draft included §22, fully preserving the buyer's purchase-agreement rights under any lender agreement. (21JA:4810; 22JA:4962; 23JA:5043; 24JA5285; 18JA:3861, 4014-4105; 10RT:1807; 14RT:3045-3046, 3070.)

b. TPA negotiations.

Overview: Corona Summit initially sought a construction loan from Key Bank. (5RT:345; 24JA:5321-5323.) Sykes, Lazarus and Robert Williams for Key Bank negotiated a draft tri-party agreement that was the genesis of the TPA. (*Ibid.*; 23JA:5241-5242; 25JA:5515-5550; 9RT:1630-1631; 13RT:2713-2716; see also 23JA:5165-5166, 5203-5240; 24JA:5398, 5435-5471, 5324, 5361-5396, 5511-5514.) In November 2007, Key Bank

backed out and Cal National stepped in as the lender. (5RT:345; 29JA:6754.)

Sykes, Lazarus and Cal National's counsel, Robert Hagle, then negotiated a few changes to the Key Bank draft, including adding TPA §5(f)(ii). (9RT:1631-1632; 14RT:3101; 20JA:4437, 4476-4494, 4515-4556, 4595-4607.)

Section 22: The first TPA draft circulated amongst Sykes, Lazarus and Williams in 2006 was based on Williams' modifying an agreement from another tri-party agreement that included the same specific-performance remedy provision as TPA §22. (23JA:5165, 5203, 5219; 28JA:6474-6547; 10RT:1811-1813; 13RT:2740.) The parties never changed that language. (Compare 23JA:5219 with 20JA:4416; see also 24JA:5376, 5451; 25JA:5531; 20JA:4493, 4535; 28JA:6488.)

Section 2: TPA §2 likewise came from that same original draft, with only immaterial modifications in subsequent drafts. (Compare 23JA:5204 with 20JA:4399-4400; see also 24JA:5436, 5362; 25JA:5517; 20JA:4477, 4519; 28JA:6474-6475.)

Section 5(a): The contract Williams used as the predicate for his Corona Summit draft also contained a provision stating that if the lender elected to complete construction after obtaining title to the Property from a loan default, the purchase agreement would be modified to read that retention of the escrow deposit as liquidated damages would be the seller's "sole and exclusive remedy" for a buyer default. (23JA:5213-5214, 5219; 28JA:6482-6483.)

After Williams deleted the provision, Lazarus insisted it be added back, which prompted Williams to express confusion as to "why we are replacing one liquidated damages provision with another" since the provision already in the PSA "looked adequate." (23JA:5213-5214, 5219, 5241 [¶18]; 24JA:5322; 13RT:2735-2747; 14RT:3082-3084, 3099-3101; see also 24JA:5447; 28JA:6551.) Rather than include a duplicative provision in the TPA, counsel agreed to state in TPA §5(a) that a lender completing construction after a seller default would be subject to PSA §10(a). (24JA:5364, 5512-5513; 25JA:5518-5519; 28JA:6551; 10RT:1828-1829, 1841-1843; 13RT:2745-2751; 14RT:3152-3153; see 14RT:3084, 3101.)

Although these §5(a) negotiations were with Key Bank, Cal National accepted this language as drafted. (10RT:1843-1844; 20JA:4437, 4479.)

Section 5(f)(ii): Lazarus similarly protected PSA §10(a) in her TPA negotiations with Cal National's counsel, Hagle, including telling him that the TPA could not override that provision. (14RT:3101-3102, 3185-3186.)

The day before the TPA and PSA were signed, the following occurred:

- After Hagle requested a last-minute addition to TPA §5(f) that the escrow deposit could not be used to pay construction costs, Lazarus wrote Hagle that *"[a]s I think we've previously discussed*, one of our concerns with language in the Tri-Party Agreement dealing with the deposit is to be sure that *there's not an implication that the language modifies the Purchase Agreement deposit provisions*." (20JA:4595, italics added.)

Lazarus proposed language intended to address "the lender's concerns while *preserving the negotiated agreements relating to the deposit.*" (*Ibid.*, italics added; see 20JA:4598.)

- Hagle responded by telling Lazarus that "I understand your concern, but fail to see how the proposed language *modifies the parties' rights under the purchase agreement, by implication or otherwise.*" (20JA:4601, italics added.) But, to address her concerns, he agreed to include language—§5(f)(ii)—about the TPA not limiting or affecting the deposit's delivery/return or the liquidated damages payable under PSA §10(a). (20JA:4601, 4604; see 14RT:3154-3158.)

- In Lazarus' final response of the day, she noted that the proposal "should address the lender's concerns *without creating any implications that go beyond the purchase agreement provisions* . . . ." (20JA:4601, italics added.)

- The next day, the parties signed the TPA containing §5(f)(ii). Hagle never suggested to Lazarus that the TPA modified PSA §10(a). (14RT:3156.)[7]

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[7] Cal National's internal documents analyzing the deal comport with an understanding that retaining the escrow deposit would be the sole remedy for a SPUSO5 breach; the only remedy for breach mentioned is the escrow deposit, not a suit for the purchase price. (E.g., 29JA:6755 ["Should CBRE walk away and forfeit the L/C [letter of credit], [Cal National] would be left in the position of having to take over a project of a net basis [loan minus letter of credit] of just over $55,000,000"]; 11RT:2165-2172; 25JA:5552-554; 29JA:6759-6776.)

4. Despite knowing SPUSO5 depended on Fund V for funding, Corona Summit and Cal National seek no pre-closing financial commitment from SPUSO5 other than the escrow deposit, and request no guarantees from Fund V.

Corona Summit and Cal National executed contracts only with SPUSO5, not Fund V. (18JA:3821; 20JA:4399.) They knew SPUSO5 was a limited-liability entity distinct from Fund V—SPUSO5 expressly represented and warranted in the PSA and TPA that it was a limited partnership and that CBRE Strategic U.S. Opportunity 5 REIT Operating, L.P., was (and would remain while the PSA was in effect) its sole limited partner and the sole member of SPUSO5's general partner. (20JA:4404, §6(d); 18JA:3837-3838, §§9(a)(i)(iv).)

As an SPE created to take title to the Property if the transaction closed, SPUSO5 lacked assets of its own unless the sale occurred; the purchase funds were to come from the capital commitments of Fund V's investors. (7RT:940; 8RT:1216, 1272-1273.) SPUSO5's lack of assets was the reason TPA §9 was re-written to give Cal National the right to demand copies of SPUSO5's "*and* its parents' and affiliates' most recent consolidated financial statements" and why it defined SPUSO5's "Net Worth" as SPUSO5's "*parents' and affiliates'* consolidated capital plus such parties' unfunded capital commitments as shown on such parties' financial statements." (20JA:4406, italics added; compare with 20JA:4483, 24JA:5367, 25JA:5522.)

Cal National knew SPUSO5 was an SPE wholly owned by, and wholly dependant for funding on, Fund V. (1AA:147.) It conducted its due diligence and underwriting on Fund V, not SPUSO5 (*ibid.*), including requesting and receiving Fund V's prospectus and verifying Fund V's ability to fund the purchase price (8RT:1410-1411; 11RT:2136, 2141-2145; 26JA:5904-6018; 29JA:6836-6860; 30JA:6877; 34JA:7907-7908).[8]

Corona Summit and Cal National knew the risks of contracting with SPEs. Corona Summit itself is an SPE that Armstrong and Butcher created to limit their personal liability. (29JA:6764; p. 4, *ante*.) And, because Corona Summit had limited assets as an SPE, Cal National required AB Properties and Armstrong and Butcher to guarantee Corona Summit's loan. (19JA:4174-4200, 4210-4216; 29JA:6764-6767; 5RT:346; 9RT:1508.) For the same reason, SPUSO5 required AB Properties to guarantee Corona Summit's obligations under the PSA. (30JA:6956-6964; see 30JA:6894-6902.)

Yet Corona Summit and Cal National never asked Fund V or any of SPUSO5's "parents or affiliates" to sign the PSA or TPA or to guarantee any of SPUSO5's obligations. Nor did the PSA or TPA require SPUSO5, Fund V or any other affiliate to deposit or set aside the entire purchase price; to the contrary, SPUSO5 and Fund V specifically *rejected* such an approach. (See 24JA:5441, 5478 [*rejected* proposed TPA §9, stating

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[8] SPUSO5's limited partnership agreement states that its limited partner has no "obligation to make any capital contribution to the Partnership" and is not liable for partnership debt beyond contributed capital. (26JA:5895; 9AA:2236.) It discloses that Fund V was multiple levels removed from SPUSO5. (26JA:5894, 5898; 9AA:2239-2240.)

"Purchaser shall at all times maintain an amount equal to the Purchase Price, specifically reserved for payment of the Purchase Price" and failure to do so may constitute a default under the construction loan]; 24JA:5321 & 28JA:6551, 6562 [buyer rejecting proposed §9 covenant to maintain liquidity].)

The escrow deposit was the *only* pre-closing financial commitment respondents contractually negotiated.

5. By amendment, the parties increase the escrow deposit to $13 million and reaffirm the rest of the PSA.

After the PSA and TPA were executed, SPUSO5 and Corona Summit negotiated—with Cal National's consent—two PSA amendments that made construction-schedule changes, increased the purchase price to $68,788,994 because of a change order, and increased the escrow deposit to $13 million. (See 27JA:6250-6257; 37JA:8969-8973.) Both amendments state that "all other terms" of the PSA "shall remain in full force and effect, unaltered and unchanged." (27JA:6251; 37JA:8969.)

All three parties executed a TPA amendment to make the TPA's terms reflect the PSA amendments, such as granting Cal National a security interest in the increased deposit. (31JA:7169-7174.) Cal National required Armstrong and Butcher to guarantee Corona Summit's increased loan obligations (19JA:4210-4216; 30JA:7052-7057; 12RT:2448), but Fund V was not required to guarantee the increased price.

6. Fund V deposits $13 million into escrow.

In compliance with the contracts, Fund V deposited into escrow letters of credit totaling $13 million. (30JA:6904-6913, 7061; 31JA:7216.)

7. SPUSO5 opts against purchasing the Property.

In 2008, the real estate market unexpectedly collapsed. (7RT:992-993.) SPUSO5 pursued selling the Property to a third party, but the offers exposed SPUSO5 to more than a $13 million loss at the PSA's purchase price. (25JA:5585-5586, 5726-5740; 26JA:5902; 7RT:992-1037; 8RT:1218-1224; 13RT:2770-2787.)

Hench and Maddocks, as the President and Vice President of SPUSO5's general partner, chose to terminate the PSA; they did not require or obtain approval from Fund V's Investment Committee. (6RT:739-740; 8RT:1225.) In March 2009, as Vice President of SPUSO5's general partner, Hench notified Corona Summit that SPUSO5 was terminating the PSA based on PSA §11(g)'s protection against events adversely affecting the Property's value, and he requested return of the escrow deposit. (26JA:6019-6020.)

Hench believed that if PSA §11(g) were deemed inapplicable, SPUSO5's worst case scenario was that—under PSA §10(a)—it would forfeit the $13 million deposit in exchange for walking away. (6RT:724, 763-765; 7RT:938, 1045, 1055.)

STATEMENT OF THE CASE

A. Pleadings.

1. Corona Summit and Cal National, represented by counsel who negotiated the PSA/TPA, sue SPUSO5 to recover the deposit.

After receiving SPUSO5's termination notice, Corona Summit sued for a declaration that it was entitled to the escrow deposit as liquidated damages. (1JA:3-7.) In that complaint and an amended complaint, Corona Summit sought the deposit only, not specific performance. (1JA:1-27; 4JA:784-788.)[9]

Cal National responded by suing solely for a declaration that it had a security interest in the deposit. (2JA:251-260; see also 9RT:1572-1573; 25JA:5583; 29JA:6861.)

The law firms that represented Corona Summit and Cal National in the PSA/TPA negotiations filed these complaints. (1JA:1; 2JA:251; 4JA:784; 9RT:1573-1575; 10RT:1871-1872.)

2. Corona Summit changes counsel and switches to a specific-performance theory.

Corona Summit later switched to new counsel, who filed a second amended complaint that sought specific performance of the PSA and

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[9] SPUSO5 sued Corona Summit for a declaration that it did not breach the PSA; the lawsuits were consolidated. (1JA:169-177.)

requested the escrow deposit as liquidated damages only if specific performance were unavailable. (3JA:505-524.)[10]

Over SPUSO5's objection, Corona Summit amended its complaint at the end of trial to seek specific performance of the TPA. (14RT:3024-3034; 35JA:8443-8452.)[11]

3. U.S. Bank acquires Cal National's loan and seeks specific performance of the TPA.

After acquiring the Corona Summit loan in Cal National's receivership, U.S. Bank—which had not participated in the PSA/TPA negotiations—filed a complaint-in-intervention for specific performance of the TPA. (7JA:1256-1257, fn.1; 8RT:1378-1379.)

4. No pleading alleges claims against Fund V or alleges SPUSO5 and Fund V are alter egos.

No claim was ever asserted against Fund V. All claims were against SPUSO5 only. The only alter ego allegations were as follows:

- Corona Summit's operative complaint alleged that "DOES 1 through 50 are alter egos of defendant SPUSO5" and that plaintiff would amend the complaint to show their "true names" when ascertained. (3JA:508:22-28.) Corona Summit never amended.

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[10] Corona Summit also sued SPUSO5 for fraudulently transferring assets, but dismissed that claim after the trial court labeled it groundless. (2RT:D-8, D42-44, E25-28; 3JA:520-522; 11AA:2706.)

[11] SPUSO5 concurrently sought leave to add a claim to rescind the PSA on mistake grounds (35JA:8292-8346; 14RT:3034-3042), but the court denied the request (15RT:3320-3322; 17JA:3761-3762).

- U.S. Bank's operative complaint alleged that "[e]ach of the defendants is an alter ego of each other defendant and is therefore responsible for its debts and/or liabilities." (7JA:1260:1-2.) The allegation was meaningless, because the complaint named no defendant (not even Does) other than SPUSO5. (7JA:1256-1271.)

B. At Trial, Respondents Litigate Contract-Interpretation Issues Against SPUSO5 Only.

At trial, Corona Summit and U.S. Bank litigated against SPUSO5 only. (4RT:1–15RT:3419.) They never attempted to plead or prove any alter ego claim. Both acknowledged the prospect of such a claim, but expressly chose to delay that decision until after judgment. (5RT:301-307.)

The trial addressed two distinct contract-interpretation issues:

(1) SPUSO5 primarily contended that it could terminate the sale under PSA §11(g)'s plain language, which provides certain termination rights where "*any* event or circumstance of which Seller has actual knowledge subsequent to the date of this Agreement . . . adversely affects the Property . . . or value of the Property . . . ." (18JA:3845-3846, italics added.) SPUSO5 argued that the precipitous drop in the Property's market value fell within §11(g)'s scope. (E.g., 4RT:67.) Under this contract-interpretation theory, SPUSO5 committed no contractual breach and therefore could recover the escrow deposit.

(2) As a fallback, secondary contention, SPUSO5 argued that, even if it had no right to terminate the sale, PSA §10(a) limited respondents

to the exclusive remedy of retaining the $13 million escrow deposit as liquidated damages. (E.g., 4RT:101.)

C. In August 2010, The Trial Court Enters A Specific Performance Judgment That Gives SPUSO5 Twenty Days To Purchase The Property, After Which It Will Be Sold To A Third Party; SPUSO5 Immediately Appeals.

The trial court concluded that the word "value" in PSA §11(g) did not mean "market value," and that the provision only governed circumstances the seller discovered during the build-out that the buyer "should be told about," such as ground contamination. (36JA:8710, 8718-8719). It thus found that SPUSO5 breached "the PSA/TPA contract" in terminating the sale. (36JA:8709.)

As for respondents' remedy, the trial court concluded that respondents were entitled to specific performance of the sale. (36JA:8709.) It construed TPA §2 as requiring SPUSO5 to pay the purchase price when all the seller's performance conditions were met, a right that could be enforced under TPA §22's specific-performance provision. (36JA:8720-8721.) It ruled that PSA §10(a) "must be construed to accommodate the specific performance remedy that is allowed to the Seller under the TPA's section 22" (36JA:8721; accord, 36JA:8729), and it refused "to suggest a definitive meaning" for the phrase in the PSA that liquidated damages were the "sole and exclusive remedy, either at law or in equity" (36JA:8727).

In August 2010, the trial court entered a judgment against SPUSO5 (36JA:8738-8746; 37JA:8815-9038) that provides:

- SPUSO5 must purchase the Property for $68,788,994, within twenty days, or the Property would be sold under statutes authorizing private sale by referee. (36JA:8744.)
- If SPUSO5 failed to purchase the Property, Corona Summit and U.S. Bank could recover $68,788,994 from SPUSO5 *minus* the proceeds from the private sale. (36JA:8739.)
- U.S. Bank was awarded $11 million in "pre-trial Incidental Compensation," consisting of its carrying costs for the Property, such as maintenance and interest. (*Ibid.*)

The judgment contained blanks for (a) "post-trial Incidental Compensation" to U.S Bank; (b) prejudgment interest and incidental compensation to Corona Summit; (c) attorney's fees to Corona Summit; and (d) costs to U.S. Bank and Corona Summit. (36JA:8739-8740.)

Three days after entry of judgment, SPUSO5 filed a timely appeal, which this Court designated B226933. (37JA:8806-8807.)

D. In November 2010, The Court Awards Attorney Fees And Costs Against SPUSO5; SPUSO5 Appeals.

Three months later, the trial court awarded $1.4 million in attorney's fees and costs to Corona Summit and $54,000 in costs to U.S. Bank; it amended the judgment *nunc pro tunc* to include those amounts. (9AA:2151-2157.) In February 2011, SPUSO5 filed a timely appeal, which this Court designated B231109. (9AA:2192-2205; 10AA:2556-2558.)

E. In December 2010, The Trial Court Appoints A Referee To Sell The Property.

After expiration of the judgment's 20-day deadline for SPUSO5 to purchase the Property, respondents moved the trial court to appoint a referee to oversee selling the Property to a third party. (9AA:2160-2185.) The court appointed one in December 2010, commencing a bidding process. (9AA:2186-2189.)

F. In February 2011, Respondents Move To Amend The Judgment To Add Fund V As A Judgment Debtor On Alter Ego Grounds.

1. Respondents' motion.

In February 2011, six months after judgment was entered and just as SPUSO5 was filing its opening brief in its judgment appeal, respondents moved under Code of Civil Procedure section 187 (section 187) to amend the judgment to add Fund V as a judgment debtor on alter ego grounds. (9AA:2206-2231.) This was the first time they sought to bring Fund V into the case.

Although the SPUSO5 trial had focused solely on contract-interpretation issues, not alter ego, respondents based their section 187 motion almost entirely on trial snippets—primarily (a) exhibits showing some overlap between SPUSO5 and Fund V officers, that Fund V included the Corona Summit project in its investment portfolio, and that Fund V obtained the letters of credit for the escrow deposit; and (b) trial testimony and attorney statements indicating that Fund V owned SPUSO5, that

SPUSO5 had no funds except for the escrow deposit, that Fund V's investors would supply the acquisition funds, and that losing the deposit would hurt those investors. (9AA:2232–10AA:2480; 10AA:2529-2554; 14AA:3497-3550, 3567-3588.)

Respondents' only evidence that the trial court admitted and that was not introduced at trial was a ledger and e-mail showing Fund V paid all of SPUSO5's expenses, including its attorney's fees, and maintained the expense ledger for SPUSO5. (9AA:2229; 10AA:2442-2474; 14AA:3606.)

Despite Fund V being five levels upstream from SPUSO5, respondents presented no evidence regarding the assets, day-to-day operations or functions of the intermediaries. (See 9AA:2232–10AA:2480; 10AA:2529-2554; 14AA:3497-3550, 3567-3588.) They likewise presented no evidence that SPUSO5, Fund V or any intermediary failed to observe and maintain the legal formalities required for limited-liability companies or partnerships. (See *ibid.*)

2. Fund V's opposition.

Fund V opposed the motion and moved to quash service on the grounds that (a) Fund V had not been a party to the underlying lawsuit and could not be added as a defendant now; (b) respondents failed to show Fund V controlled the lawsuit and was virtually represented at trial (due process prerequisites to an alter ego amendment); (c) respondents should have pleaded and attempted to prove alter ego liability at trial, which would have materially changed the litigation; and (d) respondents failed to prove

Fund V and SPUSO5 were alter egos. (10AA:2559–13AA:3482; 14AA:3596-3602.)

G. In April 2011, The Trial Court Rules That SPUSO5 And Fund V Are Alter Egos; Fund V Appeals.

In April 2011, eight months after judgment was entered, the trial court granted the alter ego motion and denied Fund V's motion to quash and a statement-of-decision request. (14AA:3634-3640.) By then, briefing in SPUSO5's judgment appeal was complete except for SPUSO5's reply. (Docket, B226933.)

The court ruled as follows:[12]

1. "Control/virtual representation" findings.

The court found that Fund V "funded and had virtual control of the litigation in which the judgment was entered" and therefore was "virtually represented" in the trial. (14AA:3608-3609.)

It identified only one factual basis for this finding—that Fund V "paid the legal expenses incurred in the defense of this action" through February 2010. (14AA:3607.)

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[12] We recite the court's April 4, 2011 order. After its issuance, SPUSO5 filed a statement-of-decision request (14AA:3611-3615), which respondents opposed on the ground that "the Court's detailed and carefully drafted written ruling provided April 4th is more than adequate to comply with [statement-of-decision] law" (14AA:3623). The court agreed, ruling that "the preparation of a *further* statement of decision is unnecessary." (14AA:3642, italics added.) It also found that SPUSO5's request was untimely because the court hearing lasted less than a day. (*Ibid.*) That ruling is suspect since the hearing involved evidence from a *multi-week* trial, but the issue is moot given respondents' and the court's conclusion that the April 4 order is a sufficient statement of decision.

2. "Unity of interest" findings.

The court found that SPUSO5 and Fund V had a unity of interest and "are a single enterprise with respect to their agreement to purchase the Property" (14AA:3606), based on the following findings:

- Fund V is SPUSO5's ultimate corporate owner. (14AA:3607.)
- Fund V created SPUSO5 as a single purpose entity to take title to the Property when it was completed under the contracts. (*Ibid.*)
- "SPUSO5 never engaged in any business, never had any employees, never had any funds of its own, never had any assets, never had any office space or telephone and did not maintain books of accounts." (*Ibid.*)
- Fund V advanced all expenses paid by SPUSO5. (*Ibid.*)
- Starting in April 2008, SPUSO5 incurred monthly consulting and other fees to Fund V, meaning Fund V would benefit from SPUSO5's funding of the purchase. (*Ibid.*)
- CBREI employees that oversaw Fund V operations made decisions for SPUSO5—specifically, Philip Hench signed the PSA and TPA, and Vance Maddocks made the decision against taking title to the Property. (*Ibid.*)
- Had SPUSO5 taken title, it would have been one of many SPEs "owned, controlled and managed by Fund 5 for the ultimate purpose of resale" and "part of a unitary enterprise consisting of a portfolio of commercial real estate investments" that Fund V managed. (*Ibid.*)

3. "Inequitable result" findings.

The court concluded that the TPA's specific-performance provision "would be frustrated" and "nullified" if Corona Summit and U.S. Bank could not "extend the specific performance obligation to the upstream entity that all parties understood would be responsible to release the funds that SPUSO5 would need to complete the purchase." (14AA:3608.) Making Fund V a judgment debtor was therefore "necessary to enforce the parties' contractual agreement and prevent a miscarriage of justice." (14AA:3609.)

The court acknowledged that Corona Summit knew pre-judgment that SPUSO5 lacked funds to complete the purchase and depended on Fund V to pay expenses. (14AA:3608-3609.) But it found such knowledge did not preclude adding Fund V as a judgment debtor because respondents never knew Fund V "would not allow SPUSO5 to honor the court's order of specific performance until after the judgment was entered." (14AA:3609.)

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Three weeks after the alter ego order was entered, Fund V filed a timely appeal, which this Court designated B232645. (14AA:3647-3648.)

H. The Court Enters A "Corrected Judgment" Specifying Fee, Cost And Interest Awards And Adding Fund V As A Judgment Debtor For All Amounts; SPUSO5 And Fund V Appeal.

In May 2011, the trial court entered a "corrected" judgment that specified all attorney's fee, cost, prejudgment interest and incidental compensation awards except for U.S. Bank's post-trial "carrying costs," and

made Fund V jointly and severally liable with SPUSO5 for all amounts. (15AA:3786-3788.) The additions increased the judgment to $82.7 million. (*Ibid.*)

The "corrected" judgment incorporated and did not change the August 2010 specific-performance order that ordered SPUSO5 to buy the Property within twenty days of that order. (15AA:3787-3795.)

SPUSO5 and Fund V filed separate, timely appeals from the "corrected" judgment in June 2011, which this Court designated B234103. (15AA:4003-4029.)

I. The Court Approves The Property's Sale; SPUSO5 And Fund V Appeal.

In June 2011, the trial court entered an order approving the referee's motion to sell the Property to a third party. (15AA:3911-3955.)

In August 2011, SPUSO5 and Fund V filed separate, timely appeals, which this Court designated B235534. (15AA:4030-4039.)

J. This Court Consolidates The Appeals.

In September 2011, this Court consolidated B231109, B232645, B234103 and B235534 for all purposes, and consolidated B226933 (SPUSO5's appeal from the August 2010 judgment) with the others for argument and decision only since its briefing was complete. (9/16/2011 order, B231109.)

STATEMENT OF APPEALABILITY

In July 2011, Fund V moved to dismiss the appeals on the ground that neither the August 2010 judgment nor May 2011 "corrected" judgment were final judgments, because the liability amount will remain undetermined until the property is sold and the trial court determines any "post-trial Incidental Compensation" to U.S. Bank. (7/19/2011 motion, B234103.)

This Court denied the motion. (8/15/2011 order, B234103.) Although it stated no reasons, presumably it concluded that each judgment or order is either a final judgment or an order after a final judgment, appealable under Code of Civil Procedure, §904.1, subdivisions (a)(1), (a)(2).

LEGAL DISCUSSION

I. THE ALTER EGO ORDER AND JUDGMENT AGAINST FUND V MUST BE REVERSED BECAUSE THE TRIAL COURT COMMITTED MULTIPLE INDEPENDENT ERRORS IN AMENDING THE JUDGMENT TO ADD FUND V AS A JUDGMENT DEBTOR.

A. The Trial Court Violated Fund V's Due Process Rights By Adding It As A Judgment Debtor.

1. Due process prerequisites and standard of review.

a. Even where an alter ego relationship exists, due process constrains adding non-parties to judgments on alter ego grounds.

Code of Civil Procedure section 187 permits trial courts to amend a judgment to add an "alter ego" judgment debtor. (*Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1072-1073.) But that power is not unfettered.

Due process imposes constitutional limits that "are in addition to, *not in lieu of*," the elements for proving that an alter ego relationship exists. (*Tripplet v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1421.) Thus, even where an alter ego relationship irrefutably exists, due process limits the manner in which, post-judgment, a non-party may be added as an alter ego judgment debtor. (*Ibid.*)

b. A non-party may be added as an alter ego judgment debtor only if it controlled the defendant's defense and was virtually represented at trial.

Due process "guarantees that any person against whom a claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses." (*Motores de Mexicali, S.A. v. Superior Court* (1958) 51 Cal.2d 172, 176.) Individuals and entities have no obligation to appear or defend in a lawsuit unless sued personally. (*Ibid.*)

Since an alter ego amendment adds a non-party to a judgment, due process permits such an amendment only where the record demonstrates that the non-party already effectively had its full and fair day in court. The plaintiff must prove that the parent company "'had control of the litigation *and* occasion to conduct it with a diligence corresponding to the risk of personal liability that was involved.'" (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778-779, italics added; accord, *Katzir's Floor and Home Design, Inc. v. M-MLS.com* (9th Cir. 2004) 394 F.3d 1143, 1149 [applying California law].) In other words, the parent must have "controlled the defense of the litigation" *and* been "virtually represented in the lawsuit." (*NEC, supra*, 208 Cal.App.3d at p. 781.)

The control and virtual representation requirements normally present factual issues reviewed on appeal for substantial evidence. (*NEC, supra*, 208 Cal.App.3d at pp. 779-781.) But because they protect due process rights, appellate courts scrutinize the record and reverse where there is

insufficient evidence of either requirement. (*Id.* at p. 781; *Katzir's*, *supra*, 394 F.3d at p. 1150.)

2. There was no substantial evidence that Fund V controlled SPUSO5's defense.

a. Fund V's payment of SPUSO5's defense costs does not establish the requisite control.

In concluding Fund V controlled the SPUSO5 litigation, the trial court relied on one solitary fact—that Fund V paid SPUSO5's attorney's fees. (14AA:3607-3609.) As a matter of law, that's not enough.

That a non-party "'supplies the funds for the prosecution or defense'" or "'appears as a witness or cooperates'" does not equal control over the litigation. (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 581-582; see Rest.2d Judgments, §39, com. c, p. 384 ["that the person merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as *amicus curiae*" is insufficient to establish litigation control]; *Katzir's*, *supra*, 394 F.3d at p. 1149 [evidence the shareholder-owner "hired the attorneys for (the corporate defendant), appeared at settlement conferences, financed the litigation, and discharged the attorneys" did not establish control].)

b. There was no evidence that Fund V's Investment Committee controlled the SPUSO5 litigation.

Rather than just paying defense funds, the record must show that the non-party *made the litigation decisions* for the defendant.

Such control is easy to establish where the subject entities are controlled by a single person who heavily participated at trial. (E.g., *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 509; *Misik, supra*, 197 Cal.App.4th at p. 1075; *Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1030 (*Farenbaugh*).) But it is exceedingly difficult to prove where, as here, the alleged owner is a partnership with its own general partner and numerous officers, principals and limited partners, and there are layers of limited-liability entities between that owner and defendant, each with their own limited and general partners, members, and officers.

Respondents did not establish litigation control simply by showing Fund V is at the top of the pyramid. They had to show who in the chain of authority actually made the decisions for the SPUSO5 litigation. They never proved that anyone other than SPUSO5's officers did so.

Respondents noted in their alter ego motion that there was some overlap between SPUSO5's officers and Fund V's managers, relying solely on information in two documents—SPUSO5's limited partnership agreement and Fund V's offering of partnership interests. (9AA:2220-2221, 2236, 2285-2287.) But those documents do not even remotely show that Fund V controlled the SPUSO5 litigation. Even ignoring the myriad management levels between SPUSO5 and Fund V, the documents show that Fund V is managed by a much larger and different group than the officers who manage SPUSO5. Two of the nine SPUSO5 officers are not principals of Fund V or members of its Investment Committee (Frye and

Leichtenberg), and the other seven SPUSO5 officers constitute only a third of the twenty individuals on the Fund V "Dedicated Team" and only half of Fund V's principals and its Investment Committee. (See 9AA:2236, 2285-2294.)

The court's alter ego ruling caught Fund V by surprise. After the ruling, Laurie Romanak, a member of Fund V's Investment Committee who is not a SPUSO5 officer, explained in a declaration supporting a stay motion that Fund V's Investment Committee manages Fund V and that it did not participate in, and was not consulted as to, the SPUSO5 litigation. (14AA:3670; see 26JA:5947-5949 [Committee description].) She further confirmed that SPE officers—not Fund V—manage and control SPE-related litigation. (14AA:3670.)[13]

The trial court's order does not even address how management decisions are made at Fund V or who controls Fund V-related litigation. It merely mentions that Hench signed the PSA/TPA and that Maddocks decided not to purchase the Property. (14AA:3607.) But that's irrelevant

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[13] Respondents tried to twist remarks during SPUSO5's opening statement into concessions that Fund V was the client. (9AA:2223-2225.) SPUSO5's counsel said no such thing. He said that his client was "a special purpose entity owned by an investment fund known as Strategic Partners U.S. Opportunity Five"—in other words, *SPUSO5 was his client.* (4RT:59; see also 11AA:2586 [SPUSO5's counsel's sworn declaration that SPUSO5 was the only CB Richard Ellis entity he represented in the litigation].) Respondents also emphasized remarks by SPUSO5's counsel that Fund V's investors would be hurt financially if SPUSO5 could not terminate under PSA §11(g) and recover the escrow deposit. (9AA:2224, citing 4RT:60-61.) That's irrelevant. Counsel's unsworn remarks are not evidence (*In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11), and they do not establish the only thing that matters—whether Fund V's management actually retained the attorney and controlled the litigation, as opposed to SPUSO5's officers.

since Hench and Maddocks do not control Fund V, so their decisions do not equate to Fund V control of SPUSO5. Regardless, the governing presumption is that Hench and Maddocks wore their hats as SPUSO5's Vice President and President when making decisions for SPUSO5. (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 549 [where a parent and subsidiary have interlocking officers and directors, the governing presumption is "that each common officer or director wore the appropriate 'hat' when making corporate and operational decisions for the respective entities"].) No evidence rebutted that presumption.

Respondents' failure to prove that Fund V controlled the litigation compels reversal of the alter ego order and the Fund V judgment.

3. There was no substantial evidence that Fund V was virtually represented at trial.

a. Virtual representation requires proof that the non-party already effectively had its full and fair day in court.

The trial court recognized that it could not impose alter ego liability unless Fund V was "virtually represented in the litigation." (14AA:3608.) But it treated litigation control (itself non-existent) as tantamount to virtual representation. (See 14AA:3607 [court stating that "Fund V had control of this litigation *and thus was* 'virtually represented' in the pre-trial, trial and post-trial aspects of this litigation" (italics added)].)

That was error.

Evidence must show that the non-party both controlled the defense *and* was virtually represented. (*NEC*, *supra*, 208 Cal.App.3d at p. 781.) Control alone is not enough, because the non-party also must have conducted the litigation "with a diligence corresponding to the risk of personal liability that was involved." (*Ibid.*) In other words, the record must show that the lawsuit would have looked the same had the non-party been sued initially and known its personal assets were at stake. (E.g., *Mirabito v. San Francisco Dairy Co.* (1935) 8 Cal.App.2d 54, 60 [finding issues were "fully and fairly tried" and nothing showed the parent "could have produced a scintilla of evidence that would have in any way affected the results of the trial"].)

Virtual representation exists only if the alter egos have identical litigation interests, so that "the trial strategy of the corporate defendant effectively represents the interests of the alter ego [parent]." (*NEC*, *supra*, 208 Cal.App.3d at p. 780.) "[S]ection 187 may not apply if the alter egos have different [litigation] interests." (*Greenspan*, *supra*, 191 Cal.App.4th at p. 510; accord, *NEC*, *supra*, 208 Cal.App.3d at p. 780 [reversing alter ego amendment because litigation interests "were not the same"].)

Alter egos' litigation interests can differ because of a defendant's limited financial exposure. (*NEC*, *supra*, 208 Cal.App.3d at pp. 780-781 [litigation interests of defendant corporation and sole shareholder differed because the corporation was on verge of bankruptcy]; *Katzir's*, *supra*, 394 F.3d at p. 1150 [same where corporation faced receivership/financial difficulties].)

That was the situation here.

b. Fund V was not virtually represented at trial.

(1) SPUSO5 and Fund V had different litigation interests because of SPUSO5's limited financial exposure.

Respondents claim Fund V was virtually represented at trial because Fund V would have benefitted from recovering the $13 million escrow deposit had SPUSO5 won its argument that it could terminate the sale under PSA §11(g). (AERT:19:26-28; 9AA:2225.)

But there were two conflicting contract arguments available to SPUSO5—(1) the deposit could be recovered because PSA §11(g) permitted termination because of a market-value drop; and (2) the parties dealt with such risk through PSA §10(a), which allowed SPUSO5 to walk from the sale because of a market-value drop and limit its loss to $13 million in liquidated damages. SPUSO5 and Fund V had different litigation interests regarding those alternatives because SPUSO5, unlike Fund V, had limited assets.

Since SPUSO5 had no assets other than the $13 million escrow deposit, it had every reason to (and did) emphasize the termination argument. By contrast, had Fund V been a party, it would have had every incentive to emphasize and further develop the liquidated-damages argument, because its potential exposure from a specific performance judgment far exceeded $13 million.

The trial transcript (as well as SPUSO5's opening brief in its judgment appeal) show that SPUSO5 primarily emphasized PSA §11(g), treating the liquidated-damages argument as a secondary, fallback argument. (E.g., 4RT:105 [opening statement: "the adverse change provision in Section 11(g) was perhaps the most important provision of this forward purchase contract"]; AOB 8 in B226933 ["it is precisely because the purchase price was ***not*** discounted to cushion for a decline in value that Buyer negotiated for the right to terminate should such a decline occur"]; see also 4RT:58-149; 15RT:3372-3400.)

Since SPUSO5 and Fund V had different litigation interests, Fund V was not virtually represented at the trial.

(2) Discovery and trial evidence would have differed materially had respondents pursued an alter ego claim against Fund V at trial.

Respondents' failure to pursue their alter ego claim at trial also affected discovery and the presentation of evidence. In opposing the postjudgment alter ego motion, SPUSO5's trial attorneys explained that because they had represented only SPUSO5 at trial, they did not prepare any defense for Fund V and never explored any alter ego facts when deposing respondents' witnesses and conducting other discovery. (12AA:3071; AERT:41-42.) Counsel was confident that regardless who would have represented Fund V had it been sued initially, discovery "would have proceeded very differently." (12AA:3071; see also 5RT:308 [SPUSO5's

counsel noting at trial that no one is "prepared to put up information related to alter ego issues nor was there any discovery done on that topic"].)

Adding Fund V as a defendant also would have fundamentally changed the trial's evidentiary composition. The claims against SPUSO5 merely involved contract interpretation. Fund V's participation at trial would have implicated numerous new evidentiary issues, such as the propriety and frequency of investment funds using SPEs and liquidated-damage clauses to protect their investors, whether this was a standard industry transaction, and what respondents knew about SPUSO5's and Fund V's financial condition and the organizational structure. (AERT:41-42.)

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Fund V was not virtually represented at trial. This case would have looked very different in terms of discovery, trial strategy and evidence had respondents sued Fund V initially. The ex post facto change of the playing field violated Fund V's due process rights, requiring reversal of the alter ego order and the Fund V judgment.

B. The Alter Ego Amendment Was An Abuse Of Discretion Because Respondents Unreasonably Delayed Their Alter Ego Claim Until After Entry Of Judgment.

1. The diligence standard: A plaintiff must have a reasonable excuse for delaying an alter ego claim.

Alter ego issues are "ordinarily raised by the pleadings, either affirmatively in the complaint or negatively in the answer." (*Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358;

Vasey v. California Dance Co. (1977) 70 Cal.App.3d 742, 749 [plaintiff "must plead and prove" all factual alter ego elements].) If a party initially lacks knowledge of an alleged alter ego relationship, it can later amend its pleading to add an alter ego claim, thereby protecting the new defendant's "due process rights to notice and the opportunity to be heard." (*Hennessy's Tavern, supra*, 204 Cal.App.3d at p. 1360.)

Although section 187 alter ego amendments to judgments are an exception to the pleading requirement, that exception cannot swallow the rule:

> Of course, if before filing suit, the plaintiff reasonably believes that an alter ego relationship exists among various individuals and companies, the complaint should probably include alter ego allegations and name the alleged alter egos as defendants.

(*Greenspan, supra*, 191 Cal.App.4th at p. 517.) Inducing plaintiffs to plead and prove alter ego claims at trial is sound policy, as it eliminates any due process concerns and ensures the allegations are "subjected to the rigors of the trial process," plus the statement-of-decision process. (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 661.)

Plaintiffs moving under section 187 to add new judgment debtors on alter ego grounds must therefore show they "'acted with due diligence to bring them in as parties.'" (*Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 48; accord, *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 309 (dis. opn. of Lucas, J.) [postjudgment alter ego amendments are "not permitted in the absence of a showing of due

diligence on the part of the plaintiff"].) Plaintiffs must "be prepared to explain any delay in making the motion" (2 Ballantine & Sterling, Cal. Corporation Laws (4th ed. 2011) §299.05), and the "amendment may be denied if the judgment creditor was aware of the alter ego relationship *before* the judgment was entered" (Ahart & Michaelson, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2010) ¶ 6:1573, p. 6G-77).

A court abuses its discretion by granting a section 187 amendment where the plaintiff lacks a reasonable excuse for delaying the alter ego claim. (*Alexander, supra*, 104 Cal.App.3d at p. 48 [reversing because plaintiffs knew or should have known of the alleged alter ego relationship "either at the time of the original proceeding or shortly thereafter" and lacked a reasonable explanation for delaying]; see *Jines v. Abarbanel* (1978) 77 Cal.App.3d 702, 717 [reversing postjudgment addition of defendant's medical corporation where plaintiff had pre-trial knowledge of the corporation].)

2. The alter ego amendment was an abuse of discretion because respondents knew all the germane alter ego facts before trial yet unreasonably delayed their claim.

Given the diligence requirement, section 187 amendments are typically upheld where the plaintiff first discovers the alter ego facts *after* judgment was entered. (E.g., *Greenspan, supra*, 191 Cal.App.4th at p. 517 ["when the complaint was filed, Greenspan had no reason to suspect the

existence of an alter ego relationship among Shy, the trustee, and the limited liability companies"]; *id.* at p. 507 [Greenspan had no obligation "to pursue Shy as an alter ego in the arbitration given that he did not suspect Shy controlled a unitary enterprise"]; *Misik, supra*, 197 Cal.App.4th at p. 1070 [alter ego facts discovered in post-judgment debtor's exam]; *Farenbaugh, supra,* 194 Cal.App.3d at p. 1027 [plaintiff learned post-judgment about defendant's lack of assets].)

That's not this case. Respondents admitted to the trial court that they were *not* claiming they didn't know before trial that SPUSO5 lacked assets and that Fund V paid all its expenses. (AERT16:20-17:5.)[14] Instead, they argued that alter ego claims need not be pleaded and proved at trial even if "the alter ego defendant is known and even if facts are known that support the alter ego claim." (AERT:16:20-17:5.)

But there is no such carte blanche to delay—plaintiffs must prove reasonable diligence. The trial court implicitly recognized the need for a reason for the delay by stating in its alter ego ruling that "while plaintiff knew of the existence of Fund 5 and its role in paying all expenses of SPUSO5, plaintiff did not know that Fund 5 would not allow SPUSO5 to honor the court's order of specific performance until after the judgment was entered." (14AA:3609.)

Yet that conclusion wrongly assumes respondents had reason to believe Fund V might cause SPUSO5 to "honor" any specific performance

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[14] Not only did respondents know at the time of contracting that SPUSO5 wholly depended on Fund V for funding (1AA:147), pre-trial discovery confirmed SPUSO5's lack of assets (11AA:2618-2620).

order by immediately funding the purchase price and foregoing an appeal. The only reasonable expectation, given the litigation's nature, was exactly what did happen—that a specific performance order would trigger *a SPUSO5 appeal.* As to the facts underlying respondents' alter ego claim against Fund V, there was no legitimate difference in their knowledge (a) at trial, (b) in August 2010, when the specific-performance judgment was entered and SPUSO5 appealed, and (c) in February 2011, when respondents finally moved to bring Fund V into the case.

The trial court confused matters by mischaracterizing pre-trial deposition testimony by Hench and Maddocks as indicating "SPUSO5 would have the funds to purchase the Property if the court ordered specific performance," and then stating that Fund V is "not prejudiced" by being held accountable for these "promises." (14AA:3609.) What promises? Hench and Maddocks did not even remotely testify that if the court ordered specific performance, Fund V would fund the acquisition instead of SPUSO5 filing an appeal:

- Hench answered "yes" to the question whether SPUSO5 would have "the funds available to close the purchase of the property *absent any additional financing.*" (14AA:3570, italics added.) That question prompted objections of "vague and ambiguous," and Hench's subsequent testimony indicates he was merely explaining that financing was unnecessary because such funds would come from capital commitments from Fund V's investors. (14AA:3570-3571.) Hench certainly was not "promising" that Fund V would fund any specific-performance order.

- Maddocks initially answered "yes" to a question regarding whether SPUSO5 would be "in a position to purchase the property at the present time if ordered by a court to do so?" (10AA:2546.) But, the court's order omits that Maddocks *changed that answer to "No"* in correcting the deposition transcript after realizing he had been confused as whether the question was about Fund V (which had capital) or SPUSO5 (which did not), and that respondents received that change *before* the trial started. (*Ibid.*; 5RT:301-302; 8RT:1271-1272; 10AA2546.)

This is not a case where a plaintiff discovers post-judgment that the defendant lacks assets. Respondents always knew—at the time of contracting, after discovery, and at trial—that SPUSO5 lacked its own assets and that an alter ego claim was the only way to compel Fund V to pay any specific-performance judgment. Respondent's unreasonable, tactical delay of their alter ego claim is another ground to reverse the alter ego order and Fund V judgment.

C. The Trial Court Further Erred By Adding Fund V As A Judgment Debtor After Expiration Of SPUSO5's Specific-Performance Deadline.

Respondents' delay defeats the alter ego claim for another reason: Because respondents delayed bringing Fund V into the case until after expiration of the judgment's 20-day deadline for SPUSO5 to purchase the Property, the alter ego amendment is jurisdictionally void and a paradigmatic due process violation.

Generally, "'once a judgment has been entered, the trial court loses its unrestricted power to change the judgment,'" unless the change is merely clerical. (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237.) Alter ego amendments are permitted under the theory that the trial court merely makes a clerical change "by merely inserting the correct name of the real defendant.'" (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 419.)

But courts "may not amend a judgment to substantially modify it or materially alter the rights of the parties under its authority to correct clerical error." (*Rochin, supra*, 67 Cal.App.4th at p. 1238.) The trial court exceeded those jurisdictional limits here.

The April 2011 addition of Fund V as a judgment debtor was not a mere clerical name change that did not materially alter anyone's rights. At that point, there was no way to substitute Fund V into the specific-performance judgment originally entered against SPUSO5, because the 20-day deadline to purchase the Property had expired and the specific-performance judgment had transformed into a money judgment. Respondents even conceded in their alter ego motion that "SPUSO5's failure to purchase the Property within the 20-day period effectively transformed the Judgment into one for money damages . . . ." (9AA:2215.)

The delay materially impacted Fund V's rights, as it deprived Fund V of the option to purchase the Property within the 20-day deadline and also denied it the right to object to the form of the original specific-performance judgment—for example, to object that the 20-day specific-

performance deadline should not commence until after any affirmance on appeal.

We have found no appellate decision—or even a trial court decision other than this one—that has permitted an alter ego amendment where a deadline in the judgment has passed and the new judgment debtor faces different terms than the original defendant.

Respondents cannot escape this fatal flaw by arguing that Fund V could have directed SPUSO5 to buy the Property within the 20-day deadline or directed SPUSO5 to object to the judgment's form. Fund V had *no reason to make SPUSO5 do either*, because Fund V had no financial exposure. Those potential options only became relevant to Fund V in April 2011, when the alter ego order put Fund V's assets at stake for the very first time. By then it was too late to comply with, or object to, the 20-day specific-performance deadline.

The alter ego amendment thus violated Fund V's due process rights and, because it was not a mere clerical name change, exceeded the trial court's jurisdictional power. This further compels reversal of the alter ego order and the Fund V judgment.

D. There Was No Substantial Evidence Of The Requisite "Unity Of Interest" And "Inequitable Result."

In addition to the due process violations and procedurals errors in adding Fund V as a judgment debtor, the alter ego ruling fails because respondents failed to satisfy the stringent standard for establishing an alter ego relationship.

1. Legal principles and standard of review.

a. Alter ego liability is an extreme remedy to be invoked only sparingly and cautiously.

Limited partnerships and limited liability companies are separate and distinct legal entities from their members and owners (Corp. Code, §§15901.04, 16201, 17003, 17101; *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 963), just as corporations are distinct from their shareholders, officers and directors (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 538). Courts must respect those separate identities unless an alter ego relationship is proved. (*Id.* at pp. 538-539; *Gruendl, supra*, 55 Cal.App.4th at pp. 658-659.)

"Because society recognizes the benefits of allowing persons and organizations to limit their business risks" via incorporation and limited partnerships, "sound public policy dictates that imposition of alter ego liability be approached with caution." (*Las Palmas, supra*, 235 Cal.App.3d at p. 1249.)

Thus, "[a]lter ego is an extreme remedy, sparingly used." (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 539; accord, Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2011) ¶ 2:51.1, p. 2-26 ["(i)n practice, courts regard the alter ego doctrine as a *drastic remedy* and disregard the corporate form only *reluctantly* and *cautiously*"]; *Dole Food Co. v. Patrickson* (2003) 538 U.S. 468, 475 ["piercing the corporate veil" is "the rare exception, applied in the case of fraud or certain other exceptional circumstances"].)

Courts may disregard limited-liability entities "only in narrowly defined circumstances and only when the ends of justice so require." (*Mesler*, *supra*, 39 Cal.3d at p. 301.)

b. The evidence must establish (1) the entities had such a "unity of interest" that they lacked separate identities; and (2) treating them as separate would cause an "inequitable result."

Limited-liability entities and their owners "are presumed to have separate existences" (*Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 737, disagreed with on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 524), and it is the plaintiff's burden to overcome that presumption (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212-1213).

Alter ego liability requires proof of: "(1) such a unity of interest and ownership between the [limited-liability defendant] and its equitable owner that no separation actually exists, and (2) an inequitable result if the acts in question are treated as those of the [limited-liability defendant] alone." (*Leek*, *supra*, 194 Cal.App.4th at p. 417; accord, *Mesler*, *supra*, 39 Cal.3d at p. 300.)

Whether the evidence meets both prerequisites is primarily a fact question reviewed on appeal for substantial evidence. (*Mid-Century*, *supra*, 9 Cal.App.4th at p. 1213.) But, since alter ego is an extreme remedy to be used cautiously, appellate courts have repeatedly reversed alter ego liability

by finding insufficient evidence. (E.g., *id.* at p. 1215; *Gruendl, supra,* 55 Cal.App.4th at p. 659; *Vasey, supra,* 70 Cal.App.3d at p. 749; *Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal.App.3d 405, 412; *Shafford v. Otto Sales Co., Inc.* (1953) 119 Cal.App.2d 849, 862-863; *Katzir's, supra,* 394 F.3d at p. 1149.)

2. There was no substantial evidence of "unity of interest."

a. The "unity of interest" prong requires proof that the entities' separateness is a sham.

To satisfy the "unity of interest" prong, the evidence must show that there exists such a "unity of interest and ownership" between the defendant and the alleged equitable owner "'that the separate personalities of the [two entities] *no longer exist.*'" (*Mesler, supra,* 39 Cal.3d at p. 300, italics added.) It is not enough that the parent owns and controls the alleged alter ego, because "[t]he mere fact of sole ownership and control does not eviscerate the separate corporate identity that is the foundation of corporate law." (*Katzir's,* 394 F.3d at p. 1149; accord, *Mid-Century, supra,* 9 Cal.App.4th at p. 1215 ["domination of ownership and control . . . is not significant in isolation"].)

Rather, "the plaintiff must show 'specific manipulative conduct' by the parent toward the subsidiary which 'relegate[s] the latter to the status of merely an instrumentality, agency, conduit or adjunct of the former . . . .'" (*Laird, supra,* 68 Cal.App.4th at p. 742.) In other words, the evidence must show that the purported separateness is a sham. (*Sonora Diamond, supra,*

83 Cal.App.4th at p. 538 [must be "sham corporate entity"]; *Mid-Century*, *supra*, 9 Cal.App.4th at p. 1215 [emphasizing there was no evidence of "subterfuge" or that appellant "generally treated corporate assets as his own or disregarded the separate nature of the business"].)

Relevant factors for consideration "include the commingling of funds and assets of the two entities, identical equitable ownership in the two entities, use of the same offices and employees, disregard of corporate formalities, identical directors and officers, and use of one as a mere shell or conduit for the affairs of the other"; however, no one characteristic governs and courts must consider all the circumstances. (*Shaoxing County Huayue Import & Export v. Bhaumik* (2011) 191 Cal.App.4th 1189, 1198.)

b. There was no evidence SPUSO5 was a sham.

(1) The evidence failed to show that no separateness exists.

There was no evidence of commingling of assets and liabilities, nor evidence that Fund V used SPUSO5 to conduct business other than the Corona Summit project. Although SPUSO5 did not maintain its own general ledger, Fund V kept a ledger on SPUSO5's behalf that separately itemized all of SPUSO5's expenses. (10AA:2442-2474.)

Nor do SPUSO5 and Fund V have *identical* officers and directors; there is merely *some* management overlap. (Pp. 39-40, *ante*.) Moreover, even where affiliated companies have identical interlocking officers and directors, that does not dispositively indicate an entity is a sham. "It is considered a normal attribute of ownership that officers and directors of the

parent serve as officers and directors of the subsidiary." (*Sonora Diamond, supra*, 83 Cal.App.4th at pp. 548-549.)

Fund V is a limited partnership five levels upstream from SPUSO5. (Pp. 6-7, *ante*.) Respondents convinced the trial court to ignore those multiple levels by labeling them a "single enterprise." But the trial court made its "single enterprise" finding in an evidentiary vacuum. Respondents' presented no evidence regarding the composition, assets or role of any of the limited-liability intermediaries between SPUSO5 and Fund V, nor any evidence that SPUSO5, Fund V or any of the intermediaries (including SPUSO5's general partner) ever disregarded the legal formalities for creating and maintaining limited-liability entities.

Instead of *proof*, respondents essentially offered *conjecture* that the multiple partnerships and companies effectively operated as one, without legitimate separateness.

(2) The organizational structure was not suspect.

Respondents did not even attempt to argue that the organizational structure was suspect. They couldn't have. SPEs are "popular real estate vehicle[s] that emerged in the 1980s," which exist for the sole purpose of purchasing and holding a single piece of real estate. (Collen, *Bankruptcy Sales And Purchases Of Real Estate: Miscellaneous Special Transactions* (1998) 27 Real Est. L.J 7, 35 (*Bankruptcy Sales*); see *In re DCNC North Carolina I, LLC* (Bankr.E.D.Pa. 2009) 407 Bankr. 651, 663, fn. 26 ["[i]t is

well known that it is customary for real estate developers to form a single purpose entity for each separate real estate project"]; 11AA:2587.)

The trial court itself recognized that SPEs are standard industry practice. (11AA:2668 [trial court: CBREI creates "a separate legal entity for each different project. That's the way these things are normally done."].)

Nor is there anything unusual about the multiple levels between SPUSO5 and Fund V. As the trial court recognized, "you have a number of steps between [Fund V] partners and SPUSO5 . . . [a]nd I don't think those steps are . . . particularly unusual. If you're going to use a single purpose entity, you're going to have a number of layers because of the corporate structure . . . . " (AERT:6:20-22.)

The structure also comports with the legitimate purpose of limited-liability companies and partnerships—separating investors from operating businesses. (See *Sonora Diamond*, *supra*, 83 Cal.App.4th at p. 545 [recognizing that subjecting a holding company to jurisdiction because it chose to invest in a business conducted through a subsidiary, rather than conduct the operations itself, would obliterate the legitimate distinction between holding and operating companies].)

(3) SPUSO5 was an SPE whose purpose was never achieved.

Respondents' argument that SPUSO5 is a sham boils down to SPUSO5's lack of assets (beyond the $13 million deposit) and its lack of a separate office with separate employees. But those facts merely reflect the

fact that the purpose for which SPUSO5 was created—to take title to, lease to stabilization and ultimately re-sell the Property (6RT:732-733; 7RT:940; 8RT:1211-1212, 1272-1273; 27JA:6195)—was never achieved.

Even the trial court recognized this. After U.S. Bank asserted as to SPUSO5 that "[t]his single purpose entity existed on paper and only on paper," the trial court correctly noted that "[i]f there had been a transfer of the property, [the] transaction had been completed . . . then SPUSO5 would have very significant assets" and "[t]he only reason it doesn't have assets is because it was to be a receptacle for the transfer of property to it and the transfer never occurred." (AERT:14:1-14.)

That SPUSO5's purpose as an SPE was never achieved is no basis to treat SPUSO5 and Fund V as lacking separate personalities for alter ego purposes. Although no California authority addresses this issue, *Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC* (Pa.Super.Ct. 2004) 846 A.2d 1264, is directly on point.

There, the plaintiff entered into a contract with an LLC specifically created for the transaction, but the LLC became "a single purpose business entity whose purpose was never achieved" when the LLC failed to reach another predicate deal, which caused the LLC to breach its contract with plaintiff. (846 A.2d at pp. 1270-1272, 1281, fn. 13.) The plaintiff obtained a multi-million dollar contract judgment against the LLC, which had little to no assets. In rejecting plaintiff's attempt to pierce the LLC's corporate veil, both the trial and appellate courts noted that while the LLC shared office space, equipment and personnel with the alleged alter ego, and never had its

own offices, employees, or bank and financial statements, those circumstances reflected the fact that the LLC was a start-up that failed before such infrastructure was needed. (*Id.* at pp. 1272-1274.)

SPUSO5, similarly, was not a sham entity—it was an SPE whose purpose was never achieved because the purchase transaction never closed.

3. There was no substantial evidence of "inequitable result."

Even if sufficient "unity of interest" evidence had existed, the alter ego order would fail because there was no substantial evidence that treating the entities as separate would cause an "inequitable result."

a. The required "inequitable result" proof.

(1) It is not enough that the judgment will remain unsatisfied absent alter ego liability.

"Difficulty in enforcing a judgment or collecting a debt does not satisfy th[e] [inequitable result] standard." (*Sonora Diamond*, *supra*, 83 Cal.App.4th at p. 539.) "'Certainly, it is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an 'inequitable result.'" (*Mid-Century*, *supra*, 9 Cal.App.4th at p. 1213; accord, *Leek*, *supra*, 194 Cal.App.4th at p. 418; *Roman Catholic Archbishop*, *supra*, 15 Cal.App.3d at p. 412.)

Any contrary rule would impermissibly make alter ego liability the rule, rather than the exception. "In almost every instance where a plaintiff

has attempted to invoke the [alter ego] doctrine he is an unsatisfied creditor." (*Associated Vendors, Inc. v. Oakland Meat Co., Inc.* (1962) 210 Cal.App.2d 825, 842.)

(2) Bad faith conduct is required.

Instead of a bare inability to satisfy the judgment, the "inequitable result" prong requires that "[t]here also must be some conduct *amounting to bad faith* that makes it inequitable for [the owner] to hide behind the corporate form." (*Leek, supra*, 194 Cal.App.4th at p. 418, italics added; accord, *Sonora Diamond, supra*, 83 Cal.App.4th at p. 539; *Mid-Century, supra*, 9 Cal.App.4th at p. 1213; *United States Fire Ins. Co. v. National Union Fire Ins. Co.* (1980) 107 Cal.App.3d 456, 470.)

The alter ego doctrine, thus, prevents parties from *misusing* limited-liability laws to create sham entities "formed for the purpose of committing *fraud or other misdeeds*." (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 538, italics added; accord, *Las Palmas, supra*, 235 Cal.App.3d at p. 1249.) It applies where the statutory privilege of limited-liability laws is "abused" or "perverted," instead of "'used for legitimate business purposes." (*Mesler, supra*, 39 Cal.3d at p. 300.)

(3) The "inequitable result" standard is more stringent in contract cases than tort, since the plaintiff voluntarily transacted with the limited-liability entity.

The "inequitable result" prong is subject to another limitation: "[C]ourts usually apply more stringent standards to piercing the corporate veil in contract cases than they do in tort cases." (1 Fletcher, Fletcher Cyclopedia of the Law of Private Corporations (2006) §41.85, 267-268; see *Cambridge Electronics Corp. v. MGA Electronics, Inc.* (C.D.Cal. 2004) 227 F.R.D. 313, 330, fn. 50 (applying California law) ["(c)ourts are less likely to apply the alter ego doctrine where the party seeking to invoke it, such as (plaintiff) here, voluntarily transacted business with the corporate entity"]; *D'Elia v. Rice Development Co.* (Utah Ct.App. 2006) 147 P.3d 515, 522 (applying California and Utah law); Friedman, Cal. Practice Guide: Corporations, *supra*, at ¶ 2:52.2, p. 2-27.)

The reason for this more stringent standard is that "the party seeking relief in a contract case is presumed to have voluntarily and knowingly entered into an agreement with a [limited-liability] entity and is expected to suffer the consequences of the limited liability associated with the [limited-liability] business form, while this is not the situation in tort cases." (Fletcher, Fletcher Cyclopedia of the Law of Private Corporations, *supra*, §41.85, at p. 268.) Thus, it "is a lot harder to hold investors personally liable in contract disputes than for tort judgments," because "contract

creditors have entered into a voluntary arrangement with the [limited-liability entity], which gave them an opportunity to negotiate terms reflecting any enhanced risk to which doing business with an entity enjoying limited liability exposed them." (*Secon Service System, Inc. v. St. Joseph Bank & Trust Co.* (7th Cir. 1988) 855 F.2d 406, 413-414.)

"Accordingly, absent very compelling equitable considerations, courts should not rewrite contracts or disturb the allocation of risk the parties have themselves established" by imposing alter ego liability in a contract case. (Fletcher, Fletcher Cyclopedia, *supra*, §41.85, at p. 270.) Where a plaintiff chooses to contract with a limited-liability entity for payment, "rather than securing added protection through personal guarantees of the shareholders, security agreements, or other potentially available devices," alter ego liability can afford "an 'unbargained for' windfall." (Friedman, Cal. Practice Guide: Corporations, *supra*, at ¶ 2:52.2, pp. 2-27, 2-28; see *Cascade Energy and Metals Corp. v. Banks* (10th Cir. 1990) 896 F.2d 1557, 1577 [parties to contracts "have chosen the parties with whom they have dealt and have some ability, through personal guarantees, security agreements, or similar mechanisms, to protect themselves from loss"].)

Consequently, "[a] finding of fraud is generally an essential element of an alter ego determination in contract cases" (e.g., misrepresentations about the defendant's financial condition) or a showing that the parent *abused* the limited-liability entity in a way that "exposed the creditors to *unexpected* risk." (Fletcher, Fletcher Cyclopedia, *supra*, §41.85, at p. 269;

Friedman, Cal. Practice Guide: Corporations, *supra*, at ¶ 2:52.2, pp. 2-27, 2-28.)

> In a contract case, the creditor has willingly transacted with the subsidiary. If the creditor wants to be able to hold the parent liable for the subsidiary's debts, it can contract for this. Unless the subsidiary misrepresents its financial condition to the creditor, the creditor should be bound by its decision to deal with the subsidiary; it should not be able to complain later that the subsidiary is unsound.

(*United States v. Jon-T Chemicals, Inc.* (5th Cir. 1985) 768 F.2d 686, 693 (*Jon-T*).)[15]

b. The evidence falls short of the required proof.

(1) The only inequity identified by the trial court—that alter ego liability would ensure specific performance—is insufficient.

The trial court did not find fraud or bad faith. (See 14AA:3604-3610.) Indeed, in rejecting Corona Summit's fraudulent transfer claim against SPUSO5 (fn. 10, *ante*), it noted that this was merely a "business dispute" about the parties trying to "shift the risk, one to the other" and it did *not* believe any party "engaged in fraud" (2RT:E-28).

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[15] See *Southeast Texas Inns., Inc. v. Prime Hospitality Corp.* (6th Cir. 2006) 462 F.3d 666, 679; *Perpetual Real Estate Servs., Inc. v. Michaelson Props., Inc.* (4th Cir. 1992) 974 F.2d 545, 550; *Miller v. Dixon Corp.* (R.I. 1986) 513 A.2d 597, 604; *Edwards Co., Inc. v. Monogram Industries, Inc.* (5th Cir. 1984) 730 F.2d 977, 981-984 (en banc).

Instead, the only "inequity" the court found was that the TPA's specific-performance provision "would be frustrated" and "nullified" if Corona Summit and U.S. Bank could not, after obtaining the SPUSO5 judgment, "extend the specific performance obligation to the upstream entity that all parties understood would be responsible to release the funds that SPUSO5 would need to complete the purchase." (14AA:3608.) Thus, the court found, making Fund V a judgment debtor was "necessary to enforce the parties' contractual agreement." (14AA:3609.)

That's not enough. That a judgment may otherwise go unsatisfied is not a sufficient basis to impose alter ego liability. The plaintiff must prove bad faith. (Pp. 60-61, *ante*.)

(2) There was no evidence of bad faith by Fund V—nothing was hidden from respondents.

Respondents were never deceived about the transaction's structure, SPUSO5's financial condition, or the identities of the contracting entities. They were sophisticated parties represented by sophisticated counsel, who entered into the PSA and TPA with their eyes wide open.

The trial court recognized repeatedly that respondents "knew of the existence of Fund V and its role in paying all expenses of SPUSO5" (14AA:3609 [alter ego order]) and knew SPUSO5 had no assets (2RT:D43 [court commenting Corona Summit knew SPUSO5 was an asset-less SPE, that the sale would not be funded until closing, and that "this is the way in which these projects are normally developed"]; 2RT:E26 [court

commenting Armstrong and Butcher knew SPUSO5 was "an entity formed to take title" that "never had any money"].)

Respondents knowingly contracted with an SPE created to take title if the sale closed, not with Fund V itself. Nothing was hidden.

In contract cases where, as here, the plaintiff had full knowledge about the limited-liability entity with which it contracted, the bad faith required to impose alter ego liability is utterly lacking. In *Lynch v. McDonald* (1909) 155 Cal. 704, for example, the Supreme Court found insufficient alter ego evidence in a contract case where the plaintiff was not "a stranger to the facts" regarding the relationship between the company with which it entered the contract and the company's owner. (*Id.* at p. 706.) Even though the owner misrepresented the profitability of the subject mining venture, the Court held that the "deception had nothing to do with the [respondent-owner's] relation to the corporation" and if the plaintiff "was content to act under a contract which respondent refused to sign except as an officer of the company he cannot complain that [respondent], who was not a party signatory to the instrument, is not bound." (*Ibid.*)

Other California cases agree. (E.g., *Shafford, supra,* 119 Cal.App.2d at pp. 862-863 [reversing alter ego judgment against corporation's owner in contract case, where there was no evidence plaintiff was confused about the contracting parties' identities or that plaintiff "believed or was led to believe that he was dealing with (the owner) personally"]; *Harris v. E.S. Curtis* (1970) 8 Cal.App.3d 837, 843 [upholding denial of alter ego liability even though corporate defendant

was underfinanced, because "no deception was practiced upon the plaintiff"; plaintiff "was not led to believe that he was dealing with the officers and shareholders as individuals as distinguished from dealing with the corporation"]; cf. *Potts v. First City Bank* (1970) 7 Cal.App.3d 341, 345 [agency-law case applying similar concepts to reverse judgment against non-contracting party].)

Respondents were not "stranger[s] to the facts." (*Lynch, supra*, 155 Cal. at p. 706.) Having knowingly entered into the PSA/TPA with SPUSO5, fully aware of its financial condition and the transaction's structure, they "should not be able to complain later that [SPUSO5] is unsound." (*Jon-T, supra*, 768 F.2d at p. 693; see Lidstone, Jr., *Piercing The Veil Of An LLC Or A Corporation* (2010) 39-AUG Colo. Law. 71, 73 ["Where a plaintiff suing on a contract knows that it is dealing with an entity and fails to ensure that the entity is adequately capitalized, it may be precluded from asserting a piercing the veil claim."].)[16]

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[16] See also *Telecom Internat. America, Ltd. v. AT&T Corp.* (2d Cir. 2001) 280 F.3d 175, 200-201 (rejecting alter ego claim as matter of law where the parent "wanted to limit its potential losses" by creating a subsidiary "as a separate entity with only as much capital as then-currently needed," plaintiff knew about the subsidiary's lack of assets when signing the contract, and the parent never executed a guarantee or other agreement with plaintiff); *Tenn. Racquetball Investors, Ltd. v. Bell* (Tenn.Ct.App. 1986) 709 S.W.2d 617, 622 (reversing alter ego judgment in breach-of-lease case because there was no evidence plaintiff believed it was dealing with the corporation's shareholder; "[o]n the contrary, it was clearly understood that the corporation [] was created specially to deal with plaintiff in lieu of [the shareholder]").

(3) Respondents impermissibly invoked the alter ego doctrine to make Fund V an involuntary guarantor, obtaining financial protection they chose not to seek contractually.

The risks of contracting with SPEs are obvious: "[A] single purpose entity may be nothing but a minimally capitalized corporate shell prior to actually closing a leveraged purchase of real estate[,]" and "[i]f such an entity is the only entity responsible for the purchaser's liabilities, the entity's lack of substance can preclude any effective remedy for failure to close." (Collen, *Bankruptcy Sales*, *supra*, 27 Real Est. L.J. at p. 33.)

Sellers have ample means to protect against that risk contractually. They can insist that the SPE's owners execute the purchase agreement. They can require that the entire purchase price be deposited in escrow or reserved in an account. They can use "personal guarantees, security agreements, or similar mechanisms, to protect themselves from loss." (*Cascade Energy*, *supra*, 896 F.2d at 1577.) That's exactly why Cal National required Armstrong, Butcher and AB Properties to guarantee Corona Summit's loan obligations. (Pp. 21-22, *ante*.)

But respondents sought no such protection from Fund V or any other SPUSO5 affiliate—no security, no guarantee, no contractual commitment, nothing. The $13 million escrow deposit was the only contractually-agreed-upon protection against a SPUSO5 default. Alter ego liability would

effectively re-write the contracts to give respondents financial protection from Fund V that they never bargained for.

That's not the alter ego doctrine's purpose. Again, *Advanced Telephone Systems*, *supra*, 846 A.2d 1264, is instructive. The plaintiff there knew it was dealing with a limited-liability SPE that would have assets only if another deal was consummated (which never happened), yet it knowingly signed the contract with the SPE only and never demanded guarantees from the owner. (*Id.* at pp. 1273, 1282.) The trial and appellate courts recognized that the circumstances, rather than showing the owner misused the corporate form, instead showed the plaintiff tried "to obtain more protection than it had bargained for" by using alter ego theory to ask "the Court, in effect, to provide guaranties after-the-fact." (*Id.* at p. 1282.)

The same is true here. The judgment against Fund V improperly makes Fund V an involuntary after-the-fact guarantor of SPUSO5's contractual commitments.

II. THE JUDGMENT AGAINST FUND V MUST BE REVERSED EVEN IF THE ALTER EGO AMENDMENT WERE VALID, BECAUSE AS A MATTER OF LAW FUND V'S LIABILITY CANNOT EXCEED THE $13 MILLION ESCROW DEPOSIT.

Even if the alter ego amendment were valid, the judgment against Fund V would have to be reversed because as a matter of law PSA §10(a) bars respondents' claims for specific performance and limits them to the exclusive remedy of the $13 million escrow deposit.

In ordering specific performance, the trial court violated multiple contract-interpretation canons, disregarded the contracts' plain language, and relied on incompetent extrinsic evidence.[17] The judgment against Fund V must be reversed irrespective of the alter ego ruling.

A. Standard Of Review: De Novo.

Although interpretation of a contract may involve questions of fact, it "is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.)

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[17] In SPUSO5's appeal from the August 2010 judgment (B226933), SPUSO5 also argues that the judgment against SPUSO5 must be reversed because (a) PSA §11(g) authorized SPUSO5 to terminate the sale; and (b) the trial court erred in refusing to permit SPUSO5 to add a mistake defense. Those are issues between SPUSO5 and respondents, so Fund V presents no argument on them. Nevertheless, if this Court reverses the judgment against SPUSO5 for any reason, it also must necessarily reverse the alter ego judgment against Fund V.

Thus, an appellate court interprets unambiguous contract language de novo, and determines de novo whether an ambiguity exists. (*ASP Properties Group v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1267.) If the contract language is ambiguous, the appellate court determines de novo whether any proffered extrinsic evidence is incompetent under the parol evidence rule or any other contract standard. (*Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1001.) And, if competent extrinsic evidence exists, the appellate court interprets ambiguous language de novo if that evidence is not in conflict, even if it supports conflicting inferences. (*ASP*, *supra*, 133 Cal.App.4th at pp. 1267-1268, fn. 4.)

De novo review is inappropriate only where contract interpretation turns on the credibility of conflicting, competent extrinsic evidence; in that circumstance, the appellate court will uphold the trial court's construction if reasonable and supported by substantial evidence. (*ASP*, *supra*, 133 Cal.App.4th at pp. 1267-1268 & fn. 4; *Parsons*, *supra*, 62 Cal.2d at p. 865.)

As shown below, when the PSA/TPA's express terms are construed under the controlling contract-interpretation canons, there is no need to consider extrinsic evidence. Regardless, the only potentially competent extrinsic evidence (evidence that does not contradict express terms) is not in conflict and supports Fund V's interpretation. De novo review governs.

B. The PSA/TPA's Plain Language Establishes That Retention Of The $13 Million Escrow Deposit Is The Exclusive Remedy For SPUSO5 Breaching Any Purchase Obligation.

1. The trial court's holding that specific performance is available requires the insupportable conclusion that the parties intended that TPA §22 abrogate PSA §10(a)'s exclusive-remedy limitation.

Liquidated damages and specific performance are mutually exclusive remedies. (*Rogers v. Davis* (1994) 28 Cal.App.4th 1215, 1220.) By its terms, PSA §10(a) does not give the seller a *choice* between these alternative remedies—it makes forfeiture of the escrow deposit as liquidated damages the *sole and exclusive* remedy for SPUSO5 breaching its purchase obligation. (18JA:3843; compare with PSA §10(b) at 18JA:3843-3844.)

Thus, the trial court's interpretation that TPA §22 gives respondents the right to compel specific performance of the purchase requires the conclusion that the parties intended to abrogate PSA §10(a). As we now show, the unambiguous contract language defeats the court's construction.

2. The PSA/TPA's plain language provides that PSA §10(a) was to be preserved.

PSA §22 expressly states that the lender in any tri-party agreement must "recognize all of Buyer's rights" under the PSA notwithstanding "any

exercise of remedies in connection with" the construction financing and that no tri-party agreement "shall limit Buyer's rights or Seller's obligations" under the PSA. (18JA:3861.) That SPUSO5 would insist on this provision and insist in PSA §10(a) on limiting the seller to the exclusive escrow-deposit remedy, but then do a complete about-face and give a right to compel specific performance of the purchase in the *concurrently-executed* TPA is not just illogical, it's absurd. (See Civ. Code, §1638 [contracts should be construed to avoid absurdities]; *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807 ["Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists."].)

The trial court correctly observed that the TPA incorporates the PSA's terms and the two agreements must be construed harmoniously as one. (36JA:8725-8726; see Civ. Code, §1642.) But the court's construction doesn't do that—it treats the TPA as superseding the PSA. Instead of following the PSA's mandate that the TPA cannot limit SPUSO5's rights under the PSA, the court's decision has the opposite effect, making TPA §22 trump PSA §10(a).

Moreover, the TPA itself fully supports the conclusion that PSA 10(a) remains fully in force. Far from eliminating any PSA rights, the TPA states that the PSA is part of the TPA "for *all* purposes" (20JA:4399, italics added), acknowledges that Cal National required SPUSO5 and Corona Summit to execute *both* the PSA and TPA (*ibid.*), and contains representations and warranties by Corona Summit and SPUSO5 that the PSA "is in *full* force and effect" (20JA:4404, §§6(a), 6(b), italics added).

And when Corona Summit and SPUSO5 amended the PSA—with Cal National's consent—to make construction-schedule changes and to increase the purchase price and escrow deposit, they re-affirmed each time that "all other terms" of the PSA "shall remain *in full force and effect*, unaltered and unchanged" by the amendments. (27JA:6251; 37JA:8969, italics added.)

And, TPA §§5(a) and 5(f)(ii)—far from eliminating PSA §10(a)—respectively state that if Cal National elects to complete the construction after obtaining title to the Property in foreclosure, it "shall be subject to the terms of the [PSA], including, without limitation, Section 10(a) thereof," and that nothing in the TPA shall limit or affect "the liquidated damages payable to Seller to the extent provided in Section 10(a) of the [PSA]." (20JA:4402-4403.)

3. Construing PSA §10(a) as barring specific performance of the sale is necessary to give full force to every provision of the TPA and PSA, as California law requires.

Ignoring this language, the trial court instead emphasized TPA §2's language that SPUSO5 "'agrees to purchase and pay the purchase price set forth in the [PSA] (the Purchase Price) for the Property, subject to and in accordance with the terms, provisions and conditions contained in the [PSA], as the same may be modified hereby, and Seller hereby authorizes and directs Purchaser to pay to Construction Lender in connection with the Closing . . . such portion of the Purchase Price as is necessary to satisfy the Construction loan in full'" upon the lender reconveying any security liens

and upon satisfaction of all PSA conditions to SPUSO5's payment. (See 36JA:8714, quoting 20JA:4399-4400.)

The court construed this language as a promise by SPUSO5 to pay the purchase price if all performance conditions were met, which would be enforceable under TPA §22's specific-performance provision. (36JA:8714.) But, because PSA §10(a) permits SPUSO5 to breach its purchase obligation in exchange for forfeiting the escrow deposit, the court's construction of TPA §2 renders PSA §10(a) inoperative and creates a direct conflict with TPA §§5(a) and 5(f)(ii).

The court's construction thus violates the mandate that "[c]ourts must interpret contractual language in a manner which gives force and effect to *every* provision, and not in a way which renders some clauses nugatory, inoperative or meaningless." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473.) Seemingly contradictory or inconsistent contract provisions "are to be reconciled by interpreting the language in such a manner that will give effect to the entire contract." (*Estate of Petersen* (1994) 28 Cal.App.4th 1742, 1753-1754.) The trial court didn't do that; instead, it acknowledged that its construction "does not resolve the meaning of 'sole and exclusive remedy, either at law or [in] equity,'" and it chose "not to suggest a definitive meaning for that phrase." (36JA:8727.) But the contract language *must* be reconciled.

The only interpretation that reads the PSA and the TPA to give force to every provision, and reconciles PSA §10(a) and TPA §22, is as follows:

- TPA §2 makes SPUSO5's payment obligation "subject to and in accordance with the [PSA's] terms, provisions and conditions"—as TPA §2 expressly states (20JA:4399-4400)—which includes PSA §10(a), with the "modification" that if the transaction closes SPUSO5 will make its payment directly to Cal National to the extent necessary to pay off the construction loan. The PSA, not the TPA, defines the purchase terms. The TPA's purpose is to provide the parties certain loan-related rights, such as providing the lender a security interest in the seller's PSA rights and giving SPUSO5 certain rights to address a loan default. (Pp. 11-12, *ante*.)

- TPA §22, in turn, provides the parties the right of specific performance for breaches of *the TPA itself*, as opposed to eliminating the PSA's remedy limitations for the buyer failing to consummate the sale. (See 20JA:4416 [TPA §22 applies to a "breach of this Agreement"]; 20JA:4399 [defining "Agreement" as the TPA].)

4. TPA §5(a) defeats the trial court's interpretation.

Respondents have attempted to brush aside TPA §5(a) by emphasizing that it applies only where the lender elects to complete construction after obtaining title to the Property in foreclosure. (15RT:3367.) But it doesn't matter whether this provision actually came into play. Its mere *existence* defeats the trial court's interpretation.

The existence of TPA §5(a) defeats the trial court's treatment of TPA §2 as an absolute guarantee by SPUSO5 to pay the entire purchase price and pay off the construction loan after construction is completed in

accordance with the contracts. Under respondents' interpretation, a lender stepping into Corona Summit's shoes would be entitled under TPA §2 to payment of the purchase price and full pay-off of the construction loan upon completing construction. But TPA §5(a) explicitly provides otherwise by making the lender *subject to* PSA §10(a), thus giving SPUSO5 the right to refuse to buy the Property and leave the lender with the exclusive remedy of the $13 million deposit. If PSA §10(a) *ever* applies under the TPA—and TPA §§5(a) and §5(f)(ii) both expressly state that it does—TPA §§2 and 22 cannot be read as superseding PSA §10(a).

And, if PSA §10(a) applies under TPA §5(a) where the lender obtains title to the Property, it must also apply where Corona Summit *retains* title and thus remains the seller. Nothing in logic, law or the contract language supports the conclusion that Corona Summit and its lender were intended to have *different* remedies if SPUSO5 breached the purchase terms.

U.S. Bank has tried to confuse the issue by claiming Cal National was not bound by any PSA terms since it only signed the TPA. But the TPA incorporates the PSA's provisions, and the rule that two concurrent agreements should be construed together applies even where a party did not sign each agreement. (*Harm v. Frasher* (1960) 182 Cal.App.2d 405, 414-415, citing cases.) Moreover, only a property's titleholder would have standing to compel specific performance of a sale. (*Hollypark Realty Co. v. Macloane* (1958) 163 Cal.App.2d 549, 552 [parties suing buyer for specific performance of real estate purchase contract must "be in a position to

convey the property to defendants"].) That's why TPA §5(a) expressly makes a lender obtaining title subject to PSA§10(a).

Instead of giving the seller and its lender different remedies, TPA §5(a)—in addition to making the lender subject to PSA §10(a) when it obtains title and completes construction—expressly makes the lender an *assignee* of the seller's rights (but not its obligations) under the PSA. (20JA:4401-4402.) It thus gives the lender the *same*—not greater—rights as the seller. (*Creative Ventures, LLC v. Jim Ward & Associates* (2011) 195 Cal.App.4th 1430, 1447 [assignee stands in assignor's shoes].) Similarly, TPA §15 provides that if the seller defaults under the construction loan, the lender "is authorized to demand, receive and enforce *Seller's rights with respect to the [PSA]* . . . and to do any and all acts in the name of the Seller or in the name of Construction Lender with the same force and effect as Seller could so if this [TPA] had not been made." (20JA:4408, italics added.)

In short, the contractual terms and plain common sense dictate that where Corona Summit retains title to the Property and thus remains the "seller," PSA §10(a) defines the exclusive remedy for SPUSO5 breaching any purchase obligation; and where the lender obtains title and effectively becomes the "seller," the TPA allows the lender to step into Corona Summit's shoes subject to PSA §10(a).

C. The Only Competent Extrinsic Evidence Confirms That The TPA's Specific-Performance Provision Does Not Trump PSA §10(a).

1. Parol evidence purportedly supporting the trial court's interpretation was incompetent.

• ***Armstrong and Butcher***: Respondents emphasized testimony by Armstrong and Butcher that Hench told them in their initial discussions that the concept essentially was "you build it, we buy it," and that the buyer essentially would serve as a "take out" lender. (See CSRB 12, 47, in B226933; USBRB 9-10, in B226933.) But, as Hench explained, the "you build it, we buy it" descriptor grossly oversimplifies a forward purchase contract when treated as an absolute commitment to purchase, because the contract will always contain contingencies and limitations, such as liquidated-damages clauses. (6RT:723; 7RT:969-978, 985-986.) Armstrong and Butcher indisputably knew about PSA §10(a)'s remedy-limitation—they specifically initialed it and negotiated the same limitation for themselves in the transaction in which they purchased the Property. (18JA:3843; 20JA:4619; 6RT:625-628; 12RT:2587-2588.)

Regardless, their testimony about Hench's statements is legally irrelevant because the PSA is integrated and therefore PSA§10(a)'s express terms control. (18JA:3850, §17(g).) Evidence of negotiations leading to an integrated agreement is not substantial evidence because the contract subsumes the negotiations, making that evidence "legally irrelevant." (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343-345.)

"'[E]xtrinsic evidence cannot be admitted to prove what the agreement was . . . because as a matter of law the agreement is the writing itself.'" (*Id.* at p. 344.) And, even where a contract is not integrated, extrinsic evidence may never be considered when it contradicts clear terms. (*Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1061.)

• ***Bonaccorso and Kellogg*:** Respondents also proffered testimony by Bonaccorso and Kellogg, members of Cal National's loan committee, about a November 2007 meeting they had with Hench and Ming Lee of CBREI (along with Houten from Cal National and Armstrong and Butcher), in which Bonaccorso purportedly told Hench that the bank needed a "come hell or high water take-out" commitment to proceed with the construction loan. (USRB 12-13, in B226933; CSRB 17, in B226933; see 8RT:1404-1407.) That testimony also is legally irrelevant.

First, Bonaccorso and Kellogg did not specifically identify any express promise by Hench that the deal would go through no matter what, without any remedy-limitation whatsoever. Bonaccorso conceded that he would not characterize Hench's statements as a "commitment," but rather that "the inference" he got from Hench—the "feeling" he came away with—was that CBREI "would perform and intended to perform" if the shell buildings were built according to the specifications. (8RT:1419.)

Second, Bonaccorso and Kellogg were not involved in the actual contract negotiations, and their understanding of the deal is not based on the actual contract language. Respondents opted not to call as witnesses the three individuals who actually negotiated the contract language for Cal

National.[18] Bonaccorso admitted that he never reviewed the final version of the TPA (he only reviewed an early draft) and that—even though he knew the PSA "goes hand and glove" with the TPA and that the TPA cannot be labeled more important—he never reviewed any version of the PSA and knew nothing about PSA §10(a) or its relationship to the TPA. (8RT:1413-1414, 1423, 1428-1429, 1432-1433; 9RT:1513, 1521-1522, 1528, 1536-1537, 1583.) Kellogg likewise admitted that he never reviewed the PSA or reviewed the final TPA. (11RT:2189, 2191.) Confirming their lack of involvement in the actual contract negotiations, Bonaccorso and Kellogg both erroneously thought that Fund V signed the contracts rather than SPUSO5. (8RT:1410, 1421; 11RT:2185, 2204.)

The trial court nonetheless predicated its TPA construction on Bonaccorso's and Kellogg's testimony, particularly the following testimony by Kellogg responding to a question from SPUSO5's counsel:

> QUESTION: And [Hench] didn't tell you that you would get--that the seller would have specific performance rights?
>
> ANSWER: Counsel, I told him, okay, that was the basis upon which we would make the loan if they're going to buy.
>
> Okay?

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[18] Those three individuals were: (1) Hagle, Cal National's attorney; (2) Houton, who signed the TPA and was designated during discovery as the person most qualified to discuss the loan; and (3) Richard Robinson, the loan's account officer. (Pp. 16-19, *ante*; 1AA:6, 8, 39-40, 49, 105, 119-120, 145, 210-213, 222; 20JA:4437, 4515, 4595, 4601-4606.)

SPUSO5 submitted excerpts of Houten's and Robinson's depositions, showing they recalled no specifics of any negotiation conversations regarding PSA §10(a) or TPA §§5(a), 5(f)(ii) and 22. (1AA:40, 46, 49, 53, 208-209, 211-214.)

(36JA:8723, quoting 11RT:2202.)

This vague, confusing snippet is not substantial evidence of anything. (*Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 157 [evidence "too vague and nonspecific" is not substantial evidence]; *Roddenberry v. Rodenberry* (1996) 44 Cal.App.4th 634, 654 ["Not every bald assertion rises to the dignity of substantial evidence"].)[19] But even if it were clear, the testimony could not support the trial court's construction, because it would be incompetent parol evidence, which is no evidence at all. (*Parsons*, *supra*, 62 Cal.2d at p. 865.)

The weight the trial court accorded Bonaccorso's and Kellogg's testimony in construing TPA §§2 and 22 shows that the court let the "extrinsic evidence" tail wag the "contract interpretation" dog. (E.g., 36JA:8729 [court stating "the contract must be interpreted to preserve a specific performance remedy"].) As we have explained, the court's construction impermissibly renders PSA§10(a) inoperative, contradicts express terms, and creates conflicts between the agreements. Since Kellogg and Bonaccorso never read the PSA (even though the TPA incorporates its terms) or even the final TPA, and were not involved in the attorney negotiations, their purported understanding of the deal is utterly irrelevant. (*Trotter v. M.H. Golden Constr. Co.* (1951) 105 Cal.App.2d 511, 515-516 [since subcontract incorporated terms of prime contract, subcontractor was

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[19] Tellingly, none of respondents' other witnesses who attended the Hench meeting recalled any "specific performance" conversation. (5RT:356 [Armstrong]; 8RT:1426-1427 [Bonaccorso]; 12RT:2558-2559 [Butcher].)

bound by, and needed to investigate, prime contract's terms]; *Markborough California, Inc. v. Superior Court of Riverside* (1991) 227 Cal.App.3d 705, 716 [parties bound by "terms of the contract even if they do not read it"].)

- ***Quarterly report*:** Respondents also argued that Fund V admitted in a 2008 quarterly report to its limited partners—a report issued after the contracts were executed and that respondents never claimed they read—that SPUSO5 was contractually bound to purchase the Property, because the report stated that Fund V "*has committed* to purchase these [Corona Summit] buildings at completion through a forward purchase agreement." (28JA:6353, italics added.) But the same page states that the "Beltway Lakes commitment *was cancelled*" and that the "Buckhead Block C commitment has *been suspended*," so Fund V obviously was not using "committed" in some absolute sense. (*Ibid.*, italics added.) The undisputed evidence was that Fund V used "commitment" in investor reports merely to connote projects that Fund V's Investment Committee has approved, not purchases that would be consummated no matter what. (6RT:727-730; 7RT:962-967; 8RT:1207-1208.)

2. The only competent extrinsic evidence confirmed the vitality of PSA §10(a).

The only way to construe the PSA and TPA harmoniously, and to give force to every provision and avoid absurdities, is to construe them as limiting respondents to the exclusive remedy of retaining the escrow deposit as liquidated damages for SPUSO5 not purchasing the Property. (§II.B,

ante.) In light of the express contract language, there was no need to consider extrinsic evidence.

But even if extrinsic evidence could be considered, the only competent extrinsic evidence regarding the interplay between PSA §10(a) and the TPA—evidence comporting with the contract language instead of contradicting it—was the negotiation history between the attorneys who drafted the provisions. (Pp. 14-19, *ante*.)

It was undisputed that Lazarus insisted on PSA §10(a)'s remedy limitation from the first draft purchase agreement and repeatedly protected it by insisting on PSA §22 and TPA §§5(a) and 5(f)(ii). (Pp. 15-19, *ante*.) Not only did Lazarus reject any language by Corona Summit or its lender that might weaken those protections (e.g., 9RT:1638-1639, 1667; 13RT:2735-2747; 14RT:3044-3046, 3067-3068, 3082-3084; pp. 16-19, *ante*), she told Cal National's counsel, Hagle, that the TPA language could not modify the PSA's deposit provisions, which prompted Hagle to assure her that it didn't (20JA:4595, 4601; pp. 18-19, *ante*).

Negotiations regarding TPA §9 were to the same effect. Consistent with PSA §10(a) affording SPUSO5 the right to forfeit the escrow deposit in lieu of purchasing the property, SPUSO5 rejected any requirement for a purchase-price reserve and insisted that TPA §9 state that if SPUSO5's parents and affiliates lacked the net worth to consummate the purchase, there would be no recourse against SPUSO5 even though Corona Summit would be in default under its construction loan. (20JA:4406; 24JA:5321, 5441, 5478; 28JA:6551, 6562; pp. 13, 21-22, *ante*.)

And although the trial court treated TPA §§2 and 22 as though they memorialized Cal National's November 2007 meeting with Hench, both provisions were drafted long before Cal National even entered the picture and thus were *not* in response to the Hench meeting. (Pp. 16-17, *ante*; 15RT:3335.)

PSA §10(a)'s remedy limitation still left Cal National with abundant protection for its $63 million construction loan. In the event SPUSO5 breached, Cal National would have the $13 million deposit, *plus* the Property itself which it could sell, *plus* personal loan guarantees from Armstrong and Butcher worth $35 million. (9RT:1508; 29JA:6765-6767, 6775, 6785-6792; 34JA:7917, 7920-7924.)

D. PSA §10(a)'s Remedy Limitation Is Valid.

Respondents argued that ever since Civil Code section 3389 was enacted in 1872, California has held "that a 'liquidated damages' clause like ¶ 10(a) does not in any event trump a Seller's right to specific performance" and that contracts must reference Civil Code sections 1680 and 3389 to foreclose specific performance. (CSRB 76, in B226933.) Not so. Those sections apply only where the parties merely stipulate to their damages at law, not where, as here, they specify an amount as the *exclusive* remedy for breach.

Section 3389: Civil Code section 3389 provides that "a contract *otherwise proper to be specifically enforced*" may be specifically enforced despite providing for liquidated damages. (Civ. Code, §3389, italics added.) The statute does "not render a contract one as to which specific

performance will be decreed simply because it contains a provision for liquidated damages . . . ." (*Morrison v. Land* (1915) 169 Cal. 580, 589.) Rather, it provides that where parties merely stipulate to liquidated damages (without indicating the remedy is exclusive) the contract remains subject to specific performance. (See, e.g., *Glock v. Howard & Wilson Colony Co.* (1898) 123 Cal. 1, 11-12; *Johnston v. Blanchard* (1911) 16 Cal.App. 321, 325-326, overruled on other grounds by *Graca v. Rodriquez* (1917) 33 Cal.App. 296.)

But where a real estate contract goes further by allowing the buyer in default to either consummate the sale or pay prescribed "liquidated damages" in lieu of performance, the contract is effectively an option and no right to specific performance exists. (See, e.g., *People v. Ocean Shore R. Co.* (1949) 90 Cal.App.2d 464, disapproved on other grounds in *County of San Diego v. Miller* (1975) 13 Cal.3d 684, 689; *California Land Security Co. v. Ritchie* (1919) 40 Cal.App. 246, 255-268; *Beckwith-Anderson Land Co. v. Allison* (1915) 26 Cal.App. 473, 475-476.)

For example, in *People v. Ocean Shore R. Co., supra*, the real estate contract specified that if the buyer defaulted on his payment obligation the seller's remedy was to retain all previously-paid moneys as liquidated damages and seller would have no other "right or claim" against the buyer—language the appellate court recognized made the liquidated damages "the exclusive remedy of the seller." (90 Cal.App.2d at pp. 467, 471, 476.) In finding the "exclusive remedy" language foreclosed specific performance, the court explained that sellers can seek specific performance

where deposits designated as liquidated damages are merely security for performance, but not where the liquidated damages are "'intended as a substitute for performance'" in that the buyer can either "'comply with the contract or pay liquidated damages in lieu thereof.'" (*Id.* at p. 470.)

Section 1680: Civil Code section 1680 adheres to these principles. It was enacted as part of a statutory scheme increasing buyers' ability to include liquidated-damages provisions in real estate contracts. (See Civ. Code, §§1675-1681.) Section 1680's purpose was to make clear that the new scheme did not affect the rules under "Section 3389, *People v. Ocean Shore R. Co.*, [*supra*,] 90 Cal.App.2d 464 . . ., and other cases interpreting Section 3389." (Cal. Law Revision Com. com., 9 West's Ann. Civ. Code (2011 ed.) foll. §1680, pp. 205-206.) Thus, just as under section 3389, no specific-performance remedy exists under section 1680 where "the contract states the liquidated damages are the seller's *sole* remedy." (Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2011) §11:106, p. 11-24.)

Accordingly, sections 1680 and 3389 do not nullify PSA §10(a)'s specific-performance bar. Section 10(a) does not merely say the seller can retain the escrow deposit as liquidated damages—it specifies that result as the seller's "sole and exclusive remedy, either at law or in equity."

> [W]hen the liquidated damages clause provides that the recovery of the specified sum as damages is the seller's *sole remedy* in the event of the buyer's default, the parties have excluded the remedy of specific performance and, in effect, have created an option.

(1 Miller & Starr, Cal. Real Estate (3d ed. 2011) §2.8, p. 28; accord, 2 Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, *supra*, §11:106, p. 11-24 [provision that "liquidated damages are the seller's *sole* remedy" forecloses specific performance]; 1 Cal. Real Property Sales Transactions (Cont.Ed.Bar 4th ed. 2010) §4.142, pp. 399-400 [same].)

***

Even if the trial court had not erred in adding Fund V as a judgment debtor, the underlying contract liability could not exceed the $13 million escrow deposit. So, even if the alter ego ruling were affirmed, the Fund V judgment must be reversed.

CONCLUSION

Controlling contract-interpretation canons, due process violations and the misapplication of alter ego standards all compel reversal of the Fund V judgment. Regardless how this Court resolves SPUSO5's appeals, the judgment against Fund V must be reversed.

Dated: February 17, 2012

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) the **APPELLANT FUND V'S OPENING BRIEF** contains **19,932** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: February 17, 2012

Edward L. Xanders

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On February 17, 2012, I served the foregoing document described as: **APPELLANT FUND V'S OPENING BRIEF** on the parties in this action by serving:

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ANITA F. COLE