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 REPLY BRIEF

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INTRODUCTION

The strategy behind respondents' 33,667-word brief (almost 2½ times the length of a regulation brief!) seems to be to spin out as many factual and legal theories as possible and hope that under the usual rules of trial court deference on review, this Court will latch onto some basis—any basis—to affirm. But there is a critical flaw in this approach. This is a contract interpretation case; and where, as here, the words of the contract may be interpreted reasonably so that every term is given meaning and the competent extrinsic evidence is not in material conflict with that meaning, review is *de novo*—not deferential.

And as this brief explains, *only* Fund V's interpretation is both consistent with the competent extrinsic evidence and gives meaning to every term of the contracts—particularly the words at the center of this dispute, that in the event of a breach of the purchase and sale agreement (PSA), "liquidated damages . . . shall be seller's sole and exclusive remedy, either at law or in equity."

The trial court simply punted on this key aspect of the case, refusing even to suggest a meaning of the "sole and exclusive remedy" language. Respondents purport to interpret it, but their bottom line—that the language in question permits the seller "to choose between liquidated damages and specific performance" (Respondents' Brief (RB) 98)—has the same effect as the trial court's approach: It simply reads the "sole and exclusive remedy" language out of the contract.

Moreover, respondents' interpretation posits the entirely absurd scenario of the buyer agreeing to—indeed, insisting upon—a liquidated-damages provision that could *only* benefit *the seller*. By contrast, Fund V's interpretation is consistent with the general practice in the real estate industry and with numerous secondary authorities and their recommended forms, which make it clear that providing for the exclusive remedy of liquidated damages is the norm in large commercial sales transactions because it spreads the risk between both parties.

Respondents' approach to the alter ego issue suffers from different, but no less fatal, flaws. As the opening brief recounted, the trial court's imposition of alter ego liability on Fund V was based entirely on shards of evidence gathered from a trial at which Fund V was neither a party nor had notice that its personal assets were at stake, despite respondents' full knowledge of all the facts on which they eventually asserted their claims against Fund V. Respondents' principal justification for this fundamentally unfair, patently unlawful approach is to claim that public policy requires courts to exercise the "greatest liberality" in piercing the corporate veil and in adding a non-party alter ego to a judgment based upon the trial court's subjective assessment of what "justice" requires. (RB 1, 34, 45, 47.)

As this brief explains, respondents are able to construct these arguments only by removing cited principles from their context and ignoring the public policy behind limited-liability structures and the stability and predictability they provide in large-scale transactions. As we explain, the actual rule is that veil-piercing is extraordinary and must be undertaken cautiously and sparingly—particularly in a contract context such as this one, where sophisticated parties went into the deal with their eyes fully open about the relationship and the financial wherewithal of the entities involved.

The use of single purpose entities (SPEs) with limited net worth and concomitantly limited financial exposure is a staple of large real estate transactions. Respondents' assertion that these arrangements can easily be undone after a trial of contract claims, simply by appealing to a trial court's amorphous, subjective sense of "justice," would inject significant uncertainty and seriously undermine the real estate industry's ability to do business.

Fund V was twice blind-sided here: First, by the trial court's treatment of the PSA's exclusive-remedy language as though it didn't exist; and second, by the trial court's conclusion that Fund V was liable as an alter ego despite all parties' full knowledge of its status at all relevant times and respondents' deliberate decision not to name it as a party to the contract or to the contract litigation. The judgment against Fund V must be reversed.

ARGUMENT

I. AS A MATTER OF LAW, THE PSA AND TPA LIMIT FUND V'S LIABILITY TO $13 MILLION IN LIQUIDATED DAMAGES.

Fund V's opening brief demonstrated that the judgment against Fund V must be reversed because, as a matter of law, PSA §10(a) limits respondents to the exclusive remedy of the $13 million escrow deposit. (AOB 70-88.)

In trying to claim otherwise, respondents gloss over the controlling de novo standard of review (see §I.A, below) and the trial court's refusal to resolve the meaning of PSA §10(a)'s "sole and exclusive remedy" language (see §I.B.1, below). They acknowledge the need to harmonize PSA §10(a) with the right to specific performance set forth in §22 of the Tri-Party Agreement (TPA), but their proffered construction is that "PSA §10(a) ultimately must be read to allow Corona Summit *to choose* between liquidated damages and specific performance" and that PSA §10(a) is simply a "general liquidated damages clause, nothing more" that was never triggered. (RB 94, 98, 111-112, italics added.) That construction is specious—PSA §10(a) unambiguously provides that the escrow deposit is the seller's exclusive remedy, and its language comports with general industry practice, uniform secondary authority and myriad recommended forms that make liquidated damages the seller's exclusive remedy. (See §§I.B.2-4, below.)

Ultimately, two cardinal rules of contract construction compel Fund V's interpretation as a matter of law: (1) the rule that courts will adopt a reasonable construction that gives force to every contract term; and (2) the rule that specific provisions control over general ones. (See §I.C, below.) The only competent extrinsic evidence exclusively supports Fund V's interpretation. (See §I.C.3, below.) Finally, PSA 10(a)'s remedy limitation is valid under California law. (See §I.D., below.)

A. This Court's Review Is De Novo.

Respondents barely address the standard of review, other than misstatements that the trial court's construction must be upheld because "there is a material conflict as to the intent and effect of PSA §10(a)" and there was "conflicting extrinsic evidence." (RB 105, 108.) But as Fund V's brief demonstrated, the only contract-interpretation context where de novo review doesn't apply is where the construction rests on the credibility of conflicting, competent extrinsic evidence. (AOB 70-71.)

De novo review therefore applies here, because the resolution of PSA §10(a)'s meaning does not rest on the credibility of conflicting, competent extrinsic evidence: (1) under settled rules of contract interpretation, the plain language of the PSA and TPA can be harmonized in full so there is no ambiguity or unaccounted-for provision, by (and *only* by) adopting Fund V's construction; and (2) respondents rely on *incompetent* extrinsic evidence—in particular, testimony about undisclosed subjective understandings and parol evidence that contradicts express contract terms. (See §I.C.3, below.)

Review therefore is de novo. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166 ["when the competent parol evidence is not conflicting, construction of the instrument is a question of law"].)

B. PSA §10(a) Unambiguously Provides That The $13 Million Escrow Deposit Is The Seller's *Exclusive* Remedy For The Buyer's Breach; The Contracts Do Not Afford The Seller A Choice Between Liquidated Damages And Specific Performance.

1. Significantly, the trial court never resolved the meaning of the crucial "sole and exclusive remedy" language.

Respondents emphasize the trial court's comments that:

- PSA §10(a) and TPA §22 "'can be read to have complementary purposes'" because §10(a) "'provides an avenue to the Seller to obtain an early payment of liquidated damages, if the Buyer and Seller agree[,] while [TPA] section 22 preserves in the Seller, and the Seller's lender, the right to compel the Buyer's performance . . . .'" (RB 84, quoting 36JA:8726.)

- "'If the Buyer had given notice of its termination early during the construction phase, the fast payment of the liquidated damages, especially in the sizable amount of $13 million, may have satisfied the Seller. However, once the construction was complete, or nearly complete, only specific performance can provide the Seller's (and the Bank's) expectations under the PSA/TPA contract.'" (RB 84, quoting 36JA:8726-8727.)

But respondents fail to mention what the trial court said next: "This interpretation of the complementary purposes of these two contract provisions *does not resolve the meaning of 'sole and exclusive remedy, either at law or in equity' (and the court chooses not to suggest a definitive meaning for that phrase)*, but it does preserve the purpose of each of the alternative contractual remedies to which the parties assented." (36JA:8727:4-8, italics added.)

Thus, the trial court never determined that PSA §10(a) and TPA §22 can be construed harmoniously to give effect to all the contract terms—it explicitly refused to construe the "sole and exclusive remedy" language. It opined that a right to specific performance of the purchase under TPA §22 could be harmonious with a right to liquidated damages under PSA §10(a) only in the sense that the seller might prefer liquidated damages in some instances but specific performance in others. As Fund V's opening brief explained, that conclusion dodged the central issue in the case: How could liquidated damages be the seller's "sole and exclusive remedy" if it also had the right to specific performance? That conclusion also avoided the duty to construe contract language harmoniously in a manner that does not make words surplusage. (AOB 74-76.) Only Fund V's interpretation meets that standard. (See AOB 11-12, 75-76.)

The closest respondents come to attempting to harmonize the "sole and exclusive remedy" language with the other terms of the contract is their argument that "PSA §10(a) is at best a general liquidated damages clause, nothing more" and it thus merely allows the seller to *choose* between liquidated damages and specific performance. (RB 94, 98.) Under this interpretation, PSA §10(a) merely gives the seller a right to obtain liquidated damages (in lieu of proving actual damages), rather than eliminating the alternate right to specific performance that respondents claim under TPA §22.

As shown below, that argument fails for multiple reasons. Not only is it irreconcilable with PSA §10(a)'s plain language, it would transform PSA §10(a) into a risk-free potential windfall provision for a seller that no rational buyer would accept, let alone demand and consistently seek to preserve, as occurred here. Respondents' tortured interpretation of PSA §10(a) is no basis to affirm the judgment. (*ASP Properties Group v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269 ["Interpretation of a contract 'must be fair and reasonable, not leading to absurd conclusions'"]; *Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 513 ["where one construction would make a contract unusual and extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail"].)

2. PSA §10(a) explicitly applies where, as here, the seller met all conditions to the buyer's performance but the buyer decides not to purchase.

Respondents argue that PSA §10(a) doesn't apply here because "if there is a pre-closing default (as there was here), Seller then *can elect* to provide a notice of default" to trigger the right to liquidated damages; they assert that Corona Summit "did not so *elect*" because the breach occurred "on the eve of the closing" after it had completed construction and met all other conditions to buyer performance. (RB 110, italics added.)

PSA §10(a) provides no such election right.

PSA §10(a) actually contains two distinct—and alternative—liquidated-damages triggers. It provides that *either* of the following two events triggers the liquidated-damages remedy:

- "[i]n the event the sale of the Property is not consummated *prior to the closing date* because of a default under or breach of this Agreement on the part of Buyer and Buyer *fails to cure such default* or breach within ten (10) business days *after written notice by Seller* (provided, however, if such default or breach cannot reasonably be cured within such ten (10) business day period, such . . . period shall be extended as reasonably necessary to permit the Buyer to cure such default or breach . . . .)"; *or*
- "in 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)* . . . ."

(18JA:3842-3843, capitalization normalized, italics added.)

PSA §10(a) thus distinguishes between (a) where the buyer breaches before the seller has satisfied all conditions to the buyer's performance (e.g., construction remains in progress), and thus the transaction is not ready to close; and (b) where the seller has satisfied all conditions to the buyer's performance (e.g., construction is complete), but the closing doesn't occur because the buyer breaches its payment obligation. The latter is what happened here.[1]

The "notice of default" requirement applies only where the construction is still in progress and the buyer may not want to forfeit the $13 million deposit and thus wants the opportunity to "cure" any default. No such "cure" notice is required (as it would serve no purpose) where, as here, the transaction is ready to close but the buyer opts not to pay the closing price.

Not only does respondents' "notice of default" argument rest on a trigger clause that has no application here, respondents mischaracterize the "notice of default" clause. PSA §10(a) does not, as respondents claim, allow the seller to "elect" not to provide the default notice and thereby create an alternate right to seek specific performance. It contains no permissive words, such as "elect," "election," "choose" or "decide." (See 18JA:3842-3843.) Instead, the notice language is *mandatory*—the exclusive remedy of liquidated damages arises only "*after* written notice by

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[1] Corona Summit's own evidence established that the first clause was specifically added because the initial version contained only the second clause (regarding "all conditions to Buyer's obligations under this Agreement having been satisfied"), which meant liquidated damages could only apply after the seller had "completed the buildings." (9RT:1608 [Corona Summit's counsel Sykes testifying he requested addition of the first clause to cover breaches before construction was completed]; see also 9RT:1606-1609; 20JA:4628, 4646; 21JA:4692, 4715-4716, 4767, 4789-4790; 22JA:4847, 4869, 4944.)

Seller" and the buyer "fails to cure." (*Ibid.*, capitalization normalized, italics added.) This notice requirement protects the buyer's interests, not the seller's, as it ensures the buyer knows about, and can potentially cure, any alleged breach if it wants the transaction to close. (See 9RT:1606-1609; 10RT:1804-1806; 22JA:4847, 4869, 4944; 24JA:5266; 23JA:4998, 5022-5023 [buyer's counsel Lazarus requested the addition of the default-notice and cure language].)

That PSA §10(a) explicitly provides for two separate circumstances in which the exclusive remedy of liquidated damages is available directly belies the trial court's analysis that PSA §10(a) and TPA §22 "can be read to have complementary purposes" because liquidated damages might suffice for the seller during the construction phase but only specific performance would suffice "once the construction was complete." (36JA:8726-8727.) The "exclusive remedy of liquidated damages" provision of PSA §10(a) was not limited to breaches during construction. It also *explicitly* applied where, as here, the seller had met all conditions to the buyer's payment (construction was completed in accordance with contractual specifications), but the sale didn't close because the buyer breached.

The "sole and exclusive remedy" language of PSA §10(a) cannot be harmonized with TPA §22 via the strained method of positing alternative remedies. That language must be accounted for—it cannot be dodged, as the trial court candidly admitted it was doing. As shown below, the provisions can indeed be harmonized, but only by according the words "sole and exclusive remedy" their plain, ordinary meaning.

3. PSA §10(a) cannot reasonably be read as providing seller a choice between liquidated damages and specific performance.

a. The plain language states that liquidated damages is the exclusive remedy—it is not permissive.

Claiming that PSA §10(a) is simply a "general liquidated damages clause, nothing more" that allows the seller to "choose between liquidated damages and specific performance," respondents argue that the language is "passive and permissive," not mandatory. (RB 94, 98, 112-113.)[2] They assert that "[b]eing 'entitled' to liquidated damages does not suggest a requirement that the Seller elect to accept them" and that PSA §10(a) only makes liquidated damages the seller's exclusive remedy if the seller "elect[s] to receive and retain the deposit." (RB 113.)

It's difficult to understand an argument that says, in effect, a party's remedy is "sole and exclusive" if that party "elects" that remedy as opposed to a different remedy. Nor does the language in question support such a

[2] Respondents criticize Fund V for stating that liquidated damages and specific performance are "mutually exclusive." (RB 84-85.) Yet they concede that a plaintiff cannot *receive* both remedies (*ibid.*), and that was Fund V's point: Since a plaintiff cannot recover both remedies, designating either remedy as "exclusive" necessarily bars the other. (AOB 72.) The remedies *are* mutually exclusive. (1 Cal. Real Property Remedies and Damages (Cont.Ed.Bar 2012) §4.44, p. 318 ["[d]espite the plaintiff's ability to join alternative remedies, however, specific performance and damages are mutually exclusive remedies for breach of contract"].)

self-defeating interpretation. PSA §10(a) does not state that the escrow deposit becomes the seller's sole remedy only *after* the seller has *elected* to *retain* the deposit. It states that when the triggering buyer breach occurs, the seller "shall be entitled to [the deposit] as liquidated damages, *which shall be* Seller's *sole and exclusive remedy*, either at law or in equity." (18JA:3843, italics added, capitalization normalized.)

The only reference to retention of the deposit is in a subsequent sentence, which states that the escrow holder shall deliver the deposit to the seller and "such retention of the deposit by Seller is intended to constitute liquidated damages to Seller pursuant to sections 1671, 1676 and 1677 of the California Civil Code, and shall not be deemed to constitute a forfeiture or penalty within the meaning of section 3275 or section 3369 of the California Civil Code, or any similar provision." (18JA:3843.) That sentence does not abrogate the prior statement that the liquidated-damages remedy is exclusive; it merely confirms the parties' intent that the escrow deposit be considered liquidated damages, and not a penalty or forfeiture, as it otherwise might be under the cited Code provisions.

Respondents urge that the word "entitled" denotes a choice because an entitlement is merely a right and rights do not have to be exercised. (RB 113.) But "entitled" is used here to mean the seller has a right to liquidated damages because it is being conferred contractually; otherwise, the seller would have to prove actual damages. PSA §10(a) thus confers on the seller the right or entitlement to liquidated damages but expressly makes that remedy *the only one to which the seller is entitled.* Respondents' construction of the word "entitled" would render the exclusive-remedy language entirely meaningless—it would even permit the seller to pursue the legal remedy of compensatory damages instead of the specified liquidated damages.

The overall structure of PSA §10 (the "Remedies" section of the PSA) further confirms that its subsection (a) is an exclusive-remedy provision, not a general liquidated damages clause. PSA §10 "occupies the field"—it designates *all* remedies *both* parties have for breach, not just *some* remedies. Subsection (a) specifies the "Remedies For Buyer's Breach," while subsection (b) specifies the "Remedies For Seller's Breach." (18JA:3842-3844.) Subsection (a) then makes receipt of the escrow deposit as liquidated damages the seller's sole and exclusive remedy for buyer breach, while subsection (b) provides the buyer the following remedies for seller breach:

> Buyer *shall have the option* to (1) terminate this Agreement by delivery of written notice of termination to Seller, whereupon the Deposit shall be returned to Buyer, Buyer shall have the right to recover from Seller its actual, documented and reasonable expenses paid to third parties in connection with this Agreement, the Property and/or Buyer's due diligence . . ., which shall not exceed Seventy-Five Thousand Dollars ($75,000) in the aggregate, and Buyer and Seller shall each be released from all other liability hereunder . . .; *or* (ii) continue this Agreement *and seek the equitable remedy of*

specific performance. In no event shall Seller be liable for buyer's consequential damages or lost profits resulting from Seller's default.

(18JA:3843-3844, italics added.)

Subsection (b) squarely contradicts respondents' construction of subsection (a), as it demonstrates that the parties:

- certainly considered specific performance an equitable remedy (and thus a remedy within subsection (a)'s exclusion of remedies "in equity");
- knew how to unambiguously confer a choice between damages and specific performance when they so intended; and
- sought to define and limit the parties' financial exposure for breaches in the most specific and comprehensive terms possible.

The overall language and structure of PSA §10 repudiates respondents' attempt to transform PSA §10(a) into a "general," non-exclusive liquidated damages clause.

b. The reference to "sole and exclusive remedy, either at law or *in equity*" plainly encompasses specific performance.

In trying to avoid PSA §10(a)'s plain language, respondents assert that "the PSA is actually silent on Seller's right to specific performance" and "PSA §10(a) does not directly address 'specific performance' at all." (RB 93; see RB 82 [§10(a) "is pointedly silent as to specific performance"]; RB 83 [same].) That, of course, is nonsense.

"'The words of a contract are to be understood in their ordinary and popular sense.'" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club Inc.* (2003) 109 Cal.App.4th 944, 955 (*Founding Members*), quoting Civ. Code, §1644.)

The ordinary and popular sense of liquidated damages being the "seller's sole and exclusive remedy, either at law or in equity" is that the parties were deliberately excluding any *other* remedies the seller might otherwise have for nonperformance.

Also, the phrase "at law *or in equity*" plainly encompasses equitable remedies, removing any conceivable doubt as to whether the exclusion only applies to remedies at law, such as compensatory damages. Thus, the ordinary and popular sense of the "in equity" reference is that it excludes specific performance: Specific performance is an equitable remedy. (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 425, fn. 14; *Patel v. Liebermensch* (2008) 45 Cal.4th 344, 349; *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1345 ["action for specific performance of a sales contract is an action in equity"].)

PSA §10(a) is *not* silent on specific performance. Its plain language, construed in the ordinary and popular sense as California law requires, *explicitly* excludes that remedy.

c. PSA §10(a)'s "exclusive remedy of liquidated damages" provision is consistent with general practice in the real estate industry and its language comports with myriad forms that make liquidated damages the seller's exclusive remedy.

Most real estate purchase agreements make recovery of the escrow deposit as liquidated damages the seller's exclusive remedy for buyer breach. (See 1 Cal. Real Property Sales Transactions (Cont.Ed.Bar 4th ed. 2011) §4.143, p. 400 ["most sellers waive specific performance and agree that liquidated damages will be their sole remedy"]; *ibid.* ["the customary form of a liquidated damages provision" waives a seller's specific-performance remedy for buyer breach]; *id.* at p. 401 ["Most sellers agree to waive all remedies other than liquidated damages. In a rising market, sellers wish to be paid the amount of the liquidated damages and be free to take advantage of the increase in values. In a falling market, sellers often wish to sell the property as soon as possible rather than to risk further losses if the specific performance action is not successful."].)[3]

[3] See also 20 West's Legal Forms (3d ed. 2002) Real Estate Transactions–Commercial Real Estate, §14:9, p. 602 ("[i]n *most instances* involving large commercial transactions, the contract will contain a liquidated damages clause limiting the purchaser's liability, in the event of a default, to the seller's retention of the deposit," italics added); *id.* at §16.3, p. 849 ("*[m]ost contracts* also provide that the deposit is to be treated as liquidated damages in the event of a default by the purchaser, which limits what the purchaser has at risk to the deposit, regardless of the seller's actual loss," italics added); 2 Commercial Real Estate Forms (3d ed. 2012) §9:13, p. 9-48 (same); Story, *Defaults And Remedies Under Real Estate Purchase*
(continued...)

Tacitly recognizing this general practice, respondents argue that PSA §10(a) is "highly customized" and "differs from most liquidated damages clauses" because its "language renders its operation conditional and permissive," thus making it a "general" liquidated damages clause, not an exclusive-remedy provision. (RB 110, 115.) Tellingly, they cite neither evidentiary nor case support for this assertion. None exists; in fact, the record and authoritative sources governing real estate industry practices reveal just the opposite.

PSA §10(a) is *not* "highly customized." (See 10RT:1805 [Corona Summit's counsel testifying at trial that the provision was *not* heavily negotiated].) The final version exactly matched the language contained in the very first draft, except for the following change: The first draft only covered a buyer breach after the seller met all its obligations to the closing; Corona Summit requested addition of the clause regarding pre-closing breaches in order to cover breaches during construction; that addition prompted the buyer to request the "notice of default" language. (20JA:4628, 4646; 21JA:4692, 4715-4716, 4767, 4789-4790; 22JA:4847, 4869, 4944; 24JA:5266-5267; 23JA:4998, 5022-5023; 18JA:3842-3843, 3992-3993; 9RT:1599, 1606-1609, 1633, 1666; 10RT:1804-1806;

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[3] (...continued)
& Sale Agreements (2000) 453 PLI/Real 513, 528 ("The parties to a real estate purchase and sale agreement can, *and often do*, limit the remedies available to the parties in the event of breach. Liquidated damages in the event of a buyer breach is the *most typical* form of limitation," italics added).

13RT:2862-2863; 14RT:3163.)[4] No changes were made or requested, nor were any comments even raised, regarding the language that respondents now claim renders PSA §10(a) a highly customized, permissive provision. (*Ibid.*)

Respondents' assertion that this provision differs from most liquidated-damages provisions rests entirely on one supposed authority—that PSA §10(a) does not use the same language as a particular CEB form that respondents claim "accomplishes Fund V's purported goals (unlike PSA §10(a))." (RB 114-115; see RB Exh. B.) Respondents emphasize the CEB form's language that the escrow deposit "'*will be deemed liquidated damages* for the buyer's nonperformance as Seller's sole and exclusive remedy against Buyer (including without limitation Seller's rights to seek ***specific performance*** of this agreement and to receive damages) for Buyer's failure to purchase the property.'" (RB 114, emphasis added by Respondents.) They argue the CEB form operates as an exclusive-remedy provision because, unlike PSA §10(a), it doesn't use the words "entitled" and "retained" and it specifically mentions "specific performance." (RB 113-115.)

But the CEB form is not the only exclusive-remedy form in town. Although that form doesn't describe the seller as being "entitled" to the

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[4] Such notice and cure language is routine. (See, e.g, 1 Miller & Starr, Cal. Real Estate Forms (2d ed. 2005) §1.20, pp. 232-233 [§9: seller's liquidated-damages right arising only if purchaser fails to cure default within ten days after written notice from seller]; 1A Miller & Starr, Cal. Real Estate Forms (2d ed. 2005) §1.32, pp. 16-17 [§9: same].) The CEB form cited by respondents also contains such language. (See 1 Cal. Real Property Sales Transactions, *supra*, §4.177, p. 460, ¶9.1.)

liquidated damages, many other exclusive-remedy forms do. (See, e.g., Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2011) Form 4:H, Purchase and Sale Agreement, pp. 4-171, 4-181 ["If Buyer fails to complete the purchase of the Property . . . by reason of any default of Buyer, it is agreed that the [escrow] deposits actually made . . . shall be non-refundable and Seller *shall be entitled to* such deposits, which amounts shall be accepted by seller as liquidated damages and not as a penalty and . . . *shall be Seller's sole and exclusive remedy*," capitalization normalized, italics added].)[5] That includes liquidated-damage forms that specifically mention "specific performance."[6]

[5] See also 3 Commercial Real Estate Forms (3d ed. 2012) Appendix, §10A:4 (purchase and sale agreement (land to be developed), ¶11: if purchaser refuses to close the transaction after all conditions precedent to its obligations have been met, "Seller *shall be entitled* to draw upon the full amounts of [the two deposited letters of credit] as agreed and liquidated damages for said breach, and as Seller's *sole and exclusive remedy* for default of Purchaser," italics added); 1 Miller & Starr, Cal. Real Estate Forms, *supra*, §1.20, p. 233 (purchase and sale agreement—small commercial properties subject to tenant leases, §9: "seller *shall be entitled*, as the *sole and exclusive remedy* for the breach, to receive the deposit . . . as liquidated damages," capitalization normalized, italics added); 1A Miller & Starr, Cal. Real Estate Forms, *supra*, §1.32, pp. 16-17 (hotel purchase agreement, ¶9: same language as preceding cite); 11 Part 1 West's McKinney's Forms (2007) Real Property Practice, §3:170, p. 503 (limitation of remedies form: if purchaser defaults, "Seller *shall be entitled* to receive and retain the Down Payment . . . as and for its *sole and exclusive remedy* hereunder, as Seller's liquidated damages," italics added).

[6] See, e.g., 1 Miller & Starr, California Real Estate Forms, *supra*, §1:22, pp. 284-285 (purchase and sale agreement—multi-property, §5: "If this transaction does not close because of default by purchaser, and seller is not otherwise in default, seller *shall be entitled* to the [escrow] deposit and all interest as liquidated damages. . . . [T]hat amount shall be the total amount seller *is entitled to receive* as liquidated damages. Seller shall have no right to additional damages, *and seller waives all right to an action for specific performance of this Agreement*," capitalization normalized, italics

(continued...)

In addition, the identical entitlement language exists in the exclusive-remedy provision that Corona Summit (as the buyer, and represented by the same attorneys who negotiated the PSA, 6RT:625-628; 12RT:2587-2588) insisted upon in the purchase agreement under which it bought the property at issue (see 20JA:4619 ["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," capitalization normalized, italics added]). Corona Summit also utilized there the same "at law or in equity" limitation that it now claims makes PSA §10(a) unusual and merely permissive. (See *ibid.*) Apparently, what's good for the goose isn't good for the gander.

Nor is there anything anomalous about PSA §10(a) referring to the seller "retaining" the deposit as liquidated damages. Such language appears in numerous exclusive-remedy liquidated-damages forms. (See, e.g., 1 Miller & Starr, Cal. Real Estate Forms, *supra*, §1:18, pp. 181-182 [purchase agreement—raw land, ¶11(c): if escrow fails to close due to default by purchaser, the seller shall have the right "*to retain* the earnest money deposit" and "*[s]uch retention* . . . is intended to constitute liquidated damages to seller . . . for the breach of this Agreement by Purchaser, all other claims to damages or other remedies at law or equity being herein expressly waived by seller," italics added].)[7] Again, that includes

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[6] (...continued)
added).

[7] See also 10 Business Transactions Solutions (2012) §53:174
(continued...)

liquidated-damage forms that specifically reference "specific performance."[8]

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[7] (...continued)
(purchase and sale agreement with seller obligated to complete development of property, ¶7(b): "in the event of Buyer's default under this Agreement, which default solely results in buyer's failure to acquire the property, Seller's sole and exclusive remedy shall be to terminate this Agreement *and to retain the deposit*," capitalization normalized, italics added); 1A Miller & Starr, Cal. Real Estate Forms, *supra*, §1:35, p. 120 (purchase and sale agreement—partially constructed project, §20: "[i]f Buyer defaults in the performance of its obligations after expiration of the initial contingency period seller shall *retain all monies deposited* as liquidated damages and as seller's sole and exclusive remedy," capitalization normalized, italics added); 1 Miller & Starr, Cal. Real Estate Forms, *supra*, §1:23, p. 323 (purchase and sale agreement—residential project, ¶7: "the Seller's right to *retain the deposit* shall be the sole remedy of seller in the event of a breach of this agreement by Purchaser," capitalization normalized, italics added); 3 Commercial Real Estate Forms (3d ed. 2012) §10.32, p. 10-614 (hotel purchase and sale agreement, ¶20(d): "in the event Purchaser defaults in its obligations under the Agreement to close the purchase of the Property, the deposit . . . shall be paid to *and retained by Seller* as . . . liquidated damages . . . [and] Seller shall have no other remedy whether at law or in equity for any such default by purchaser," italics added); 2 Commercial Real Estate Forms (3d ed. 2012) Appendix, §9A:2 (agreement of purchase and sale—short form for complex transactions, ¶14: "[i]n the event that the sale contemplated hereby is not consummated because of Purchaser's liability, failure or refusal to perform any of Purchaser's obligations hereunder, . . . Escrow Agent shall pay [the deposit] to Seller, who shall *retain the [deposit]* as full liquidated damages, and not as a penalty, and as its sole and exclusive remedy for such default," italics added); 11 Part 1 West's McKinney's Forms, *supra*, Real Property Practice, §3:26, p. 304 (contract of sale: office, commercial and multifamily residential premises, ¶13.04: "[i]f Purchaser shall default in the performance of its obligation under this contract to purchase the Premises, the sole remedy of Seller shall be *to retain* the Down Payment as liquidated damages for all loss, damage and expense suffered by Seller including, without limitation, the loss of its bargain," italics added).

[8] See, e.g., 1A Miller & Starr, Cal. Real Estate Forms, *supra*, §1:165, p. 563 ("*[d]elivery to and retention of* the released deposits amount by Seller shall be Seller's sole and exclusive remedy against buyer, and Seller waives any and all right to seek other rights or remedies against buyer, including without limitation, specific performance," capitalization normalized, italics added.)

Moreover, no case law or secondary authority supports respondents' contention that a liquidated-damages clause must specifically use the term "specific performance" to waive that remedy. To the contrary, secondary authority *uniformly* states that the contract need only indicate that liquidated damages are the seller's *sole* remedy. (See, e.g., 1 Miller & Starr, Cal. Real Estate (3d ed. 2011) §2.8, p. 28 ["when 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," emphasis in original]; Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, *supra*, ¶11:106, p. 11-24 [seller may seek specific performance "notwithstanding a liquidated damages provision (CC §1680) . . . unless the contract specifies the liquidated damages are the seller's *sole* remedy," ellipses and italics in original]; Story, *supra*, 453 PLI/Real at p. 530 [under Civil Code section 1680, a liquidated damages provision does not preclude the seller from seeking specific performance unless it "also provides that the liquidated damages are the seller's *exclusive remedy* in the event of a buyer breach of its obligation to purchase the property," italics added].)

That includes the very CEB treatise that respondents rely upon. Although the CEB form touted by respondents specifically mentions "specific performance," the treatise's text does *not* state that a form must reference that term to exclude that remedy. To the contrary, it instructs buyers to confirm that their contract states that liquidated damages "will be the seller's *sole remedy*" and it advises that "[i]f the provision states only that the *amount of damages* the seller can recover is liquidated damages, the seller arguably retains a right to equitable remedies, including specific performance." (1 Cal. Real Property Sales Transactions, *supra*, §4.142, pp. 399-400, italics added.)

By explicitly excluding all other remedies "at law or in equity," PSA §10(a) amply meets the CEB standard for an exclusive-remedy provision. In fact, had the CEB form used that terminology instead of simply defining liquidated damages as "Seller's sole and exclusive remedy against Buyer," it wouldn't have needed to add the clarifying phrase "including without limitation Seller's rights to seek specific performance of this agreement and to receive damages." (See RB Exh. B.) PSA §10(a)'s "at law or in equity" language is more comprehensive than the CEB form, as it leaves no doubt that the exclusion covers *all* equitable remedies, such as specific performance, injunctive relief, constructive trust, unjust enrichment, rescission and reformation.

Presumably that's why Corona Summit employed that same language when it purchased the subject property (20JA:4619), as many forms do (see, e.g., 3 Commercial Real Estate Forms, *supra*, §10.32, p. 10-614 [¶20(d), liquidated-damages provision stating "seller shall have no other remedy whether at law or in equity for any such default by purchaser"]; 1 Miller & Starr, Cal. Real Estate Forms, *supra*, §1:18, p. 182 [¶11(c), liquidated damages provision using phrase "other remedies at law or equity"]; 20 West's Legal Forms (2011 supp.) Real Estate Transactions–Commercial Real Estate, §14:25, p. 559 [form of breach-of-contract provision: the deposit "shall be paid to and retained by seller" as liquidated damages and "[s]eller shall have no other remedy whether at law or in equity for any such default by purchaser," capitalization normalized]).

PSA §10(a)'s "at law or in equity" language actually goes further than necessary to exclude specific performance as a remedy. Consistent with treatises' statements that the liquidated-damages provision need only indicate that those damages are the seller's only remedy, many exclusive-remedy liquidated-damage forms specify the escrow deposit as the seller's "sole and exclusive remedy"—as PSA §10(a) does—but *without* PSA §10(a)'s additional reference to equitable remedies. (See, e.g., Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, *supra*, at p. 4-181 [Form 4:H, Purchase and Sale Agreement: if buyer fails to complete purchase because of own default, the escrow deposits "shall be Seller's sole and exclusive remedy," capitalization normalized]; 1A Miller & Starr, Cal. Real Estate Forms, *supra*, at §1:35, p. 120 [purchase and sale agreement—partially constructed project, §20: "seller shall retain all monies deposited as liquidated damages and as seller's sole and exclusive remedy," capitalization normalized].)[9]

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[9] See also 1 Miller & Starr, Cal. Real Estate Forms, *supra*, §1.20, p. 233 (purchase and sale agreement—small commercial properties subject to tenant leases, ¶9: "seller shall be entitled, as the sole and exclusive remedy for the breach, to receive the deposit . . . as liquidated damages," capitalization normalized); 1A Miller & Starr, Cal. Real Estate Forms, *supra*, §1:32, pp. 16-17 (hotel purchase agreement, ¶9: same as last form); 10 Business Transactions Solutions, *supra*, §53:174 (purchase and sale agreement—seller obligated to complete development of property, ¶7(b): if buyer's default "results in buyer's failure to acquire the property, seller's sole and exclusive remedy shall be to terminate this Agreement and to retain
(continued...)

Respondents' ipse dixit assertion that PSA §10(a) "differs from most liquidated damages clauses" (RB 115) is fiction. Although PSA §10(a) may not mirror the particular CEB form cited by respondents, numerous forms confirm that PSA §10(a)'s language is not extraordinary and that it is an exclusive-remedy provision, not a general liquidated damages clause.

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[9] (...continued)
the deposit"); 2 Commercial Real Estate Forms, *supra*, Appendix, §9A:1 (purchase agreement, ¶8: "in the event this escrow is terminated by reason of any default of buyer . . . seller shall receive [the escrow deposits] as its sole and exclusive remedy," capitalization normalized); *id.* at §9A:2 (agreement of purchase and sale—short form for complex transaction, ¶14: seller shall retain the liquidated-damages escrow deposit "as its sole and exclusive remedy for such default"); 2 Commercial Real Estate Forms, *supra*, §9:29, p. 9-197 (real estate purchase agreement, ¶9.2: "[s]uch liquidated damages shall be Seller's sole and exclusive remedy for any default by Purchaser, and Seller shall have no other rights against Purchaser under the Purchase Agreement or otherwise"); 20 West's Legal Forms, *supra*, Real Estate Transactions–Commercial Real Estate, §14:20, p. 671 (commercial real estate purchase agreement, ¶9.2: same as preceding cite); *id.* at §14:19, p. 652 (commercial purchase agreement and escrow instructions, ¶8: if escrow is terminated by default of buyer, seller shall receive the escrow deposit(s) "as its sole and exclusive remedy," capitalization normalized); 3 Commercial Real Estate Forms, *supra*, Appendix, §10A:4 (purchase and sale agreement—land to be developed, ¶11: if purchaser refuses to close transaction after all conditions precedent to its obligations have been met, seller entitled to deposit as liquidated damages "as Seller's sole and exclusive remedy for default of Purchaser"); 11 Part 1 West's McKinney's Forms, *supra*, Real Property Practice, §3:170, p. 503 (form for limitation of remedies: if purchaser defaults, "Seller shall be entitled to receive and retain the Down Payment . . . as and for its sole and exclusive remedy hereunder, as Seller's liquidated damages").

d. Respondents' interpretation makes PSA §10(a) a risk-free, potential windfall, provision for the seller that no rational buyer would accept, let alone actively request and protect as here.

Ordinarily, an exclusive-remedy liquidated-damages clause in a real estate sales contract represents a trade-off of the seller's and buyer's competing interests and risks regarding potential changes in market value. "In agreeing to liquidated damages payable to the seller, buyers are able *to fix the amount of their 'downside' exposure*," but they must pay the fixed amount even if it exceeds the seller's actual damages, including "even if the property has appreciated in value" over the contract price. (Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, *supra*, ¶¶4:313 to 4:314, p. 4-84.) Thus, a liquidated damages clause may substantially benefit sellers in an appreciating market (where the property can be sold to another buyer at a higher price), but "[i]n a depreciating market, the seller's actual damages could exceed the agreed-upon liquidated amount . . . ." (*Id.* at §4:312, p. 4-84.) So, a liquidated-damages provision can allow the seller to obtain the deposit even "in a rising market" but "also reassures the buyer *that there is a limit to its exposure*." (1 Cal. Real Property Sales Transactions, *supra*, §4.142, p. 398, italics added.)

But this standard trade-off doesn't exist under respondents' interpretation of PSA §10(a). Respondents' construction that the seller can choose between $13 million in liquidated damages and specific performance makes PSA §10(a) a risk-free, potential windfall, provision for the seller:

- If the seller has little to no actual damages, such as when the property appreciates in value above the purchase price, stays the same or only slightly declines, the seller can still recover $13 million in liquidated damages and sell the property to another buyer. (See Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, *supra*, ¶11:105, p. 11-24 ["in an appreciating market, a liquidated damages provision can be a boon for sellers, who may be able to resell for a premium over and above the liquidated sum"].)
- If the property value declines but the actual damages from buyer breach are less than $13 million, the provision remains a boon to the seller because it still can take the $13 million deposit and sell the property, thus again realizing more than the contractual purchase price.
- And if an unexpected calamity causes the property to decline in value more than $13 million, the seller can ignore the liquidated-damages provision and instead seek specific performance to recover the full purchase price.

Respondents' interpretation transforms PSA §10(a) into a "win win" for only the seller. No rational buyer would risk $13 million—almost 20% of the purchase price of the property—in exchange for nothing.

Respondents' interpretation is particularly implausible in light of the undisputed evidence that it was *the buyer's* counsel Lazarus who insisted on PSA §10(a)'s remedy limitation from the very beginning and actively protected it throughout the negotiations. (See AOB 14-19.) Not only did Lazarus's first draft to Corona Summit contain the remedy limitation (9RT:1599, 1633; 13RT:2856-2857; 14RT:3163; 20JA:4628, 4646; AOB 15), but she objected when an exclusive-remedy liquidated-damages provision was deleted from the draft TPA, successfully insisting on the inclusion of TPA §5(a) as a replacement (23JA:5213-5214, 5241 [¶18]; 24JA:5322, 5363-5364, 5447, 5512-5513; 25JA:5518-5519; 28JA:6474, 6482-6483, 6551; 10RT:1827-1829, 1840-1844; 13RT:2734-2751; 14RT:3082-3084, 3099-3104, 3151-3153; AOB 17-18); and she convinced Cal National's counsel to include TPA §5(f)(ii) to avoid any implication that the TPA modified the PSA's escrow deposit provisions (20JA:4595-4604; 14RT:3154-3158; AOB 18-19). The notion that the buyer's counsel consistently acted against her own client's interests by demanding and seeking to preserve a version of PSA §10(a) that could only benefit the seller is nonsensical.

4. The clause instructing the escrow holder to deliver the deposit to the seller upon joint notice is irrelevant.

Relying on language that "the escrow holder shall, upon written notice from Seller and Buyer, immediately deliver the deposit to Seller" (18JA:3843, capitalization normalized), respondents argue that the contract means that the $13 million deposit only becomes the seller's exclusive remedy if the buyer and seller *jointly* notify escrow to release it to seller. (RB 110). They claim this "highly customized" language never came into play because SPUSO5 litigated the question of whether it breached and therefore the parties never made the "prerequisite" joint request. (RB 110-111.)

But this language was not "highly customized." It was in the very first PSA draft and was never changed or commented upon by any party. (See pp. 18-19, above.) It does not, and cannot, mean that the escrow deposit becomes the seller's "sole and exclusive remedy" only if the seller and buyer mutually *agree* and *instruct* the escrow agent to release the funds—that would render the "sole and exclusive remedy" language illusory and meaningless. Indeed, it effectively would make liquidated damages the seller's remedy only in the exceedingly narrow circumstance where the buyer and seller mutually agree both that the buyer breached *and* that the actual damages approximated $13 million—in any other situation, one of the parties would certainly oppose the deposit's release.

Respondents also distort PSA §10(a)'s plain language. PSA §10(a) does not state that the escrow deposit becomes the seller's "sole and exclusive remedy" only *after* the seller and buyer jointly notify the escrow holder to release the deposit. Rather, as noted previously, it states that the *buyer's breach* triggers the seller's entitlement to the deposit as liquidated damages "which shall be Seller's sole and exclusive remedy, either at law or in equity." (18JA:3843, capitalization normalized). Nor does it state that the deposit must be released immediately whenever the seller *claims* a breach occurred. Rather, it makes a buyer's breach a prerequisite to the deposit's release; and sometimes—as occurred here—the question whether there was a breach must be litigated. Once a breach is determined either through litigation or otherwise, the seller's sole and exclusive remedy for that breach is liquidated damages and the escrow deposit must be released to the seller.

Respondents also ignore that the PSA is not just a purchase agreement—it also provides "joint escrow instructions." (18JA:3821, capitalization normalized.) The language relied upon by respondents does not define when liquidated damages become the seller's exclusive remedy. It is simply an escrow instruction—it instructs that "the escrow holder" must "immediately deliver the deposit to Seller" after "written notice from Seller and Buyer." (18JA:3843.)

The common-sense interpretation of the joint-notice language, and the only one comporting with its plain and ordinary meaning, is that it is an escrow instruction that shields the parties (and the escrow agent) from one side *unilaterally* demanding the deposit where entitlement is disputed. Thus, this escrow instruction tracks the preference of escrow agents and what they require in practice:

> [T]he seller is not entitled to receive [the liquidated-damages escrow deposit] unless and until the buyer's breach occurs *and some action is taken by both parties* to cause the escrow holder to release the monies. [¶] This is so even though the

> purchase agreement (and/or separate escrow instructions) states that the liquidated damage amount is to be paid to the seller by the escrow holder automatically and without further consent of the buyer upon buyer's breach. *As a practical matter, escrow holders generally refuse to release monies in dispute . . . .*

(Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, *supra*, ¶4:326, p. 4-84.10, italics added; see also 1 Cal. Real Property Sales Transactions, *supra*, §4.142, p. 399 ["escrow holders usually require both parties' consent in writing after the breach before they will release the buyer's funds to the seller"].)

C. Contract Construction Rules Compel The Adoption Of Fund V's Interpretation Of The PSA And TPA.

As demonstrated above, the plain and ordinary meaning of PSA §10(a) is that the $13 million escrow deposit is the seller's sole and exclusive remedy where, as here, the seller has met all conditions to the buyer's performance but the buyer breaches by not paying the closing price. Respondents' attempted transformation of the provision into a never-triggered "general" liquidated damages provision fails as a matter of law.

This leads to the question of how PSA §10(a) can be reconciled with TPA §22's grant of a specific-performance remedy for "breach of this Agreement." As demonstrated in Fund V's opening brief and further shown below, settled contract interpretation rules provide the basis for such reconciliation and give full, common sense effect to both PSA §10(a) and TPA §22. Those rules are: (1) the rule that courts will adopt a reasonable construction that gives force to every contract term; and (2) the rule that specific provisions control over general ones.

Respondents correctly recognize the importance of these two rules, but contort them to argue they support respondents. (RB 93, 95.) Respondents have it backwards. Both rules compel reversal.

1. The rule that courts must construe language harmoniously to give effect to every provision compels the adoption of Fund V's interpretation.

As our opening brief explained, "'[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'" and "[s]eemingly 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.'" (AOB 75, quoting *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473 and *Estate of Petersen* (1994) 28 Cal.App.4th 1742, 1753-1754; see also *McAuliff v. McFadden* (1919) 42 Cal.App. 505, 511 [where parties concurrently execute multiple contracts covering the same subject matter, the contracts "must be so construed as to give effect, as far as practicable, to every part of each instrument"].)

The only interpretation of the PSA and the TPA that gives force to every provision in both agreements, reconciles all seemingly inconsistent language, and does not render any language inoperative or meaningless, is Fund V's construction: That the PSA defines the purchase terms and the seller's exclusive remedies for buyer breach; and the TPA, rather than abrogating the buyer's PSA rights, instead provides certain loan related-rights—such as authorizing the buyer to pay the lender to pay off the loan if the transaction closes and providing the lender with security interests in the seller's PSA rights—that are subject to specific performance under TPA §22. (AOB 11-12, 75-76.)

Respondents' contrary arguments and interpretations all impermissibly read out of existence or create irreconcilable conflicts with (1) PSA §10(a)'s language that the $13 million escrow deposit "shall be seller's sole and exclusive remedy, either at law or in equity," and (2) PSA §22's express provision that the TPA does not limit the buyer's rights under the PSA. Ultimately, their arguments all reduce to the contention that the TPA and PSA can be harmonized by reading PSA §10(a) as just a "general," non-exclusive-remedy liquidated damages clause. But PSA §10(a) cannot reasonably be so read.

TPA §2: The linchpin of respondents' theory is that TPA §2 "mandates that the Buyer pay the purchase price for the Property upon Corona Summit's performance of its obligations under the PSA (which performance is conceded) and repay the Construction Loan . . . ." (RB 81.) They claim that "[p]ursuant to §2 of the TPA, the Buyer expressly and unqualifiedly committed to the Bank that it would buy the completed project and would concurrently pay off the Bank's Construction Loan –

provided only that Corona Summit fulfill its obligations under the PSA." (RB 85-86; see also RB 87 [claiming buyer owed Bank and seller "the separate and distinct obligation under TPA §2 to pay the purchase price and to pay the Bank directly from that purchase price"].) They claim this right can be specifically enforced under TPA §22. (RB 81, 87.)

The problem: TPA §2 does not actually say that, and what it *does* say is that the parties intended to preserve PSA §10(a)'s "exclusive remedy of liquidated damages" provision.

TPA §2 states that "Purchaser 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 (a) upon delivery by Construction Lender of a full reconveyance of the Property from the lien of the deed of trust that secures the obligations of Seller under the construction loan . . .; and (b) upon satisfaction of all conditions to Purchasers' payment thereof set forth in the Purchase Agreement." (20JA:4399-4400, italics added.)

Accordingly, TPA §2 does not state, let alone unequivocally, that the buyer is unqualifiedly committing to pay the purchase price and pay off the loan if the seller has completed construction in accordance with the contract. The first part of TPA §2 only states that the buyer is agreeing to pay the purchase price "subject to" and "and in accordance with" the "terms, provisions and conditions" in the PSA. Those "terms, provisions and conditions" include PSA §10(a). And the second part of TPA §2 only states that the seller is "authorizing and directing" the buyer to make the payment to the lender "in connection with the Closing" if all conditions to payment have been satisfied and certain reconveyance documents exchanged. So, the first part confirms that the buyer is purchasing subject to the PSA's terms; and the second part adds a seller authorization to the buyer to pay the lender to the extent necessary to pay off the loan—an authorization needed because the PSA doesn't address such loan-related matters.[10]

Even if this were not the only conceivable construction of TPA §2, it is the only one that avoids an irreconcilable conflict with PSA §10(a) and PSA §22. It therefore controls. (*City of Atascadero*, *supra*, 68 Cal.App.4th at pp. 473-475; *Estate of Peterson*, *supra*, 28 Cal.App.4th at p. 1753, fn. 4.) The PSA's patent purpose was to set forth all the purchase obligations, construction obligations, and breach remedies between the seller and buyer. That includes the provision in PSA §10(a) that makes forfeiture of the escrow deposit the seller's exclusive remedy if the buyer breaches its

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[10] Thus, the language "as the same may be modified hereby" clearly refers to the fact that the quoted sentence of the TPA modifies the PSA by requiring the buyer to pay that portion of the purchase price necessary to pay off the construction loan to the lender rather than to the seller. PSA §22 prohibits the TPA from limiting *the buyer's* rights guaranteed under the PSA (18JA:3861), but it does not prohibit the TPA from modifying *the seller's* rights, such as directing payment of the closing funds to the lender instead of the seller and giving the lender security interests in the seller's PSA rights.

purchase obligation after the seller has satisfied all conditions to the buyer's performance. If TPA §2 is read to require the buyer to go forward with the closing after all performance conditions are met, that would mean the parties altered the buyer's rights under PSA §10(a)—which would squarely violate the mandate of PSA §22.

Respondents' only response to this interpretational flaw in their position is to argue that PSA §22 did not protect the buyer from a claim for specific performance of the purchase price because no "right" to be free from specific performance ever existed under PSA §10(a) "due to the limitations of PSA §10(a) as discussed above." (RB 124.) As we have shown, those "limitations" are fictional as they rest on the infirm contention that PSA §10(a) is merely a general, non-exclusive liquidated damages provision that was never triggered. (See §I.B, above.)

The law precludes the answer that respondents effectively urge: Just ignore the exclusive-remedy language. Since Fund V's construction gives force to every word in the two agreements, as California law requires, that construction must prevail.

TPA §22: Respondents' interpretation of TPA §22 runs into the same trouble. They primarily argue that since TPA §22 grants a specific performance remedy for breaches of the TPA, it permits suit for specific performance of the buyer's obligation under TPA §2 to purchase the property once the seller satisfies all conditions to performance. (RB 81, 87.) But that argument goes nowhere since, as shown, controlling rules of contract construction preclude that interpretation of TPA §2.

One must therefore ignore U.S. Bank's myriad cries about how Cal National wasn't a party to the PSA and therefore it would have been absurd for Cal National to have waived "specific performance of TPA §2" because that was Cal National's "only remedy for Buyer's breach." (RB 86-87; see also RB 92 ["The notion the Bank waived its right to its sole remedy is nowhere supported in the contract and, in any event, is prohibited by Civil Code Section 1638 as an absurdity"], 97-98.) The Bank didn't "waive" anything—it never had the right under TPA §2 to force the buyer to pay notwithstanding PSA §10(a). That doesn't mean the Bank has no remedy for buyer breach; it just limits the Bank's right to seek specific performance to enforcement of its rights under the TPA, such as pursuing the Bank's assigned security interest in both the property and the $13 million escrow deposit. The Bank has the same—not greater—rights as the seller through its assigned security interests. (AOB 78; see 20JA:4401, §5.) Plus, it also has personal loan guarantees from Armstrong and Butcher worth $35 million. (9RT:1508; 29JA:6765-6767, 6775, 6785-6792; 34JA:7917, 7920-7924.) The Bank was not remedy-less for a SPUSO5 breach.

Respondents also argue that because the concurrently-executed PSA and TPA should be construed harmoniously, TPA §22 must be read as affording the right to specific performance of covenants in both the TPA *and the PSA*. (RB 83, fn. 32, 89-90.) They base this argument on TPA §20(e), a boilerplate provision in the TPA's "Miscellaneous" section which states that "[a]ll the exhibits and schedules annexed hereto are incorporated herein by reference as if fully set forth herein and form a part of this

Agreement." (20JA:4414.) They argue that because the PSA is a TPA exhibit, it is "inescapable" under TPA §20(e) that TPA §22's provision of specific performance "for breach of this Agreement by Seller, Purchaser or Construction Lender" means "the TPA and the PSA combined." (RB 90.)

Wrong. The only inescapable conclusion is the exact opposite one. Respondents' interpretation rests on the absurd notion that the parties intended—through a backdoor, boilerplate reference in TPA §20(e)—to supplant the PSA's own elaborate remedies provision for buyer and seller breaches and to ignore PSA §22's mandate that any tripartite agreement with a lender must recognize—and not limit—all the buyer's rights under the PSA. It would create irreconcilable inconsistencies and conflicts with PSA §§10(a) and 22 that can be, must be, and easily are avoided.

The TPA's very first page defines "Agreement" to mean the "[t]his Tri-Party Agreement" and defines the PSA as the "Purchase Agreement." (20JA:4399.) Throughout the TPA, "Purchase Agreement" is used to refer to the PSA—in fact, the term appears *in practically every provision*—and "this Agreement" is used to refer to the TPA itself. (See 20JA:4399-4437.) The notion that the parties suddenly switched gears in TPA §22 and used "this Agreement"—on an issue of crucial importance, remedies—to include the PSA is preposterous. Nor, had the parties so intended, would they have said "breach of this Agreement by Seller, Purchaser *or Construction Lender*." (20JA:4416, italics added.) The Construction Lender could not breach the PSA—it wasn't a party to that agreement. Consequently, the term "this Agreement" in §22 *must* have been referring to the TPA.

TPA §5(a): Fund V's opening brief explained that TPA §5(a)'s provision that if the lender elected 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," defeats treating TPA §2 as an absolute guarantee by the buyer to pay the entire purchase price and pay off the construction loan once construction was completed in accordance with the contracts. (AOB 74, 76-77.) That's because under respondents' interpretation of TPA §2, the lender stepping into Corona Summit's shoes would be entitled to full payment of the purchase price under TPA §2, yet TPA §5(a) *expressly* makes the lender in that context *subject to the exclusive remedy of liquidated damages under PSA §10(a)*. (AOB 76-77.) We explained that it doesn't matter whether TPA §5(a) actually came into play here—its very existence establishes that the lender had no unconditional, absolute right to full payment of the purchase price, as respondents contend TPA §2 provides. (*Ibid.*)

Respondents' response is that the statement that TPA 5(a)'s "mere *existence* defeats the trial court's interpretation" is "dead wrong" and "debunked" by the fact that TPA §5(a) "applies to a particular situation that never occurred here – a default by Seller Corona Summit, followed by the Bank electing to complete in Corona Summit's place." (RB 120, italics added.) They further assert that Cal National "simply was not and is not governed by the PSA" because the "election to complete" context discussed in TPA §5(a) never arose and "[i]f the parties intended for the Bank at all times to be subject to PSA §10(a) (and they did not) then TPA §5(a) . . . would be superfluous." (RB 121.)

But Fund V has never argued that the Bank was "at all times" subject to PSA §10(a.) There is, and can only be, one seller of the property—its title-holder. Corona Summit is bound by PSA §10(a) so long as it holds title and remains the seller. But TPA §5(a) provides that if the seller defaults on the loan and the lender "acquires title to the Property" and elects to complete the transaction, it shall "be deemed to have assumed" the seller's obligations and "be subject to" PSA §10(a). (20JA:4401-4402.) In other words, PSA §10(a) only becomes directly binding on the lender when the lender becomes the title holder and thus the seller of the property (as opposed to the situation here, where the lender is enforcing the seller's PSA rights as assignee under TPA §§5(a) and 15).

By recognizing the vitality of PSA §10(a) when the lender becomes the seller, TPA §5(a) defeats respondents' construction of TPA §2 as an absolute obligation by the buyer to pay the seller and lender. It further confirms that the parties did not intend for the lender to have *greater* rights against the buyer than the seller—regardless whether, after a loan default, the lender obtains title to the property and elects to complete under TPA §5(a) or, as here, instead seeks under TPA §15 to enforce the seller's PSA rights as the assignee of those rights. (See AOB 78.)

Respondents' non-response simply ignores what the opening brief explains.

TPA §5(f)(ii): Respondents similarly fail to effectively explain away TPA §5(f)(ii)'s statement that nothing in the TPA "shall limit or affect . . . the liquidated damages payable to Seller to the extent provided in [PSA §10(a)]." (20JA:4403.)

They claim this provision "does not alter or extend the reach of PSA §10(a)" and does not "accomplish anything beyond recognizing that PSA §10(a) – such as it is – exists." (RB 123.) But this provision confirms that the parties had PSA §10(a) on their radar when drafting the TPA and did not intend for the TPA to limit or affect that provision's unequivocal statement that liquidated damages was "seller's sole and exclusive remedy at law or in equity" for breach of the payment obligation. Indeed, it was undisputed that this provision was added as a result of buyer's counsel Lazarus' efforts to prevent any possible implication that anything in the TPA overrode PSA §10(a). (See AOB 18-19.)

Consequently, respondents' attempt to cast aside TPA §5(f)(ii) rests, once again, on their argument that PSA §10(a) is not an exclusive-remedy provision and was never triggered—which, as explained above, makes no sense whatsoever.[11]

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[11] At times, respondents seem to concede that PSA §10(a) may be an exclusive-remedy provision but contend that it never went into effect here because certain prerequisites failed to occur to trigger it. (See, e.g. RB 123.) To the extent this is their position, it further undermines their construction of TPA §2: If PSA §10(a) *ever* applies as an exclusive-remedy provision under *any* circumstance, then TPA §2 cannot be the unqualified payment commitment overriding all other contrary provisions that respondents claim.

Respondents also assert that §5(f)(ii) imposes no limitation on the Bank's remedies. (RB 123.) But as our opening brief explained: "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." (AOB 77, italics in original.) Respondents response to this point: Silence.

2. The rule that specific terms control over general terms compels application of PSA §10(a)'s exclusive-remedy mandate.

A second fundamental rule of contract interpretation equally compels the conclusion that the contracts limit respondents to the exclusive remedy of $13 million in liquidated damages: The rule that "when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision." (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1235.)

> [A] specific provision relating to a particular subject will govern in respect to that subject, as against a broader provision, even though the latter, standing alone, would be broad enough to include the subject to which the more specific provision relates.

(*General Ins. Co. v. Truck Ins. Exch.* (1966) 242 Cal.App.2d 419, 426.)

This includes apparently conflicting remedy provisions. For example, in *Prouty*, *supra*, 121 Cal.App.4th 1225, the Court of Appeal applied this rule to resolve a conflict between remedy provisions that seemed otherwise in conflict—two provisions that "state generally no rights or remedies exist under the contract to third persons" and a third provision that "expressly grants rights to specific third persons regarding their employment with [defendant]." (*Id.* at p. 1235.) The court recognized that the more specific remedy provision—the latter—must be upheld as an exception to the two broader, across-the-board provisions.

Here, even aside from the fact that Fund V's interpretation allows all PSA/TPA language to be construed harmoniously, the specific-over-general rule compels the conclusion that PSA §10(a) is an exception or carve-out to the general remedy language in TPA §22. TPA §22 is an across-the-board grant of specific performance regarding all breaches of the TPA, while PSA §10(a) specifically governs the narrower, specific context of the seller's remedy where the buyer does not complete purchase of the property because of a buyer breach. (18JA:3843.)

Respondents acknowledge the specific-over-general rule but claim it supports *their* interpretation because "the PSA is actually silent on Seller's right to specific performance" while TPA §2 specifically states that the parties have "'the remedy of specific performance' for breach of 'this Agreement.'" (RB 93.) They claim "TPA §22 is the more specific provision," because it uses the term "specific performance" while PSA §10(a) only uses the more general term "in equity." (RB 93-94.)

Nonsense. PSA §10(a) is not silent on specific performance—it plainly excludes *all* equitable remedies. (See pp. 15-16, above.) More important, application of the specific-over-general rule does not depend on what words are used to connote the remedy of specific performance. It depends, rather, on which remedy provision deals *with the more particularized context.* What matters is that TPA §22 is a general, across-the-board provision regarding any breaches of the TPA by anyone, while PSA §10(a) covers the narrower, more specific context of the buyer's breaches of its purchase obligation.

3. The competent extrinsic evidence exclusively supports Fund V's interpretation.

Respondents argue that because some extrinsic evidence supports their view and some supports Fund V's view, "there is a material conflict as to the intent and effect of PSA §10(a)" and therefore the trial court's interpretation must be upheld. (RB 108.) But California law substantially constrains the use of extrinsic evidence. Respondents' approach exceeds those limits.

"When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible." (*Founding Members, supra*, 109 Cal.App.4th at p. 955.) "Although the intent of the parties determines the meaning of the contract . . ., the relevant intent is 'objective'—that is, the objective intent *as evidenced by the words of the instrument*, not a party's subjective intent." (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54-55, italics added.)

Consequently, testimony regarding the undisclosed subjective intent or understanding of a witness is irrelevant and incompetent and cannot be considered. (*Founding Members, supra*, 109 Cal.App.4th at p. 960;

Berman v. Bromberg (1997) 56 Cal.App.4th 936, 948; *Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1166, fn. 3.) "Further, parol evidence is admissible only to prove a meaning to which the language is 'reasonably susceptible,' not to flatly contradict the express terms of an agreement." (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1167, citations omitted; accord, *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1061 (*Thrifty Payless*).) Thus, courts "must give significance to every word of a contract, when possible, and avoid an interpretation that renders a word surplusage." (*In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 49.)

And where a contract is integrated, as here (18JA:3850, §17(g)), extrinsic evidence cannot be considered to add to, vary or contradict the express terms (*Thrifty Payless*, *supra*, 185 Cal.App.4th at p. 1061).

Respondents' proffered extrinsic evidence violates all these rules. The only *competent* extrinsic evidence—the undisputed evidence regarding what the attorneys negotiating the PSA and TPA *communicated* to each other and that does not contradict the contract terms—exclusively supports Fund V's interpretation. (See AOB 14-22, 79-85.)[12]

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[12] Respondents accuse Fund V of failing to summarize the facts in the light most favorable to the judgment because "Appellant's brief only cites to the testimony of Lorie Lazarus." (RB 104, fn. 44.) Baloney.

The opening brief details the history of the negotiations between the attorneys, relying on the drafts and correspondence exchanged between Sykes for Corona Summit, Williams for Key Bank, Hagle for Cal National, and Lazarus for the buyer, as well as the testimony of Sykes, Williams and Lazarus (Hagle did not testify). (See AOB 14-22.) It also discusses the testimony by Armstrong, Butcher, Bonaccorso, Kellogg and Hench, but correctly distinguishes between competent and incompetent extrinsic

(continued...)

a. Settled construction rules render respondents' parol evidence incompetent.

Because Fund V's interpretation of the PSA and TPA reasonably reconciles all the contract language, while respondents' interpretation requires reading PSA §10(a)'s exclusive-remedy language out of existence, respondents' parol evidence is incompetent: "Where one interpretation can reasonably reconcile the language of each part of a contract and another interpretation cannot, it is safe to say that the contract is not reasonably susceptible to the second interpretation" and extrinsic evidence supporting the latter interpretation is incompetent and inadmissible. (*Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 387.)

b. Respondents impermissibly rely on unsupported hyperbole.

Respondents rely extensively on hyperbole rather than evidence.

They claim—without any citations—that the reason no one ever deleted or qualified the specific performance language in TPA §22 is "because no one ever doubted or disputed that all three parties were fully entitled to specifically perform this transaction." (RB 95-96.) Really? If that were true then:

- Why did Corona Summit and Cal National, when represented by the lawyers who actually negotiated the PSA/TPA, sue to recover the escrow deposit only and switch to suing for specific performance only after

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[12] (...continued) evidence. (AOB 79-85.)

Corona Summit retained new counsel and a new bank intervened in Cal National's place? (See AOB 24-25.)

- Why do Cal National's internal documents analyzing the deal only discuss recovery of the escrow deposit as the remedy for buyer breach? (AOB 19, fn. 7, discussing 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:5552-5554; 29JA:6760 ["[t]he only way that CBRE can break the Tri-Party Agreement without forfeiting the letter of credit is if Armstrong-Butcher Properties does not deliver the buildings by August of 2009"].)

- Why did the first draft of the TPA contain TPA §22 *and* a provision stating that if the lender elected to complete construction after obtaining title, retention of the escrow deposit would be the "sole and exclusive remedy" for buyer default, which led to the buyer successfully insisting that the language be retained in the form of TPA §5(a)'s reference to PSA §10(a)? (See p. 29, above; AOB 17-18.)

- Why does TPA §9 state that if the buyer's net worth (defined as its parents' and affiliates' consolidated capital and unfunded capital commitments) falls below the purchase price while the construction loan is outstanding, a default will exist under the loan as to the seller but the buyer "*shall have no liability,* nor shall Construction Lender or Seller have any rights against [buyer] for the same"? (20JA:4399, 4406, italics added; see AOB 13.)

- Why did SPUSO5 *reject* any provisions that the purchaser would maintain a reserve equal to the purchase price? (See AOB 21-22, discussing 24JA:5441, 5478; 24JA:5321; 28JA:6551, 6562.)

- Why do the 55 volumes of appendices submitted in connection with this appeal not contain a shred of *documentary* evidence that the seller or the Bank demanded or expected the right to specific performance of the sales transaction, or that the buyer was promising that right?

- Why did respondents instead have to base their interpretation of TPA §§2 and 22 on purported oral conversations in November 2007 between Armstrong and Butcher of Corona Summit, Bonaccorso and Kellogg of Cal National, and Hench and Lee of CBREI, even though those TPA provisions were fully drafted long before Cal National entered the picture and that meeting occurred? (AOB 16-17, 85.)

- Why is there no testimony that Hench or any other buyer representative ever *said* that there *wouldn't* be a liquidated-damages cap on the buyer's exposure or that the seller *would* have a right to specific performance? (See, e.g., 9RT:1605 [Sykes testifying that the "topic of specific performance" was never discussed in any negotiations with Hench or any other buyer representative]; 6RT:760-761, 7RT:969-971 [Hench testifying that he does not recollect the November meeting, but that every deal he's ever done has a liquidated-damages cap to protect their investors]; 5RT:356 [Armstrong]; 8RT:1426-1427 [Bonaccorso]; 12RT:2558-2559 [Butcher].)

Respondents' bald assertion that everyone always understood specific performance was available to compel this transaction is nonsense. That hotly-disputed issue is the reason this lawsuit exists.

Respondents rely on similar hyperbole in asserting—without any record support—that "[t]he notion that Corona Summit would agree to borrow over $61 million (or that the Bank would lend it) to construct shell buildings for this build-to-suit transaction only to allow the Buyer to decline to accept the finished product all in exchange for its *mere $13 million deposit* simply defies logic." (RB 97-98, italics added.) They similarly claim, without record support, that Corona Summit required the "clear and specifically enforceable commitment to purchase" in TPA §2 because its principals Armstrong and Butcher "personally guaranteed the construction loan the Buyer paid off" and "[u]nder no circumstances could they allow the Buyer to walk away and leave them with such personal liability." (RB 88.)[13]

But this is just more huffing and puffing:

- The $13 million deposit was not "mere." It was huge, roughly 20% of a purchase price that was predicated on the property's projected worth at the time the buildings were completed—and it cannot be forgotten that it would be paid *notwithstanding that the sellers would retain the fully-*

[13] Respondents provide lengthy record citations for their sweeping statement, but the citations only show that Armstrong and Butcher personally guaranteed the loan. (RB 88, citing 19JA:4099-4167, 4168-4173, 4174-4179, 4180-4185, 4186-4191, 4192-4200, 4205-4209, 4210-4216, 4217-4225; 5RT:346:1-11; 19JA:4099-4167, 4174-4179, 4180-4185, 4186-4191.)

developed property to sell to other buyers. Respondents' audacity to label the deposit "mere" exists only because they now operate against the backdrop of a calamitous, unexpected market collapse in 2008-2009 that was not on anyone's radar screen in 2007 when the contracts were signed and only because respondents chose to pursue specific performance in that rapidly declining market, instead of selling the property and pursuing the deposit as liquidated damages.

- The reason "[m]ost sellers agree to waive all remedies other than liquidated damages" is that in a rising market sellers want to be paid the liquidated damages "and be free to take advantage of the increase in values" but "[i]n a falling market, sellers often wish to sell the property as soon as possible rather than to risk further losses if the specific performance action is not successful." (1 Cal. Real Property Sales Transactions, *supra*, §4.143, p. 401.) Corona Summit's suggestion that it never would have agreed to the exclusive-remedy of a $13 million deposit rests on 20-20 hindsight. At the time the contracts were signed, no one knew if the market would rise or fall and the standard exclusive-remedy provision was an entirely reasonable trade-off.

- The loan was not just for construction costs—it also paid off Corona Summit's development loan used to buy the property. (19JA:4140, 4205; 20JA:4399 [recital B]; 29JA:6760.) Although the 2008 market collapse essentially meant Corona Summit overpaid for the property, Corona Summit seeks to shift *all* market and development risk to the buyer.

- If Corona Summit (and its principals Armstrong and Butcher) had wanted and expected the right to compel specific performance of the purchase price, logically that provision would have appeared *in their purchase agreement with the seller*. It would make no sense for the buyer and seller to agree in the PSA to make liquidated damages the seller's only remedy for buyer breach—as the conspicuous, specifically-initialed PSA §10(a) states—but then agree in the concurrently-executed TPA that the buyer was making an unqualified commitment to purchase upon completion of construction. Nor would it make sense for them to agree in TPA §9, as they did, that if the net worth of SPUSO5's parents fell below the purchase price, a loan default will exist "but Purchaser shall have no liability, nor shall Construction Lender or Seller have any rights against Purchaser for the same." (20JA:4399, 4406.)

Respondents' hyperbole does not and cannot support the judgment.

c. Respondents impermissibly rely on incompetent evidence of undisclosed subjective understandings.

To the extent they point to any evidence at all, respondents base their contention of a "material conflict as to the intent and effect of PSA §10(a)" solely on the testimony of three individuals: Lazarus (buyer's counsel), Armstrong (a Corona Summit principal, along with Butcher) and Sykes (Corona Summit's negotiating counsel). (See RB 104-108.)

But this so-called conflict impermissibly rests on assertions of Armstrong's and Syke's *subjective* understandings and intent *that was never* *conveyed to the other side.* Thus, "[w]hile this 'subjective intent' evidence was conflicting, it was not *competent* extrinsic evidence, because evidence of the undisclosed subjective intent of the parties is irrelevant to determining the meaning of contractual language. [Citations.]" (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1166, fn. 3, italics in original [ignoring testimony regarding what the witness "subjectively understood and intended the [contract language] to encompass"]; *Havstad v. Fidelity National Title Ins. Co.* (1997) 58 Cal.App.4th 654, 661 ["party's subjective intent cannot be used to create an ambiguity or a material factual issue"].)

***Armstrong*:** Respondents emphasize testimony that Armstrong "did not understand (or concede) that by initialing PSA §10(a) that Corona Summit was purportedly 'waiving' the remedy of specific performance; no one told him that and he had no such understanding." (RB 106, citing 5RT:378:11-18; 6RT:617:4-7; see also RB 106, citing 5RT:378:11-18; 6RT:616:23-617:3 [Armstrong "did not understand by initialing PSA §10(a) that Seller was waiving the remedy of specific performance"].) Armstrong's subjective understanding is irrelevant.

While respondents emphasize Armstrong's testimony that the buyer's representatives never told him that Corona Summit wouldn't be entitled to specific performance, it is equally true that Armstrong *never told the buyer* that Corona Summit demanded or expected that remedy. (See RB 106, citing 5RT:355:23-26, 356:4-8, 356:9-13, 377:10-15, 377:27-378:4, 378:5-10; 6RT:670:10-12.)[14] Armstrong never discussed specific performance with the buyer's representatives. (5RT:356:9-13; see also 6RT:632:19-22).

***Sykes*:** The only relevant and competent evidence mentioned by respondents is Syke's concession that he never had *any* discussions with Hench, Lazarus or any other buyer representative about "the topic of specific performance." (See RB 106, citing 9RT:1605-1606.)

The rest of the cited testimony consists entirely of more incompetent subjective intent testimony—claims by Sykes that it is customary for buyers' counsel to expressly waive the specific performance remedy in Civil Code sections 1680 and 3389, that he never discussed his views with Lazarus because her draft PSA had no such waiver, that he believed PSA §10(a) was merely a liquidated damages clause and not a specific-performance waiver, and that he ensured TPA §22 was never changed to avoid adversely affecting the seller's specific performance rights under the PSA. (RB 106-107.)

That testimony is irrelevant and incompetent because (a) Sykes conceded that he never conveyed his subjective views to Lazarus or any other buyer representative (9RT:1611:3-21; 10RT:1855:9-1860:15, 1864:28-1865:14, 1897:7-1898:14); and (b) Sykes was not an expert

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[14] Relying on the same record citations, respondents state that "Armstrong testified they never intended to waive specific performance because they read and understood it was expressly spelled out in TPA §22 and not spelled out at all in the PSA or PSA §10(a)." (RB 102, fn. 43; compare with citations at RB 106.) Again, such undisclosed subjective intent is irrelevant.

witness, and the trial court specifically recognized that his testimony about purported customs among California attorneys "was at least one bridge too far," that it was not trial evidence, and that the court was not relying on it (3RT:I-40 to I-44; 10RT:1879-1881, 1883, 1887-1889).

d. Kellogg's and Bonaccorso's "commitment" testimony cannot support the judgment.

In discussing the purported "conflict" regarding PSA §10(a)'s intended scope, respondents do not mention Bonaccorso's and Kellogg's testimony that they sought a "come hell or high water commitment" from Hench at their November 2007 meeting. (See RB 104-108; see also 8RT:1407.) Respondents' failure to discuss that testimony effectively concedes the obvious: Their testimony is incompetent as to PSA §10(a)'s meaning because it is undisputed that Bonaccorso and Kellogg were not the bank representatives who actually negotiated the TPA or PSA, they never reviewed the PSA despite knowing it went "hand and glove" with the TPA, and they never knew the PSA's contents. (See AOB 80-81 & fn. 18; 8RT:1413-1414, 1423, 1428-1429, 1432-1433; 9RT:1513, 1521-1522, 1528, 1536-1537, 1583; 11RT:2158, 2177-2179, 2189, 2191, 2206.)

Further, to the extent Bonaccorso's and Kellogg's testimony might be twisted into the assertion Hench made some sort of promise that the buyer would purchase the property once construction was completed no matter what, the testimony would conflict with PSA §10(a) and thus violate the rule that parol evidence cannot contradict express terms and must prove a meaning to which the language is reasonably susceptible. (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1167; *Thrifty Payless*, *supra*, 185 Cal.App.4th at p. 1061.)

But in truth, Bonaccorso's and Kellogg's testimony *can* be construed consistently with PSA §10(a) being an exclusive-remedy provision. Neither claimed that Hench actually *said* the buyer would purchase the property no matter what or that the PSA (which already contained a fully-drafted §10(a) by the time of the November meeting) would not contain a standard exclusive-remedy liquidated-damages cap on the buyer's exposure.[15] PSA §10(a)'s exclusive-remedy language comports with the serious commitment that Bonaccorso and Kellogg sought from Hench—at the time the PSA/TPA were executed, the prospect of it ever making sense for the buyer to forfeit $13 million in lieu of closing the sale was extremely unlikely. It would take an unexpected disaster. That the sky did fall—in the form of the 2008

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[15] Bonaccorso testified that he told Hench that he needed "a come hell or high-water take out" and "the only push-back [he] got [back from Hench] was that the building had to be built according to specifications." (8RT:1407.) 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" because the only item Hench "pushed back with" and seemed "concerned about" was that the shell buildings had to be delivered according to the specifications. (8RT:1419.)

Kellogg testified that Hench led the conversation by saying they would buy the buildings upon completion of the shells, that he does not remember any other statement by Hench or any other buyer representative, and that Hench never said the buyer would have an option or could walk from the deal if the project's value declined at time of completion. (11RT:2135-2137, 2139-2140.)

Thus, notwithstanding respondents' assertion that the buyer "affirmatively represented to the Bank that SPUSO5 would complete the deal in order to satisfy the Construction Loan" (RB 109), the Bank's witnesses never actually identified any such affirmative statement by Hench.

economic meltdown that devastated the real estate market overnight—does not allow respondents to ignore PSA §10(a)'s express cap on the buyer's exposure.[16]

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

Respondents claim "California law has been steadfast since 1872 that a 'liquidated damages' clause like PSA §10(a) does not in any event trump a seller's right to specific performance." (RB 99.) This is inaccurate. As Fund V's opening brief explained, Civil Code sections 3389 and 1680 apply to contracts that merely provide a right to liquidated damages, not ones that specify those damages are the exclusive remedy. (AOB 85-88.)

Conjuring a standard that no case, statute or even secondary authority has ever embraced, respondents argue that "given the protections of Sections 3389 and 1680, any waiver of specific performance needed to

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[16] The trial court's statement of decision on the contract (not alter ego) issues states (a) that Kellogg and Bonaccorso met with Hench in November 2007 "to obtain assurances that CBREI would direct its investment fund to pay the purchase price and cause SPUSO5 to take title, thus paying off the Bank's construction loan, provided that Armstrong and Butcher completed the property in accordance with the contract plans and specifications and on schedule"; and (b) that "Hench gave the Bank executives those assurances." (36JA:8707.) The record and the law support only a narrow reading of that statement.

First, there was no discussion at the November meeting *about SPUSO5* or about who would take title to the property; the discussion was solely about Fund V. (See pp. 101-102, below.)

Second, as noted above, Bonaccorso and Kellogg never actually claimed that Hench represented that the buyer would pay no matter what or that the already-drafted PSA would not contain a standard exclusive-remedy liquidated-damages provision. Thus, their testimony was not inconsistent with the parties capping the buyer's exposure at $13 million. As previously noted, if construed more broadly, their testimony would be incompetent parol evidence as it would conflict with PSA §10(a)'s express terms.

expressly waive specific performance and the protections of those code sections." (RB 102, original emphasis.) Asserting that Fund V and SPUSO5 "are presumed to know the law," they dismiss PSA §10(a)'s "sole and exclusive remedy" language as "boilerplate." (RB 103.) But language making liquidated damages the "seller's sole and exclusive remedy, either at law or in equity" is hardly boilerplate. In stating SPUSO5 was presumed to know the law, respondents ignore that *no authority of any kind* has *ever* stated that a liquidated damages provision must expressly use the words "waive the right to specific performance" to make liquidated damages the exclusive remedy for breach. It is respondents who ignore the law.

They ignore that in cases such as *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, and the other cases cited at AOB 86, the courts upheld provisions allowing payment of liquidated damages in lieu of performance even though the contracts did not state that the seller was waiving any right to specific performance. (See AOB 86-87.) They similarly ignore that secondary authorities uniformly recognize that Civil Code sections 3389 and 1680 allow sellers to have a specific performance remedy notwithstanding a liquidated damages clause "*unless the contract states the liquidated damages are the seller's sole remedy*." (Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, *supra*, ¶11.106, p. 11-24, italics added; see pp. 23-24, above.)

Yes, as Corona Summit now claims it intended, "[a] seller might wish to preserve the remedy [of specific performance] rather than *waive it* *in the customary form of a liquidated damages provision.*" (1 Cal. Real Property Sales Transactions, *supra*, §4.143, p. 400, italics added.) But if that was Corona Summit's intent, why did it enter into just such a customary form? Corona Summit needed to *reject* PSA §10(a), not specifically initial it.

If this Court were to accept respondents' theory that parties must expressly use the terms "waiver" and "specific performance" to make liquidated damages a seller's exclusive remedy, it would be the first court ever to impose such a requirement. This would effect a startling change in the law that would blind-side numerous buyers, not just the parties here. PSA §10(a)'s language comports with—and indeed is more comprehensive than—the exclusive-remedy liquidated-damages provisions recommended by numerous well-respected secondary authorities. (See pp. 19-26 & fns. 4-9, above.)

Since no authority actually supports respondents' characterization of the law, they resort to contending that the California Supreme Court has "raised doubt" about whether the right to specific performance under Civil Code sections 1680 and 3389 can ever be trumped "no matter how explicit the wording." (RB 94, fn. 38, 103.) They claim that the Court in *Bleecher v. Conte* (1981) 29 Cal.3d 345, "paused and took the time to question" whether a provision stating that the seller expressly waived its right to specific performance would waive the statutory protections. (RB 103.)

No it didn't. The Supreme Court simply identified issues that it need not reach: After holding that "the seller's waiver of her right to specific performance in the liquidated damages clause did not prevent the buyers from compelling the specific performance of this land sale agreement," the Court stated in a footnote that "[i]n view of this resolution of the specific performance issue, it is unnecessary to determine (1) whether the seller might be entitled to specific performance notwithstanding the presence of the liquidated damages clause (see Civ. Code, § 3389) or (2) whether she could bring a damage action to recover the cost of preparing reports and a tract map if they were not prepared." (*Bleecher v. Conte*, *supra*, 29 Cal.3d at p. 354 & fn. 6.)

Respondents engage in another diversion by arguing that PSA §10(a) "did not morph this unified contract into an option contract." (RB 116, capitalization normalized; see RB 116-120.) They claim that Fund V "remarkably contends" that PSA §10(a) "transformed the PSA/TPA contract from an agreement to purchase real estate into a mere option contract – under which Buyer could freely terminate." (RB 116; see also RB 6 [claiming Fund V characterizes the liquidated damages clause "as an 'option'"].) Based on this caricature of Fund V's argument, they then argue that there was no evidence "the contract between the parties either includes, or was meant to include, an option arrangement," emphasizing the trial court's comments that had the parties intended for the word "value" in PSA §11(g) to give the buyer an option to terminate because of market value changes, they would have discussed that matter. (RB 116; see 36JA:8711.)

Fund V obviously is *not* claiming that PSA §10(a) actually makes the PSA an option contract. The point is that it is like an option "*[i]n practical effect*" because "[u]nder a purchase and sale agreement in which the buyer's only liability is a specified amount of liquidated damages, the buyer essentially has the right, but not the obligation, to refuse to close so long as the buyer pays the seller the stipulated liquidated sum." (Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, *supra*, ¶8:3, pp. 8-1 to 8-2, italics added; see also *id.* at ¶8:156, p. 8-34.4 ["An option to purchase is *conceptually similar* to a purchase and sale agreement under which the seller's sole remedy in the event of a buyer's breach is the right to recover stipulated liquidated damages. When the parties have liquidated the seller's damages under a purchase and sale agreement, the buyer *effectively* has the right to refuse to close and walk away from the deal by paying the specified finite sum (i.e., the 'liquidated damages' amount)," italics added]; 1 Miller & Starr, Cal. Real Estate, *supra*, at §2.8, p. 28 [when parties specify the liquidated damages are "the seller's sole remedy in the event of buyer's default" they "*in effect*, have created an option" by excluding specific performance; italics added].)

That's all Fund V has argued: The contract unquestionably is a purchase and sale agreement; and unlike an option contract, the liquidated-damages provision must comply with statutory requirements for liquidated damages and the seller must prove that the buyer breached. (Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, *supra*, ¶¶8.156 to

8:161, pp. 8-34.4 to 8-35 [comparing option agreements to purchase agreements with exclusive-remedy liquidated-damages provisions].)

Respondents ignore these distinctions by arguing that even if the deposit was an "option" fee, SPUSO5 forfeited its right to invoke the benefits of "such option" by suing to recover the deposit. (RB 117.) But since the seller's right to liquidated damages arises only upon *a breach*, SPUSO5 had every right to argue that it had the right to terminate under PSA §11(g) and therefore never breached. (See Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, *supra*, ¶8.159(a), pp. 8-34.5 to 8-35 [to realize benefit of exclusive-remedy liquidated-damages provision, "the seller must still prove the buyer breached the agreement"; "[b]y contrast, under an option agreement, the seller has already received consideration in payment for its irrevocable offer; and need not prove a breach of contract as a condition to retaining the consideration"].)

After the trial court rejected SPUSO5's argument about PSA §11(g) and determined that it breached, that established breach triggered PSA §10(a)'s exclusive remedy of the seller receiving the escrow deposit as liquidated damages. The seller did not, as respondents suggest, receive no consideration in exchange for the buyer's right under PSA §10(a) to choose not to perform. *It received $13 million* (and it kept the property). Under settled principles of contract construction, it had no right to more than that.

The specific performance judgment must be reversed.

II. THE TRIAL COURT MADE MULTIPLE INDEPENDENTLY REVERSIBLE ERRORS IN AMENDING THE JUDGMENT TO ADD FUND V AS A JUDGMENT DEBTOR.

The judgment against Fund V also must be reversed for a separate reason: The trial court erred in amending the judgment to add Fund V as a judgment debtor under Code of Civil Procedure section 187 (section 187).

In trying to defend the trial court's indefensible alter ego ruling, respondents are forced to re-write California law. Relying on language in *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 508 (*Greenspan*) and *Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1073 (*Misik*), they claim the law encourages courts to apply the "greatest liberality" in piercing limited-liability veils and adding non-party alter egos to judgments. (RB 1, 34, 45, 47; see §II.A, below.) But *Greenspan* actually confirms what ample authority holds: Courts, for policy reasons, must *cautiously* and *sparingly* impose alter ego liability. The language quoted by respondents actually pertains to the standard *for amending pleadings against a defendant to conform to proof,* a context that lacks the due process concerns associated with adding non-parties to judgments and the policy concerns associated with piercing corporate veils. (See §II.A, below.)

Respondents don't just reverse the controlling public policy mandate—they also seek to remove important constraints on alter ego liability, erroneously claiming they don't exist:

- They treat "control of the litigation" and "virtual representation" as one concept for section 187 purposes, even though each is a separate due-process-required element. (See §II.B, below.)
- They claim no "due diligence" requirement exists for section 187 motions, even though case law and public policy mandate that requirement and no published decision has upheld the postjudgment addition of a non-party where the plaintiff had pre-trial knowledge of the pertinent facts. (See §II.C, below)
- They completely ignore the jurisdictional flaw in adding Fund V after expiration of the 20-day deadline in the original judgment. (See II.D, below.)
- They claim no "bad faith conduct" requirement exists for alter ego liability, even though it is black letter law and it rests on policy considerations that are paramount when contract claims are at issue. (See §II.E, below.)

This brief explains, under a correct application of California law and public policy, that respondents did not come close to meeting their burden of proof—and they now try to circumvent the dearth of evidence on the central alter ego issues (a by-product of respondents' moving for alter ego liability based on a non-alter ego trial) by improperly shifting the burden of proof to Fund V. Moreover, respondents' extensive reliance on *Greenspan* and *Misik* is wholly misplaced, as those cases involved a typical alter ego context where *one person* owned and controlled the subject entities, that person participated in the trial, and the plaintiff had no reason to know about the defendant's insolvency or the alter ego relationship until after judgment. That's a far cry from the circumstances here.

A. Public Policy Mandates That Courts Cautiously—Not Liberally—Impose Alter Ego Liability, Both In Terms Of Deeming An Alter Ego Relationship To Exist And In Adding Non-Party Alter Egos To Judgments.

1. The alter ego doctrine must be sparingly, cautiously applied.

Citing California, United States Supreme Court and secondary authority, our opening brief explained that the alter ego doctrine is an extreme remedy to be invoked only sparingly and cautiously. (AOB 53-54.)

Respondents claim the exact opposite, quoting *Greenspan*, *supra*, 191 Cal.App.4th at p. 508 and *Misik*, *supra*, 197 Cal.App.4th at p. 1073 for the proposition that "'the greatest liberality is to be encouraged in the allowance of [Section 187] amendments in order to see that justice is done.'" (RB 47.) They characterize *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523 (*Sonora Diamond*) and *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220 (*Las Palmas*)—which expressly state that alter ego liability should be imposed only sparingly and cautiously—as outliers. (RB 45-46.)

Respondents misstate the law. *Greenspan* and *Misik* were not discussing the standard for determining *the existence* of an alter ego relationship; they were discussing the standard for determining when an entity *already determined to be an alter ego* can be added under section 187 to a judgment as an additional judgment debtor. (See *Greenspan*, *supra*, 191 Cal.App.4th at pp. 508, 510-514 [reciting quoted language in section regarding addition of judgment debtors, not section regarding alter ego doctrine]; *Misik*, *supra*,197 Cal.App.4th at pp. 1073-1074 [same].)

Greenspan actually *defeats* respondents' argument, as it confirms that *Las Palmas* accurately recites California alter ego law. The *Greenspan* court relied extensively on *Las Palmas* in describing alter ego law, including *Las Palmas*'s recognition that "'[b]ecause society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, *sound public policy* dictates that imposition of alter ego liability *be approached with caution*.'" (*Greenspan*, *supra*, 191 Cal.App.4th at p. 512, quoting *Las Palmas*, 235 Cal.App.3d at p. 1249, italics added.)

Far from being outliers, *Las Palmas* and *Sonora Diamond* are seminal alter ego cases. (See, e.g., *Greenspan*, *supra*, 191 Cal.App.4th at pp. 512-514 [following *Las Palmas* "approached with caution" standard]; *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1219 [same]; *Pacific Landmark Hotel Ltd. v. Marriott Hotels Inc.* (1993) 19 Cal.App.4th 615, 628 [same]; *Tamko Roofing Products, Inc. v. Smith Engineering Co.* (8th Cir. 2006) 450 F.3d 822, 827 [following both *Sonora Diamond* and *Las*

Palmas as stating California law]; Presser, Piercing The Corporate Veil (June 2012) §2:5, p. 148, fn. 1 ["*Sonora Diamond* appears to have become a leading case followed in both the federal and state courts"].)

Respondents attempt to distinguish *Sonora Diamond* and *Las Palmas* on their facts and to side-step the U.S. Supreme Court's statement in *Dole Food Co. v. Patrikson* (2003) 538 U.S 468, 475 that "piercing the corporate veil" is "the rare exception" by arguing that the Court "understandably" denied alter ego liability in that case. (RB 45-46.) But Fund V cited those cases for their accurate descriptions of alter ego law, not for their facts. (See, e.g., *Katzir's Floor and Home Design, Inc. v. M-MLS.com* (9th Cir. 2004) 394 F.3d 1143, 1149 [citing *Dole* as recognizing that piercing the corporate veil is the "rare exception"].)

In suggesting courts should apply the "greatest liberality" in piercing the corporate veil (RB 45, 47), respondents turn public policy on its head. The exact opposite is true: Alter ego liability—which entails overturning liability-limitation rules that businesses broadly rely upon and that exist for strong policy reasons—*must* be invoked sparingly and cautiously. (*Greenspan, supra*, 191 Cal.App.4th at p. 512; *Tran, supra*, 104 Cal.App.4th at p. 1219; *Sonora Diamond, supra*, 83 Cal.App.4th at p. 539; *Pacific Landmark, supra*, 19 Cal.App.4th at p. 628; *Las Palmas*, 235 Cal.App.3d at p. 1249.) "Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." (*Anderson v. Abbott* (1944) 321 U.S. 349, 362.) Since the law "permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities," corporate separateness "should be pierced only reluctantly and cautiously." (*Cascade Energy and Metals Corp. v. Banks* (10th Cir. 1990) 896 F.2d 1557, 1576.)

2. Due process likewise requires caution in adding non-parties to judgments.

As Fund V's opening brief explained, due process imposes constitutional limits on amending a judgment to add a non-party alter ego as an additional judgment debtor—the non-party effectively must already have had its full and fair day in court through the defendant. (AOB 36-38.)

Respondents seek to minimize these due process restraints by again quoting *Greenspan, supra*, 191 Cal.App.4th at p. 508, for the proposition that "'the greatest liberality is to be encouraged in the allowance of such amendments in order to see that justice is done,'" and emphasizing that *Greenspan* quoted *Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14, 20-21 (*Carr*), and was recently followed in *Misik, supra*, 197 Cal.App.4th at p. 1073 (RB 34, 45; accord RB 1, 47). They highlight this language in the very first paragraph of their brief, adding the bracketed language "post-trial alter ego" before the word "amendments" to suggest that this is an alter ego or section 187 standard. (RB 1.) But it's not. The quoted language actually refers to the *standard for amending pleadings against a current defendant to conform to proof*, not the standard for adding non-party alter egos to judgments.

The quoted language comes from two *non*-alter ego cases—*Carr* and *Carman v. Athearn* (1947) 77 Cal.App.2d 585. *Misik* cites only *Greenspan* for this proposition; *Greenspan* in turn relies solely on quoted language from *Carr*; and the *Carr* language is a quotation from *Carman v. Athearn* reciting the conformance-to-proof standard. (See *Misik*, *supra*, 197 Cal.App.4th at p. 1073; *Greenspan*, *supra*, 191 Cal.App.4th at p. 508; *Carr*, *supra*, 23 Cal.App.4th at p. 20; *Carman v. Athearn*, *supra*, 77 Cal.App.2d at p. 594.)

Carr was not an alter ego case. (23 Cal.App.4th at p. 21 [court found insufficient alter ego evidence].) Instead, *Carr* upheld the amendment of a judgment to add the appellant because the plaintiff had sued "the right party under the wrong name, a fact which must have been clear to the defense from the inception of the litigation"; the named defendants sought to benefit from the mistake by conducting themselves "as though they were the proper defendants"; and the appellant's failure to raise the mistake in discovery or trial proceedings "approached a fraud on the court." (23 Cal.App.4th at pp. 20-23.)

The *Carr* court concluded that under those circumstances, the plaintiff's "error essentially amounted to *no more than a variance between pleading and proof*" and that "[t]he decision to grant an amendment *in such circumstances* lies in the sound discretion of the trial court." (23 Cal.App.4th at p. 20, italics added.) It then quoted language from *Carman v. Athearn*, *supra*, 77 Cal.App.2d at p. 594, a case discussing the amendment of claims to conform to proof, that "'[t]he greatest liberality is to be encouraged in the allowance of such amendments in order to see that justice is done.'" (*Carr*, *supra*, 23 Cal.App.4th at p. 20.) It also cited Civil Procedure Code section 469, the statute regarding variances between pleading and proof. (*Ibid.*)

The *Greenspan* court, in importing *Carr*'s language into a section 187 alter ego case, failed to recognize that *Carr* and *Carmen v. Athearn* were discussing the standard for amending claims against defendants to conform to proof. Courts apply "[g]reat liberality" in considering such amendments "to the end that lawsuits may be determined upon their merits." (*Desny v. Wilder* (1956) 46 Cal.2d 715, 751; accord, *Board of Trustees of the Leland Stanford Jr. University v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163.) But that public policy rationale has nothing to do with amending *a judgment* to add *a non-party*, a context that entails fundamental due process concerns that are absent from the conformance-to-proof context.

Greenspan's inadvertent and erroneous importation of the conformance-to-proof standard—which *Misik* then parrots—has no application here. Courts can permit the addition of non-parties to judgments on alter ego grounds only after ensuring they already effectively had their full and fair day in court. Due process precludes treating requests for a material change in a *judgment* with the "greatest liberality," particularly where, as here, the plaintiff could have—but elected not to—bring the non-party into the case before trial despite knowing all the pertinent facts.

B. The Post-Judgment Addition Of Fund V As A Judgment Debtor Violated Due Process.

1. To be added as a judgment debtor, an alter ego entity must have controlled the litigation *and* been virtually represented.

Before a non-party can be added to a judgment as an alter ego judgment debtor, due process requires the plaintiff to prove that the non-party both controlled the defendant's defense and was virtually represented at trial. (AOB 37-42.)

Respondents, nonetheless, argue that "there is only <u>one</u> requirement" because "'control of the litigation' and 'virtual representation' are merely two different ways to describe the same standard." (RB 35, original emphasis.) They cite language from various cases indicating, as the trial court stated, that control of the litigation establishes that the defendant was virtually represented. (RB 35-36; see 14AA:3607 [trial court stating "Fund V had control of this litigation and *thus was* 'virtually represented'"; italics added].) They then argue that Fund V "controlled, and thus was virtually represented" in the entire lawsuit. (RB 42, 44.)

Even assuming respondents had presented substantial evidence of control—as explained below, they didn't—that's not the correct standard. Even *Greenspan*, which respondents repeatedly emphasize and label a "seminal" section 187 case (RB 65), recognizes that the two requirements are distinct: *Greenspan* repeatedly acknowledges that "section 187 applies only if the parties to be added as judgment debtors had control of the underlying litigation *and* were virtually represented." (*Greenspan*, *supra*, 191 Cal.App.4th at p. 517, italics added; see also *id.* at p. 509 [referring to the "*requirements* that the proposed judgment debtors have had control of the underlying litigation *and* have been virtually represented," italics added]; *ibid.* [multiple statements that Greenspan must show the claimed alter egos controlled the arbitration *and* were virtually represented].)

Similarly, although respondents cite language from their other claimed "seminal" case, *Misik*, as suggesting control is dispositive (RB 35-36, 65), they ignore that *Misik* elsewhere correctly cites *NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772 (*NEC*), for the principle that an alter ego can be added to a judgment only where the plaintiff proves the defendant's alter ego "had control of the litigation *and* was virtually represented in the lawsuit" (*Misik*, *supra*, 197 Cal.App.4th at p. 1075, italics added).

The reason litigation control alone does not establish virtual representation is that the absence of a claim putting the parent's personal assets at stake can materially impact litigation choices, including both discovery and trial strategy. If the case might have looked materially different had the parent been sued, there can be no virtual representation for due process purposes notwithstanding any litigation control. (See *NEC*, *supra*, 208 Cal.App.3d at p. 781 [the non-party must have "had occasion to conduct the litigation with a diligence corresponding to the risk *of personal liability that was involved*," italics added]; AOB 41-42.)

Thus, as *Greenspan* recognized, "section 187 may not apply if the alter egos have different interests," the action must have been "'fully and fairly tried,'" and nothing must appear "'in the record to show that [the proposed judgment debtors] could have produced a scintilla of evidence that would have in any way affected the results of the [litigation]." (*Greenspan*, *supra*, 191 Cal.App.4th at pp. 509-510.)

It is true that some cases contain stray language that a party who controlled the litigation "thus was" virtually represented. (See RB 36.) But the source of that confusion is *NEC*'s isolated, passing quotation of a statement in a treatise that alter ego amendments to judgments are appropriate where the alter egos "'in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.'" (*NEC*, *supra*, 208 Cal.App.3d at p. 778.)[17] The rest of the *NEC* opinion shows that litigation control is *not* dispositive by itself. The *NEC* court:

- noted that a judgment can be binding on an individual associated with a corporation only if that person "'had control of the litigation *and* occasion to conduct it with a diligence corresponding to the risk of personal liability that was involved'" (*id.* at pp. 778-779, italics added);
- emphasized the holding in *Mirabito v. San Francisco Dairy Co.* (1935) 8 Cal.App.2d 54 (*Mirabito*) that the action was fully and

[17] "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase–however fortuitously coined." (*Lingle v. Chevron USA Inc.* (2005) 544 U.S. 528, 531.)

fairly tried and that nothing indicated the non-party alter ego could have done anything different to affect the trial result (*NEC*, *supra*, 208 Cal.App.3d at p. 780);

- held that if the defendant and non-party alter ego did not have identical litigation interests, it cannot be said that the non-party "had occasion to conduct the litigation with a diligence corresponding to the risk of personal liability that was involved *or that [the non-party alter ego] was virtually represented in the lawsuit*" (*id.* at pp. 780-781, italics added); and
- after finding the non-party was not virtually represented, *separately* analyzed whether there was sufficient evidence that the non-party alter ego "controlled the defense of the litigation" (*id.* at p. 781).

Thus, control is not, as respondents suggest, dispositive by itself. (See, e.g., Thomas, Cal. Civ. Courtroom Handbook & Desktop Ref. (2012 ed.) §40:80 [section 187 motion "may be denied when the alter ego did not exercise some degree of control over the underlying litigation (Citation); when the interests of the alter ego and judgment debtor corporation were not the same (Citation); or when the plaintiff was aware of the alter ego relationship before the judgment was entered (Citation)"].)

2. Respondents failed to establish that Fund V controlled the litigation.

Fund V's opening brief explained that the trial court's only factual finding regarding whether Fund V controlled the litigation was that Fund V paid SPUSO5's attorney fees, that Supreme Court and other authority establish that payment of defense costs does not alone establish litigation control, that the record needed to show that Fund V's Investment Committee (which controls Fund V) directed the litigation, and that there was no such evidence. (AOB 38-39.)

Claiming the trial court's written ruling cannot be the sole focus, respondents present a muddle of "control" and "virtual representation" arguments. (RB 38-44.) Their control-related arguments reduce to two: (a) that no authority requires a showing of who made the litigation decisions; and (b) citing only *Mirabito*, that courts "have added entity alter egos as judgment debtors without a specific showing of 'who' made the litigation decisions." (RB 42, 44.) Both arguments miss the mark.

In *Mirabito*, the Court of Appeal concluded that the appellant was "fully aware of all the [legal] proceedings" and "in effect the two corporations are *identical*." (8 Cal.App.2d at pp. 58-60, italics added.) Those findings establish that the appellant made the litigation decisions. Here, in contrast, the undisputed evidence showed SPUSO5 and Fund V were *not* identical (even assuming they were alter egos).

Where, as here, the alleged alter ego entities are not identical, control over the litigation necessarily equates to the individuals or entities *who directed* the litigation, not just who paid the attorney's fees. As *NEC* recognizes, "control of the litigation" for due process purposes "'may consist of a combination of factors, usually including the financing of the litigation, the hiring of attorneys, *and control over the course of the* *litigation.*'" (*NEC*, *supra*, 208 Cal.App.3d at p. 781, italics added.) Thus, in *Greenspan*, the court found the requisite litigation control existed because "[t]here is no dispute that [the alter ego individual who controlled the single enterprise] *directed* the defense of the arbitration." (191 Cal.App.4th at p. 509, italics added.) Similarly, in *Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39 (*Alexander*), the Court found sufficient litigation-control evidence where the attorney who represented the defendant at the original trial "testified that he primarily dealt during the litigation with appellant" (the defendant's sole shareholder), that "appellant was kept fully advised of what was occurring in the lawsuits," and that appellant knew all the issues and heavily participated in the litigation as both a lawyer and corporate officer. (*Id.* at p. 46.)

There was no such evidence here. Since respondents never raised the alter ego issue until after judgment, no discovery or trial evidence addressed who controlled the SPUSO5 litigation. Nor did respondents present any such evidence in their post-judgment motion.[18] Respondents try to paper over this evidentiary void by arguing that the "manner in which litigation decisions were made on behalf of Fund V . . . undoubtedly would never have been discoverable based on the attorney-client privilege." (RB 42.) Not so. The attorney-client privilege only protects communications between the attorney and client, not questions about how Fund V manages

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[18] In *Greenspan*, the plaintiff conducted substantial post-judgment debtor discovery before moving to amend the judgment to add the alleged alter ego. (191 Cal.App.4th at p. 506.) Here, in contrast, respondents based their post-judgment alter ego motion on snippets from a trial that did not involve alter ego issues. (See AOB 29-30.)

litigation and who directed the defense of the lawsuit against SPUSO5. (See, e.g., *Alexander*, *supra*, 104 Cal.App.3d at p. 46.)

In cases such as *Greenspan* and *Misik*, where one person owned or controlled all the various entities, litigation control is an easy question. But the opposite is true where, as here, a case involves multiple companies with different management personnel. Fund V is not owned or controlled by one person or even a handful of individuals—it is managed by a large group, its Investment Committee, and that group does *not* manage SPUSO5. Respondents needed actual evidence of litigation control, not conjecture.

Instead of evidence, respondents rely on the opening statement of SPUSO5's trial counsel; respondents assert that he spoke "not simply about his actual client (Fund V)" but about the case's impact on Fund V's institutional investors. (RB 39.) But SPUSO5's counsel did *not* say Fund V was his client. As Fund V's opening brief demonstrated and respondents ignore: SPUSO5's counsel specifically stated—without contradiction—that his client *was SPUSO5*, a single purpose entity owned by Fund V; counsel's unsworn remarks were not evidence; and counsel's remarks did not establish that Fund V's management actually controlled the litigation, as opposed to SPUSO5's officers. (AOB 40, fn. 13.)

Respondents further confuse matters by arguing that "SPUSO5 existed only on paper and could not possibly have directed or made any decisions about this litigation." (RB 42.) But the officers and directors of SPUSO5's general partner were entrusted with managing SPUSO5; and those managers did not control Fund V. Two of the nine SPUSO5 officers are not principals of Fund V or members of its Investment Committee, and the other seven SPUSO5 officers were 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. (9AA:2236, 2285-2294; AOB 5-6, 39-40.)

As Laurie Romanek, an Investment Committee member and non-SPUSO5 officer explained, the Investment Committee manages Fund V and it was not apprised and consulted about the SPUSO5 litigation because SPE officers manage and control SPE-related litigation. (14AA:3670; AOB 40.) Respondents argue in a footnote that Romanak's declaration should be ignored because it was submitted after the trial court ruled on the section 187 motion. (RB 44, fn. 19.) But her evidence was uncontroverted and, more importantly, it demonstrated respondents' failure of proof: There was no evidence, at trial or afterwards, that the people who control Fund V—its Investment Committee—knew about and controlled the SPUSO5 litigation, as opposed to the individual SPE officers.

As the parties seeking to impose alter ego liability, respondents had the burden to prove litigation control. They didn't meet that burden.

3. Respondents failed to establish that Fund V was virtually represented at the trial.

As Fund V's opening brief explained, virtual representation exists only where the alter egos had *identical* litigation interests, so that the defendant's trial strategy "'effectively represents the interest of the alter ego [parent].'" (AOB 42, quoting *NEC*, *supra*, 208 Cal.App.3d at p. 780.) Due process requires a showing that the non-party already had its full and fair day in court, even if it was not an actual party at the time of trial.

In response, respondents assert that "SPUSO5 was an entity whose purpose was never achieved" and thus "[i]ts 'litigation interest' was Fund V's interest." (RB 40.) They claim SPUSO5's argument about having the right to terminate under PSA §11(g) was for Fund V's benefit because, if successful, Fund V would recover the $13 million escrow deposit and any loss of that deposit "would be borne by Fund V." (RB 40-41.) But that misses the point. This case wasn't just about recovering the deposit. It also was about a specific performance claim against SPUSO5. Fund V and SPUSO5 had different litigation interests as to the latter because SPUSO5's exposure was limited to losing the $13 million deposit, while Fund V's potential liability far exceeded that deposit.

Respondents try to skirt this difference by arguing that "[t]he issues of specific performance and liquidated damages were actively and vigorously contested in the trial court" and that "[i]t is impossible to imagine 'more effort' being expended on these issues." (RB 41.) That, again, misses Fund V's point: Even if those issues were litigated extensively, that does not establish the due-process-required conclusion that the trial would have looked the same had Fund V been sued before trial. To reach that conclusion, the litigation interests of SPUSO5 and Fund V had to be identical.

They weren't. The two contract arguments—(1) that the deposit was recoverable because PSA §11(g) permitted termination because of a market-value decline, and (2) that PSA §10(a) allowed SPUSO5 to breach because of a market-value decline but limited its liability to $13 million—*inherently conflict.* To the extent SPUSO5 argued that the parties intended for PSA §11(g) to apply in the event of market-value declines, that necessarily undermined its ability to argue that PSA §10(a) was designed to cover such declines. But given SPUSO5's limited financial exposure, it had nothing to lose by placing primary emphasis on the 11(g) argument, such as asserting in its opening statement that "the adverse change position in Section 11(g) was perhaps the most important provision of this forward purchase contract." (4RT:105.)

Respondents try to avoid this reality by arguing that "[e]ven if Fund V were now to assert in retrospect that it would have argued liquidated damages/specific performance differently had it been named as a defendant prior to trial," it wouldn't matter because "Fund V had every opportunity to litigate the issue . . . ." (RB 41-42.) But that highlights the fatal due process problem here. If Fund V would have employed a different litigation strategy had it known its personal assets were at stake, an "opportunity to litigate" without that knowledge cannot satisfy due process. Defendants have a due process right to know what's at stake so they can present a fully-informed defense. If the litigation interests are not identical, it cannot be said that the non-party alter ego was virtually represented.

Respondents also gloss over that their failure to pursue the alter ego claim at trial affected discovery and the presentation of evidence. (AOB 44-45.) While the claims against SPUSO5 merely involved contract interpretation, a claim against Fund V would have implicated a host of new issues—for example, the use of SPEs in the real estate development industry and general practices regarding entering sales contracts with SPEs instead of their affiliates; whether respondents had previously contracted with SPEs; how, when and why SPUSO5 became a signatory to the transaction; what the parties said to each other about SPUSO5; and the composition and role of the intermediaries between SPUSO5 and Fund V. As the trial was not about alter ego and respondents predicated their post-judgment motion almost exclusively on snippets from that trial (AOB 29-30), there is a dearth of evidence in this record regarding the issues that would have been central to an alter ego trial.

Fund V was not virtually represented.

C. Respondents' Unreasonable Delay In Bringing Their Alter Ego Claim Independently Requires Reversal Of The Post-Judgment Addition Of Fund V As A Judgment Debtor.

Fund V's opening brief demonstrated that the trial court abused its discretion in granting the alter ego amendment because respondents knew all the pertinent alter ego facts before trial and lacked a reasonable explanation for delaying their alter ego claim until after judgment. (AOB 45-50.)

Respondents claim that Fund V misstated the law when it quoted *Hennessey's Tavern, Inc. v. American Air Filter Co., Inc.* (1988) 204 Cal.App.3d 1351, 1358 (*Hennessey's*), for the proposition that "[t]he alter ego issue is ordinarily raised by the pleadings" without mentioning the case's subsequent statement that alter ego issues can be resolved "at a hearing to determine the identity of the judgment debtor." (RB 72, emphasis omitted.) Respondents ignore that no such hearing was needed here, since they knew Fund V's identity before trial. They also ignore Fund V's point: *Hennessey's* recognition that alter ego claims are "ordinarily" raised by the pleadings confirms that section 187 alter ego amendments are the exception, not the rule.

The obvious policy preference is to have parties, where reasonably possible, plead and prove alter ego claims at trial. Doing so ensures that alter ego allegations are "subjected to the rigors of the trial process" as well as the statement-of-decision process (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 661), and it eliminates all due process issues regarding whether the alter ego party had a full and fair day in court. Thus, although *Greenspan* acknowledges that plaintiffs can raise alter ego issues by section 187 motion, it also recognizes that "the complaint *should probably* include alter ego allegations and name the alleged alter egos as defendants" when the plaintiff already knows about the alter ego issue. (191 Cal.App.4th at p. 517, italics added.)

Public policy therefore mandates that plaintiffs act with due diligence in raising alter ego claims. (AOB 45-47.) Respondents label the due diligence requirement "a nonexistent legal principle," arguing that *Alexander, supra*, 104 Cal.App.3d 39 "did not create any 'rule' about the effect of delay" and that due diligence is merely a "factor" for potential consideration. (RB 74-75.) Wrong. *Alexander* states that to "'justify the addition of new defendants, plaintiff *must* have acted with due diligence to bring them in as parties.'" (*Alexander, supra*, 104 Cal.App.3d at p. 48, quoting *McIntire v. Superior Court* (1975) 52 Cal.App.3d 717, 721, italics added.)

Nor did Justice Lucas state in his *Mesler* dissent, as respondents contend, that "due diligence" is merely a "factor" that courts can consider but choose to ignore. (RB 74.) To the contrary, after citing *Alexander* for the proposition that parties may move postjudgment to add alter ego judgment debtors, Justice Lucas stated: "However, such amendment is *not permitted* in the absence of a *showing of due diligence* on the part of the plaintiff, *and* of participation in the defense of the underlying action by the claimed alter ego." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 309 (dis. opn. of Lucas, J.).) Thus, the plaintiff must show due diligence *in addition* to showing that the alter ego controlled, and was virtually represented in, the underlying action. Due diligence is no more a mere "factor" than are control of the litigation and virtual representation—plaintiffs must establish all three.

Respondents therefore beg the question by citing *Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815, for the proposition that adding Fund V as a judgment debtor "was unquestionably 'within the permissible range of options set by the legal criteria.'" (RB 74.) *Dorman* merely recites the general standard for determining an abuse of discretion; it was not a section 187 or alter ego case and it provides no legal criteria for such cases.

Nor do respondents proffer any legal criteria for analyzing the timing of a section 187 motion—they treat the trial court's discretion as limitless, arguing courts *can* deny a section 187 motion on the ground that the plaintiff had pre-judgment knowledge of the alter ego facts but don't have to. (RB 78.) But courts do not have unfettered discretion. Although there is no time limit for adding an alter ego nonparty to the judgment, the plaintiff "must act with due diligence." (Thomas, Cal. Civ. Courtroom Handbook & Desktop Ref., *supra*, §40:80, citing *Alexander*, *supra*.)

In *Greenspan, Misik* and every other case respondents cite, due diligence was a non-issue because the plaintiff had no reason to know the defendant lacked assets, or that an alter ego relationship existed, until *after* judgment was entered and plaintiff attempted enforcement. Respondents nonetheless assert that "[n]o case law supports the theory that courts typically deny Section 187 motions where alter ego facts are known prior to trial." (RB 77.) In so arguing, respondents ignore that few litigants attempt what they did—forego pleading and proving an alter ego claim at trial despite knowing all the pertinent facts. The *only* published section 187 decision involving a plaintiff with pre-trial knowledge of the alter ego facts is *Jines v. Arbarbanel* (1978) 77 Cal.App.3d 702; and there the Court of Appeal *reversed* the post-judgment amendment (noting, as part of its justification for reversal, that the plaintiffs "were aware of the existence of the corporation before the case was tried"). (*Id.* at p. 717.) *No* published appellate decision has ever upheld a section 187 amendment where, as here, the plaintiff had full knowledge of the alter ego facts before trial.

Respondents failed to show the requisite diligence. They assert as an excuse for delaying their alter ego claim "the virtual certainty the trial date would be continued if Fund V were added as a defendant" and the attendant increased expense in maintaining the property during the continuance. (RB 76.) But that argument (which the trial court never adopted, see 14AA:3603-3610) directly undermines their position: If Fund V would have been entitled to a continuance of the trial to add it as a defendant (presumably to permit the discovery and different evidentiary presentation associated with adding a new party), how can it comport with due process to add Fund V as a judgment debtor post-judgment *based solely upon snippets from the non-continued trial*? Respondents cannot have it both ways. A plaintiff's desire to avoid a continuance cannot trump a defendant's due process rights.

Respondents also offer as an excuse that they "did not know that Fund V would refuse to fund SPUSO5 if the court ordered SPUSO5 to buy the Property." (RB 75.) But as Fund V's opening brief demonstrated, that argument speciously assumes respondents had reason to believe that SPUSO5 (through funding from Fund V) would immediately comply with any specific performance judgment instead of appealing. (AOB 48-50.)

Respondents ignore this point in their brief. They instead emphasize deposition testimony by Hench and Maddocks that—when read in full—merely confirms that SPUSO5 could pay the purchase price only if Fund V provided funding. (RB 75-76; AOB 49-50). Hench and Maddocks never said that if a court ordered specific performance, Fund V would fund the acquisition in lieu of SPUSO5 appealing the judgment. (*Ibid.*)[19]

D. The Trial Court Lacked Jurisdiction To Add Fund V As A Judgment Debtor After Expiration Of SPUSO5's Specific-Performance Deadline.

Fund V's opening brief demonstrated that the alter ego amendment was jurisdictionally void because the April 2011 addition of Fund V as a judgment debtor was not a mere clerical name change that did not alter rights—at that point, the 20-day deadline for SPUSO5 to purchase the property had expired and the specific-performance judgment had transformed into a different judgment, a money judgment for certain unspecified amounts. (AOB 50-51.) Fund V noted that it knew of no previous case permitting an alter ego amendment where a deadline in the original judgment had passed and the newly-added judgment debtor faced different terms than the original judgment. (AOB 52.)

Respondents concede the absence of such authority by identifying none in their brief. In fact, they sweep this jurisdictional flaw under the

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[19] Respondents claim SPUSO5 and Fund V would not have sought an emergency stay from the Court of Appeal unless they were contemplating complying with the judgment. (RB 76, fn. 29.) Really? SPUSO5, by petition for writ of supersedeas, sought an emergency *and* permanent stay explicitly because it wanted to preserve the status quo and prevent the judgment's enforcement while its appeal was pending. (14AA:3581-3586.) It explained it was forced to do so because the trial court had ordered a $123 million appeal bond—an impossibility for SPUSO5 or Fund V. (*Ibid.*)

carpet. Their brief doesn't even mention the issue, let alone attempt a counter-argument.

Respondents do claim Fund V was not prejudiced by its belated addition to the judgment because it could have "complied with the specific performance order simply by funding SPUSO5" and it "had a subsequent opportunity" to purchase the property through the referee's sale. (RB 79.) But they ignore that Fund V had no reason to fund the specific performance judgment since it had no financial exposure until April 2011. (AOB 52.) Regardless, it is irrelevant whether Fund V was or wasn't prejudiced; where jurisdictional error occurs, the resulting judgment must be reversed even in the absence of prejudice. (*In re Marriage of Jackson* (2006) 136 Cal.App.4th 980, 997.)

E. Respondents Failed To Establish The "Unity Of Interest" And "Inequitable Result" Requirements For Deeming Entities To Be Alter Egos.

For a court to find an alter ego relationship exists, the plaintiff must prove (1) "such a unity of interest and ownership" between the entities or individuals "that no separation actually exists"; and (2) that treating the acts as those of the limited-liability entity alone would cause an "inequitable result." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 417 (*Leek*); AOB 54.) There was no substantial evidence of either prerequisite here.

1. There was no substantial evidence of the requisite "unity of interest."

Respondents argue that the requisite "unity of interest" was proved because the Corona Summit project was part of Fund V's investment portfolio and Fund V's investors would provide the funds needed to close the purchase. (RB 48-49.) But one of the fundamental purposes of limited-liability companies is to separate investors from the businesses in which they invest. (AOB 58.) The "unity of interest" prong therefore requires more than just a funding/investment link. Rather, the separate personalities must no longer exist; the purported separateness must be a sham. (*Mesler*, *supra*, 39 Cal.3d at p. 300; AOB 55-56.) The evidence here—mostly isolated portions of the trial that did not address alter ego—did not establish that.

Respondents concede, as they must, that Hench signed all SPUSO5 documents, including the contracts and termination letter, as vice president of SPUSO5's general partner. (RB 49.) But they try to confuse matters by claiming "Hench knew nothing of that entity." (RB 49, citing 6RT:765.) That's not Hench's testimony. Hench was not asked about the SPUSO5 general partner; rather, he was asked whether he was familiar with all five different layers—"all these companies" between Fund V and SPUSO5's general partner—and he answered "no." (6RT:765.) Because the trial was not about alter ego, Hench was not asked anything further about this issue nor did anyone fully address the status or composition of those companies.

As Fund V's opening brief explained, respondents "presented no evidence regarding the composition, assets or role of any of the limited-liability intermediaries between SPUSO5 and Fund V" and no evidence that any of those entities "ever disregarded the legal formalities for creating and maintaining limited-liability entities." (AOB 57.) Respondents do not claim otherwise. Instead, they try to circumvent this evidentiary void by arguing "Fund V produced no evidence of the purpose or activity of any of these entities." (RB 53.) That argument reverses the burden of proof. Respondents, as the parties seeking to impose alter ego liability, had the burden to conduct discovery and present evidence on those issues. (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212-1213 (*Mid-Century*); *Auer v. Frank* (1964) 227 Cal.App.2d 396, 410; Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2012) ¶2:51.1, p. 2-28 ["the burden of pleading and establishing alter ego liability is on the plaintiff creditor"].) Accordingly, their myriad references to "a confusing chain of dummy entities," "multiple layers of shell companies," and "layers of shell entities" must be ignored. (RB 43, 53-54.) The assertions are conjecture, not evidence.

The same is true for respondents' assertion—not backed by any record citations—that "the companies did not 'maintain arm's length relationships among [themselves].'" (RB 51-52, quoting *Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 840 (*Associated Vendors*).) Respondents never proved that the intermediaries were shells or that they did not maintain arm's length relationships. Neither the trial nor discovery addressed such issues; and respondents presented no new evidence to that effect in their post-judgment motion to add Fund V as a judgment debtor. (See AOB 29-30.)

Respondents also assert that the requisite "unity of interest" exists because "SPUSO5's 'officers' consisted of key Fund V officers" and SPUSO5 "was an empty shell" with no separate office or bank account. (RB 50-52.) But the officers and directors were not *identical*—there was only *some* management overlap. (See pp. 77-78, above; AOB 39-40.) And the only reason SPUSO5 lacked separate offices and a separate bank account is that it was a single purpose entity whose purpose—to take title to, lease to stabilization and ultimately re-sell the property—was never achieved. (AOB 58-59.) That SPUSO5 was "a single purpose business entity whose purpose was never achieved" does not establish for alter ego purposes that SPUSO5 and Fund V lacked separate personalities. (*Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC* (Pa. Super.Ct. 2004) 846 A.2d 1264, 1272 [¶18], 1281 fn.13, discussed at AOB 59-60.)

2. There was no substantial evidence of the requisite "inequitable result."

a. Bad faith conduct is required.

As part of their effort to establish that an alter ego finding is nothing more than a subjective exercise of unlimited trial court discretion, respondents assert that Fund V's citation of cases requiring bad faith "is but another example of Fund V's attempt to fashion new rules and standards unsupported by California case law." (RB 59.) They argue that while "*some* courts mention 'bad faith' in stating the general rule, the relevant standard is 'inequity' or 'injustice,' not bad faith." (*Ibid.*, italics added.) Incorrect—bad faith is required.

Alter ego is an equitable doctrine, so a fortiori there must be an inequity or injustice. But in explaining what "inequity" or "injustice" means in the alter ego context, courts have *repeatedly* stated that a mere inability to pay the judgment is insufficient and that there "*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; see AOB 61.)

This requirement is not reflected in stray, insignificant remarks by "some courts," as respondents contend. (RB 59.) It's the mandate of the California Supreme Court. That Court has specifically held that the fact a corporation or partnership might be considered a shell entity cannot by itself justify alter ego liability, because "separate corporate or partnership existence will not be disregarded *except in instances of bad faith*." (*Westinghouse Electric Corp. v. Superior Court* (1976) 17 Cal.3d 259, 279, italics added.) It has recognized that while the standard, stated generally, extends beyond actual fraud to encompass "injustice," injustice in this context means bad faith:

> "The corporate entity of the wholly owned subsidiary will be disregarded only when recognition of the separate entities of parent and subsidiary would produce fraud *or injustice*.

> [Citations.] *Bad faith in one form or another must be shown* before the court may disregard the fiction of separate corporate existence. [Citations]."

(*Id.* at p. 274, emphasis added, quoting *Luis v. Orcutt Town Water Co.* (1962) 204 Cal.App.2d 433, 434-444; accord, *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc.* (1932) 217 Cal. 124, 129 ["[b]ad faith in one form or another *must be shown* before the court may disregard the fiction of separate corporate existence," italics added]; *Erkenbrecher v. Grant* (1921) 187 Cal. 7, 11 [recognizing need for evidence of a "dishonest motive or intention to accomplish a wrong"]; *id.* at p. 12 [alter ego doctrine applies to defeat "fraud or some *kindred wrong*," italics added]; *Clark v. Millsap* (1926) 197 Cal. 765, 781 ["[i]f the purpose and intent of the corporation are bad, its corporate entity will be no cover for wrong, fraud and bad faith"].)

Consistent with this Supreme Court precedent, California intermediate appellate courts have long recognized that the alter ego doctrine affords protection only "where some conduct *amounting to bad faith* makes it inequitable . . . for the equitable owner of a corporation to hide behind its corporate veil." (*Associated Vendors*, *supra*, 210 Cal.App.2d at p. 842, italics added; see *Mid-Century*, *supra*, 9 Cal.App.4th at p. 1213 [noting *Associated Vendors* "catalogu[ed]" alter ego law]; *Pearl v. Shore* (1971) 17 Cal.App.3d 608, 616 [*Associated Vendors* is "leading case"]; Presser, Piercing The Corporate Veil, *supra*, §2:5, pp. 161-162

[*Associated Vendors* is "one of the most frequently-cited California veil piercing decisions"].)

This is not, as respondents assert, the view of just *some* courts. (RB 59.) It's been black letter California law for a long time.[20]

Notably, respondents do not identify any case that actually *holds* bad faith conduct is not required. They instead emphasize that *Mesler, supra,* 39 Cal.3d at pp. 300-303, *Greenspan, supra,* 191 Cal.App.4th at p. 511, and *Misik, supra,* 197 Cal.App.4th at p. 1073 discuss "equity and justice" without specifically mentioning the words "bad faith." (RB 60.) All three cases, however, involved determinations that the trial court *procedurally* erred in failing *to reach* the alter ego question; none resolved whether

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[20] See, e.g.:

First Appellate District: *Arnold v. Browne* (1972) 27 Cal.App.3d 386, 397 (Div. 2); *Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal.App.3d 405, 412 (Div. 2); *McKee v. Peterson* (1963) 214 Cal.App.2d 515, 531 (Div. 1); *Associated Vendors, supra,* 210 Cal.App. 2d at pp. 838, 842 (Div. 1); *Carlesimo v. Schwebel* (1948) 87 Cal.App.2d 482, 491 (Div. 1); *Duarte v. Postal Union Life Ins. Co.* (1946) 75 Cal.App.2d 557, 577 (Div. 1).

Second Appellate District: *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1123 (Div. 4); *Crestmar Owners Assn. v. Stapakis* (2007) 157 Cal.App.4th 1223, 1232 (Div. 8); *Hennessey's, supra,* 204 Cal.App.3d at p. 1358 (Div. 3); *United States Fire Ins. Co. v. National Union Fire Ins. Co.* (1980) 107 Cal.App.3d 456, 470 (Div. 3); *Pearl v. Shore, supra,* 17 Cal.App.3d at p. 616 (Div. 5); *Rosen v. E. C. Losch Co.* (1965) 234 Cal.App.2d 324, 334 (Div. 1); *Luis v. Orcutt Town Water Co., supra,* 204 Cal.App.2d at pp. 443-444 (Div. 4); *Wilson v. Stearns* (1954) 123 Cal.App.2d 472, 484 (Div. 1); *Marr v. Postal Union Life Insurance Co.* (1940) 40 Cal.App.2d 673, 681-682 (Div. 1); *Chiarello v. Axelson* (1938) 25 Cal.App.2d 157, 160 (Div. 2).

Third Appellate District: *Leek, supra,* 194 Cal.App.4th at p. 418; *Mid-Century, supra,* 9 Cal.App.4th at p. 1213; *Gardner v. Rutherford* (1943) 57 Cal.App.2d 874, 882.

Fifth Appellate District: *Sonora Diamond, supra,* 83 Cal.App.4th at p. 539.

plaintiff's evidence actually met the "unity of interest" and "inequitable result" requirements. (See *Mesler*, *supra*, 39 Cal.3d at pp. 295-306 [trial court erred in denying plaintiff's request to amend pleading to add alter ego theory]; *Greenspan*, *supra*, 191 Cal.App.4th at pp. 495-496, 514-522 [trial court erred in concluding alter ego liability was inapplicable to trust context and to parties who prevail in arbitrations]; *Misik*, *supra*, 197 Cal.App.4th at pp. 1068-1069 [trial court erroneously concluded it was procedurally barred from considering motion to amend judgment to add alter ego debtor].)

In all three cases, the appellate courts reversed and remanded for the trial court to make alter ego determinations in the first instance. Although all three appellate courts noted the "unity of interest" and "inequitable result" requirements, none discussed the "inequitable result" prong in any detail (other than *Misik* recognizing that actual fraud is not required.) (*Mesler*, *supra*, 39 Cal.3d at p. 300; *Greenspan*, *supra*, 191 Cal.App.4th at p. 511; *Misik*, *supra*, 197 Cal.App.4th at pp. 1073-1074.)

Since cases do not stand for propositions not considered (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332), these cases do not establish alter ego liability can be imposed without bad faith conduct. Significantly, however, *Mesler* and *Greenspan* do acknowledge that the corporate form is disregarded only when it "'is abused'" or "'perverted'"—language indicating bad faith. (*Mesler*, *supra*, 39 Cal.3d at p. 300; *Greenspan*, *supra*, 191 Cal.App.4th at p. 510.)

b. Public policy requires bad faith conduct, particularly where contract claims are at issue.

Requiring bad faith furthers sound public policy as it allows businesses to predict what conduct will trigger liability where limited-liability structures are employed. In contrast, respondents' urged standard—that alter ego liability depends on each particular judge's post hoc subjective assessment of what seems "inequitable" or "unjust" under the circumstances—is the type of amorphous standard that California courts have rejected in similar business contexts. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 185 (*Cel-Tech*) [unfair competition]; *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1316-1317 [unconscionability of contracts].)

California public policy requires tethering such considerations to objective standards, because "[a]n undefined standard of what is 'unfair' fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 185; accord, *Morris*, *supra*, 128 Cal.App.4th at pp. 1316-1317.) Allowing the legitimacy of business contracts to rest on amorphous judge-to-judge subjective considerations of "inequity" is bad policy: California businesses need "to know, to a reasonable certainty, what conduct California law prohibits and what it permits." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 185.) The "bad faith conduct" requirement for alter ego liability does that. Respondents' amorphous standard doesn't.

For similar policy reasons, courts must apply the "bad faith conduct" requirement more stringently in contract cases than tort cases. As Fund V's opening brief explained, contract disputes differ from tort because in a contract case the plaintiff voluntarily transacted with the limited-liability entity and, if (as here) it knew the relevant facts, could have contracted for the protection sought through the alter ego claim. (AOB 62-64.)

Respondents mistakenly accuse Fund V of urging a fraud requirement. After quoting a piece of a sentence in Fund V's brief that "'[a] finding of fraud is generally an essential element of an alter ego determination in contract cases'" (RB 67, quoting AOB 63), they assert that "Fund V cites no California law to support its argument that a showing of fraud is required to pierce the corporate veil in contract cases" (RB 68).

But Fund V did not claim that actual fraud is required. Here's what the sentence in Fund V's brief actually says in full, with the portion omitted by respondents italicized:

> 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."*

(AOB 63, quoting 1 Fletcher, Fletcher Cyclopedia of the Law of Private Corporations (2006) §41.85, at p. 269 and Friedman, Cal. Practice Guide:

Corporations (The Rutter Group 2011) ¶2:52.2, pp. 2-27, 2-28 [now at *id.* (The Rutter Group 2012) ¶¶2:52.2 to 2:52.3, pp. 2-29 to 2-30], italics added, bolded language was originally in italics in AOB.)

Respondents thus attack a strawman in arguing California alter ego law does not require proof of actual fraud. (RB 68.) While actual fraud is unnecessary, there still must be bad faith. (*Associated Vendors*, *supra*, 210 Cal.App.2d at p. 838 ["while the [alter ego] doctrine does not depend on the presence of actual fraud, it is designed to prevent what would be fraud or injustice, if accomplished" and "[a]ccordingly, bad faith in one form or another is an underlying consideration and will be found in some form or another in those cases wherein the trial court was justified in disregarding the corporate entity"].) And bad faith in the contract context requires far more than just a showing that the judgment will go unsatisfied. (AOB 62-64, 66-67.)

Although respondents dispute the numerous authorities in the opening brief recognizing the policy distinction between tort and contract claims, they rely only on irrelevant factual distinctions. (RB 65-68.) They do not, and cannot, contest the point that matters: Contract cases differ from a policy standpoint because plaintiffs can protect themselves contractually and public policy seeks to encourage parties to specify their rights and obligations clearly and in writing.

Respondents also emphasize the lack of published California appellate authority on this issue, noting the opening brief cites federal and out-of-state courts applying California law. (RB 65; see AOB 62.)

Respondents emphasize that *Greenspan* and *Misik* "were contract cases." (RB 65.) They ignore that *Greenspan* and *Misik* never addressed the tort-contract distinction (both remanded for the trial court to make alter ego determinations in the first instance, see pp. 93-94, above), and cases are not authority for propositions not considered (*Agnew v. State Bd. of Equalization*, *supra*, 21 Cal.4th at p. 332).

Although no published California appellate court decision directly addresses this issue, California courts have denied alter ego liability in contract settings where the plaintiff knew the relevant facts at time of contracting. (AOB 66-67.) Moreover, it is self-evident that alter ego liability raises different policy considerations in a contract setting than tort, given the plaintiff's ability (and obligation) to protect itself contractually—no express California authority is necessary to establish that obvious principle. (AOB 62-64; see *Oncology Therapeutics Network Connection v. Virginia Hematology Oncology PLLC* (N.D.Cal. 2006) 2006 WL 334532, *19 [concluding that although it has not found California cases articulating whether the alter ego standard differs for contract and tort cases, "[i]n our view, . . . California will not pierce the corporate veil for a mere breach of contract" and instead requires "some showing of bad faith or wrongdoing"]; *Cambridge Electronics Corp. v. MGA Electronics, Inc.* (C.D.Cal. 2004) 227 F.R.D. 313, 331 & fn. 50 [same].)

c. There was no substantial evidence of bad faith; the two circuit court cases cited by respondents *support* Fund V's position.

Fund V's opening brief demonstrated that the bad faith required to impose alter ego liability was lacking here because respondents had full knowledge of the transaction's structure, SPUSO5's financial condition and the identities of the contracting entities. (AOB 20-22, 65-67.) All the relevant facts were open to respondents; neither Fund V nor SPUSO5 engaged in any deception or misrepresentations whatsoever. (*Ibid.*)

In claiming alter ego liability is warranted despite their knowledge of all the facts, respondents claim that two federal cases—*G.E.J. Corp. v. Uranium Aire, Inc.* (9th Cir. 1962) 311 F.2d 749 (*G.E.J. Corp.*) and *Federal Deposit Insurance Corp. v. Sea Pines Co., Inc.* (4th Cir. 1982) 692 F.2d 973 (*Sea Pines Co.*)—imposed alter ego liability under "circumstances similar to those at issue here." (RB 61-62.) Respondents have it backwards. Both cases imposed liability based on evidence that is *absent* here. Thus, these cases actually demonstrate the insufficiency of the alter ego evidence here.

G.E.J. Corp.: Plaintiffs signed an option agreement with GEJ, a corporation that GEJ's parent created for the specific transaction, even though plaintiffs knew GEJ lacked adequate capital. (311 F.2d at p. 757.) The parent created GEJ as a conduit to purchase the property in order to obtain certain tax benefits. (*Id.* at pp. 755-756.) When plaintiffs expressed concern about the parent not signing the contract, the parent assured them that it could not sign the contract "without losing the tax advantages it desired to obtain" but that it "would be responsible for GEJ Corporation's obligations contained in the option agreement and would stand behind GEJ Corporation in the performance of the option agreement." (*Id.* at p. 757, fn. 6.) The Ninth Circuit upheld alter ego liability because "there were misrepresentations which, while perhaps not amounting to fraud, induced [plaintiffs] to enter into the transaction." (*Id.* at p. 757.)

Sea Pines Co.: When plaintiff made a loan to a subsidiary, it knew or should have known that the subsidiary was undercapitalized and had common directorships with its parent. (692 F.2d at p. 977.) When the subsidiary later became insolvent, which shifted its directors' fiduciary duties from its stockholders to its creditors, the directors mortgaged the subsidiary's only unencumbered piece of property (which was worth more than plaintiff's loan) to back the parent's debts—an act that benefitted the parent only. (*Ibid.*) The Fourth Circuit held that even if plaintiff should have known the subsidiary was undercapitalized when it made the loan, the corporate veil could be pierced because "there was no evidence to indicate that [plaintiff] knew or should have known that the directors would breach their fiduciary duties by stripping the subsidiary of its assets, when it became insolvent, for the benefit of the parent." (692 F.2d at pp. 977-978.)

Both cases involved classic instances of bad faith, unlike here.

In *G.E.J. Corp.*, the plaintiffs acted consistent with public policy by seeking to protect their interests contractually. They sought to have the parent sign the contract, only to be told that the transaction must be structured through GEJ for tax benefits and that plaintiffs need not worry because the parent would be responsible. Respondents brazenly assert that "[t]hese are precisely the assurances Hench gave Corona Summit and the Bank on behalf of Fund V one month before execution of the PSA and TPA." (RB 62, fn. 25.) Nonsense.

There is no evidence here that Corona Summit or Cal National *ever* raised *any* concern about SPUSO5 signing the contracts, that they ever sought to have Fund V sign or guarantee the contracts after the signatory was changed to SPUSO5, that Fund V claimed it structured the transaction through SPUSO5 for tax or any other special reasons, or that Fund V ever told either of them to not worry about SPUSO5 being the signatory. SPEs are used to limit the parent's liability; thus, the self-evident reason to structure the deal through the SPE here was to protect Fund V in the event of a breach—precisely what happened here! (AOB 4-6, 20-21, 57-58.)

In claiming Hench gave "precisely the[se] assurances" at the November 2007 meeting, respondents ignore that the issue of SPUSO5 signing the contracts *was never even discussed* at that meeting; indeed, the two Cal National attendees at that meeting (Bonaccorso and Kellog) testified that they never knew SPUSO5 was the signatory (they thought it was Fund V), that they did not negotiate the TPA, and that they never saw the final version of the TPA. (8RT:1410-1411, 1421-1423, 1429; 11RT:2184-2185, 2204-2205.) The issue of SPUSO5 being the signatory arose only *after* that November meeting and there is no trial evidence regarding exactly how it arose and what was said at that time. (See, e.g., 34JA:7907 [11/30/07 Cal National loan committee memo mentioning only

Fund V]; 20JA:4438 [12/11/07 draft TPA specifying CBRE Strategic U.S. Opportunity 5 REIT Operating L.P. (see AOB 6) as purchaser, not SPUSO5 or Fund V]; 20JA:4518 [12/17/07 draft TPA leaving blank for purchaser name]; 8RT:1409-1416; 9RT:1518-1519.)[21]

The two bank employees who actually negotiated the agreements, Robinson and Houten (whom respondents never called to testify at trial), said virtually nothing in their depositions about SPUSO5 becoming the signatory, except to acknowledge that they knew it was a single purpose entity wholly owned and funded by Fund V and that they conducted their due diligence on Fund V. (See 1AA:147; AOB 81, fn. 18; see also 1AA:3-253 [Robinson/Houten testimony]; 13RT:2856 [buyer's counsel Lazarus testifying that she does not recall any discussions about SPUSO5].)

Respondents never came close to establishing the type of representations at issue in *G.E.J. Corp.*—representations that the contract *had to be entered into with the subsidiary* for a reason other than limiting liability and that induced the plaintiff to agree to sign the contract with the subsidiary *instead of with the parent.*

Nor are the circumstances analogous to *Sea Pines Co.* There, the parent company acted in bad faith by stripping its subsidiary of its existing

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[21] The draft designating the REIT entity as buyer presumably was based on the earlier February 2007 PSA, which had specified CBRE Strategic U.S. IV REIT Operating, L.P.—a limited-liability REIT entity multiple levels removed from Fund IV—as the buyer. (See 18JA:3968, 4018; 19JA:4398; 34JA:8179.) In their brief, respondents erroneously define the latter REIT as Fund IV. (RB 9.) In actuality, neither PSA was executed with a "Fund"—the buyer was always a limited-liability entity several steps removed from the parent Fund.

assets after the subsidiary became insolvent, thereby breaching fiduciary duties to its subsidiary's creditors. The contracting plaintiff had no reason to know the directors would breach fiduciary duties if the company subsequently became insolvent. Here, in contrast, Corona Summit and Cal National knew when they signed the PSA/TPA that SPUSO5's only asset was the $13 million escrow deposit, Fund V never stripped SPUSO5 of that asset, and Fund V never breached fiduciary duties owed to respondents.

d. Public policy compels that respondents bear the onus for failing to pursue contractually the obligation they seek to impose through the alter ego doctrine.

In trying to analogize this case to *G.E.J. Corp.* and *Sea Pines Co.*, respondents fail to recognize that this case involves fundamentally different public policy considerations. The reason contract claims differ from tort claims for alter ego purposes is that a plaintiff, if it knows the relevant facts, can obtain contractual protections against non-payment. (AOB 62-69.) The *G.E.J. Corp.* plaintiffs, for example, sought to protect themselves by raising concerns about G.E.J. being the signatory, while the *Sea Pines Co.* plaintiffs had no reason to seek protection as they had no reason to expect the subsequent fiduciary breaches and asset-stripping.

Here, in contrast, Corona Summit and Cal National never asked Fund V for any protection against SPUSO5's non-payment of the full purchase price despite knowing SPUSO5's only asset was the $13 million escrow deposit. SPUSO5 being the signatory wholly comported with Fund

V's understanding that the buyer could decide under PSA §10(a) to forfeit the escrow deposit in lieu of closing the sale. If Corona Summit and Cal National wanted a guarantee that Fund V would pay any potential damages beyond the $13 million deposit, they should have done what the *G.E.J. Corp.* plaintiffs did—demand that Fund V sign the contract or guarantee full payment of the purchase price upon completion of construction. Had Fund V refused based on the sort of inducing representations made in *G.E.J. Corp.*, the bad faith conduct required for alter ego liability would exist.

But not only did Corona Summit and Cal National never ask Fund V to sign the contracts or provide a guarantee, they repeatedly agreed to provisions indicating that Fund V's only financial exposure *was the $13 million escrow deposit*: They never requested deletion of PSA §10(a)'s exclusive-remedy language; they agreed to TPA cross-references to PSA §10(a); and they agreed in TPA §9 that if the buyer's net worth—defined as "Purchaser's parents' and affiliates' consolidated capital plus such parties' unfunded capital commitments as shown on such parties' financial statements"—fell below the purchase price, the seller would be considered in default under its loan "but Purchaser shall have no liability, nor shall Construction Lender or Seller have any rights against Purchaser, for the same." (20JA:4406.)

Respondents emphasize that TPA §9 defines SPUSO5's net worth as its parents' and affiliates' net worth. (RB 53.) But they ignore §9's mandate that the seller and lender shall have no recourse against the buyer if that net worth dropped below the purchase price. (20JA:4406.) Consequently, respondents' claims that SPUSO5 was "undercapitalized" are misleading. (RB 50.) The only pre-closing financial commitment contractually imposed on SPUSO5 was the $13 million escrow deposit—which was fully funded.[22]

Respondents simply ignore what the contracts actually say when they assert that "[n]o guarantee or other payment obligation from Fund V was necessary because Fund V was already obligated to pay, through its commitment to provide the purchase price to SPUSO5 upon closing." (RB 53.) No such contractual commitment existed.

Where, as here, a plaintiff who failed to pursue available contractual obligations later seeks to impose them through alter ego liability, the plaintiff is using the alter ego doctrine to obtain a windfall. (Friedman, Cal. Practice Guide: Corporations, *supra*, at ¶2:52.3, p. 2-30 [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"].)

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[22] Respondents cite a Ninth Circuit case for the proposition that "undercapitalization alone can justify piercing the corporate veil." (RB 50.) But that case is "wrong, since there has never been a California case where evidence of undercapitalization, standing alone, has supported piercing of the veil." (Presser, Piercing The Corporate Veil, *supra*, §2:5, pp. 155-156; see also *id.* at §2:5, p. 155, fn. 14 [noting the case "is incorrect"]; *id.* at §1:9, p. 67, fn. 2 [same]; *Mid-Century*, *supra*, 9 Cal.App.4th at p. 1213 ["courts have cautioned against relying too heavily in isolation on . . . inadequate capitalization"].)

Public policy mandates that respondents bear the onus for the contractual obligations to which they, knowing all the relevant facts, agreed to secure the sale. To avoid unnecessary lawsuits and ensure contracting parties can accurately predict obligations and risks, the law must encourage contracting parties to express rights and obligations in the clearest terms possible. Respondents should not be permitted to wield alter ego law to obtain the equivalent of contractual benefits they failed to obtain. (See AOB 66-67 & fn. 16, 69 [cases denying alter ego liability where the plaintiff knowingly entered into contracts with a limited-liability company having little to no assets].)

CONCLUSION

The judgment against Fund V must be reversed. The trial court erred in adding Fund V as an alter ego judgment debtor; regardless, any contract liability cannot exceed the $13 million escrow deposit.

Dated: October 31, 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 REPLY BRIEF** contains **26,853** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: October 31, 2012

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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 October 31, 2012, I served the foregoing document described as: **APPELLANT FUND V'S REPLY BRIEF** on the parties in this action by serving:

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Executed on October 31, 2012, at Los Angeles, California.

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

ANITA F. COLE