2d Civil No. B179751

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JANET E. BURKLE,

Petitioner,

vs.

RONALD W. BURKLE,

Respondent.

Los Angeles County Superior Court Case No. BD390479
Honorable Stephen Lachs and Honorable Roy L. Paul

RESPONDENT'S BRIEF

[Filed Under Seal per Court's Order, dated January 26, 2005
Cal. Rules of Court, rule 12.5]

WASSER, COOPERMAN & CARTER
Dennis M. Wasser (SBN 41617)
Bruce E. Cooperman (SBN 76119)
2029 Century Park East, Suite 1200
Los Angeles, California 90067
Telephone: (310) 277-7117
Facsimile: (310) 553-1793

GREINES, MARTIN, STEIN & RICHLAND LLP
Irving H. Greines (SBN 39649)
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

**CHRISTENSEN, MILLER, FINK, JACOBS,
GLASER, WEIL & SHAPIRO LLP**
Patricia L. Glaser (SBN 55668)
10250 Constellation Boulevard, 19th Floor
Los Angeles, California 90067
Telephone: (310) 553-3000
Facsimile: (310) 556-2920

Attorneys for Respondent
RONALD W. BURKLE

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INTRODUCTION

Eight years ago, appellant Janet Burkle ("Jan") and her husband Ronald Burkle ("Ron")—a wealthy and successful couple—decided to give their broken marriage another try. In aid of their reconciliation attempt, they decided to enter into a postmarital agreement designed to iron out sources of marital friction relating to their differing financial objectives.

Jan wanted the financial status quo. She wanted to preserve the extremely affluent lifestyle that Ron's previously successful, but risky, investments had produced. She did not want future investments to jeopardize the wealth already accumulated. Ron, on the other hand, wanted to continue investing aggressively in high-risk ventures. The agreement, negotiated over a period of months, harmonized Jan's and Ron's respective objectives to the then-satisfaction of each.

At all times, Jan was advised by her chosen team of top-notch attorneys (family law experts), accountants, investigators, and other advisors. When Jan signed the agreement, it gave her exactly what she wanted: financial stability, with minimal risk, at a level of affluence unattainable by most. Among other things, the agreement entitled Jan to the following: The right to receive, upon her request or upon later divorce, more than $30 million tax free, with interest at 5% annually until paid; *plus* payments of $1 million per year, which became her separate property on receipt, to be spent as Jan wished, so long as the couple remained together; *plus* payment of all her living expenses; *plus* a home of her choosing, to be purchased for her by Ron, if the couple later separated.

In return, Ron was entitled to freely invest the assets, it being agreed that he would personally keep any gains and suffer any losses. Jan expressly acknowledged that the assets allocated to Ron "may and probably will increase dramatically in value in the future . . . ."

After the agreement was executed, Ron fully performed for more than four years, without a word of objection from Jan, and Jan got exactly what she bargained for. The parties remained married, and Jan received from Ron millions of dollars in payments under the agreement, without strings, to spend exactly as she wished. However, exactly as Jan expected might happen, Ron's investments were spectacularly successful. He took significant risks and dramatically enhanced his wealth.

Three years ago, Jan decided the marriage was not fulfilling her expectations and she left Ron. About a year later, she decided she wanted a share of Ron's increased wealth. She wanted the full benefit of the risks taken by Ron even though she entered the agreement because she wanted to avoid those very risks. In short, Jan wanted it all—she wanted the lifetime security the agreement gave her plus the gains she relinquished in order to obtain such security.

But the agreement precluded Jan from having it all. How to get around the agreement she freely and knowingly entered? The answer: Seek to rescind the agreement and concoct a tale. Despite her legal team's extensive pre-agreement investigation into Ron's financial affairs, despite comprehensive financial disclosures made by Ron before the agreement, despite her own intimate knowledge of Ron's investments and business activities, and despite the widespread publicity that surrounded them, Jan

claimed she was entitled to rescission because she was ignorant of Ron's finances and was unduly influenced when she entered the agreement.

But Jan's effort to overturn the agreement didn't work, for a simple reason: She didn't prove her case; her story wasn't credible. The trial judge (Hon. Stephen Lachs) didn't buy her story. After listening to ten days of evidence, Judge Lachs issued a 17-page statement of decision rejecting each of Jan's assertions. He determined: (1) the agreement was valid and enforceable—that Jan had entered the agreement freely, with full knowledge of the pertinent facts, with full appreciation of what she was receiving and relinquishing, and without undue influence; and (2) Jan was precluded from seeking rescission by the dispositive affirmative defenses of ratification, estoppel and laches because, knowing the pertinent facts, she willingly accepted from Ron, over a four-year period of time, millions of dollars in contract benefits, plus a new home, without ever voicing a word of complaint.

Amazingly, despite a 33,049-word opening brief, Jan neither mentions nor challenges any of the trial court's findings. Nor does she acknowledge or come to grips with the overwhelming evidence that supports them. Indeed, Jan doesn't even confront the fact that her proof on the issue of lack of knowledge was itself legally insufficient to support a finding in her favor.

Rather than confronting these realities, Jan dodges them. She recites only the limited evidence that was favorable to her—the very evidence that Judge Lachs rejected as being incredible—hoping that this Court will second-guess Judge Lachs' findings. But, of course, Jan cannot

retry her case on appeal. Rather, Judge Lachs' unchallenged findings are binding on appeal. They conclusively establish not just that the agreement is valid and enforceable, but also that Jan was precluded from seeking rescission.

Marital agreements, like the one reached here, are supported by strong public policy considerations because they facilitate marital harmony, help in effectuating reconciliation of troubled marriages, and reduce the likelihood of litigation. Courts should strive to uphold such agreements especially where, as here, they are supported by unchallenged findings that the parties entered the agreement with full knowledge of the facts, with full appreciation of the agreement's tradeoffs, with full representation by talented legal teams, and without undue influence.

Avoiding what matters—the terms of the agreement, the findings rejecting the credibility of Jan's testimony, the evidence that supports such findings, and her own failure of proof—Jan dwells on irrelevant considerations. She repeatedly complains that Ron did better than she did after the agreement was reached. But Jan obtained exactly what she bargained to receive: security, wealth and risk avoidance; and Ron gained what Jan, at the time she signed the agreement, acknowledged he might achieve: a "probability" that his assets would dramatically increase in value. It is elementary, of course, that the validity of an agreement is measured at the time it is reached; it cannot be invalidated because one party later does better than the other.

The order upholding the agreement's validity and enforceability and determining that Jan was legally precluded from seeking rescission based

on the dispositive defenses of ratification, estoppel and laches is supported by unchallenged findings, by substantial evidence, by the law and by strong public policy. It should be affirmed summarily.

STATEMENT OF THE CASE

After hearing ten days of evidence, the trial court determined that the postmarital agreement ("Agreement") between Jan and Ron Burkle is valid and enforceable, holding as follows:

- Jan "signed the Agreement freely and voluntarily, and free from any emotional influence that interfered with an exercise of her own free will." (Exh. A:775 [¶ 6(a)].)[1]
- Jan was fully informed regarding her and Ron's assets. (Exh. A:780-781, 783 [¶¶ 32, 46-47].)
- Ron "did not conceal assets or significant financial information from" Jan. (Exh. A:775 [¶ 6(b)].)
- The Agreement was "fair and equitable" when made. (Exh. A:787 [¶ 60].)
- Jan's acceptance of benefits under the Agreement for over four years, while knowing the pertinent facts and not voicing any complaint, precluded her from rescinding the Agreement by reason of her ratification, estoppel and laches. (Exh. A:783-784, 787 [¶¶ 48, 59].)

Under the most elementary of appellate principles, we recite the evidence in the light most favorable to the trial court's decision and findings. (See discussion in § II.A, below.)

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[1] Exhibit A is the trial court's Statement of Decision attached to the end of this brief. The exhibit is copied from Volume IV of the Appellant's Appendix and refer to it by its Bates-stamped page numbers, so that "Exh. A:775 [¶ 6(a)]" refers to paragraph 6(a) of Bates-stamped page 775 of Exhibit A.

A. The Agreement And Its Prelude.

1. Jan and Ron attempt to rebuild their broken marriage.

Jan and Ron had been living separately for a number of years, he in Beverly Hills, she with their children in Claremont. (3/24 RT 66:8-70:14, 133:1-13; AA V:798 [¶ B].)[2]

In June 1997, Jan filed a dissolution petition. (AA I:1.) This acted as a catharsis for the couple. Thereafter, relations warmed as Jan and Ron discussed what had gone wrong with their marriage and how they could try to fix it. (3/24 RT 81:11-84:10; 6/17 RT 177:5-179:8.) They decided to attempt reconciliation and the dissolution proceeding was never prosecuted and was eventually dismissed.[3]

Ron had been extremely successful in high-risk investments in various supermarket chains—including Food4Less—and had built up substantial assets.[4] (3/24 RT 61:3-62:5, 135:6-13; 6/29 RT 54:16-55:14,

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[2] Citations to the Appellant's Appendix are in the format "AA Volume:page." The Reporter's Transcript ("RT") is referred to by the date of the transcript, then page number:line number, e.g., 6/18 RT 181:15-182:9.

[3] Jan did not pursue previously initiated discovery or restraining orders; the dissolution proceeding was held in abeyance while the parties worked at restoring the marriage; and it was eventually dismissed in June 2003. (6/29 RT 85:20-86:24; 6/30 RT 39:7-11; AA I:4; AA V:969, 972 [Ron's lawyer writes Jan's lawyer that "things are assuming a 'stand-down' posture" while Ron and Jan attempt to restore the marriage], 980 [Ron's lawyer requests confirmation of "open extension" to file a response to dissolution petition], 982 [Jan's lawyer: "All requests for restraining orders are currently on hold, and will remain so as long as the parties are working at restoring the marriage"].)

[4] Food4Less was Ralphs's parent company, and the parties used Ralphs and Food4Less interchangeably. (E.g., 3/24 RT 61:9-62:5, 128:22-

(continued...)

63:21-65:9.) Ron and Jan, however, had differing views as to risk and risk tolerance; they had different visions of their financial futures; they had different ideas about financial matters—causing anxiety and bad feelings in the marriage. (E.g., 3/28 RT 151:12-152:10; 6/16 RT 180:25-181:20; 6/17 RT 28:23-29:8; 6/18 RT 189:19-190:5; 6/29 RT 71:20-72:15, 119:7-120:24.)

As part of the reconciliation process, Ron suggested an agreement to harmonize the couple's economic goals and stabilize their relationship. (3/24 RT 111:8-23.) Ron's suggestion became the basis for months of negotiations that ultimately led to the Agreement.

The central theme of the Agreement was to continue (not end) the marriage, while allowing both Jan and Ron to achieve their differing economic goals. The Agreement recited its purposes as follows:

- To "promote increased understanding, harmony and trust by effectively and finally resolving all financial issues, disputes and conflicts they might have now and in the future." (AA V:798.)
- To "increase the probability that [Jan and Ron would] remain married to each other and [to] remove [that] substantial impediment to their marriage . . . one which ha[d] already brought them close to the point of dissolving the marriage." (AA V:806 [¶ 2.14].)[5]

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[4] (...continued)
25, 183:2-5; 7/2 RT 60:13-15, 64:14-19.)

[5] While the Agreement was in furtherance of reconciliation, the Agreement recited it "fully and fairly satisf[ied] [Ron's and Jan's] property and financial rights and expectations" regardless whether their

(continued...)

Although she equivocated at trial, Jan ultimately testified that the first provision accurately recited her intent in 1997 (6/18 RT 170:19-172:4); she never expressed any contemporaneous disagreement with the second statement (7/6 RT 21:2-19).

2. Prior to entering the Agreement, Jan obtains independent advice from a team of experts she handpicked and then engages in prolonged negotiations.

Before the Agreement was entered, there were months of negotiations conducted between Jan's and Ron's separate counsel. (AA V:969 [inter-counsel July 2 letter noting couple's attempt to reconcile], 973-983, 990-1040; AA VI:1041-1135 [counsels' negotiation correspondence]; 6/30 RT 42:8-46:18.) Ron and Jan did not negotiate the terms between themselves; rather, Ron honored Jan's request that the matter be handled through their respective attorneys. (3/24 RT 138:4-22, 153:8-154:1; 7/2 RT 74:7-77:17, 168:19-170:7; AA V:989-1040; AA VI:1041-1135.)

Assisted by her personal lawyer, Franklin Pelletier, Jan interviewed numerous family-law attorneys before selecting Barry Harlan, who, with Pelletier, put together a team of highly qualified lawyers, including two additional certified family-law specialists, plus experts in tax, corporate, securities, and real estate law. (6/17 RT 169:3-8; 6/29 RT 24:10-29:9, 79:8-

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[5] (...continued)
reconciliation efforts succeeded; reconciliation was not a condition of the Agreement. (AA V:798, 799 [¶ D].)

80:21, 178:19-184:4; 6/30 RT 19:11-26:5, 38:1-21, 47:1-20; AA V:840-851, 922-924.) Jan also had the services of a preeminent forensic accounting firm (3/23 RT 74:15-77:7; 6/29 RT 84:16-25) and a private investigator (6/29 RT 19:9-13).[6]

This team had over six months to investigate Ron's assets and advise Jan before the Agreement was signed. (AA V:800 [¶ 2], 839-852, 920-928, 984-986 [attorney billing records and privilege logs].) The team billed at least $166,000 in legal and expert consultant fees for its work. (AA V:853-854, 859; AA VI:1134 [¶¶ 2, 4], 1136; see also AA V:839-852 [Harlan's billing records], 920-928 [billing records for Jan's personal lawyer, Pelletier], 976, 983; 6/29 RT 193:4-194:1.)

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[6] Jan secretly gathered her legal team over a two-month period before filing her dissolution petition in June 1997. (3/24 RT 148:10-14; 6/29 RT 14:8-21, 26:15-29:9, 147:21-148:3; AA V:840–841 [April-June 1997 attorney billing records], 920-924 [same].) Yet she continued to interview leading family-law lawyers in order to conflict them out of representing Ron. (Compare AA V:840, 960 [Harlan bills nearly 21 hours before 5/22 retainer letter confirming Jan's request for his representation] *with* AA V:922-924 [Pelletier entries noting visits after 5/22 to preeminent family-law attorneys]; 6/29 RT 26:12-27:25 [same].) "The reasonable inferences here" are that Jan "contacted" all the high-powered family lawyers in L.A. "to disqualify [Ron] from representation." (Respondent's Appendix ("RA") 49 [Judge Paul, denying Jan's motion to disqualify Ron's present trial counsel]; see also 3/24 RT 80:1-12.)

3. With the advice of her legal team, Jan enters the Agreement knowingly and willingly, fully understanding and appreciating the Agreement's terms and its tradeoffs.

Jan personally reviewed both the original and the final drafts of the Agreement. (6/18 RT 71:18-72:4, 166:24-167:25, 169:13-17, 170:8-18, 180:4-14.) As a licensed real estate agent, Jan was experienced with contracts. (6/17 RT 156:15-157:10; 6/18 RT 170:8-18, 180:4-14.)

Prior to Jan's executing the Agreement, Jan's principal lawyer, Barry Harlan, a certified family-law specialist and name partner in his firm (6/29 RT 179:3-180:10), certified in a writing attached to the Agreement that he advised and consulted with Jan in connection with her marital rights and obligations; that he fully informed her of the legal effect of the Agreement on her rights; and that Jan acknowledged to him that "she understood the legal effect of the foregoing Agreement." (AA V:824.) In his deposition testimony, read into the record, Harlan stated it was his practice to sign such confirmations only if they were true. (6/29 RT 185:15-19.)

Jan consulted with Mr. Harlan and two other certified family-law specialists retained as consultants before she signed the Agreement; Jan admitted that each advised her of her rights under the Agreement; and that each answered all questions that she had about the Agreement. (AA V:932, 934; 6/18 RT 158:18-159:20; see also 6/18 RT 168:18-169:1, 180:16-181:14; 6/30 RT 20:22-21:6; 7/6 RT 9:8-10:6.)

That Jan knew what she was doing was confirmed by the Agreement itself. In underlined capital letters, Recital F of the Agreement affirmed:

- That Jan had "CAREFULLY READ THE ENTIRE AGREEMENT";
- That the Agreement had "BEEN FULLY EXPLAINED TO [HER] BY [HER] RESPECTIVE COUNSEL";
- That Jan understood "THE CONTENTS AND LEGAL EFFECT OF [THE] AGREEMENT"; and
- That Jan had "DISCUSSED WITH [HER] RESPECTIVE COUNSEL, AT LENGTH, NUMEROUS ALTERNATIVES AVAILABLE WITH RESPECT TO THE FORM AND SUBSTANCE OF A POSTMARITAL AGREEMENT AND THAT THEY . . . ADOPTED THE PROVISION OF [THE] AGREEMENT AFTER CAREFUL CONSIDERATION OF SUCH AVAILABLE ALTERNATIVES." (AA V:799 [¶ F].)[7]

Recital F further affirmed—again, in underlined capital letters—that Jan was aware that:

". . . THE ASSETS [ASSIGNED TO RON] MAY AND PROBABLY WILL INCREASE DRAMATICALLY IN VALUE IN THE FUTURE AND THAT JAN'S INTEREST THEREIN IS BEING FIXED AT THIS TIME,

[7] Under Evidence Code section 622, recitals (except as to consideration) appearing in a written agreement are conclusively deemed to be true, as the Agreement in the instant case expressly confirmed. (AA V:799-800 [¶ G.1].)

NOTWITHSTANDING THE POSSIBILITY OF FUTURE INCREASES." (AA V:799 [¶ F].)

Jan testified that she read this recital; that it was true; and that she was satisfied with the recital at the time she executed the Agreement. (6/18 RT 180:12-185:10.) She admitted, based on her experience as a licensed real estate agent, that she knew that such a capitalized and underlined provision has special significance. (6/18 RT 179:25-180:14.)

In a separate recital, Jan acknowledged that she had "relied solely on her[] personal judgment" and not "on any statement, warranty or representation of the other party [i.e., Ron], or any representative of the other Party" and that she had entered the Agreement "freely, willingly, and voluntarily." (AA V:800-801 [¶¶ G.8, G.10].)

The trial court found that the Agreement's recitals accurately reflected Jan's and her attorneys' states of mind at the time the Agreement was executed. (AA IV:783 [¶ 44].)

4. Jan's and Ron's differing economic goals: Jan wanted financial stability and liquidity; Ron wanted to continue with high-risk, potentially high-return investments.

Ron and Jan intended the Agreement's "financial provisions . . . [to] fully and fairly satisfy their property and financial rights and expectations" and to resolve fully all possible financial issues between them. (AA V:798.) They understood and appreciated that each had differing

financial goals and risk tolerances. (E.g., 3/28 RT 205:1-206:10; 6/16 RT 180:25-181:20; 6/17 RT 185:5-21; 6/29 RT 41:3-24; see also § A.1, above.) The Agreement sought to reconcile the couple's differing financial objectives as part of their reconciliation effort.

Jan wanted to preserve the financial success the couple had already attained. She favored financial stability, and she desired her own financial independence. (3/23 RT 112:3-17; 3/24 RT 19:5-12; 3/28 RT 159:4-14, 205:1-206:10; 6/18 RT 109:2-14, 175:1-23, 189:1-14; 6/29 RT 35:10-36:17, 71:20-72:15.) She was risk averse. (3/28 RT 151:12-152:10; 6/18 RT 189:19-190:5; 6/29 RT 119:7-120:24.) She acknowledged she married Ron for "security" and "knew he would always be a good provider and (she) would never have to do without." (AA V:1196.) As the Agreement stated, Jan "desire[d] financial security and assurance that she [would] be able to enjoy her present lifestyle without hindrance or risk of loss." (AA V:798.)

At trial, Jan tried to back away from this language in the Agreement. She repeatedly tried to deny at trial that financial security and risk aversion had been among her goals. (6/18 RT 173:16-174:14, 189:15-18; 6/29 RT 34:19-35:11, 36:18-37:2.) Ultimately, however, Jan admitted, both at trial and in her impeaching deposition testimony, that these were her goals, that she disliked risk, and that she had been concerned about Ron making risky investments. (6/18 RT 174:20-176:20, 189:1-190:5; 6/29 RT 35:12-36:17, 119:7-120:4.) Jan also desired to have her own money to spend as she wished, without having to obtain Ron's approval. (6/16 RT 180:25-181:20; 6/17 RT 28:23-29:8; 6/29 RT 71:17-72:15.)

For his part, Ron desired the "financial freedom to make investments which could yield high returns but which carry the risk of significant loss." (AA V:798.) He wanted to continue to pursue his high-risk (and potentially high-return) investment strategy, without being subject to Jan's or her lawyers' concerns or interference ever again.[8] (3/24 RT 91:16-93:6, 107:22-111:23; 3/28 RT 141:21-142:4; AA V:798; AA VI:1044-1045 [¶ 2.6].)

Jan admitted she understood that the Agreement was fixing her wealth, while giving Ron financial freedom. (6/18 RT 179:11-24, 181:24-182:9; 6/29 RT 40:3-41:24.) She had seen how Ron had almost lost everything in the aftermath of the Los Angeles riots and a prior merger. (3/28 RT 151:22-25.)

5. The Agreement achieves an economic tradeoff that each party desired: Jan bargains for and receives financial predictability and liquidity, limiting her risk, while Ron bargains for and receives potential for high growth albeit with correlative risk.

The Agreement afforded Jan the economic security and limited risk she desired and afforded Ron the upside economic potential he desired. It

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[8] For example, when the merger involving Food4Less (see § C.2, below), was first announced in November 1997, it was a risky proposition. (7/2 RT 175:11-176:7; see also 3/28 RT 248:14-21; 7/2 RT 62:2-63:6 [describing how the deal had fallen apart and only come back together in late October], 64:14-65:5 [deal presented serious FTC complications], 69:1-2 [same].) Although the merger ultimately closed, had it fallen apart, the financial consequences could have been disastrous—as Jan well knew. (3/28 RT 151:22-25; 7/2 RT 175:11-176:7.) The Agreement was designed to insulate Jan from precisely that kind of risk. (7/2 RT 175:11-176:7.)

did so by effectively assigning the couple's assets (and the risks associated with its fluctuations) to Ron and providing Jan with set substantial amounts then and in the future. (AA V:802-804, 806, 826-838 [¶¶ 2.1, 2.2.2, 2.4, 2.5, 3.1, asset schedules].)

Jan confirmed that "the most significant factors and critical elements for Jan in entering into [the] Agreement [were] that it provide[d] her with liquidity and predictability and reduce[d] her risk of potential loss." (AA V:799 [¶ E]; 6/18 RT 189:1-14.) That's exactly what Jan received under the Agreement.

a. The Agreement gives Jan economic security and liquidity, with minimal risk.

Consistent with Jan's goals, the Agreement afforded her the following:

- An entitlement to receive tax-free, lump-sum payments totaling $30,014,134, the amount representing one-half the tax-effected value of the assets acknowledged by the Agreement to be community property.[9] (AA V:803 [¶2.2.2].) These payments were due

[9] Jan's lawyer acknowledged that it was appropriate for Ron to seek to discount the assets to after-tax value, as Ron would incur capital gain tax when he liquidated the assets to make Jan's tax-free payments. (6/30 RT 44:15-46:8.) The trial court, an experienced former superior court family law judge, found "that parties frequently consider the tax-effected values of assets in negotiating a division of their assets by agreement, and that such approach was not unfair or extraordinary here." (Exh. A:788 [¶ 60].)

whenever Jan wanted to receive them or, absent such a request, if either party filed for divorce.[10] (*Ibid.*)

- An entitlement to receive annual 5% interest on the $30 million sum, with such interest accruing every year after 1997. (AA V:803 [¶ 2.2.2].) At the present time, Jan's entitlement, including accrued interest, is in excess of $40 million.
- An entitlement to receive $1 million a year plus having Ron pay all her living and other family expenses, for as long as the couple lived together. (AA V:804, 811 [¶¶ 2.4, 8.4].)
- An entitlement to receive a house of Jan's choice (for up to $3 million, in 1997 value) to be purchased by Ron as her separate property, in the event she might later separate from Ron. (AA V:805 [¶ 2.12].)

Jan knew her rights were being fixed by the Agreement and she was satisfied with and accepted the arrangement. (6/18 RT 181:15-182:9.)[11]

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[10] The Agreement provided that if either Jan or Ron died while the marriage was intact, the Agreement would be "of no force or effect" and the assets would be divided pursuant to California law. (AA V:809 [¶ 5.2]; 3/23 RT 124:24-126:9; 3/24 RT 15:2-16:2.)

[11] During trial and on appeal, Jan's lawyers tried to make much of Ron's unwillingness to collateralize the $30+ million obligation with particular assets (e.g., 3/24 RT 44:24-46:5; see also Appellant's Opening Brief ["AOB"] 41-42), but Jan believed Ron would honor his promise and, in any event, she had the right to receive her $30+ million at any time. (6/29 RT 150:14-21; AA V:803 [¶ 2.2.2]; AA VI:1041.)

b. The Agreement gives Ron the right to control the couple's property with freedom to invest as he wished, with him keeping all gains and suffering all losses.

In exchange for Jan's receiving $1 million a year, plus her right to one-half of the tax-effected value of the community assets ($30+ million) in the event either requested a property division, plus her right to a home, Ron received the right to sole management and control of all their assets. (AA V:803, 804 [¶¶ 2.2.2, 2.5], 806 [3.1].) Ron was to bear the risks of any future losses regarding such assets, but he would reap the rewards of any profits. (AA V:799, 804 [¶¶ F, 2.3]; see also 3/28 RT 132:10-134:15, 142:12-143:1; 7/2 RT 175:11-176:7; see AA V:990 [Jan's lawyer unsuccessfully proposes that Jan share in any "great increase" in community property assets]; AA VI:1041 [proposal rejected by Ron].)

Jan fully understood that she was relinquishing her interest in the couple's assets in exchange for $30+ million tax free, whether or not Ron's net worth declined and whenever she demanded it. (6/18 RT 179:11-185:10, 190:1-5.) As the Agreement recited, Ron desired financial freedom to make investments "*which could yield high returns but which carry the risk of significant loss*," and Jan understood—as Recital F reflects—that the upside, which could be significant, would belong to Ron. (AA V:798, emphasis added, 799 [¶ F].)

The Agreement confirmed as Ron's separate property ownership in entities holding interests in two supermarket chains, Smith's and Dominick's. (AA V:806 [¶ 3.1.1], 836-838.) Ron had claimed that these

and other assets were his separate property, accruing to him after his 1991 separation from Jan. (3/24 RT 127:21-129:9, 134:18-136:13; 6/16 RT 90:17-24, 125:5-19.) Jan had disagreed, claiming the couple did not separate until June 10, 1997 (the date she filed her petition for dissolution). (AA V:799 [¶ E].) The Agreement compromised these opposing claims, with Jan agreeing "not [to] count[] Smith and Dominick assets as community property" (AA V:990 [¶ 3]; see also 6/30 RT 46:9-18; AA V:806 [¶ 3.1.4: determination of these assets as Ron's separate property "is a material term of this Agreement" which Jan "knowingly and voluntarily consents to"]), and with Ron agreeing to relinquish his separate property claims to his Beverly Hills home ("Green Acres"), art work, and portions of his Food4Less stock (AA V:828-829; 3/24 RT 127:21-129:13; 3/28 RT 129:13-22).[12]

The trial court found that the parties' respective positions regarding the date of separation and the actual values of the marital assets were asserted in good faith and that the Agreement represented a reasonable compromise of those positions. (Exh. A:788 [¶ 63].)[13]

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[12] At the time Jan entered the Agreement, she understood that the Smith's and Dominick's interests were valued at $87 million after tax (i.e., $27 million more than the tax-effected $60 million value assigned to the community property assets). (AA V:893, 897 [disclosures in original draft agreement]; see also AA V:806 [¶ 3.1.4 [acknowledging Smith's and Dominick's as having "great value"].) Jan knew her counsel had advocated to Ron's counsel that Jan would prevail at trial if the date-of-separation issue were tried. (AA V:973-975, 977 [letter "cc'd" to Jan], 982-983.) She knew that prevailing on that issue would make "a substantial and material difference in the value of the community estate." (AA V:798-799 [¶ B]; 6/30 RT 43:9-16.)

[13] The Agreement also resolved a dispute over whether Jan had authorized Ron to sign certain documents for her. (AA V:805 [¶ 2.8]; see (continued...)

B. Jan's Contemporaneous Assessment Of The Agreement: While Not Effectuating An Equal Split, It Was Fair And Met All Of Jan's Needs In The Manner She Desired.

In a handwritten statement that Jan personally prepared and read at a meeting attended by the parties and their counsel in early September 1997, Jan stated that while the "[A]greement . . . given its value or 'bottom line' when compared to [her and Ron's] net worth as a couple, is certainly not equal," her part of the deal was "more than enough for a person to live comfortably on for many years . . ." and she had "no wish to continue [her] marriage based on monetary gain . . . ." (AA VI:1203; see also 6/18 RT 74:18-76:1; 6/29 RT 121:5-8, 125:3-15; AA V:992 [¶¶ 4, 3.14: Jan's attorney viewed Smith's and Dominick's as community property, to be ceded to Ron "as part of a negotiated settlement"].)

At trial, Jan claimed she did "not recall" whether she thought the Agreement was fair. (6/18 RT 185:14-19.) However, her recollection was "refreshed" by her deposition testimony that she believed the Agreement was fair in 1997. (6/18 RT 185:20-186:20.) Thereafter, she admitted that, in 1997, she believed the Agreement was fair. (6/18 RT 186:4-8.)

The trial court found that Jan had obtained what she bargained for—financial security. (Exh. A:782 [¶ 40].) It found that, in light of Jan's goals and desires, the Agreement was "fair and equitable." (Exh. A:787

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[13] (...continued)
3/24 RT 7:25-8:10, 162:5-166:22, 168:11-172:12; 6/29 RT 42:5-46:25.) Although Jan claims Ron forged her signature on those documents (AOB 3-4), the facts are that she had no problem with Ron's signing for her and that the asserted dispute was instigated by her lawyers. (3/24 RT 162:5-166:22, 169:24-170:9.)

[¶ 60].) The court further concluded that Jan received protection from declining asset values and that "the amount [Jan] would receive under the Agreement is so large in absolute terms that it is not unlikely that a rational person could comfortably reach this conclusion." (Exh. A:787 [¶ 56].)

C. Jan Extensively Investigated And Knew The Pertinent Facts Prior To Entering The Agreement.

Not only did Jan know and understand the terms of the Agreement, as well as its benefits and tradeoffs, she also knew the facts on which it was premised.

1. Jan's extensive investigation and knowledge of the facts.

Jan's legal team actively conducted its own independent investigation of Ron's assets, the adequacy of his disclosures, and his business activities.[14] The investigator produced a three-volume report, one volume of which alone consisted of 300 pages. (AA V:986; see also AA VI:1137.) Jan never shared the results of any of these investigations with Ron. (3/24 RT 110:1-19.)

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[14] E.g., 6/29 RT 19:3-13, 32:22-34:18; 6/30 RT 40:2-19; see generally AA V:840-851, 920-928 (attorney billing records showing investigations, especially: AA V:846 [7/6/97: "Search on Lexis for news stories re Ronald Burkle"], 850 [9/3/97: "analysis of financial information provided" in draft Agreement], 850-851 [9/5/97: "review and analysis of private investigators reports re parties assets: determine accuracy of assets; determine whether all assets have been listed in the Postmarital Agreement; interoffice conference with Barry T. Harlan re assets not listed in Postmarital Agreement"]).

Ron did nothing to impede Jan's team in its investigations. (6/29 RT 91:21-23; 6/30 RT 39:12-17; 7/2 RT 80:1-5.) Moreover, Ron provided Jan with Schedules of the community and separate property assets and his estimates of their values. (AA V:826-835, 837-838.) The trial court found the valuations Ron submitted were made in good faith (Exh. A:780-781 [¶ 32]) and that there was no material change in the value of community assets listed in the Schedules between the June 1997 valuation date agreed to by the parties and the date the Agreement became final on November 22, 1997 (Exh. A:784 [¶ 50]; see 3/23 RT 106:19-107:7, 134:14-135:2; 3/24 RT 146:10-14; 3/28 RT 126:2-127:15); and that there was no material change in the value of the Food4Less stock (Exh. A:784 [¶ 50]; see 3/24 RT 194:19-21, 197:14-20; 7/2 RT 94:10-13). The trial court also found it was reasonable for the parties to have set a fixed valuation date in June 1997. (Exh. A:782-783 [¶ 43].)[15]

When Jan's counsel requested more information and assurances regarding Ron's valuations, Ron responded by providing extensive footnotes explaining the assumptions upon which he reached his valuations. (3/23 RT 105:1-13; AA VI:1042 [¶ 2], 1079-1093.) The footnotes included, for example, detailed explanations of appraisals, valuations, receivables, and bad debts. (AA V:831-835, 838; AA VI:1079-1093.) They informed that certain companies ("Yucaipa Companies"), through

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[15] The parties had agreed to value assets as of June 6, 1997—a date a few days before Jan first filed for dissolution. (3/23 RT 130:6-131:19; 3/24 RT 9:11-11:5.) A fixed valuation date needs to be set in marital estates having major assets because the values inevitably fluctuate, and if they are not pegged to a set date, the parties end up constantly "renegotiating and run the risk of problems all the way through and never get an agreement done." (3/24 RT 9:21-23.)

which Ron managed various interests, had "management contract retainers" and "earn substantial fees in connection with its acquisitions." (AA V:832 [note 14].)

Moreover, Ron offered Jan and her team unobstructed access to any books, records or information they desired "together with personnel to assist [them] in reviewing the documentation." (AA V:859; see also 3/23 RT 100:6-16; 7/2 RT 80:20-82:7, 184:10-24, 186:15-187:1.) These records contained all that Jan or her team could possibly have wanted to know about Ron's finances and business dealings; they included the documentation supporting the Schedules and footnotes Ron had submitted; they included information about ongoing merger efforts; and they supplied verification as to the accuracy of the Schedules. (6/16 RT 47:8-17; 7/2 RT 80:16-82:7, 95:6-13, 183:13-184:9, 187:17-191:6.) Although Ron's offer to provide such access remained open the whole time of the negotiations, Jan's team never chose to look at these records. (3/28 RT 108:6-14; 6/30 RT 39:18-40:1; 7/2 RT 81:1-82:7.)

Jan claims that Ron's disclosures contained several omissions or discrepancies. (AOB 8-9, 21, 60-61.) But all were either explained to the trial court's satisfaction or were immaterial. (See Exh. A:780-781, 782, 784 [¶¶ 32, 42, 49]; see also § II.D.2, below.)

2. Jan knew about the mergers at the time they occurred.

One of Jan's central claims was (and continues to be) that she was kept in the dark about two events not mentioned on Ron's Schedules—the

merger of Smith's (which she agreed was Ron's separate property) into another publicly traded grocery-store chain, Fred Meyer, and the subsequent merger of Fred Meyer with Food4Less (agreed to be community property). (7/2 RT 64:8-69:2.)[16]

At trial, Jan testified that she "didn't recall" Ron ever telling her about the mergers and that she didn't otherwise know about them. (6/18 RT 96:10-97:10; 6/29 RT 52:24-58:14, 153:2-11, 163:1-20.) The evidence was otherwise, overwhelmingly so. That Jan knew about both mergers is established again and again by the evidence, including the following:

- Ron told Jan about the mergers. (3/24 RT 176:2-15, 198:18-199:5; 3/28 RT 230:18-231:8; 7/2 RT 56:21-64:2, 70:10-71:7.)
- The mergers were important events involving many of Jan's and Ron's mutual friends. (3/24 RT 138:23-139:16, 198:18-199:5; 3/28 RT 219:7-16, 237:14-238:3; 7/2 RT 61:16-64:2.) Ron and Jan talked about the mergers and about the people involved all the time. (*Ibid.*) Even according to Jan, Ron would tell her about his acquisitions. (6/29 RT 55:7-10.) And she learned even more when people around her commented about seeing Ron's name in the paper in the fall of 1997 regarding Ralphs. (6/29 RT 64:23-65:9.)
- The Smith's-Fred Meyer merger was publicly announced in May 1997, before Jan filed her first dissolution petition, and it closed in early September, two months before Jan signed the

[16] The Food4Less merger involved a third supermarket chain as well: QFC, known as Hughes in Southern California. (7/2 RT 64:3-65:5, 68:3-5.)

Agreement.[17] (3/24 RT 139:17-140:14; 7/2 RT 56:6-20.) Ron told everyone at a September 6 meeting, with both Jan and her counsel present, that he was flying to the closing of the Smith's-Fred Meyer merger the next day. (7/2 RT 56:2-57:5.)

- When Ron returned from the Smith's-Fred Meyer closing, he and Jan watched a videotape of the closing. (7/2 RT 57:18-59:25.)
- After the Smith's merger, Ron became the Chairman of the Board of the merged entity, Fred Meyer. (3/24 RT 140:20-24; 7/2 RT 158:23-159:5.) Given his controlling interest in Food4Less, there was a general expectation that Fred Meyer and Food4Less would merge. (3/24 RT 194:22-195:4; 7/2 RT 155:17-156:4.) And, as expected, that merger was publicly announced November 6—the day after Jan signed the Agreement, but two weeks before the Agreement became binding with Ron's signature. (AA V:798, 821; 7/2 RT 84:11-85:23.)
- Jan was present at the September 6 negotiating meeting, when her counsel floated the idea of Jan obtaining "upside" in a Food4Less merger, but Ron declined because Jan was unwilling to take the downside. (3/28 RT 132:4-134:15, 142:18-143:1; 7/2 RT 54:24-56:1, 171:22-176:7.)
- Jan's lawyer floated the merger "upside" idea once again, this time in writing in late September; he was again rebuffed.

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[17] The valuation of Smith's (and later Fred Meyer) was public knowledge as those stocks were publicly traded, with any fluctuations in their stock price readily available. (3/24 RT 172:16-173:9.)

(AA V:990-991; AA VI 1041.) Counsel's letter specifically inquired about a Ralphs/Hughes merger. (AA V:990.) Hughes was part of the eventual three-way merger with Ralphs and Fred Meyer. (See note 16, above.)[18]

- Ron was constantly flying around the country to handle merger negotiations. When Jan packed Ron's bags for him, Ron and Jan discussed the merger meetings Ron was about to attend.[19] (3/28 RT 230:18-231:8; 7/2 RT 61:6-10, 70:18-71:7.)
- Ron took Jan on at least two of these trips where he met with different groups to discuss the mergers. (7/2 RT 69:20-23, 70:13-17.)
- At a party the couple threw in late October, Ron and many of the couple's friends, who were also involved in the Food4Less/Fred Meyer merger, spent the day in the corner—to the irritation of their spouses—discussing the merger, which was then threatening to unravel. (7/2 RT 62:12-64:2.) Ron apologized to Jan and explained the reason he was huddled up with the others. (7/2 RT 63:19-64:2.)
- News of the Food4Less merger made local and national headlines on November 6, the day after Jan signed the Agreement

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[18] The trial court declined Jan's invitation to consider her counsel's inquiries about the mergers to be merely a lucky guess. (7/6 RT 190:4-192:3.)

[19] Jan's testimony that she had no idea where Ron, with whom she was newly reconciling, was going on his many trips and that he "[c]ould have been in Russia" for all she knew (6/29 RT 53:14-18) was inherently incredible.

(AA V:821), but still two weeks before Ron signed (AA V:798, 821; 7/2 RT 85:1-23). Jan read the L.A. Times article about the merger to Ron over the phone. (7/2 RT 86:1-87:25.)

- A few days after the Food4Less merger announcement, Jan and Ron flew to New York for congratulatory events and, on return, discussed the merger with Ron's family at dinner. (7/2 RT 90:10-93:5.)
- During the two weeks following the announcement of the Food4Less merger, Ron and Jan talked about the effect of the merger on Ralphs' management team, which included a friend of theirs. (7/2 RT 88:1-11.)
- All information about the mergers was publicly disclosed and available to Jan and her consultants in SEC documents filed in conjunction with the announcements and closings of the mergers. (3/24 RT 62:24-63:10, 140:6-14; 3/28 RT 248:14-249:7; 7/2 RT 67:4-9, 157:21-158:4.)
- Although people around Jan often commented to her that they had read about Ron in the paper (6/29 RT 55:7-23, 64:23-65:9), Jan claimed, at trial, that she didn't hear about the Food4Less merger as she "didn't take the paper." (6/29 RT 49:9-10.) But, Jan was impeached. The evidence showed that she regularly read the newspapers and had learned about some of Ron's other investments that way. (3/24 RT 173:8-9; 6/29 RT 119:1-120:4 [Jan admits to learning about Ron's Playa Vista investment from reading the L.A. Times]; 7/2 RT 87:8-10; see also AA V:855

[Jan's counsel writes Ron's counsel (cc'ing Jan) that "In reading the Los Angeles Times this morning," he learned of Ron's intention to invest in the Playa Vista project"], 925 [attorney bill: "review LA Times article re Dreamworks" (i.e., Playa Vista)].)

- During the two-week interval between when Jan signed and when Ron signed, the announced Food4Less merger was widely known. (7/2 RT 84:11-85:8 [merger prominently, publicly announced November 6 and 7].) Although the lawyers were tinkering with the Agreement in this two-week period, neither Jan nor her lawyers ever informed Ron or his lawyers that they had any doubts or concerns about the Agreement's terms, the mergers, or Ron's disclosures. (AA VI:1115-1133.)

The bottom line is that Jan and her legal team contemporaneously knew about the mergers. The record overwhelmingly supports the trial court's rejection of Jan's claims of ignorance.

D. Jan Was Not Unduly Influenced To Enter The Agreement.

The trial court determined that Jan was not unduly influenced to enter the Agreement. It found that "overwhelming[]" "credible evidence at trial" "fully and completely rebutted" any undue influence presumption, even had there been one. (Exh. A:782 [¶ 41].) It further found that Ron did not coerce, pressure or threaten Jan in any way—not physically, not emotionally, not economically—to get her to sign the Agreement (Exh. A:778-779 [¶¶ 26-27]); that Ron genuinely wanted to reconcile (Exh. A:777 [¶ 17]); that Ron never told Jan to fire her attorneys and never

threatened to cut Jan off financially (Exh. A:779 [¶ 26]); that Jan possessed the requisite mental capacity to enter into the Agreement at the time she signed it (Exh. A:779 [¶ 27]); and that there was no persuasive evidence to support a conclusion that Jan entered into the Agreement as a result of a depressed mental condition or for any other undue reason (Exh. A:778-779 [¶¶ 26-27]).

Substantial evidence supports these findings, including for example:

- Jan and her counsel acknowledged in the Agreement itself that she was acting freely, based on the advice of her own counsel, without relying on Ron. (AA V:799-800 [¶G].) These acknowledgments are conclusively binding on Jan. (See note 7, above.)
- At all times, Jan was independently represented by counsel of her own choosing, whom Ron played no role in selecting. (6/29 RT 77:25-78:14.)
- Jan acted independently, knowing exactly what she was doing throughout. She gathered her legal team; investigated Ron's finances; and sprang the divorce petition on Ron with great stealth and planning.[20] She then attempted to hamstring certain of Ron's investments that she believed were risky. (3/24 RT

[20] For example, Jan deceived Ron into believing their marriage was improving while her team investigated his finances. (3/24 RT 71:25-72:4; 6/29 RT 14:8-21, 122:7-19; AA VI:1199.) When Ron got wind of Jan's inquiries, Jan falsely denied any knowledge. (3/24 RT 71:19-72:18.) Concerned that Jan thereafter did not return his calls, Ron drove to Jan's Claremont home, but the house was empty—no children, no Jan. (3/24 RT 72:19-73:21.) Jan promised to return with the children, but instead sent a process server while attempting, unsuccessfully, to leave the state with their children. (3/24 RT 73:23-76:14; 6/29 RT 9:8-10:10, 14:8-15:22.)

91:16-93:8; 6/18 RT 189:15-25; 6/29 RT 119:7-120:24; AA V:855-856, 970-971.)

- Ron made sure that Jan felt no financial pressure, transferring $100,000 into her bank account shortly after he was served with the dissolution petition and paying all of Jan's bills submitted to him. (6/17 RT 178:13-18; 6/29 RT 83:21-84:9.) Jan admitted she felt no financial pressure from the time she filed the divorce petition through the time she signed the Agreement. (6/17 RT 178:13-18; 6/29 RT 84:1-9, 90:20-91:2.)
- During the course of their reconciliation, Jan proceeded deliberately and cautiously. When Ron formally proposed a reconciliation in July, Jan declined. (3/24 RT 84:11-15, 89:12-91:12, 106:25-107:13; 6/17 RT 178:19-179:8 [Jan says yes to Ron's first offer to reconcile]; AA V:899-890 [Jan writes Ron that she has reconsidered].) Only eventually did Jan decide that she wanted to reconcile. (3/24 RT 149:3-150:25; 3/28 RT 176:22-177:6; 6/17 RT 183:3-184:14; 6/29 RT 13:9-14.)[21] Jan and the children did not move in with Ron until after she was satisfied with the Agreement's basic terms. (3/24 RT 144:1-146:9; 6/16 RT 182:2-10; 6/18 RT 82:20-83:9.)
- Ron honored Jan's request that all negotiations be through their respective lawyers. (See § A.2, above.) Negotiations of the

[21] Jan suggests that Ron engineered a romantic cruise to sway Jan's feelings. (AOB 50.) In fact, the cruise was a long planned social commitment with friends, a repeat of one that they had taken a year earlier. (6/17 RT 183:3-184:14.)

Agreement's terms spanned more than two months, with various drafts being exchanged. (AA V:989-1040; AA VI:1041-1135.) At any time during this period, Jan could have elected not to proceed.

- Ron repeatedly discouraged Jan from any precipitous action, telling her that she "needed to talk to her attorney" (3/24 RT 144:6-22) and insisted she should not sign the Agreement in his presence, but only at her attorneys' office with their advice (3/28 RT 213:20-214:11; 6/18 RT 94:10-14; 7/2 RT 74:17-77:17).
- Although her legal team handled the details of the negotiations, Jan remained informed as to the issues. Her lawyers' time records revealed that she communicated regularly with them. (6/29 RT 19:3-13, 30:5-6, 32:22-34:18; AA V:840-851, 920-928; see also AA V:977 [lawyer's letter "cc"d to Jan].)
- At a day-long negotiating session, Jan observed negotiations about significant aspects of the Agreement, including collateralizing the $30+ million payment obligation with particular assets, the tax-effect valuation of assets, and "what was community, and what was separate and why." (6/30 RT 42:16-44:13; see also 3/24 RT 141:2-143:1; 6/29 RT 37:3-39:13; AA V:851 [billing record showing 6.5 hour meeting].) During this session, Jan read a handwritten prepared statement and came across as a "very bright and very strong" individual possessing full control of her faculties and emotions. (7/6 RT 19:2-12; see also 3/24 RT 141:13-142:4; AA V:1197-1204.)

- Jan admitted that Ron never told her not to investigate independently. (6/29 RT 91:21-23.) She admitted that Ron never threatened her physically. (6/29 RT 91:3-5.) She did not recall ever telling Ron that she felt he had forced her to sign the Agreement. (6/29 RT 87:19-89:6.)
- At trial, Jan identified only two things as the cause of her claimed "stress and duress" in entering the Agreement, namely, that Ron had made wild accusations about her attorney and that Ron had told her to trust him rather than her attorneys. (6/29 RT 86:25-87:16, 128:17-130:8; see also 6/18 RT 91:20-94:5) Ron denied both claims. He denied ever criticizing Jan's attorneys or interfering with her relations with them. (7/2 RT 77:2-80:12.) He denied threatening her or pressuring her in any manner. (7/2 RT 77:2-80:15.) The trial court believed Ron and disbelieved Jan. (Exh. A:778-779 [¶ 26].)
- The week before Jan signed the Agreement, she spent several hours going over the final copy with her certified family-law specialist lawyers, and she ultimately signed at their office without Ron present. (6/18 RT 95:12-16; 7/2 RT 82:8-24; 7/6 RT 9:8-10:5; AA VI:1094.) Ron was unaware when Jan was signing. (7/2 RT 82:8-83:18.) Ron was in no hurry to sign, waiting another two weeks. (AA V:821 [Ron signs November 21].)
- Jan's attorney certified that he had advised Jan with respect to the Agreement and that Jan had acknowledged she understood her rights. (AA V:824.)

E. Over A Five-Year Period, Jan Accepts Millions Of Dollars In Benefits Under The Agreement, All The While Knowing The Matters She Now Claims Were Concealed And Never Uttering A Single Complaint.

Consistent with the Agreement's underlying purpose, Jan and Ron reconciled in 1997 and lived together as husband and wife until the end of 2001—over four years after the Agreement was executed. (6/18 RT 156:8-157:8.) The court specifically found that Ron's intent to reconcile was genuine. (Exh. A:777 [¶ 17].)

Several months after entering the Agreement, Jan—already knowing about the supposedly undisclosed mergers—felt that Ron had not been sincere about reconciling, that the attempt to reconcile had been a ruse—contrary to the trial court's finding that Ron had been sincere. (6/29 RT 92:22-94:24, 110:3-112:8, 154:24-155:23, 160:5-16.) Jan felt so strongly about this that she returned a ring Ron had given her when they were reconciling. (6/29 RT 97:20-99:8.)

Despite her misgivings, as well as her knowledge about the mergers and the widespread publicity that surrounded them, she remained with Ron, without raising any issues about nondisclosure of assets and without complaining that she felt she had been unduly influenced into signing the Agreement. She continued to accept Ron's $1 million annual property payments, again without a single complaint. (6/18 RT 154:1-155:22; 6/29 RT 100:19-109:18; AA V:901, 904, 914; see also AA V:804 [¶ 2.4].)[22]

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[22] At trial, Jan asserted that Ron never actually fulfilled his obligation to pay $1,000,000 per year. (3/28 RT 81:15-82:23; see AOB 13.)
(continued...)

Also without protest from Jan, Ron paid all family living expenses, as per the Agreement. (6/17 RT 78:1-17, 144:20-150:7; 6/29 RT 65:10-66:6; AA V:811 [¶ 8.4].)

In December 2001, more than four years after the Agreement was executed, Jan decided to separate once again. (6/17 RT 101:19-22; AA V:1171.) At her request, Ron wired $1.4 million, as required by the Agreement, so she could purchase the house she had chosen as her separate property. (6/17 RT 38:15-39:20; AA VI:1172; see AA V:805 [¶ 2.12].) She moved into her new home in April 2002. (6/18 RT 156:15-157:5.) Again, Jan voiced no complaint to Ron.

Jan stayed in touch with her lead attorney, Mr. Harlan, whose office helped arrange for her home purchase. (6/29 RT 80:22-81:7; 7/2 RT 50:8-18.) And, in June 2003, Jan commenced the instant dissolution proceeding. (AA I:5-6.) This was at least five and a half years after she learned of the mergers; five years after she suspected Ron had not been sincere about the reconciliation; one and a half years after Jan decided to separate; and 14 months after she moved into the new house provided for her under the Agreement.

F. The Present Proceeding.

Jan commenced the present dissolution proceeding in June 2003, six years after her initial dissolution proceeding. (AA I:1, 5.) The trial court

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[22] (...continued)
The trial court found otherwise. (Exh. A:784-785 [¶ 51]; see AA V:901, 914; AA VI:1172; AA VII:1209-1349; 6/16 RT 165:24-167:22; 6/29 RT 100:19-109:18.)

granted Ron's motion to enforce the private-judge dispute resolution provision in the Agreement and the parties and their counsel ultimately stipulated that the Hon. Stephen M. Lachs, a retired Superior Court judge "highly experienced in family law matters" (AOB 19), would preside as judge pro tempore. (AA I:221-222, 226-231; AA V:814.) Trial as to whether the Agreement was valid and enforceable was conducted over ten days intermittently spread over a five-month period and included both live and videotaped deposition testimony. (E.g., 3/23 RT 55:23-72:15 [Jan's impeaching videotaped deposition testimony].)

At trial, Jan declined to call Mr. Harlan or any other member of her legal team to testify as to their knowledge of the facts or their advice, although portions of Harlan's deposition testimony were read into the record. (6/29 RT 176:12-194:3; 6/30 RT 18:19-57:8.) Invoking attorney-client and work-product privileges, Jan objected to any questioning with respect to what her team knew, did not know, or advised.[23]

In a 17-page statement of decision, Judge Lachs determined the Agreement was "valid and enforceable." (Exh. A:775 [¶ 7].) He determined that Jan entered the Agreement "freely and voluntarily" in "exercise of her own free will"; that Jan did not rely on any representation by Ron; that Ron "did not conceal assets or significant financial information from" Jan; that "overwhelming" evidence established that Jan was not

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[23] E.g., 6/29 RT 30:12-24 (Ron's counsel blocked from asking about Jan's conversations with investigator), 39:8-20 (Ron's counsel blocked from asking whether Jan ever told her lawyers not to represent or help her); 6/30 RT 5:7-11:21 (Ron's counsel blocked from asking what Jan wrote her lawyers, supposedly on Ron's request); 7/2 RT 51:6-15 (Ron's counsel blocked from asking about Jan's communications with counsel).

subjected to any undue influence; and that Jan's knowing acceptance of the Agreement's benefits over a four-plus year period and her delay in seeking rescission constituted ratification, estoppel and laches, which barred her attempt to set aside the Agreement. (Exh. A:775, 780, 782-784 [¶¶ 6, 32, 37, 38, 46-48, 59].)

The trial court observed that Jan would not have challenged the validity of the Agreement if the value of the assets had gone down, rather than up. (3/28 RT 37:25-38:14; see also 1/21 RT 75:17-76:21.) If that had occurred, the court doubted that Jan would have been insisting on rescinding the Agreement and taking less than $30 million. (3/28 RT 37:25-38:14.)

The trial court's findings were set forth in a tentative decision, a proposed statement of decision, and in a 17-page final statement of decision. (AA IV:650-654, 684-699, 773-789.) Jan filed 20 pages of objections to the court's findings and conclusions and demanded that the court reconsider. (AA IV:702-739.) Jan failed to point to any material omitted issue or ambiguity that was not ultimately addressed in the final statement of decision. (AA IV:702-737, 740-753, 773-789.)

The trial court entered an order confirming the Agreement's validity and enforceability. (AA IV:792-793.) This interlocutory appeal followed. (AA IV:792-794; see Cal. Rules of Court, rule 5.180.)

LEGAL DISCUSSION

I. THE ORDER THAT THE AGREEMENT IS VALID AND ENFORCEABLE SHOULD BE AFFIRMED SUMMARILY: THE FINDINGS THAT JAN'S RESCISSION ACTION IS PRECLUDED BY DISPOSITIVE AFFIRMATIVE DEFENSES—RATIFICATION, ESTOPPEL, AND LACHES—ARE NOT CHALLENGED BY JAN AND, THUS, ARE BINDING ON APPEAL.

In addition to finding the Agreement valid and enforceable (Exh. A:775, 780-781 [¶¶ 6-7, 32]), the trial court also found that the affirmative defenses of ratification, estoppel, and laches barred Jan from contesting the Agreement's validity and enforceability. (Exh. A:783-784, 787 [¶¶ 48, 57, 59].)

Jan neither mentions nor challenges the propriety of the affirmative-defense findings. Thus, each defense must be presumed established as a matter of law. And, since each defense is a complete, dispositive bar to Jan's attempted rescission, the order holding the Agreement valid and enforceable must be affirmed on each of these independent, unchallenged grounds.

A. The Trial Court Expressly Found That The Affirmative Defenses Of Ratification, Estoppel, And Laches Precluded Jan From Attacking The Agreement's Validity.

The trial court found that Jan, by her conduct, "ratified the Agreement and is estopped to deny the validity and enforceability of the

Agreement at this late juncture" (Exh. A:784 [¶ 48]); it further found that her claims are barred by laches (Exh. A:787 [¶ 59]). According to the trial court's findings:

- At all pertinent times, Jan was informed of the facts she claimed she didn't know and which form the basis of her rescission claim, e.g., the Smith's and Food4Less mergers. (Exh. A:775, 780-781, 783 [¶¶ 6(b), 32, 46-47].)
- Jan accepted benefits under the Agreement for years before first raising any claim of invalidity. (Exh. A:783-784 [¶ 48].)
- Jan's delay was unreasonable, as she "waited over five years to complain about any aspect of the Agreement, which is evidence that she felt the Agreement was fair, given the obvious and notorious success of [Ron's] post-Agreement ventures." (Exh. A:784 [¶ 48].)
- Ron "detrimentally relied upon the promises and representations made by [Jan] in the Agreement by, among other things, complying with the Agreement for years and accumulating property with the understanding that under the Agreement it would be his separate property." (Exh. A:787 [¶ 58].)

One would not know from reading Jan's brief that any of these findings were made. Not once does Jan mention them.

B. The Ratification, Estoppel And Laches Findings Preclude Jan's Equitable Attack On The Validity Of The Agreement.

Jan sought equitable relief, namely, nullification and rescission of an agreement that she executed. (AA I:6; AA VII:1350; e.g., *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 390 [rescission is a form of equitable relief]; *Gill v. Rich* (2005) 128 Cal.App.4th 1254, 1264 ["Rescission is an equitable remedy"]; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 124, p. 191 ["The traditional action for rescission, i.e., to have a rescission adjudged, is equitable"].)

Ratification, estoppel, and laches are each complete, dispositive defenses to equitable claims:

- This is true of ratification. (E.g., *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1225-1227 [plaintiff sought to rescind settlement agreement claiming she lacked contractual capacity; held, rescission denied as plaintiff ratified the agreement by accepting benefits after she regained contractual capacity]; *Gedstad v. Ellichman* (1954) 124 Cal.App.2d 831, 835 [ex-wife who did not seek to rescind for more than one and one-half years after knowing of husband's alleged fraud ratified the agreement and waived the fraud].)[24]

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[24] See also: *Hagge v. Drew* (1945) 27 Cal.2d 368, 382-383 (purchaser ratified sale agreement by going through with the sale after knowledge of facts allegedly concealed); Civ. Code, §§ 1588 ("A contract which is voidable solely for want of due consent, may be ratified by a subsequent consent"), 1589 ("voluntary acceptance of the benefit of a transaction is equivalent to a consent of all the obligations arising from it,

(continued...)

- This is true of estoppel. (E.g., *Giacomazzi v. Rowe* (1952) 109 Cal.App.2d 498, 501-502 [spouse estopped from claiming rights in community property she had previously agreed she had no interest in]; *Estate of Warner* (1914) 168 Cal. 771, 775 [if wife, "with knowledge of . . . right (to rescind prenuptial contract), continues thereafter to accept from the other party payments due thereunder, the right of such person to rescind the contract for that breach is thereby barred"].)[25]
- This is true of laches. (E.g., *Nealis v. Carlson* (1950) 98 Cal.App.2d 65, 68-69 [laches barred wife from vacating final divorce decree obtained by husband's false affidavit because, had she acted promptly instead of waiting thirteen months after she knew the relevant facts, the husband could have filed new affidavit showing he had promptly cured the default]; *Godfrey v. Godfrey* (1939) 30 Cal.App.2d 370, 380-381 [laches barred putative husband from avoiding agreement to pay wife on the ground that they weren't legally married, when, "with full knowledge of the circumstances" surrounding their marriage,

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[24] (...continued)
so far as the facts are known, or ought to be known, to the person accepting").

[25] See also *Lemat Corp. v. American Basketball Assn.* (1975) 51 Cal.App.3d 267, 276-277 (ABA estopped to avoid technically invalid indemnity contract where it had received and retained benefits of the contract); Evid. Code, § 623 ("Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it").

husband "acquiesced in (performing agreement), without objection, for a period of eight years"].)[26]

As one court summarized, "one is not permitted to stand by while another develops property in which he claims an interest, and then if the property proves valuable, assert a claim thereto, and if it does not prove valuable, be willing that the losses incurred . . . be borne by the opposite party. This thought was expressed in one case by the following language: 'If the property proves good, I want it; if it is valueless, you keep it.'" (*Livermore v. Beal* (1937) 18 Cal.App.2d 535, 549.)

This precisely reflects our case. Jan bargained for and obtained security; did not want to incur risk; stood by while Ron took all the risk; and now wants the benefits Ron gained from taking risk even though she agreed they belonged to Ron. The trial court properly refused to allow this to happen.

C. Where, As Here, An Appellant Does Not Challenge Case-Dispositive Findings, Such Findings Must Be Deemed Conclusively Established On Appeal.

Jan does not challenge any of the trial court's ratification, estoppel and laches findings. "A trial court's findings are *binding* on appeal where

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[26] See also *Hamud v. Hawthorne* (1959) 52 Cal.2d 78, 86 (laches barred relief where plaintiffs waited over five years after deed was recorded to seek relief, acting as "opportunists" trying to garner unanticipated gains); Fam. Code, § 1101, subd. (d)(3) (laches is expressly available as defense to a spouse's alleged breach of fiduciary duty with respect to community property); cf. Fam. Code, § 1617 (premarital agreements: statute of limitations applicable to claims for relief tolled during marriage, but laches, estoppel and other equitable defenses limiting time for enforcement still available).

the appellant does not expressly challenge them." (*BGJ Associates, LLC v. Wilson* (2003) 113 Cal.App.4th 1217, 1230, emphasis added.) Such findings are "presumed correct." (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 887; see also *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 321.)

Jan's "failure to raise an argument in [her] opening brief [as to the dispositive findings] waives the issue on appeal." (*Dieckmeyer v. Redevelopment Agency of Huntington Beach* (2005) 127 Cal.App.4th 248, 260; see also *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 368 [failure to challenge ruling on appeal waives challenge].)

As a matter of law, the order affirming the validity and enforceability of the Agreement should be affirmed summarily. (*Hagge v. Drew*, *supra*, 27 Cal.2d at pp. 382-383 [affirming ratification determination where "(n)o contention is raised as to the sufficiency of the evidence to support the finding"]; *1119 Delaware v. Continental Land Title Co.* (1993) 16 Cal.App.4th 992, 1004 [summarily affirming judgment on cause of action as to which no argument presented in opening brief].)

D. Even Had Jan Challenged The Ratification, Estoppel, And Laches Findings, They Would Be Impervious To Attack Because They Are Supported By Substantial Evidence.

Because this Court is not presented with any challenge to the trial court's ratification, estoppel and laches findings, it need not assess the substantial evidence that supports them. (*Building Industry Assn. of San*

Diego County v. State Water Resources Control Bd., *supra*, 124 Cal.App.4th at p. 887, fn. 14.)[27]

Nonetheless, the findings are supported by substantial evidence.[28]

For more than four years, Jan accepted from Ron millions of dollars of payments and a house as his performance under the Agreement and she allowed Ron to take major investment risks—not shared by her—without ever placing Ron on notice that she believed the Agreement was invalid or that she would later claim a right to share in the upside of the risks he took.[29] Jan did this even though:

- She knew about the Smith's and Food4Less mergers (the supposed nondisclosure of which is a centerpiece of her claim)

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[27] Should Jan try to raise the issue in her Reply Brief, the Court should decline to consider it. "Fairness militates against [the Court's] consideration of any arguments an appellant has chosen not to raise until its reply brief, and the authorities holding to that effect are numerous." (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1372, fn. 11.)

[28] Had Jan challenged the findings, review would be limited to determining whether substantial evidence supported them. (E.g., *Gedstad v. Ellichman*, *supra*, 124 Cal.App.2d at pp. 835-836 ["we are bound by the trial court's finding of laches because if appellant can be said to have made any showing of excuse of delay at all, said showing was certainly not such that it proves as a matter of law that she had not forfeited her right to attack the validity of the property settlement agreement"]; *White v. Moriarty* (1993) 15 Cal.App.4th 1290, 1295-1296 [upholding ratification determination based on findings supported by substantial evidence]; *Marriage of Cesnalis* (2003) 106 Cal.App.4th 1267, 1277 [affirming equitable estoppel determination based on substantial evidence].)

[29] During the period after Jan learned of the mergers, Jan accepted more than $4 million in payments from Ron. (AA VI:1172, VII:1209-1349.) She acknowledged *in writing* her satisfaction with Ron's annual $1 million payments. (AA V:901, 914; see also 6/29 RT 100:19-109:18; AA VII:1209-1349.) When Jan decided to separate in December 2001, she directed Ron to wire $1.4 million, as required under the Agreement, to purchase the house she chose. (6/17 RT 41:8-23; AA VI:1171; see AA V:805 [¶ 2.12].)

before she signed the Agreement and before it became final on November 22, 1997. (See Statement of the Case, § C.2.)

- By 1998, she suspected (albeit, unreasonably) that Ron had been "just pretending" about wanting to reconcile. (6/29 RT 94:8-12; see also 6/29 RT 154:24-155:23.) She sought rescission on the ground that the reconciliation was a ruse (AOB 46), yet she believed it was a ruse five years before she sought rescission, but never voiced a complaint.
- Pursuant to the Agreement she bought a house funded by Ron and moved into it in April 2002. (6/29 RT 156:15-157:19.) She remained in contact with her lawyers; indeed, Harlan's office helped her with the purchase. (6/29 RT 80:22-81:7; 7/2 RT 50:8-51:5.) Yet, she waited another 14 months before retaining a new lawyer and claiming that the Agreement was invalid.[30] (AA I:3, 5-6; see also 6/29 RT 157:15-22.)

Jan's delay in claiming the Agreement was invalid and seeking rescission, while continuing to accept the Agreement's benefits, substantially prejudiced Ron. Based on his reliance on the Agreement's validity, Ron continued to honor its terms by making all required payments to Jan, while believing he was free to pursue aggressive investment endeavors, taking whatever risks were involved and suffering the consequences of his decisions, in order to obtain any gains yielded by the risks he took. (E.g., 3/28 RT 142:12-143:1; 7/2 RT 175:11-176:7.) If Jan

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[30] After reconciling with Ron, Jan admitted she was not subject to any arguable undue influence. (6/29 RT 153:2-21, 173:2-24.)

early on had informed Ron that she had any reservations or that she believed the Agreement was invalid, Ron would have had the opportunity promptly to address any such issues and to adjust his conduct accordingly. Jan, however, chose to remain silent.

The Agreement afforded Jan exactly what she bargained to receive—economic security, with limited risk; she knew she was relinquishing the upside potential that accompanies economic risk-taking. Knowing all the facts, Jan remained silent for more than four post-Agreement years so she could reap both the security of her bargain and attempt to share the benefits she promised Ron could keep as his own.

The trial court properly rejected Jan's transparent effort to have the best of all worlds. As the trial court sensibly observed, had Ron's risky investments turned out disastrously, Jan would not now be foreswearing the $40+ million (including interest) provided her in the Agreement and insisting on a smaller share of community assets. (3/28 RT 37:25-38:14.) "[I]n litigation as in life, you can't have your cake and eat it too." (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 555 & fn. 1; see *Holland v. Pyramid Life Ins. Co. of Little Rock* (5th Cir.1952) 199 F.2d 926, 929 [party could not wait until the risk covered by life insurance policy had expired before seeking to rescind and to obtain refund of premiums].)

The unchallenged and fully supported findings of ratification, estoppel and laches compel that the order upholding the validity and enforceability of the Agreement be affirmed summarily.

II. THE ORDER UPHOLDING THE AGREEMENT AS VALID AND ENFORCEABLE SHOULD BE AFFIRMED SUMMARILY: THE FINDINGS THAT JAN WILLINGLY ENTERED INTO THE AGREEMENT WITH FULL KNOWLEDGE OF THE MATERIAL FACTS AND WITHOUT UNDUE INFLUENCE ARE UNCHALLENGED AND ARE BINDING ON APPEAL.

In upholding the Agreement's validity and enforceability, the trial court expressly determined that Jan entered the Agreement freely and voluntarily, with full knowledge of the material facts, with a complete understanding of the Agreement's effect, and without undue influence. (Exh. A:775, 778-779, 780-781 [¶¶ 6, 26-27, 32].)

Jan ignores these findings and the substantial evidence that supports them. Jan nowhere contends that the findings are insufficient to support the determination that the Agreement is valid and enforceable, nor does she challenge the sufficiency of the evidence to support the findings. Indeed, Jan readily admits she has not complied with the substantial evidence rule.[31]

Rather than reciting and addressing the evidence in the light most favorable to the findings, as the law requires, Jan simply tells her side of the story. This she cannot do. The unchallenged findings must be deemed supported as a matter of law.

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[31] In a footnote, Jan asserts that "[t]he trial court's factual findings in favor of Ron, as set forth in its Statement of Decision, are not entitled to the deference normally given to such findings under the substantial evidence rule." (AOB 3, fn. 1.) In Section II.B, below, we demonstrate why there is no merit to either of Jan's reasons for not complying with the substantial evidence rule.

A. There Being No Challenge To Any Of The Trial Court's Findings, This Court Must Presume That The Record Contains Substantial Evidence To Sustain Each Finding.

Jan wants this Court to act as the trier of fact. She wants it to consider and accept her lopsided tale even though the trial court rejected it. Of course, this Court cannot supplant the fact finder.

The governing principles—ignored by Jan— are set forth in *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, as follows:

- "It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact." (*Id.* at p. 881, internal quotation marks omitted.)
- If an appellant chooses to attempt to rebut this presumption, the appellant must ". . . demonstrate that there is *no* substantial evidence to support the challenged findings." (*Ibid.*, emphasis in original, internal quotation marks omitted.)
- "A recitation of only [appellant's] evidence is not the 'demonstration' contemplated" by the standard of review. (*Ibid.*)
- If appealing parties contend that "some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived." (*Ibid.*, emphasis in original, internal quotation marks omitted.)[32]

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[32] Countless cases agree. (E.g., *Marriage of Fink* (1979) 25 Cal.3d 877, 887 [applying same rules in marital dissolution appeal]; *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053 ["'[T]he power of an appellate court begins and ends with a determination as to whether there is any

(continued...)

Jan cannot escape these principles. They command that each of Judge Lachs' unchallenged findings must be deemed supported by substantial evidence and that each is beyond challenge on appeal. As with the ratification, estoppel and laches findings discussed in Section I above, Jan's case should end here.

B. Jan Has Not Presented Any Viable Reason For Ignoring The Substantial Evidence Rule.

Jan tries to dismiss the most elementary of appellate rules—the substantial evidence rule—in a perfunctory footnote. (AOB 3, fn. 1.) Without barely any analysis or explanation, she proclaims the rule does not apply for two reasons: that the trial court supposedly misallocated the burden of proof as to undue influence and that the findings were negated by her objections to the statement of decision. (*Ibid.*; see also AOB 20, 32-33.) Each reason fails.

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[32] (...continued)
substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] [The court] must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .' [Citation.]," internal quotation marks omitted].) The testimony of a single witness, even if contradicted, suffices as substantial evidence; it is not the appellate court's function to re-weigh credibility. (E.g., *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465 [appellate court does not re-weigh the evidence]; *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398 [same]; *Marriage of Mix* (1975) 14 Cal.3d 604, 614 [testimony of party may alone suffice]; *2,022 Ranch, LLC v. Superior Court* (2003) 113 Cal.App.4th 1377, 1387 ["The appellate court may not weigh the evidence, resolve conflicts in the evidence, or resolve conflicts in the inferences that can be drawn from the evidence. If there is substantial evidence in favor of the finding, no matter how slight it may appear in comparison with the contradictory evidence, the finding must be affirmed"].)

1. Jan's burden-of-proof assertion does not negate application of the substantial evidence rule.

Jan claims the substantial evidence rule does not apply because the trial court misallocated the burden of proof as to undue influence. (AOB 2-3, fn. 1, 20, 32-33.) The premise is both irrelevant and untenable.

a. Jan's assertion is irrelevant because the trial court found that, no matter how the burden of proof was allocated, overwhelming evidence established that there was no undue influence.

Jan's premise is irrelevant. This is because the trial court expressly found that no matter which party had the burden of proof as to undue influence, the evidence "overwhelmingly" established that any presumption of undue influence was "completely and fully rebutted." (Exh. A:782 [¶ 41].) Jan never grapples with this finding. Rather, she tries to dismiss it as being "speculative and simply meaningless." (AOB 38, fn. 8.)

This doesn't work.

The trial court heard the evidence and determined that it overwhelmingly negated any presumption of undue influence that may have arisen. It is Jan's burden as appellant to "*demonstrate* that there is no material, credible evidence or no reasonable inference from the evidence to support the challenged findings." (*Barney v. Fye* (1957) 156 Cal.App.2d 103, 107, emphasis added, internal quotation marks omitted; see discussion

in § I.C, above.) Jan doesn't even try to do so. Nor could she if she tried. (See, e.g., §§ A-D of Statement of the Case.)

Under the law, the substantial evidence rule applies to support the presumption-rebuttal finding, just as it applies to all other findings. "[W]hether or not the spouse gaining . . . an advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence." (*Weil v. Weil* (1951) 37 Cal.2d 770, 788; see also *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1087 [question whether party has met burden under judicially created presumption is one for trial court, "not a reviewing court"]; *Barney*, *supra*, 156 Cal.App.2d at p. 108 ["For an appellate tribunal to say upon the record in the instant case that the trial judge was not justified in determining that the presumption of fraud and undue influence was overcome by respondent, would in our opinion be a usurpation of the legitimate function of the trial court"].)

The trial court's finding that overwhelming evidence negated any presumption of undue influence completely refutes Jan's assertion. The finding is binding without regard to which party had the burden of proof. (*Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, 1061-1062 [regardless of whether presumption of undue influence shifted burden of proof, substantial evidence supported trial court's finding that there was no undue influence]; *Marriage of Friedman* (2002) 100 Cal.App.4th 65, 72 [appellate court is "bound by this factual finding" that presumption of undue influence was "dispelled"]; *Leathers v. Leathers* (1946) 77

Cal.App.2d 134, 140-141 [regardless of whether presumption of undue influence shifted burden of proof, substantial evidence, binding on appeal, supported trial court's finding of no undue influence]; *Marsiglia v. Marsiglia* (1947) 78 Cal.App.2d 701, 706-707 [regardless of presumption of undue influence, substantial evidence "sustain(s) the (trial) court's findings, including, in effect, that plaintiff had full knowledge of all the facts necessary for her protection prior to the time she executed the property agreement and grant deed; that she executed them with full understanding of their contents and meaning, and with the benefit of the independent advice of her attorney"].)

Nor is there merit in Jan's subsidiary contention that only clear and convincing evidence can overcome the asserted presumption. (AOB 30-31.) The law is to the contrary: "The . . . burden of proof [to overcome an undue influence presumption] is by a preponderance of the evidence." (*Estate of Stephens* (2002) 28 Cal.4th 665, 677.)[33] But even if—contrary to the law—a higher standard of proof were applicable here, that standard was unquestionably satisfied by the finding that any presumption was overcome

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[33] See also *Conservatorship of Davidson*, *supra*, 113 Cal.App.4th at pp. 1061-1062 ("even if we were to conclude the presumption of undue influence was activated under these facts and the burden of proof did shift, respondent would then only have been required to prove the absence of undue influence by a preponderance of the evidence"); *Estate of Sarabia* (1990) 221 Cal.App.3d 599, 605 (same); Evid. Code, § 115 ("Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"). *Gold v. Greenwald* (1966) 247 Cal.App.2d 296, relied on by Jan, was decided before Evidence Code section 115 mandated the preponderance standard. (See *Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1492 [the "Supreme Court has repeatedly cautioned against making too much of the choice of language in judicial opinions describing burdens of proof without taking into consideration the statutory preference for proof by preponderance in civil action"].)

by "overwhelming[]" proof. (Exh. A:782 [¶ 41]; *Roth v. State Bar* (1953) 40 Cal.2d 307, 314 [equating "overwhelming" and "clear and convincing" proof].) Jan does not even try to show how the "overwhelming" proof establishing no undue influence failed to satisfy any clear and convincing standard that might have applied.

b. Jan's assertion is wrong: No presumption of undue influence was ever triggered because, as the trial court found, the factual predicate for such a presumption was not proven.

In addition to being irrelevant, Jan's presumption theory also is untenable. According to Jan, the Agreement, on its face, is presumed to be the product of undue influence because "of the fiduciary relationship between Ron and Jan." (AOB 20-21.) If that were true, every transaction between a husband and wife automatically would be subject to a presumption of undue influence. But this is not the law. The trial court was absolutely correct in rejecting that theory. (Exh. A:782 [¶ 40(d)].)

Like all other contracts, written agreements between spouses are presumptively valid.[34] Whether conditions exist that would trigger an undue influence presumption is a question for the trier of fact: "It is for the trier of fact to determine whether the presumption will apply and whether

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[34] E.g., Civ. Code, §§ 1614 (consideration presumed for written document), 3545 (the presumption is that "(p)rivate transactions are fair and regular"); Fam. Code, §§ 721, subd. (a) (spouses may enter into agreements with each other); 1500 ("The property rights of husband and wife prescribed by statute may be altered by a . . . marital property agreement"); see *Adams v. Adams* (1947) 29 Cal.2d 621, 624.

the burden of rebutting it has been satisfied." (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605.)

In order to trigger an undue influence presumption, the party advocating such a presumption—here, Jan—must first demonstrate, to the satisfaction of the trier of fact, that the other party—here, Ron—gained an *unfair advantage*. (Fam. Code, § 721(b) [neither spouse shall take "*unfair* advantage" of the other, emphasis added]; Civ. Code, § 1575 [undue influence consists of *unfair* advantage].) "The claim that a presumption of undue influence arose by reason of the marriage is untenable. The evidence, in addition to a showing of marriage relationship, *must also show such unfairness of the transaction* as will tend to establish that the wrongful spouse made use of the confidence reposed for the purpose of gaining an *unreasonable advantage over the mate*." (*Snyder v. Snyder* (1951) 102 Cal.App.2d 489, 492, emphasis added.) Our Supreme Court has confirmed this rule. (*Marriage of Saslow* (1985) 40 Cal.3d 848, 863-864, citing and quoting with approval both *Snyder* and Civ. Code, § 1575.)

None of the cases Jan cites supports her assertion that undue influence must be presumed if Ron obtained any benefit whatsoever under the Agreement. Rather, each case is premised on factual findings demonstrating that one spouse did gain an *undue* advantage *over* the other; none involved a finding, as here, that the agreement was fair and equitable, with mutual benefits.[35]

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[35] See *Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996 (trial court found undue influence arose where husband conveyed his separate property residence to wife as joint tenant; appellate court affirmed: "when any interspousal transaction advantages one spouse *to the disadvantage of* (continued...)

Nor does Probate Code section 16004 support Jan's assertion. (AOB 25.) The reason is simple: Family Code section 721 specifically defines the mutual fiduciary obligations owed between spouses as "subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code . . . ." While section 721 also refers to other sections of the Probate Code, it conspicuously does not mention Probate Code section 16004.

Jan's reliance on *Bradner v. Vasquez* (1954) 43 Cal.2d 147 (see AOB 25-26) is similarly misplaced. That case is an attorney-client transactional case—involving a one-way fiduciary duty owed by attorney to client—decided under the precursor to section 16004; it is not a spousal case governed by Family Code section 721. And, even *Bradner* recognized that a party seeking to trigger a presumption of undue influence still had to establish that the other party had gained some advantage over him. (*Id.* at

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[35] (...continued)
the other, the presumption arises that such transaction was the result of undue influence," emphasis added); *Marriage of Lange* (2002) 102 Cal.App.4th 360, 363-364 (trial court found presumptive undue influence where wife obtained a "financial advantage" over husband by obtaining additional security, in the form of a note with interest, for funds contributed to improve community property where no consideration given for the additional security; appellate court affirmed holding that presumption applies "if (spouse's) position is improved, (or she) obtains a favorable opportunity, or . . . otherwise gains, benefits, or profits"); *Marriage of Haines* (1995) 33 Cal.App.4th 277, 287, 293-296, 301-302 (trial court found undue influence by a preponderance of evidence; wife "transferred her interest in real property to (husband) for his cosignature on an automobile loan—clearly inadequate consideration for execution of the quitclaim deed"; appellate court affirmed: "when an interspousal transaction *advantages one spouse over the other*, a presumption of undue influence arises," noting that Fam. Code, § 721 requires *unfair* advantage, emphasis added); cf. *Marriage of Barneson* (1999) 69 Cal.App.4th 584, 588-589 (dicta: presumption issue never reached).

p. 152 ["There was evidence from which the court could reasonably conclude that Bradner obtained an advantage from the Vasquezes by the contract at the time it was made"]; see cases cited in note 35 above, all resting on trial court *factual* findings that a presumption applied.)

Jan did not satisfy either the section 721 or even the *Bradner* standard here. Judge Lachs determined, at the outset, that he could not conclude from the face of the Agreement itself that one party gained an advantage, let alone an unfair one, over the other. (1/21 RT 55:14-56:10; 2/29 RT 84:7-85:12; 3/23 RT 47:17-48:14.) After hearing evidence from both sides, Judge Lachs found as a matter of fact that no presumption was triggered because the Agreement was "fair and equitable" to both Jan and Ron—that each party got exactly what each wanted out of the Agreement and that "[t]he Agreement provided mutual advantages" to each. (Exh. A:782, 787-788 [¶¶ 40, 60].) In short, Jan did not satisfy her burden of establishing that a presumption of undue influence arose.

Jan does not challenge the factual sufficiency of Judge Lachs' findings; they are therefore binding on appeal. (See discussion in §§ I.C, II.A, above.)

Additionally, Judge Lachs found that Jan and Ron dealt at arm's length, each represented by independent counsel, something that was apparent on the face of the Agreement. (Exh. A:781, 788 [¶¶ 32, 61].) This factor alone generally avoids any presumption of undue influence. (E.g., *Estate of Cover* (1922) 188 Cal. 133, 144 [husband "avoid[s]" presumption of undue influence, if he "*deal[s] with [wife] at arm's length and as he would with a stranger, all the while giving her the opportunity of*

independent advice as to her rights in the premises," emphasis added]; accord *Collins v. Collins* (1957) 48 Cal.2d 325, 330; see also *Colton v. Stanford* (1890) 82 Cal. 351, 372-373 [no presumption of undue influence where fiduciaries deal at arm's length represented by counsel].)

Bottom line: Jan did not prove the factual predicate for any presumption to arise in this case. Moreover, the automatic presumption of invalidity that Jan advocates would make bad policy. It would undermine the strong public policies favoring marital harmony, reconciliation, and the resolution of issues. (See § III.A, below.) It would automatically plant in all marital agreements seed of their potential future undoing and make them inherently unreliable, since all such agreements would be presumptively invalid. It would promote litigation, even though the purpose of such agreements is to resolve disputes.

c. Even if (contrary to both fact and law) the trial court had somehow misapplied the burden of proof, Jan still would not be entitled to reversal of the order upholding the Agreement.

Even if Jan could somehow overcome these principles, she still could not prevail. There are two reasons why this is so.

First, Jan nowhere contends or establishes that she suffered prejudice resulting from any misapplied burden of proof. Demonstrated prejudice, of course, is a prerequisite to reversal (Cal. Const., Art. VI, § 13), even where the burden of proof is improperly allocated. (E.g., *Sargent Fletcher, Inc. v.*

Able Corp. (2003) 110 Cal.App.4th 1658, 1674 ["Even were we to conclude the court should have given a burden-shifting instruction, we also would conclude that Sargent Fletcher was not prejudiced by the court's failure to do so in this case"]; *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 393-394 [judgment may not be reversed for misallocated burden of proof absent appellant's demonstration of harm].)[36]

Here, the absence of prejudice is conclusively established not merely by Jan's failure to address the issue, but also by the trial court's unchallenged finding that any presumption was rebutted by overwhelming evidence. (E.g., *Murphy v. Atchison, T. & S.F. Railway* (1958) 162 Cal.App.2d 818, 822-824 [failure to instruct jury on presumption of due care that would have favored plaintiff was harmless in light of abundant evidence rebutting it].)[37]

Second, even if—contrary to the record—Jan had asserted and shown prejudice, she still would not prevail because the unchallenged findings that her rescission claim is barred by the complete defenses of ratification, estoppel and laches (see § I, above) stand independently of any issues concerning undue influence; thus, they survive without regard to the burden of proof on undue influence. Where, as here, two completely

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[36] The cases Jan relies on to claim that she need not show prejudice predate the Supreme Court's determinative decision in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, making clear that prejudice is a prerequisite to reversal. (See also *Marriage of Steiner* (2004) 117 Cal.App.4th 519, 526-527.)

[37] To show prejudice, Jan would have to recite *all* the evidence, something she has not done. (*Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 [appellant has burden of demonstrating prejudice based on record as a whole]; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106 [same].)

independent grounds support a ruling, the ruling must be affirmed as long as one ground is legally supported. (E.g., *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 Cal.App.4th 86, 92 [alternative finding supported by substantial evidence prevails even where other finding not supported]; *In re Jonathan B.* (1992) 5 Cal.App.4th 873, 876 [lack of support for one of several findings does not require reversal].)

2. Jan's objections to the statement of decision—directed at issues the trial court in fact resolved—do not negate application of the substantial evidence rule.

Equally without merit is Jan's assertion that her objections to the statement of decision somehow negate the force of the trial court's findings. (AOB 3, fn. 1; see also AOB 20.) Nothing could be further from the truth.

Jan fundamentally misperceives what a statement of decision is supposed to accomplish, and she misunderstands the rules that govern when, in limited, specifically-defined circumstances articulated by statute, an unresolved objection can negate an inference favorable to some findings.

A statement of decision is "sufficient if it fairly discloses the court's determination as to the *ultimate facts* and material issues in the case." (*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380, emphasis added.) A trial court is "*not* required to address how it resolved intermediate evidentiary conflicts, or respond point by point to the various issues posed in appellant's request for a statement of decision" (*Muzquiz v. Emeryville* (2000) 79 Cal.App.4th 1106, 1126, emphasis in

original) and "is not required to make an express finding of fact on every factual matter controverted at trial, where the statement of decision sufficiently disposes of all the basic issues in the case" (*Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118). (Accord *Marriage of Garrity & Bishton* (1986) 181 Cal.App.3d 675, 686-687 ["A trial court in rendering a statement of decision under Code of Civil Procedure section 632 is required only to state ultimate rather than evidentiary facts," citation and internal quotation marks omitted]; see generally 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 411, p. 470.)

If, and only if, (a) a statement of decision fails to dispose of an ultimate fact or issue essential to disposition of the case or if it is ambiguous on such a point, *and* (b) a party objects to that omission or ambiguity, *and* (c) the trial court fails to clarify the ambiguity or rectify the omission, then—and only then—will it "not be inferred on appeal . . . that the trial court decided in favor of the prevailing party *as to those facts or on that issue*." (Code Civ. Proc., § 634, emphasis added.)

Jan completely ignores this test. She does not set it out, nor does she even try to satisfy it. She has not demonstrated that the statute applies. Thus, it must be inferred on appeal that the trial court decided in Ron's favor as to all issues.

In fact, Jan could not have satisfied the statutory test even if she had tried. Her 34 pages of objections to the Statement of Decision did not identify material omitted issues or ambiguities. (AA IV:702-721.) Rather, Jan simply advanced "objections" that amounted to reargument of her case and reassertion of her legal positions. (AA IV:740-751; Exh. A:788 [¶ 65].)

However, reargument of positions lost at trial cannot possibly allow a losing party to negate the findings against her.

In her Opening Brief, Jan identifies only six specific objections that she claims the trial court ignored. (AOB 38, fn. 8, 53, 65-66, 67, 73.) None reveals an omitted or ambiguous finding of ultimate fact or an unresolved material issue falling within section 634. For example, Jan's objection to the trial court's finding that any undue influence presumption would have been overwhelmingly rebutted was simply an expression of disagreement with the court's conclusion. (AA IV:714-715; see AOB 38, fn. 8, mistakenly citing AA IV:716 instead of AA IV:714.) While Jan bickers with the bottom line, she does not point to any finding that was omitted or ambiguous. Jan's remaining objections likewise fail to satisfy the requirements of section 634. They amount to nothing more than expressions of disagreements with findings that the trial court made or evidentiary quibbles. None points to an unresolved omission or unresolved ambiguity.[38]

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[38] Compare:

(1) Exh. A:777, 779, 784 (¶¶ 19, 29 49: finding that the records Ron made available to Jan would have disclosed all relevant information, including all relevant information about the mergers) *with* AA IV:707, 708, 716 cited at AOB 65-66 (disagreeing with that finding).

(2) AA IV:724-729 cited at AOB 53 (objecting that the trial court failed to address whether consideration for the Agreement included the parties' agreement to reconcile or attempt to reconcile) *with* Exh. A:777, 780-781 (¶¶ 17-18, 31, 33: finding that both Jan and Ron "genuinely did want to reconcile," but that "reconciliation was not a condition of the Agreement" and that consideration for the Agreement included mutual economic compromises).

(3) AA IV:715 cited at AOB 73 (seeking determination of date on which assets were valued) *with* Exh. A:782 (¶ 43: valuation date was June 6, 1997); see also Exh. A:784 (¶ 50: finding that the relevant values

(continued...)

If a disappointed litigant could undermine a factual finding simply by disagreeing with it, no deference would ever be afforded to trial court findings. That, of course, is not the law.

The bottom line: The trial court addressed the relevant material issues and found the necessary ultimate facts. Nothing more was required. Because Jan has failed to identify any material omission or ambiguity, let alone one that was objected to, section 634 does not apply. Instead, *all* facts and inferences must be construed in favor of the findings and judgment. (*Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

But even had Jan established that she properly objected to, and the trial court failed to rectify, any material omissions or ambiguities, her position, asserting that *all* the trial court's findings must be rejected wholesale, would still be utterly devoid of merit. Section 634 is far more narrow than that. It provides that if an objection to an omission or ambiguity is not corrected, it shall "not be inferred on appeal . . . that the trial court decided in favor of the prevailing party *as to those facts or on that issue*." (Code Civ. Proc., § 634, emphasis added.)

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[38] (...continued)
did not materially change between June and November).

(4) AA IV:716 cited at AOB 66 (asking what specific information was disclosed in the public merger announcements) *with* Exh. A:783-784 (¶¶ 46-47, 49: finding that Jan knew about the mergers and that Jan could or should readily have discovered all financial information about the mergers by reviewing the information Ron made available to her, "including, but not limited to, information regarding the Yucaipa warrants and the management agreement cancellation fee").

(5) AA IV:716-717 cited at AOB 67 (objecting to drawing an inference from lawyer's assertedly privileged refusal to testify) *with* Exh. A:776, 783 (¶¶ 12, 47: finding that trial court was drawing no inference from assertion of privilege, but inference permissible from Jan's failure to provide relevant evidence).

Not one of Jan's objections points to any specific fact or issue as to which she claims section 634 would apply; nor did any of her objections point to any basis (let alone a viable basis) that would permit an appellate court to disregard the trial court's findings *carte blanche* or to undermine the trial court's findings that the Agreement is valid and enforceable and that Jan's rescission attempt is barred by the dispositive defenses of ratification, estoppel and laches.

C. Because Jan Chose Not To Produce (And, In Fact, Blocked) Key Evidence Within Her Control And Central To Her Assertions That She Lacked Knowledge And Was Subjected To Undue Influence, She Failed To Prove Her Case And Should Be Precluded From Advancing Such Assertions On Appeal.

Jan's rescission claim was based on her assertions that she entered the Agreement without knowledge of certain facts, like the mergers, and was subjected to undue influence. By opting to seek rescission premised on these fact-based claims, Jan voluntarily placed in issue what she knew and what she relied on in entering the Agreement.

It is uncontroverted that Jan's legal team engaged in an extensive investigation into Ron's finances. (See Statement of the Case, § C.1, above.) Under the law, what Jan's legal team knew was conclusively attributable to her. (Civ. Code, § 2332; *Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 828 [constructive notice applies to attorney-client relationship and "'is

irrebutable,'" quoting *Powell v. Goldsmith* (1984) 152 Cal.App.3d 746, 751]; *Lazzarevich v. Lazzarevich* (1952) 39 Cal.2d 48, 50 ["Ordinarily a person is held to know what his attorney knows and should communicate to him"; held, attorney's knowledge that divorce had become final imputed to client]; *Chapman College v. Wagener* (1955) 45 Cal.2d 796, 802 [knowledge of attorney negotiating agreement imputed to client].)

At trial, Jan testified she did not know certain facts, like the mergers. But Jan's testimony, standing alone, did not (and could not legally) establish Jan's lack of knowledge. The reason is, as the cases just cited hold, that her legal team's knowledge was conclusively attributed to her and, thus, what she knew necessarily included what her legal team knew. In short, in order for Jan to prove her assertion that she lacked knowledge, she had to prove two things: that she was personally unaware of the facts and also that her legal team was unaware. One without the other could not suffice to prove Jan's lack of knowledge.

Jan's proof failed here. She never offered any evidence showing what her legal team knew or did not know. There being no proof that Jan's legal team lacked knowledge of the facts as to which Jan disclaimed knowledge (e.g., the mergers), the bottom line is that Jan failed to prove her case. She didn't prove she didn't know.

Our point here has nothing whatever to do with drawing an improper inference based on Jan's assertion of attorney-client privilege. This is so because Jan did not have to assert any privilege in order to elect to call the members of her own legal team to testify in support of her case in chief. That decision was Jan's and Jan's alone; it was not compelled by anything

Ron did; it was not driven by any effort by Ron to obtain privileged information. Asserting a privilege relates to preventing someone else from obtaining confidential information; it has nothing to do with a decision by the privilege holder as to whether or not to introduce evidence essential to proving her case.

Here, Jan made a tactical decision not to call members of her legal team to prove an essential element of her rescission case—lack of knowledge. Her decision resulted in a failure of proof as to that element: Jan never proved she lacked knowledge. Even if the trial court had believed her story (it didn't), Jan's evidence would not have sufficed to support a finding that she lacked knowledge.

But even if testimony from Jan's legal team were not indispensable to her case, her decision not to introduce evidence as to what the team learned from its investigations would still have permitted a trier of fact to infer that the team's testimony would not have been favorable to Jan's position; this inference would not arise from Jan's asserting the privilege, but rather it would arise from her decision not to call key witnesses (solely within her control) whose testimony would have strongly supported Jan's case if she were telling the truth.

Finally, decisional law uniformly establishes that Jan's case could properly have been dismissed by reason of her assertion of privilege. Under the law, a plaintiff who places a fact in issue cannot preclude the other side from inquiring fully about that issue. If the plaintiff asserts a privilege in such circumstances, the proper remedy is to dismiss her case.

For each of these reasons, now to be more fully explained, Jan cannot claim on appeal that she lacked knowledge of the mergers or any other facts.

1. By seeking rescission, Jan placed her and her legal team's knowledge directly at issue.

The centerpiece of Jan's rescission claim is her assertion that she was not fully informed of the pertinent facts, such as the mergers, and was improperly influenced to sign the Agreement without being adequately informed.

It is uncontroverted that, over a six-month period, Jan's legal and investigative team collected, reviewed, and analyzed on Jan's behalf extensive information on Ron's finances, including, for example, preparation of a three-volume investigative report. They also communicated regularly with Jan. (Statement of the Case, §§ C and D, above.)[39] And, as demonstrated above, what Jan's legal team knew was attributable to Jan.

Lack of knowledge and justifiable reliance were essential elements of Jan's rescission case. (E.g., *Alliance Mortgage Co. v. Rothwell* (1995)

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[39] What little Ron knew about Jan's team's investigation was gleaned largely from Harlan's and Pelletier's billing records, which they voluntarily submitted in 1997 as part of their request that Ron pay for Jan's legal fees. (AA V:983.) These records revealed that Jan's team closely investigated and scrutinized Ron's business affairs. (See, e.g., Statement of the Case, § C.1; see also AA V:850-851 [9/5/97 billing entry: "review and analysis of private investigators reports re parties assets: determine accuracy of assets; determine whether all assets have been listed in the Postmarital Agreement; interoffice conference with Barry T. Harlan re assets not listed in Postmarital Agreement]; see also AA V:986; AA VI:1137.)

10 Cal.4th 1226, 1239, fn. 4 ["justifiable reliance . . . (is) also (an) essential element() of . . . constructive fraud"]; *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 516, fn. 14 [constructive fraud requires proof of both "nondisclosure (breach of fiduciary duty)" *and* "reliance and resulting injury (causation)," that is, ignorance of the true facts]; Hogoboom & King, Cal. Practice Guide: Family Law (Rutter Group 2005) § 9:243, pp. 9-62.11 to 9-62.12 [free and voluntary entry into agreement with full knowledge of facts negates undue influence].)

Jan could not have been relying on Ron—justifiably or otherwise—to disclose facts that she or her team already knew. (*Cameron v. Cameron* (1948) 88 Cal.App.2d 585, 592-593, 596 [no justifiable reliance on husband's alleged misrepresentations regarding his characterization of certain property as separate where wife's attorneys were aware of the problems, made their own investigations, were not denied access to any information, and advised her to sign the agreement]; *Weingarten v. Weingarten* (1989) 234 N.J.Super. 318, 325-329 [560 A.2d 1243, 1247-1248] [wife's claim that divorce settlement agreement should be set aside on ground that she relied on husband's misrepresentation of the marital estate's value placed her own attorney's knowledge and advice at issue].)

2. By reason of her election to decline to introduce (and to preclude inquiry into) essential and highly relevant evidence probative of Jan's knowledge of the facts and what influenced her to act, Jan should not be allowed to claim on appeal that she lacked knowledge of any facts or was subjected to undue influence.

Three separate principles combine to preclude Jan from arguing on appeal that she lacked knowledge or that she was subjected to undue influence.

a. By not introducing evidence of the facts gathered by Jan's legal team in investigating Ron's finances, Jan failed to prove a prima facie case that she lacked knowledge; she could not have prevailed even if (contrary to fact) the trial court had believed her.

As demonstrated above, Jan's knowledge consisted of two components: What she knew plus what her legal team knew.

Here, Jan only opted to present half her case. She testified to what she claimed she knew, but she elected not to present evidence of what her legal team knew or what they told her. Without proving what her legal team knew or didn't know (such knowledge being attributable to Jan), Jan never proved that she lacked knowledge. For this reason alone, Jan's claim that she lacked knowledge was never proven. There being no factual basis

for Jan's claim that she lacked knowledge, this Court should not consider the claim on appeal.

b. Jan's failure to introduce evidence as to her legal team's knowledge of Ron's finances permitted the trier of fact to draw an inference adverse to Jan's claim that she lacked knowledge.

Even if proof regarding the knowledge of Jan's legal team were somehow not essential to Jan's proving a prima facie case as to her claim that she lacked knowledge, such proof was, at the very least, centrally and uniquely relevant to that issue and the issue concerning the influences that prompted Jan to sign the Agreement.

Where, as here, Jan opted not to introduce highly probative evidence—lying solely within her control—that was relevant to key issues that she voluntarily placed in controversy, a trier of fact could properly infer that such evidence, if introduced, would not have been favorable to Jan. It is elementary that a trier of fact can permissibly view a litigant's claims with distrust where the record reveals the witness has within his or her control highly probative evidence that the witness fails to produce. (Evid. Code, §§ 412, 413.)[40]

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[40] "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust" and "[i]n determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts (continued...)

Here, the information gained through Jan's legal team's investigation was highly pertinent as to the state of Jan's knowledge and her claim of undue influence, yet Jan opted not to produce such evidence. Under the circumstances, a trier of fact could properly conclude that such evidence, if introduced, would not have been favorable to Jan. Numerous cases so hold. (E.g., *Westinghouse Credit Corp. v. Wolfer* (1970) 10 Cal.App.3d 63, 69 [trial court properly inferred attorney's testimony would have been adverse to defendant seeking relief from default when defendant—who claimed attorney failed to represent her—declined to disclose their communications]; *Shapiro v. Equitable Life Assur. Soc.* (1946) 76 Cal.App.2d 75, 93-94 ["The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party," internal quotation marks omitted]; see generally 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation At Trial, §115, pp. 153-154 [collecting cases allowing adverse inference from party's failure to produce evidence].)

Jan's decision not to produce highly probative evidence in support of her claims of lack of knowledge and undue influence should preclude her from advancing such claims here.

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[40] (...continued)
in the case against him, or his willful suppression of evidence relating thereto, if such be the case." (Evid. Code, §§ 412, 413.)

c. Where a plaintiff places certain issues in controversy by bringing suit, but asserts privilege to preclude the other party from having access to probative evidence, the plaintiff's suit should properly be dismissed.

Where a plaintiff, such as Jan, asserts a privilege as to crucial evidence pertinent to proving facts that she voluntarily placed in issue by bringing suit, the case is properly subject to dismissal. The reason: A litigant cannot have it both ways. A litigant cannot place issues in controversy and simultaneously assert a privilege to preclude access to information relevant to those issues.

As one court declared, a plaintiff may have "the right to stand on the privilege, but [she has] not the right to proceed with [her] claim while at the same time insisting on withholding key evidence from [her] adversary." (*Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 292 [dismissing claim where plaintiffs asserted trade secret privilege as to circumstances of a settlement it wanted the defendant to pay].) Numerous cases are in precise accord.[41]

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[41] E.g., *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 174-175 (dismissing plaintiff's claim where plaintiff withheld evidence under self-incrimination privilege); *Dalitz v. Penthouse International, Ltd.* (1985) 168 Cal.App.3d 468, 479 (magazine, suing for libel, could not "use the First Amendment simultaneously as a sword and a shield" by raising reporter's shield to protect sources, thereby forestalling inquiry into the truth of or good faith as to its reporting); *Fremont Indemnity Co. v. Superior Court* (1982) 137 Cal.App.3d 554, 560 (plaintiff may not "initiate a lawsuit and then by reliance upon the privilege against self-incrimination effectively prevent the party sued from getting at the facts by way of discovery, and thus prejudice preparation of his defense"; insurance bad faith claim

(continued...)

Having chosen to place issues as to her knowledge and the influences that prompted her to enter the Agreement in controversy by requesting rescission, Jan's assertion of privilege to preclude Ron from gaining access to the information gathered by her legal team subjected her claim to outright dismissal. Since the trial court could properly have dismissed Jan's claim because she hid the ball, Jan should not be allowed to argue here that she lacked knowledge or was subjected to undue influence.

We anticipate Jan will respond by asserting, as she did below, that adverse inferences cannot be drawn where evidence is not produced under claim of privilege, citing Evidence Code section 913. (7/6 RT 167:1-9; AOB 67.) But, the argument doesn't work.

First, the trial court expressly declared it was drawing no inference from Jan's assertion of privilege: "In reaching its findings, conclusions and determinations . . . [the trial] [c]ourt drew no inference from [Jan's] assertion of any . . . [attorney-client] privilege or [work-product] doctrine." (Exh. A:776 [¶ 12].) Judge Lachs must be taken at his word.

Second, regardless of the reason why Jan did not call any member of her legal team, the bottom line, as demonstrated above, is that her failure to do so resulted in her failure to prove her case. Since the knowledge of Jan's legal team was attributable to Jan, the absence of evidence as to that component of Jan's knowledge amounted to a failure of proof.

Third, there were non-privileged matters as to which members of Jan's legal team could have testified, without violating any confidence. For

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[41] (...continued)
dismissed where plaintiff insured asserted self-incrimination privilege).

example, at the September 6, 1997, meeting attended by Jan and her attorney, Mr. Harlan, and by Ron and his counsel, Ron testified that he discussed the Food4Less merger (see Statement of the Case, § C.2, above) and Mr. Harlan later referred to such merger in his September 16, 1997, memorandum to Ron's counsel (*ibid.*). These were non-privileged matters as to which Mr. Harlan could well have testified if he disagreed that the mergers were disclosed. Not calling Mr. Harlan to testify as to this matter permitted an inference that his testimony would not have been favorable, as the trial court concluded.[42]

Fourth, Jan's voluntary decision not to call team members whose testimony was essential to her claim of lack of knowledge and highly relevant to the other rescission issues she raised has nothing to do with the assertion of a privilege; rather, it is a tactical decision, nothing more, nothing less.[43] Indeed, a party cannot even assert a privilege as to evidence

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[42] Judge Lachs found: "Petitioner's failure to call Mr. Harlan to testify regarding this matter at trial further supports the Court's finding that such possible merger was disclosed by Respondent to Petitioner." (Exh. A:783 [¶ 47].)

[43] As the Law Revision Commission explained, section 913 "deals only with the inferences that may be drawn from the exercise of a privilege; it does not purport to deal with the inferences that may be drawn from the evidence in the case. [Evidence Code] [s]ections 412 and 413, on the other hand, deal with the inferences to be drawn from the evidence in the case; and *the fact that a privilege has been relied on is irrelevant to the application of these sections*." (Law Rev. Com. com. to Evid. Code, § 412, emphasis added; see *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 62 ["While not binding, the Commission's official comments reflect the intent of the Legislature in enacting the Evidence Code and are entitled to substantial weight in construing it"].) Thus, concluded the Commission, "there is no inconsistency between Section 913 and Sections 412 and 413." (Law Rev. Com. com. to Evid. Code, § 412; see also 3 Witkin, Cal. Evidence, *supra*, Presentation At Trial, § 115, p. 154 [Evid.

(continued...)

that the party has not opted to proffer, so no unfavorable inference based on the *non*-assertion of a privilege could possibly have been drawn here.

Here, Jan never asserted a privilege as to the evidence she elected not to introduce, such as the evidence concerning the knowledge gained by her legal team as to Ron's finances. Evidence Code section 913, relied on by Jan (AOB 67), only bars adverse inferences from the *assertion* of a privilege, not from a litigant's election not to produce her strongest evidence.

For all the reasons stated above, Jan should not be permitted to claim on appeal that she was ignorant of the facts and was subjected to undue influence.

D. Although Jan Raises No Tenable Substantial Evidence Argument, Substantial Evidence Supports The Findings That Jan Freely Entered The Agreement With Full Knowledge of the Facts, With Full Appreciation of Its Compromises, Benefits And Risks, And Without Undue Influence.

As is true with the case-determinative points advanced in Section I, above, the case—once again—could stop here. The unchallenged findings that Jan had knowledge and was not subjected to undue influence must be presumed correct and supported by substantial evidence. (See discussion in

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[43] (...continued)
Code, § 913 "merely prohibits comment on the claim of privilege as such; it does not prevent the drawing of inferences from the evidence (or lack of it)"; citing Commission's Comments].)

§ I.C, II.A, above.) More fundamentally, however, as just demonstrated (§ II.C.2.a, above), Jan failed to prove even a prima facie case that she lacked knowledge: Since her legal team's knowledge was conclusively attributed to Jan, her failure to call any member of her team to testify as to its knowledge left Jan's proof on the knowledge issue fatally incomplete and, thus, insufficient. Although these reasons alone conclusively negate any need for this Court to examine the sufficiency of the evidence to support the trial court's findings that Jan knew all pertinent facts and was not subjected to undue influence, we will now briefly recite such evidence out of an abundance of caution.

1. Substantial evidence supports the trial court's determination that the Agreement is valid and enforceable.

As Ron's factual recitation conclusively demonstrates, substantial evidence supports the trial court's findings that Jan entered the Agreement with a complete understanding of its benefits, risks and compromises, knowing exactly what the deal contemplated (Statement of the Case, §§ A.3, A.5, above); that Jan entered the Agreement after having independently and fully investigated, and with full knowledge of, the material facts (Statement of the Case, §§ A.2, A.3, C, above); and that Jan entered the Agreement of her own free will, not because of any undue influence (Statement of the Case, §§ A.3, D, above).

These facts—completely unchallenged by Jan on appeal—support the trial court's findings that (a) Jan "exercised her own judgment, with the

advice of a team of skilled attorneys, to conclude the Agreement was satisfactory to her" after having over six months to investigate the parties' assets and liabilities; (b) Ron "did not conceal assets or significant financial information from" Jan; (c) Ron made "a true and full disclosure of community assets" and their values, and "fulfilled his fiduciary duties" of access and disclosure to Jan; (d) Jan and her lawyers knew the relevant facts, including the mergers; (e) Jan "did, in fact, enter into the Agreement freely, willingly and voluntarily, and free of any fraud, duress, medical condition or undue influence"; and (f) "the credible evidence at trial established overwhelmingly that any [undue influence] presumption would have been fully and completely rebutted." (Exh. A:775, 780-783 [¶¶ 32, 35, 37-39, 41, 46-47].)

These unchallenged findings and supporting evidence conclusively establish that the Agreement is valid and enforceable, exactly as the trial court found. (*E.g.*, *Marriage of Friedman*, *supra*, 100 Cal.App.4th at pp. 69, 72-73 [affirming validity of and enforcing agreement where "wife understood the scope and purpose of the postnuptial agreement"]; *Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 686 [affirming trial court's finding, based on substantial evidence, that wife was suffering "buyer's remorse," not duress, where wife was represented by competent counsel, and husband "provided . . . substantial economic documentation; informed both her attorneys that more such documentation was located at the family residence; and offered to assist (wife) in locating those documents"].)[44]

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[44] See also *Marriage of Wipson* (1980) 113 Cal.App.3d 136, 143 (although wife was "attempting to recover from the trauma and confusion

(continued...)

2. Jan's evidentiary quibbles are baseless.

Rather than dealing with what really matters—the trial court's findings and the substantial evidence that supports them—Jan presents her own spin on a few snippets of evidence, as if doing so somehow undermines the force of contrary findings. Once again, however, Jan ignores the substantial evidence rule in advancing these evidentiary contentions.

None has the slightest merit:

- Jan hypothesizes that Ron's efforts to reconcile were merely a "ruse" to deflect the marital dissolution action to a less "inconvenient time." (AOB 46.) But the court found otherwise. (Exh. A:777 [¶ 17].) And, overwhelming evidence—including Jan's own testimony—establishes that Ron genuinely wanted to reconcile. (E.g., 3/23 RT 109:22-110:6; 3/24 RT 149:4-151:18; 3/28 RT 176:22-177:6; 182:3-184:14; 6/18 RT 83:1-6; 6/29 RT 13:6-14.) Indeed, the couple remained reconciled *for over four*

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[44] (...continued)
normally present in a dissolution," she was far from being a "frightened, confused woman" and knowingly entered into marital settlement agreement; affirming trial court's enforcement of agreement); *Weil v. Weil*, *supra*, 37 Cal.2d at p. 787 (no undue influence where wife "fully understood the nature and legal effect of the step she was taking"); *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 917 (no undue influence "when . . . the trustee/attorney produces evidence that the transaction was conducted at arm's length with an intelligent, experienced and sophisticated client"); *Colton v. Stanford*, *supra*, 82 Cal. at pp. 372-373 (no undue influence where evidence showed that partner's widow placed no confidence in other business partners and acted exclusively upon advice of disinterested counsel); see generally *Keithley v. Civil Service Bd.* (1970) 11 Cal.App.3d 443, 452 (listing factors suggesting undue influence, *none* of which are present here).

years, until *Jan* decided she wanted to end the marriage. (See Statement of the Case, § E, above.)

- Jan claims that Ron would not let her move in with him until she signed the Agreement. (AOB 50-51.) Not so. The trial court found that Jan was not pressured to sign the Agreement. (Exh. A:776, 778-779 [¶¶ 15, 26, 29].) Jan testified that she never viewed moving in with Ron as being connected with finalizing the Agreement. (6/18 RT 81:17-21.) When Jan decided to move in after first refusing, she did so because she was comfortable with the couple's prospects for a successful reconciliation and with the basic terms of the Agreement. (6/16 RT 182:2-10; 6/17 RT 182:24-184:14; 6/18 RT 82:20-83:9; AA V:899.) She did not sign the Agreement until nearly two months after she moved in. (AA V:821.)
- Jan contends that she was under "constant intense pressure from Ron to actually sign the agreement." (AOB 51, citing 6/18 RT 91-95.) Ron testified to the contrary. (7/2 RT 77:2-80:15.) The trial court believed Ron. (Exh. A:778-779 [¶ 26].)
- Jan asserts that Ron "assured her that they were going to grow old together and the agreement would never actually come into effect." (AOB 51.) The evidence Jan cites (6/29 RT 159-160) says no such thing. In fact, it was Jan who testified that *she* "believe[d] that [she] and Ron were going to be reconciled and live together until" they "grow old together." (6/29 RT 160:5-9.) There is no evidence that Ron made any such representation. In

any event, it is Jan who moved out and petitioned for dissolution. (See Statement of the Case, § E, above.)

- Jan contends that it would have been "futile" for Jan to have insisted on viewing Ron's records. (AOB 51.) But the trial court properly excluded as speculative the evidence she cites. (6/30 RT 51:10-54:1.) Jan nowhere claims the ruling was erroneous. In fact, Ron did make a sincere offer to open his office and Jan's team never took him up on it. (AA V:859; 3/28 RT 108:1-14; 6/30 RT 39:18-40:1; 7/2 RT 82:6-7.) If Jan had wanted to test the sincerity of Ron's offer, her team should have attempted to schedule an appointment. It never did.
- In a footnote, Jan points to a cryptic note buried in an exhibit—an exhibit the trial court *did not admit into evidence* (7/6 RT 47:17-24)—and claims that it showed that Ron "somehow ended up with an additional 827,321 shares of Fred Meyer in his own personal name" after the merger. (AOB 62, fn. 10, citing Exhibit 76 [purported printout of SEC document: Schedule 13D filed by Fred Meyer].) Jan does not contend that the trial court erred in excluding the exhibit. Moreover, there was *no* mention of this entry at trial; no offer of proof to explain what it meant; no opportunity for Ron to put on evidence explaining it. Indeed, Jan did not even offer the exhibit until after both sides had rested, and the trial court rejected it on that basis. (7/6 RT 46:24-47:23.) Jan, of course, cannot rely on evidence that is outside the record. (*Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 962-963

[on appeal party cannot rely on "possible theories that were not fully developed or factually presented to the trial court," citation and internal quotation marks omitted].)

- Jan argues that the records Ron made available would not have revealed any information she now claims was concealed. (AOB 65-66.) But this is total speculation, as she never bothered to view the records. Nor is Jan's speculation supported by the evidence she cites. (See 3/28 RT 112:5-114:2; 7/2 RT 184:3-189:25.) Moreover, her speculation is refuted by Ron's testimony that the records he made available confirmed the assets and values on the Schedules and contained all the information Jan could possibly have wanted to know about the mergers, cancellation fees, and otherwise concerning Ron's business interests. (7/2 RT 80:16-82:7, 94:16-95:13, 187:19-189:25; see also Statement of the Case, § C.2, above.)
- Jan claims there were two inconsistencies between the Schedules Ron provided and his supplemental financial footnotes. (AOB 7, fn. 3; 9.) One asserted inconsistency was fully explained as a typographical error in a footnote that did not affect the bottom line. (7/2 RT 93:6-94:9.)[45] The other asserted inconsistency was irrelevant: the larger figure was used to value the asset, meaning that either the asset's value was stated correctly or was overstated. (3/24 RT 156:8-25; compare AA 837 [valuing Smith's interest at

[45] The footnote mistakenly valued the Food4Less interest at $52 million, whereas the true value, listed on the Schedule, was $42.5 million. (AA V:829, 831 [note 5].)

$45.5 million] with AA 838 [note 3: valuing interest at $31 or $36.1 million].) Either way, the inconsistency could not have affected Jan's decision to enter the Agreement. And, the asset in question—Smith's stock—was something that Jan had agreed would be Ron's separate property and, thus, it did not affect Jan's community property entitlement.[46]

- Jan claims there were entities (RB Management LLC and Waterton Investments II) not reflected in the Schedules Ron provided. (AOB 37.) The trial court found those were simply entities that, at the time, had no value, had no assets, and were ultimately funded with assets that had already been fully disclosed. (Exh. A:782 [¶ 42]; see 7/2 RT 114:10-118:20.)
- Pointing to an exhibit that was not received in evidence, Jan complains about a supposed undisclosed rise in the publicly available stock price of the Smith's/Fred Meyer shares between June and November 1997. (AOB 7, 60, citing Exhibit 74.) Once again, Jan's argument is based on a *refused* exhibit. (Exhibit 74; 7/6 RT 38:16-46:22.) And, once again, she makes no contention

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[46] Jan also claims an inconsistency between the Schedules and Ron's testimony with respect to his interest in Food4Less. (AOB 9.) There is none. Ron actually owned 2,834,100 shares, valued at $42 million. (3/28 RT 256:7-258:4.) Ron denied his interest could be calculated as Jan proposes—through rough calculations based on his average percent-ownership interests. (3/24 RT 190:5-191:15.) The trial court believed Ron. (Exh. A:781 [¶ 32: Ron's estimates were "sincerely held" and "reasonable"].) Of course, all these claimed inconsistencies would have been apparent to Jan and her team in 1997, and thus could not have been material to Jan's decision to enter the Agreement; she either didn't care (and hence didn't ask about them), or resolved the inconsistencies through her own investigations.

on appeal that the exhibit was improperly refused. Moreover, the point is irrelevant because Jan undeniably agreed that, regardless of value, the shares in question were to be Ron's separate property. (AA V:990 [¶ 3: conceding Smith's as Ron's separate property].)[47]

- Jan claims that Ron failed to update the asset values in the Schedules—which everyone agreed were to be valued as of June 6, 1997 (see note 15, above)—to reflect the values as of the Agreement's effective date in the end of November, after the announcement of the mergers. (AOB 73.) Stipulating to a set valuation date is proper. (*Marriage of Hahn* (1990) 224 Cal.App.3d 1236, 1239-1241.) In any event, any disclosure defect was immaterial as the overall community property asset values remained the same. (3/24 RT 194:19-21, 197:14-20; 7/2 RT 94:10-13.) Moreover, Ron met his duties by telling Jan about the mergers and providing her team access to his files.[48] In addition,

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[47] In any event, Ron had "no obligation to inform [Jan] of market values of fully disclosed [and publicly traded] securities." (*Marriage of Heggie* (2002) 99 Cal.App.4th 28, 35, citing *Marriage of Connolly* (1979) 23 Cal.3d 590, 598.)

[48] Fam. Code, §§ 721, subd. (b)(1)&(2) (fiduciary duty includes affording "each spouse *access* at all times to any books kept regarding a transaction for the purposes of inspection and copying" and "[r]endering upon request, true and full information of all things affecting any transaction which concerns the community property," emphasis added), 1100, subd. (e) (duty to disclose and to provide access to marital asset information "upon request"). Jan nevertheless argues Ron had a duty under Family Code § 1100, subdivision (d), to inform her in writing about the mergers (AOB 74)—but that provision does not apply, as the merger was not a "sale," "exchange," "or other disposition of all or substantially all of the personal property used in the operation of the business."

the valuations were publicly known (once the Food4Less merger was announced there was a set exchange ratio or equivalence between Food4Less and publicly traded Fred Meyer stock, 3/24 RT 194:13-21).

- Jan claims that Ron did not disclose that the Food4Less merger would ultimately produce significant management contract termination fees for the Yucaipa Companies when the merger was completed in March 1998—four months after she signed the Agreement.[49] (AOB 8-9, 61-62; see 7/2 RT 68:19-69:2 [merger completed 3/10/98].) But Jan knew about the Food4Less/Fred Meyer merger before she signed the Agreement (see Statement of the Case, § C.2) and the Schedules disclosed that Yucaipa was community property, that it had "management contract retainers," and that it "earns substantial fees in connection with its acquisitions" (AA V:830, 832 [note 14]; 3/24 RT 192:21-25; 3/28 RT 244:8-246:11).[50] The management-contract fees and fees for terminating its contracts—including those with Fred Meyer and Food4Less—were all spelled out in Yucaipa's contracts, which Ron made available to Jan and her team (though they chose not to review them) and which were publicly available as well. (3/28 RT

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[49] Jan also claims that Yucaipa sinisterly profited by exchanging valueless warrants for stock as part of the merger. (AOB 59.) The record reflects, however, that the stock was in payment of Yucaipa's fees; to obtain certain tax advantages, the warrants were canceled as part of the transaction. (3/28 RT 253:6-256:5; 7/2 RT 197:13-198:17.)

[50] The cancellation fee merely represented an acceleration of amounts due under the remaining years of an existing contract. (3/28 RT 240:20-241:65, 242:1-243:3.)

246:24-247:4, 248:6-249:7, 253:6-20; 6/16 RT 47:8-17; 7/2 RT 67:4-9, 95:14-24, 188:17-189:25, 195:1-196:4.)[51] Moreover, Jan's team independently investigated Yucaipa. (AA V:841-842 [June 13 billing entry: "review of limited asset search for Yucaipa Companies Phase I and Phase II"], 986 [300-page asset investigation report re "Phase II"]; see also AA V:850-851 [9/97 billing entries showing evaluation of assets listed on schedules].) The law assumes that Jan's team obtained all the information it required and, if Jan's team did not know of the pertinent Yucaipa information, Jan should have called her team members as witnesses at trial to so testify, but she elected not to do so. (See discussion in § II.C, above.)[52]

In any event, Jan has never shown or hinted that the $2.6 million Yucaipa value disclosed on the Schedules was inaccurate after subtracting

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[51] Jan may not complain when she consciously declined to view those records. (*Boeseke v. Boeseke* (1974) 10 Cal.3d 844, 849 [wife "may not now complain" when she was aware husband's list of assets did not disclose all facts in his possession relating to the value, nature, and extent of the community property, but then declined opportunity to investigate or request further facts].)

[52] "When one undertakes an investigation and proceeds with it without hindrance it will be assumed that he continued until he had acquired all the knowledge he desired and was satisfied with what he learned." *Collins v. Collins*, *supra*, 48 Cal.2d at p. 330, quoting *Cameron v. Cameron*, *supra*, 88 Cal.App.2d at pp. 593-594, internal quotation marks omitted; see also *Hayward v. Widmann* (1933) 133 Cal.App. 184, 189 ["One who has actually investigated the truth of the representation, and is given full and fair facilities for doing so, and who acts upon his own judgment and knowledge, cannot be said to rely upon the representation"].)

expenses.[53] (AA V:830; 3/24 RT 192:21-194:12; 3/28 RT 247:8-23, 256:1-5.)

For these reasons, there is no merit in any of Jan's evidence-based arguments, all refuted by the trial court's findings, by the substantial-evidence rule, and by the rule that evidentiary rulings unchallenged on appeal are presumed correct.

E. There Is No Merit In Jan's Contention That Findings Of Undue Influence And Fiduciary Breach Were Compelled As A Matter Of Law.

Jan asserts that the law *required* the trial court to find undue influence and fiduciary breach. (AOB 28-32, 38-40, 57-69.) Not so. These issues present questions of fact resolvable by—and resolved here by—the trier of fact:

- "The issue of whether or not undue influence has been exerted frames a question of fact." (E.g., *Marriage of Dawley* (1976) 17 Cal.3d 342, 354, citations omitted; accord *Marriage of Bonds* (2000) 24 Cal.4th 1, 31 [collecting cases].)
- The same is true as to claims of breach of fiduciary duty. (E.g., *Duffy v. Cavalier* (1989) 215 Cal.App.3d 1517, 1536, fn. 10 [whether a person breaches a fiduciary duty is a question of fact

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[53] See *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 884 [to obtain award of lost profits, plaintiff "must show loss of net pecuniary gain, not just loss of gross revenue"].) Ron testified that Yucaipa typically generated fees along the lines produced by the Food4Less merger, but the *net* value was far less—$2.6 million. (3/24 RT 192:21-194:12; 3/28 RT 247:15-249:23 [explaining how Yucaipa Companies' income was offset by expenses].)

that "depends on the specific facts and circumstances presented in a given case," including "the relative sophistication and experience" of the parties; their ability to independently evaluate the relevant information "and exercise an independent judgment thereon"; the nature of the transaction; and "the actual financial situation and needs of the" parties].) Numerous authorities are in accord.[54]

On appeal, "[t]he issue is whether there is substantial evidence to support the trial court's conclusion that the [prevailing party] did not breach [his or her] fiduciary duties." (*Jones v. Wagner* (2001) 90 Cal.App.4th 466, 471-472 [action between business partners]; *Marriage of Friedman*, *supra*, 100 Cal.App.4th at p. 72 [appellate court "bound by (trial court's) *factual* finding" of no fiduciary breach, emphasis added]; *Marriage of Bonds*, *supra*, 24 Cal.4th at p. 31 ["a reviewing court should accept such (no undue influence) factual determinations of the trial court as are supported by substantial evidence"].)

Here, the trial court heard the evidence and concluded there was no undue influence and no breach of fiduciary duty. (Exh. A:778-779, 780-781 [¶¶ 26, 32].) Jan does not contest these findings. They are presumed binding on appeal. (See discussion in § II.A, above.)

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[54] E.g., *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 425 (the scope of fiduciary disclosure duties "varies with the facts of the relationship," citing *Duffy*); *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 415 ("whether a fiduciary duty has been breached, and whether a statement constitutes constructive or actual fraud, depends on the facts and circumstances of each case"); *Petersen v. Securities Settlement Corp.* (1991) 226 Cal.App.3d 1445, 1453-1457 (stockbrokers' duty to disclose risks of investments varies depending on financial status/needs/degree of dependence of customer).

Jan contends that *Vai v. Bank of America* (1961) 56 Cal.2d 329 suggests otherwise. (AOB 31-32, 58, 65, 69.) This is not true. There is not a word in *Vai* that states, suggests or hints that an appellate court must accept as true factual assertions that it rejects. In fact, *Vai* defers to the trial court's factual findings, but concludes the trial court drew the wrong legal conclusion from the facts it found. (56 Cal.2d at p. 342 ["The facts as found by the trial court show the existence of a fiduciary relationship and constructive fraud as a matter of law"].)

In *Vai*, the trial court *found* that the husband told his wife and her lawyer that he was too ill to respond to discovery; that he promised to provide the wife with full and complete information about the community property; and that he promised he would negotiate a fair and equitable property settlement agreement. (*Id.* at p. 334.) Relying on these representations, the wife and her lawyer stopped their own investigation. (*Ibid.*) The Supreme Court concluded that, based on the facts the trial court had actually found, the trial court erred in holding that no fiduciary relationship existed between the husband and wife. (*Id.* at p. 342.) It concluded that the trial court's findings established the existence of a fiduciary relationship as a matter of law. (*Ibid.*)

Vai is far afield from the facts of this case. Unlike the situation in *Vai*, the trial court here correctly determined that there was a fiduciary relationship, but that there was *no evidence of breach or any other abuse of the fiduciary relationship*. (Exh. A:778-779, 780-781 [¶¶ 26, 32].) It concluded Ron made good-faith, "true and full disclosure of community assets" and that he exerted no undue pressure. (*Ibid.*) Additionally, it

found that Jan "knowingly chose to deal at arm's length and to rely on her own investigation of community assets"—as *Vai* recognizes spouses are perfectly free to do.[55] (Compare *Vai*, *supra*, 56 Cal.2d at p. 336 *with* Exh. A:781-782 [¶¶ 32, 36-38].)[56]

Relying heavily on a totally inapplicable case (*Vai*), Jan ignores a case that matters (*Marriage of Friedman*, *supra*, 100 Cal.App.4th 65), even though it was a key case relied on in Ron's trial brief (see RA 71-73, 78-79). *Friedman* addresses the same issue presented here. There, the wife (a lawyer) and the husband (who was engaged in the forensic consulting business) entered into a postmarital agreement, prepared by the husband's attorney, that provided each party's future income, property, and debts

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[55] Unlike the husband in *Vai*, Ron *never* told Jan or her lawyers to rely on him and Ron declined to warrant the completeness and accuracy of the Schedules. (AA VI:1042.) And Jan acknowledged she was not relying on any representation by him. (AA V:800 [¶¶ 8, 9].) Ron in no way impeded Jan's investigation (e.g., AA V:859); and Jan's team conducted its own extensive independent investigation (e.g., AA V:986).

[56] The fraud cases on which Jan relies are likewise inapposite. (AOB 57-69, citing, inter alia, *Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, and *Marriage of Varner* (1997) 55 Cal.App.4th 128.) In both cases, unlike the situation here, the complaining spouse was actually or effectively unrepresented by counsel. (*Varner*, 55 Cal.App.4th at p. 144; *Brewer*, 93 Cal.App.4th at p. 1337.) And in both cases, unlike here, the defendant spouse made materially misleading statements or outright misrepresentations about assets and values *on which the complaining spouses actually relied*. (*Varner*, 55 Cal.App.4th at pp. 134, 143; *Brewer*, 93 Cal.App.4th at pp. 1346-1347.) In *Varner*, unlike here, the husband prevented the wife from obtaining material financial information. (*Varner,* 55 Cal.App.4th at p. 143.) Here, Jan was fully represented by a team of lawyers, Ron made no misrepresentation, and Jan expressly did not rely on Ron's Schedule of assets and estimated values. Finally, in *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1164-1165, this Court affirmed a fraud judgment on substantial evidence that the defendant "specifically undertook to produce all relevant information" then omitted material information. Here the trial court, on ample evidence, found otherwise.

would be his or her separate property. (100 Cal.App.4th at p. 68.) The wife wanted to protect her assets from her husband's potential creditors. (*Id.* at p. 73.) At the time they signed the agreement, "the parties had reasonable expectations that they would not share in the fruits of each other's business achievements." (*Id.* at p. 67.) After entering the agreement, the husband's business "flourished beyond his and his wife's dreams." (*Id.* at p. 69.) When the marriage fell apart, the wife, seeking to obtain the benefits of her husband's post-agreement success, sought to have the agreement rescinded. (*Ibid.*)

Both the trial court and the Court of Appeal saw through the wife's stratagem. In words directly applicable to our case, *Friedman* recognized: "Subsequent events, whether unforeseen or fortuitous, and whether they favor one side or the other, should not dictate how we decide the legal issue here presented." (*Id.* at p. 73.)[57] Just as in *Friedman,* "Judicial erasure of a competent adult's signature on an agreement does not serve the purpose of the law of contracts, i.e., to protect the reasonable expectations of the parties." (*Id.* at p. 67.)

This is exactly the case here. Jan willingly and knowingly entered the Agreement in order to preserve her financial status quo, unwilling to endure the risks that Ron wanted to take. Ron took the risks and

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[57] See also *Marriage of Connolly*, *supra*, 23 Cal.3d at p. 604 ("The fact that later events included a successful public offering which resulted in a financial bonanza must not divert us from our conclusion that at the time the trial court, counsel, and the parties made and accepted the property division before us its essential terms were fair and reasonable"); *Marriage of Heggie*, *supra*, 99 Cal.App.4th at p. 35 (no fraud where wife bargained for essentially cash buyout, making subsequent increase in value of husband's stock shares irrelevant).

enormously increased his wealth. As in *Friedman*, Jan—not having agreed to take the risks—should not be allowed to share in Ron's successes.

III. NO OTHER BASIS EXISTS FOR REVERSING THE ORDER UPHOLDING THE AGREEMENT'S VALIDITY AND ENFORCEABILITY.

Jan argues the Agreement should not be enforced for a variety of reasons. (AOB 38-56, 69-83.) None is tenable.

A. Contrary To Jan's Assertions, Spousal Agreements, Particularly Those Facilitating Reconciliation, Are Favored Even If The Property Is Not Divided Perfectly Equally.

Jan contends that competent, fully informed, and freely acting spouses who are separately represented by counsel should not be allowed to enter into enforceable agreements if a court, in retrospect, might view the property allocation as unequal. (See AOB 39 [arguing that to be enforceable, an agreement between spouses must be "fair, just and equitable. In marital cases, this means the division of the community must be equal"].) That is not the law.

As long as spouses "agree upon the property division, no law requires them to divide the property equally, and the court does not scrutinize the [agreement] to ensure that it sets out an equal division." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 666; see also *Marriage of Cream* (1993) 13 Cal.App.4th 81, 87 [spouses "are free to divide their community

estate in any fashion they wish and need not divide it equally"]; *Marriage of Brewer & Federici*, *supra*, 93 Cal.App.4th at p. 1349 ["we do not mean to suggest that (the spouses) lacked the ability to decide upon an unequal distribution of assets"].)[58]

In this case, Jan and Ron decided to attempt reconciliation and, as part of that effort, to resolve their differing economic interests and goals. The Agreement was entered to achieve such resolution. (AA V:799, 806 [¶¶ C, 2.14].) The Agreement had the desired effect—it paved the road for an actual multi-year reconciliation. It is exactly the type of agreement favored by the law. "Public policy seeks to foster and protect marriage, to encourage parties to live together, and to prevent separation." (*Hill v. Hill* (1943) 23 Cal.2d 82, 93.) Postnuptial agreements advance these policies. (*Matassa v. Matassa* (1948) 87 Cal.App.2d 206, 214 [the law favors post-nuptial property agreements]; accord *Marriage of Friedman*, *supra*, 100 Cal.App.4th at p. 72.) This is especially true if the agreement aids in

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[58] *Andrew v. Andrew* (1942) 51 Cal.App.2d 451 (AOB 39) and *Marriage of Tammen* (1976) 63 Cal.App.3d 927 (AOB 45) do not suggest to the contrary. In *Andrew*, the husband *tricked* the wife into an unequal division. There, unlike here, the wife was unrepresented by counsel and the husband misrepresented that the agreement, which the wife never read, divided all property "half and half." (51 Cal.App.2d at pp. 454-455.) Here, there was no trickery and Jan was represented by counsel and a team of experts who performed their own investigation as to the couple's assets and knew that Ron claimed substantial assets as separate property. Unlike the wife in *Andrew*, Jan actually believed the division was "not equal." (AA VI:1203.)

In *Tammen*, the *court* purported to divide marital assets *evenly*, as it was required to do *absent an agreement*. (Fam. Code, § 2550.) Here, there was an agreement that provided for division as agreed by the parties.

reconciliation. (*Schwab v. Schwab* (1959) 168 Cal.App.2d 20, 24 ["An agreement promoting reconciliation is favored by the law . . . ."].)

A postnuptial agreement not tainted by fraud, compulsion or abuse of the parties' confidential relationship is "valid and binding." (*Matassa v. Matassa*, *supra*, 87 Cal.App.2d at p. 214.) That's exactly what the trial court found here.

B. Contrary To Jan's Assertions, The Agreement Is Not Subject To Invalidation For Lack Of Lawful Consideration.

Jan argues the Agreement is not supported by lawful consideration. (AOB 44-53.) She is wrong—for multiple separate reasons.

1. The Agreement needn't be supported by any consideration.

Marital agreements transmuting property from separate to community (or vice versa)—such as Jan and Ron accomplished under the Agreement—need not be supported by *any* consideration. Family Code section 850 expressly so declares: "[M]arried persons may by agreement or transfer, with *or without* consideration . . . : (a) Transmute community property to separate property of either spouse." (Fam. Code, § 850, emphasis added.)[59]

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[59] See *Marriage of Broderick* (1989) 209 Cal.App.3d 489, 500 (like marital transfers, real property deeds are valid without consideration; wife could not claim inadequate consideration where she accepted $3,000 from her husband in return for a quitclaim deed relinquishing her community

(continued...)

2. There is no restriction on the type of consideration that can support a postmarital agreement.

Jan contends that an unequal property split can only be based on economic considerations; she claims "agreements to reconcile, or to attempt to reconcile, are not legitimate consideration for economic concessions." (AOB 47, 52, 53.) Again, Jan is mistaken.

First, Jan's argument goes nowhere because, even if she were correct (she isn't), she ignores the trial court's findings that she *did* enter the Agreement for *economic* reasons. Jan bargained for and obtained millions of dollars that became her separate property; she obtained a home that became her separate property; and she obtained protection from economic risk and fluctuating marital asset values. (Exh. A:777, 782, 784-785, 787 [¶¶ 18, 40, 51, 56]; see AA V:803-804, 811 [¶¶ 2.2.2, 2.4, 8.4].)[60] These are real *economic* benefits which Jan was entitled to keep regardless whether Ron's investments succeeded or flopped.

These economic benefits suffice as consideration to support the entire Agreement. (Civ. Code, § 1605 [legal consideration consists of "*[a]ny* benefit conferred, or *agreed to be* conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled," emphasis added]; see also *Rice v. Brown* (1953) 120 Cal.App.2d 578, 582 ["The law

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[59] (...continued)
property interest in a family home, an interest that she alleged was worth $13,000).

[60] The monetary payments belonged to Jan even if Ron died, in which case Jan would also be entitled to receive 50 percent of all the assets. (AA V:809 [¶ 5.2].) And, if Ron's risky investments had resulted in large losses, Jan could have potentially received well over half of all the assets under the Agreement in the event of divorce.

will not weigh the quantum of consideration," and "[t]he slightest consideration is sufficient to support the most onerous obligation," internal quotation marks omitted]; *Chrisman v. Southern Cal. Edison Co.* (1927) 83 Cal.App. 249, 254 [trifling consideration will sustain contract if promisor not otherwise entitled to it].)

Here the trial court found that the Agreement was, "[i]n light of each party's goals and desires," a "fair and equitable" agreement, "effectively compromising a multitude of issues between the parties." (Exh. A:787 [¶ 60].) That is all the law conceivably required: The law "does not require an exact relation between value and price but only what is just and fair under all of the circumstances." (*Rader v. Thrasher* (1962) 57 Cal.2d 244, 252.)

Second, although there is true economic consideration here, Jan's assertion that only economic consideration can support an agreement allocating marital property is wrong. "[W]here dissension exists between a husband and wife, and they have become estranged on that account, the execution of a conveyance of property from the husband to the wife, which is free from fraud or undue influence, made as an inducement for reconciliation, harmony, and the renewal of marital relations, constitutes a sufficient consideration for the execution of the instrument." (*Dale v. Dale* (1927) 87 Cal.App. 359, 364.) Numerous cases agree.[61]

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[61] E.g., *Schwab v. Schwab*, *supra*, 168 Cal.App.2d at p. 24 (marital property transmutation made as inducement for reconciliation supported by adequate consideration); *Cummins v. Cummins* (1935) 7 Cal.App.2d 294, 301-302 (husband's conveyance of property to wife in consideration of "love and affection" constituted valid consideration for reconciliation agreement entered into during divorce proceedings); *Tillaux v. Tillaux*

(continued...)

Jan's citations are not to the contrary. (AOB 52, citing *Fishbaugh v. Fishbaugh* (1940) 15 Cal.2d 445; *Lane v. Lane* (1926) 78 Cal.App. 326.) Those cases do not talk about the adequacy of consideration, but rather address lies by a spouse concerning his or her intent to reconcile. Here, Jan received exactly what she bargained to receive in a context where, the trial court found, Ron genuinely wanted to reconcile. (Exh. A:777 [¶ 17]; see 3/28 RT 176:22-177:6; 6/29 RT 109:19-110:2.)

According to Jan, *O'Hara v. Wattson* (1916) 172 Cal. 525, holds that "pretium affectionis" is never valid consideration. (AOB 53.) *O'Hara* says no such thing. It merely *affirms* a trial court's *factual finding* on "a question upon which the decision of the trial court must, in large measure, control." (172 Cal. at p. 527.) In our case, too, this Court should defer to the trial court's fact findings that the consideration was sufficient.

Rather than supporting Jan, *O'Hara* actually rejects the very argument that Jan now makes:

> "It will not do to say that the consideration must be held inadequate unless the value of the property at the time of the contract . . . exactly or even substantially equals the price fixed by the contract. . . . Undoubtedly the relations of the parties, and their love, affection, or regard for each other, as well as the object to be attained by the contract, may be given some effect." (*Id.* at p. 528.)

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[61] (...continued)
(1897) 115 Cal. 663, 669 (deed conveyed out of "love and affection" supported by "full and meritorious consideration").

3. There is no merit to any of Jan's other claims that the consideration was inadequate.

Jan raises an assortment of other claims concerning the supposed inadequacy of consideration. None has merit.

a. Jan argues that consideration failed because she ended up with money and property "to which she was legally entitled, and which Ron was already legally bound to give her or to acknowledge as hers." (AOB 44-45.) Not so. Jan had *no* legal entitlement to a continuing marriage *and* $1 million per year payments to become her separate property upon receipt or to $30+ million and her own home regardless of future risk.

b. Jan contends the consideration was inadequate because she could not have done worse had she divorced Ron. (AOB 40-44.) The trial court rejected this speculation. (Exh. A:787 [¶ 56]; see also Exh. A:781 [¶ 33] [Ron compromised on the characterization of assets under his theory of the date of separation].) And, Jan's speculation ignores reality: She didn't want to divorce; she wanted to reconcile. Without the Agreement, Jan could not have had both the economic security she wanted *and* a continuing marriage to Ron, who thrived on financial risk. (3/24 RT 110:24-111:23; 6/18 RT 175:3-23; 6/29 RT 41:15-24.)

c. Jan asserts that some of the Agreement's terms were "grossly advantageous to Ron, and disadvantageous to" her. (AOB 40-42.) This is untrue. It ignores that Jan wanted the Agreement at the time. It also

ignores substantial evidence to the contrary.[62] In any event, as demonstrated above, the quantum of consideration is irrelevant.

d. Jan argues that the consideration was inadequate because it was not separately collateralized. (AOB 45.) Under the law, consideration can be valid without collateralization. As demonstrated above, any consideration, including an unsecured promise to pay, suffices as legal consideration. (Civ. Code, § 1605 ["(a)ny benefit . . . *agreed* to be conferred" qualifies as consideration, emphasis added].) Adding collateral

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[62] Jan's characterizations of one-sidedness are inaccurate. She relies solely on evidence favorable to her, disregarding the substantial evidence rule and the trial court's right to credit Ron's evidence, rather than hers. Here are some examples:

• Jan claims that certain debts that the Agreement allocated to the community were incurred to purchase Ron's separate assets and therefore should not have been a community responsibility. (AOB 41.) Ron testified that the funds generated by those debts were *not* used to purchase separate property. (6/16 RT 56:21-23, 125:24-127:1.)

• Jan claims that Ron undervalued the Smith's and Food4Less interests. (AOB 40.) But this is at odds with Ron's directly contrary testimony. (3/24 RT 146:10-14, 156:8-157:9; 3/28 RT 256:7-257:2.) Jan claims the value of Food4Less increased by $60 million between June 6 and November 22. (AOB 41.) In fact, there was no change. (3/24 RT 194:19-21, 197:14-20; 7/2 RT 94:10-13.)

• Jan contends that her interest should not have been based on a tax-effected value. (AOB 41.) But, this is contradicted by her own lawyer's deposition testimony admitting that this was a reasonable approach. (6/30 RT 45:2-46:8.)

• Jan's claim that she received only a 5% interest rate on her $30+ million (AOB 41) is inaccurate. Her true interest was 8.33%—because she received an additional $1 million a year, representing a further 3.33% return. Whether 8.33% or 5%, the rate was an objectively reasonable one: As of November 21, 1997 (the date Ron signed the Agreement), a five-year Treasury Note was yielding taxable interest at 5.75% (http://wwws.publicdebt.treas.gov/AI/OFAuctions) and an unsecured federal court judgment entered on that date would have borne *taxable* interest at 5.43% per annum. (See 28 U.S.C. § 1961; http://www.federalreserve.gov/releases/ h15/19971124.)

to a promise goes to the amount, not the adequacy, of the consideration.[63] In any event, Jan was not concerned about collateral. The issue was discussed during negotiations and in the end, as the trial court found, Jan "trusted [Ron's] business acumen to the extent that she was not afraid that [Ron] would be unable to fulfill his part of the bargain." (Exh. A:786 [¶ 55]; see 6/29 RT 150:14-21; 6/30 RT 42:16-43:7; AA V:990 [¶ 1]; AA VI:1041.)

e. Jan argues that the Agreement lacks consideration because it is premised on an assertedly losing legal claim—that the couple was separated before Jan filed her petition for divorce in June 1997. (AOB 46-47.) Jan is wrong. Compromise of a plausible or honestly held legal position is valid consideration. (*Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 792 [compromise of dispute asserted in good faith is valid consideration, even if claim ultimately proves unfounded]; Rest.2d Contracts, § 74(1) [forbearance or surrender of even an invalid claim or defense is proper consideration where either "the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or . . . the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid," emphasis added].)

Here, Ron's position was both honestly held and supported: For many years before 1997, the parties had separate residences; did not have keys to each other's houses; and saw each other only infrequently. (3/24 RT 66:8-71:13, 73:12-21; 6/29 RT 61:25-62:10; see also AOB 4 [Jan

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[63] Jan ignores the fact that if asset values had started to fall, Jan had the absolute right to demand payment of her $30+ million *at any time*. (AA V:803 [¶ 2.2.2].)

admits Ron "spent much of his time" at Green Acres]; AA V:798 [¶ B: recital in the Agreement that the parties had been "living separate and apart for approximately five (5) years"].) Regardless how a trial court would ultimately have ruled on the separation issue, it is undeniable the date of separation was in dispute and was compromised by the Agreement. (AA V:798-799 [¶¶ B, E].) The compromise "obviated the need to litigate that very issue and that issue cannot now be reopened." (*A.J. Industries, Inc. v. Ver Halen* (1977) 75 Cal.App.3d 751, 760-761 [no rescission for lack of consideration where agreement was entered into to avoid litigating allegedly invalid claim; release of a claim is good consideration].)

But even if compromise of the separation claim could somehow not qualify as valid consideration, it is undisputed that other valid consideration (e.g., the fixed $1 million yearly payments, the fixed promise to pay $30+ million, the obligation to purchase Jan a home) independently supported the Agreement.

C. The Dispute Over Whether Ron Tendered Adequate Payment *After* Jan Repudiated The Agreement Is Not A Ground For Rescission.

Jan asserts a right to rescind because Ron did not *continue* to perform the Agreement *after* she claimed the Agreement was void and sought to rescind. (AOB 76-83.) Jan's assertion is untenable.

The trial court found that Jan, by claiming the Agreement was void and seeking to set it aside, intentionally repudiated the Agreement, thus

relieving Ron of any duty of continued performance. (Exh. A:784-785 [¶¶ 51-53].) Both substantial evidence and the law support the finding.

1. Jan's divorce action and her discovery responses—both under oath—unequivocally repudiated the Agreement, seeking to have it declared null and void. (AA I:6 [Jan's sworn divorce petition states Agreement is "void and unenforceable"]; AA X:1935-1956 [sworn discovery responses to same effect].)[64] This excused Ron from any obligation to further perform. "It is well settled that an unequivocal repudiation of the contract by one party prior to material breach of the contract by the other party excuses the other party from tendering performance of his concurrently conditional obligations." (*Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 102-103; see Civ. Code, §§ 1440, 1511, 1515; see also *Beverage v. Canton Placer Mining Co.* (1955) 43 Cal.2d 769, 777 ["where a vendor repudiates a contract and indicates that he is not bound thereby, a tender is unnecessary"].)[65]

2. Jan contends that her divorce petition and sworn discovery responses were just a "mere assertion" of unenforceability, not a repudiation. (AOB 80.) However, the very case on which she relies, *Atkinson v. District Bond Co.* (1935) 5 Cal.App.2d 738 (see AOB 80), refutes her position. *Atkinson* holds that "a distinct, unequivocal and

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[64] Jan served discovery responses before any payment was due. (AA X:1935-1956 [discovery responses served by 9/17]; see also AA V:803 [¶ 2.2.2(a): first payment due 90 days after service of dissolution petition, i.e., 9/23]; AA VI:1171-1172 [Ron's 9/23 tender letter].)

[65] Of course, Ron stands ready to perform once the Agreement is validated by the Court. The trial court had no doubt about that. (7/6 RT 70:8-16.)

absolute refusal" to be bound by an agreement is a repudiation. (5 Cal.App.2d at p. 744.) That's exactly what occurred here.

In any event, whether Jan repudiated was a question of fact for the trial court. (*Singh v. Burkhart* (1963) 218 Cal.App.2d 285, 293.) The trial court held that Jan's conduct was a repudiation. (Exh. A:785 [¶¶ 52, 53].)

3. Jan argues that Ron somehow "nullified" her unequivocal repudiation by attempting to tender payment. (AOB 81.) Jan cites no authority for this strange proposition, nor is there any. An offer by one side to continue to perform does not negate the other side's repudiation especially where, as here, Jan reconfirmed her repudiation by refusing the tendered payment. (AA VI:1173.)[66]

4. Jan admits that she "would have to refuse to accept any payments under the [Agreement] in order to avoid any claim by Ron that she had ratified the Agreement and waived her right to avoid it." (AOB 43.)[67] The law did not require Ron to perform an idle act. (Civ.

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[66] See Rest.2d Contracts, § 257 ("The injured party does not change the effect of a repudiation by urging the repudiator . . . to retract his repudiation"); *Guerrieri v. Severini* (1958) 51 Cal.2d 12, 19-20 ("Manifestation by the injured party of a purpose to allow or to require performance by the promisor in spite of repudiation by him, does not nullify its effect as a breach, *or prevent it from excusing performance of conditions and from discharging the duty to render a return performance*," emphasis added, internal quotation marks omitted).

[67] A party seeking to rescind who accepts later tendered performance reaffirms the agreement and waives the rescission claim. (*Saret-Cook v. Gilbert, Kelly, Crowley & Jennett*, *supra*, 74 Cal.App.4th at pp. 1225-1227; *Gedstad v. Ellichman*, *supra*, 124 Cal.App.2d at p. 835.)

Code, § 3532.) A party cannot both remain poised to reject any tender made and claim a defective tender.[68]

For these reasons, Jan cannot seek rescission based on anything that happened after she filed the present action.

D. Contrary To Jan's Assertions, Ron Is Not Suing For Specific Performance; He Simply Asks, In Response To Jan's Claims, That The Agreement Be Honored.

According to Jan, her attempt to rescind the Agreement somehow translates into a demand by Ron for its specific performance. (AOB 53-57, 81-82.) This is wrong, and it makes no sense.

It is Jan who sought rescission, not Ron. All Ron wants is that Jan honor the agreement she executed; he is not seeking to compel her to do anything.

At bottom, Jan fundamentally misunderstands the limited scope of specific performance. It is a remedy invoked to make someone else *do* something he or she promised to do when money damages will not suffice—such as transferring or assigning a unique home pursuant to a sales contract. (E.g., Civ. Code, § 3387 [authorizing specific performance as remedy for breach of an agreement to transfer real property].) Jan's

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[68] "[T]echnical defects in the matter of tender become unimportant" where a party admits that had "an unconditional offer on the part of (the opposing party) to perform their obligations under the contract . . . been made, . . . such offer . . . would have been refused." (*Boro v. Ruzich* (1943) 58 Cal.App.2d 535, 541.)

unsupported proclamations can't unilaterally turn Ron's *defense* to her suit into a specific performance action he never brought.[69]

Even under a specific performance standard, the adequacy of consideration or fairness of the deal is a fact question for the trial court subject only to substantial evidence review. (*Paratore v. Perry* (1966) 239 Cal.App.2d 384, 387.) The trial court found the Agreement "fair and equitable" and one a "rational person could comfortably reach." (Exh. A:787-788 [¶¶ 56, 60].) Jan has not attacked the sufficiency of the evidence to support that finding.

E. Jan's Discovery And Evidentiary Contentions Are Meritless.

Jan argues that certain discovery and evidentiary rulings hampered her ability to prove her case. (AOB 35-38.) The assertions are untenable.

1. Jan's arguments are waived.

A trial court's discovery and evidentiary orders are presumed correct, unless proven otherwise on appeal; an appellant must affirmatively demonstrate both error—an abuse of discretion—and prejudice. (E.g., *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 432 [discovery rulings]; *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1022 [evidentiary rulings].) Jan does not attempt to

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[69] Were the law otherwise, every time a defendant pleaded settlement or release the defendant would have to prove a specific performance case. But that is not the law. (See *Booth v. Bond* (1942) 56 Cal.App.2d 153, 157 [party pleading release need only show *some* consideration].)

demonstrate either, thereby waiving any right to complain. (See § II.A, above.)

2. The discovery rulings were within the trial court's broad discretion.

Even had Jan not waived her right to challenge them, the trial court's discovery rulings were well within its discretion.

Jan initially sought broad-gauged discovery into everything Ron used to create the Schedules, i.e., to go behind the Schedules, on the theory that the Agreement was presumptively invalid on its face. (1/21 RT 11:24-14:18; 2/29 RT 78:17-79:10; AA II:322-326, 406-409.) As we demonstrated above (see discussion in § II.B.1.b, above), the Agreement was facially valid, unless and until Jan proved that Ron gained an unfair advantage, something Jan never succeeded in doing.

Under the circumstances of this case, the trial court deemed it inappropriate to allow unfettered discovery in the first instance. Undisputably, the parties entered the Agreement while each was fully represented by independent counsel; moreover, the Agreement contained numerous recitals affirming that it was exactly what the parties wanted. (E.g., 1/21 RT 56:20-58:12, 75:8-76:5.) The Agreement acknowledges that both sides had ample time and opportunity to do whatever investigations they desired. (AA V:800.) The parties specifically intended the Agreement to "fully resolve all possible financial issues between them so that they will each of them be spared the financial and emotional costs of litigation." (AA V:798; see 1/21 RT 36:10-16, 55:6-13, 75:8-76:5.) The trial court

recognized that if the Agreement were ultimately upheld, allowing the unfettered discovery Jan demanded would have defeated one of its central purposes. (1/21 RT 74:10-76:5.) Additionally, Jan never claimed during the discovery proceedings that Ron misrepresented or concealed any particular information such as would justify her broad discovery demand.

Thus, the court sensibly decided to approach the case in steps, so as to focus the initial inquiry on the seminal issue of the circumstances surrounding the negotiation and execution of the Agreement, including the issue concerning Jan's reliance, or absence thereof, on Ron. (1/21 RT 55:6-58:12, 74:22-80:10, 86:22-87:5; 2/29 RT 82:13-91:13.) Accordingly, the trial court denied Jan's broad discovery requests *without prejudice* to renewal at a later time. (E.g., 1/21 RT 86:25-87:5; 2/29 RT 82:13-91:13.)

Nowhere does Jan challenge the trial court's exercise of discretion to determine the order of the issues to be tried. Nor does she claim that the trial court denied her any discovery as to the issues to be tried first. (See Cal. Rules of Court, rule 5.175 [authorizing bifurcation of family law trial]; *Marriage of Hixson* (2003) 111 Cal.App.4th 1116, 1121-1122 [trial court did not abuse discretion in limiting discovery directed at assets listed in prior negotiated stipulated judgment without preliminary showing to impeach the judgment's validity].) The discovery provided included extensive depositions of Ron and other witnesses, as well as the production of the couple's tax returns and other documents. (2/29 RT 4:12-23, 40:19-

41:6, 57:2-14, 74:23-76:16, 96:17-99:20, 106:9-117:10; 6/16 RT 35:12-19, 38:24-40:5.)[70]

3. The discovery rulings could not have been prejudicial given the trial court's finding that Jan did not rely on Ron in entering the Agreement.

Jan's discovery complaint is that she had no sufficient opportunity to discover whether Ron accurately stated and valued the marital assets. In the end, however, Jan's contention is beside the point, as the trial court found that she didn't rely on Ron. It found that she relied on her own judgment and her own team's extensive, independent investigations of the couple's assets, and that Ron never pressured her to sign the Agreement. (Exh. A:776, 778, 780-783 [¶¶ 12, 21, 31, 35, 38, 43].)

4. Jan has demonstrated neither error nor prejudice in any evidentiary ruling.

Jan also complains that the trial court refused to allow her to show that she and Ron did not separate until June 1997. (AOB 35-38.) The trial

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[70] Jan suggests that in portions of discovery not part of the record on appeal, Ron's counsel may have objected to discovery which, according to Jan, sought relevant information. (AOB 36.) The question on appeal, however, is not what discovery Ron's counsel objected to, but what the *trial court* ruled. In any event, it is improper for Jan to rely on matters outside the appellate record. (*Sacks v. FSR Brokerage, Inc.*, *supra*, 7 Cal.App.4th at pp. 962-963 [lodged depositions not read by court are outside appellate record]; 6/30 RT 119:13-120:3 [Jan's counsel requests depositions be lodged but "not offer[ed] . . . for the judge to read the testimony"]; see also this Court's 4/22/05 Order [denying Ron's motion to strike deposition transcripts, but noting Court "will not consider any items that were not part of the record before the trial court during the proceedings that are the subject of the appeal"].)

court excluded the evidence as irrelevant to the issues then being tried. (6/16 RT 140:13-159:2; 6/17 RT 128:19-132:22.) Jan does not challenge this ruling as erroneous nor does she show prejudice. Thus, the ruling is presumptively correct and there is nothing for this Court to decide.

In fact, however, there was no reason to litigate the date of separation, as the issue was resolved by the Agreement. (AA V:798-799 [¶¶ B, E].)[71] Inquiry into a resolved issue made no sense; it had no relevance to the issue being tried—the validity and enforceability of the Agreement. (E.g., *A.J. Industries, Inc. v. Ver Halen*, *supra*, 75 Cal.App.3d at pp. 756-760 [no abuse of discretion in refusing to allow proof of director's malfeasance when issue had been previously negotiated and settled].)

F. Contrary to Jan's Contention, The Statutes Mandating Formal Asset Disclosures In A Marital Dissolution Proceeding Do Not And Cannot Undermine The Validity Of The Agreement.

Family Code sections 2100, et seq., require the exchange of formal, sworn, written asset disclosures in marital dissolution proceedings before a property-division judgment may be entered.[72] Jan contends that the

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[71] Before Jan signed the Agreement, she undeniably knew all the facts and arguments regarding the couple's separation, and her lawyers undoubtedly understood and advised her of the significance of the separation date on the characterization of the marital property as separate or community. (6/16 RT 140:13-157:6; AA V:824, 973-975, 977.)

[72] These statutes have been amended since 1997 when the Agreement was executed. *In this Section F, all references to the Family*

(continued...)

Agreement—under which she accepted millions of dollars without complaint for over five years—must be voided because neither she nor Ron made such formal disclosures before entering the Agreement. (AOB 69-76.)

Jan is wrong for two independently dispositive reasons: (1) the trial court found, as expressly permitted by statute, that "good cause" excused compliance with the disclosure statutes and Jan has not shown or suggested the trial court erred or abused its discretion in so finding, and (2) the statutes were never intended to apply to agreements, such as the one here, made in contemplation of reconciling. (Exh. A:780 [¶ 31].)

Each of these findings separately and independently compels rejection of Jan's assertions. The Agreement cannot be set aside unless the trial court was wrong on *both* points. Jan raises *no* issue as to the former reason and misconceives the statutory scheme in attacking the latter reason.

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[72] (...continued)
Code are to the 1997 provisions, unless otherwise noted. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1193-1194 [absent clear legislative directive, statutory amendments are presumptively not retroactive]; see Stats. 2001, ch. 703, § 8 [certain amendments to these sections expressly only apply prospectively].)

1. Exactly as the statutes expressly permit, the trial court found good cause for excusing compliance with the formal disclosure requirements; Jan's brief neither mentions nor attacks this finding and, thus, the finding is binding on appeal.

The statutes that require formal asset disclosures in marital dissolution proceedings expressly allow the trial court to excuse compliance if it determines there is "good cause" for doing so. (Fam. Code, §§ 2105, subd. (a) [good cause excuses final disclosure], 2106 [property-division judgment can be entered if there is "good cause" for not complying with disclosure requirements]; *Elden v. Superior Court* (1997) 53 Cal.App.4th 1497, 1512 [remanding for determination whether good cause exists for excusing failure to make disclosures].)

Here, the trial court expressly found "good cause [to] exist . . . to enforce the Agreement, as authorized under Family Code § 2105, even without strict compliance with the declaration of disclosure requirements . . . ." (Exh. A:780 [¶31].) Jan neither mentions nor attacks this finding. It is binding. (See §§ I.C, II.A, above.)

But even if Jan had attacked the good cause finding, she could not have prevailed. "Determinations of good cause are generally matters within the trial court's discretion, and are reversed only for an abuse of that discretion." (*Laraway v. Sutro & Co.* (2002) 96 Cal.App.4th 266, 273, citations omitted.)

An abuse of discretion does not exist unless an appellant affirmatively demonstrates that, after resolving all evidentiary conflicts in

favor of the good cause ruling and considering the circumstances as a whole, a reasonable judge could not have made the same ruling. (*Marriage of Duncan* (2001) 90 Cal.App.4th 617, 630 [discretionary ruling must be affirmed "unless no judge could reasonably make the order made," citations and internal quotation marks omitted]; *Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118 [to be reversed, despite all favorable inferences, ruling must exceed "the bounds of reason"]; *Marriage of Smith* (1990) 225 Cal.App.3d 469, 480 [where court has discretion, no reversal unless "considering all the relevant circumstances, the court has exceeded the bounds of reason or it can fairly be said that no judge would reasonably make the same order under the same circumstances," citations and internal quotation marks omitted].)

Jan neither contends nor demonstrates that the good cause ruling was unreasonable, nor could she. The good cause determination here was eminently rational, supported by substantial reasons. In its findings, the trial court found good cause "because, among other reasons, [(1)] the parties were represented by sophisticated and competent counsel and expert forensic accountants, [(2)] there was no impediment to investigation by either side, and [(3)] Petitioner accepted the benefits of the Agreement for years before challenging it." (Exh. A:780 [¶ 31].) The good cause finding is further supported by substantial evidence showing that Jan was fully informed of the pertinent facts at the time she entered the Agreement; that Ron made comprehensive, good-faith affirmative disclosures of assets and valuations; that he provided detailed financial footnotes when Jan's team requested them; that he made available to Jan and her team all of his books

and records; that Jan undertook her own extensive independent investigation into Ron's assets; that Jan and her team had actual knowledge of the mergers that she now claims were not disclosed; and that Jan relied solely on what her own investigation disclosed, not on Ron. (See Statement of the Case, §§ A-D, above.) Further, if Jan was truly uninformed about any meaningful fact, she could have called any member of her investigative team to confirm her lack of knowledge, but she never did. (See § II.C, above.)

Unquestionably, Judge Lachs' determination that good cause existed for not requiring compliance with the statutory formal asset disclosure requirements was authorized by statute, reasonable, and fully supported by the record. It was entirely proper for Judge Lachs to conclude that the statutory objective—to assure that the parties to a dissolution proceeding are fully informed of marital assets and liabilities before final issuance of a property decree (Fam. Code, § 2100, subd. (a))—was met.

2. Even if the statutory disclosure requirements were not excused by the finding of good cause, the statutory scheme was not applicable, as it was intended to apply only to agreements, unlike the one here, made in dissolution proceedings with the purpose of terminating the marriage and dividing property in those proceedings.

The second independent reason why formal statutory asset disclosures were not required here is that sections 2100, et seq., as in effect

in 1997, were inapplicable. Such statutes, by their terms, applied only to those spousal agreements entered into during dissolution proceedings with a view towards obtaining a judgment dissolving the marriage and dividing property. As the trial court found, that was not the case here. (Exh. A:780 [¶ 31]; 1/21 RT 72:12-74:9.)

Spouses, even prospective spouses, can agree in a variety of contexts on how property is to be divided, whether or not their marriage is ever dissolved. For example, they can enter into premarital agreements, postmarital agreements during the course of a marriage, reconciliation agreements, or agreements designed to dissolve the marriage (popularly known as "marital settlement agreements").[73] Only one of these types of agreements is governed by sections 2100, et seq., namely, those agreements entered in contemplation of obtaining a dissolution decree in an active dissolution proceeding.

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[73] California law has long differentiated between agreements made during a continuing marriage, including those intended, as here, to effect a reconciliation, and so-called marital settlement or marital termination agreements intended to dissolve a marriage or lead to a legal separation. (*Plante v. Gray* (1945) 68 Cal.App.2d 582, 587 [agreement made to continue marriage not mooted by reconciliation as marital settlement agreement would be].) Although no longer statutorily defined, a "marriage settlement agreement" has long been understood in California as a term of art referring to an agreement that *ends* a marriage. (See former Civ. Code, § 178 [spouses could agree to a "marriage settlement"].) It is well understood (and was understood by the Legislature when it enacted sections 2100, et seq.) that marital settlement agreements—that is, comprehensive agreements reached by spouses who are dissolving a marriage—are significantly different from other types of spousal agreements, i.e., premarital agreements, agreements during a continuing marriage. (See Hogoboom & King, Family Law, *supra*, § 9:4, pp. 9-1 to 9-2; §§ 9:310-9:446, pp. 9-70 to 9-98.11 [extensively discussing issues specific to marital settlement agreements as part of an action to dissolve a marriage].)

Sections 2100, et seq., call for a specific form of disclosures, but only in a *specific context*—the context of a property division as part of dissolving a marriage in the course of active dissolution proceedings. By statutory directive, those sections apply only in dissolution, nullification or legal-separation proceedings. (Fam. Code, § 2000.)

The disclosure statutes contemplate a two-step process incident to proceedings seeking marital dissolution: first, the service of a preliminary declaration of disclosure (Fam. Code, § 2104); and, second, unless waived, the service of a final declaration of disclosure (Fam. Code, § 2105).[74]

Final disclosures are required, absent good cause, "before or at the time the parties enter into an agreement for the resolution of property or support issues other than pendente lite support, *or, in the event the case goes to trial*, no later than 45 days before the first assigned trial date . . . ." (Fam. Code, § 2105, emphasis added.)[75] On its face, therefore, the statute

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[74] Jan quotes extensively from Family Code section 2102 to suggest that Ron owed a duty not just to disclose the mergers, but to do so in writing as an "investment opportunity" as described in the statute. (AOB 73-74.) Like the rest of sections 2100, et seq., that section, however, applies only in dissolution, nullity and legal-separation proceedings (Fam. Code, § 2000) and only "[f]rom the date of separation to the date of the distribution of the community asset or liability in question" (Fam. Code, § 2102). Thus, like the rest of sections 2100, et seq., the provision was intended to be operative only in legal dissolution proceedings distributing community assets. In any event, the mergers were not "investment opportunities." There was no opportunity for anyone, least of all Ron, given insider-trading restrictions, to "invest" in them.

[75] Preliminary disclosures require identifying (but not valuing) all of a spouse's assets and liabilities "regardless of the characterization of the asset or liability as community, quasi-community, or separate." (Fam. Code, § 2104.) Final disclosures require disclosing "[a]ll material facts and information regarding the characterization of all assets and liabilities" and "regarding the valuation of all assets that are contended to be community

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contemplates resolution of the property or support "issues" that are pending in the dissolution proceeding either by agreement or by trial. In short, the "agreement" referred to in the statute is necessarily an *alternative* to taking a pending dissolution case to trial—that is, it is a means of resolving the case in lieu of proceeding to trial. It is not some agreement that stands independent of the litigation process, as the Agreement does.

That sections 2100, et seq., apply only to agreements reached in the specific context of seeking a decree dissolving marriages is reinforced by the structure of the Family Code itself. Those statutes are found in Family Code, Division Six, Part 1. As noted above, that Part applies only to a "proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties." (Fam. Code, § 2000.)[76]

A different statutory scheme governs spousal agreements made, as here, as part of a continuing marriage. That scheme appears in Family Code, Division Four, "Rights And Obligations During Marriage"—e.g., in sections 721, 850, 852, 1100, and 1500. No mention is made in *that* Division of the sort of formalized disclosure requirements specified for agreements made in dissolution proceedings with a view towards

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[75] (...continued)
property or in which it is contended the community has an interest." (Fam. Code, § 2105.) The Agreement's Schedules coupled with Ron's other disclosures did just that.

[76] *People v. Hull* (1991) 1 Cal.4th 266, 272 ("it is well established that 'chapter and section headings [of an act] may properly be considered in determining legislative intent' [citation], and are entitled to considerable weight. [Citation]," internal quotation marks omitted; *Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 573 (a statute's placement in the Code is relevant to construing its meaning).

terminating the marriage and embodying the agreement as part of a final judgment.[77]

The 1997 version of section 2105, in effect at the time of the Agreement, confirmed that the statutory scheme only applies to agreements intended to dissolve a marriage and to be incorporated into a dissolution judgment. It referred to waiver of the final disclosure requirements only in a "*marital settlement agreement* or by stipulated judgment or a stipulation entered into in open court." (Fam. Code, § 2105, subd. (c), emphasis added (1997).) As discussed above (see note 73), a "marital settlement agreement" is a term of art applying only to agreements terminating marriages. If section 2105 was intended to apply generally to all agreements between spouses, there presumably would have been some provision for waiver in all agreements, not just those in "marital settlement agreements."

On its face, the statutory scheme evidences a legislative intent to apply only to marital dissolution proceedings and, thus, only to spouses who are engaged in and pursuing a pending court action seeking dissolution of their marriage when, as part of that process, they are about to: (1) have a trial to resolve the issues concerning division of their assets or setting their support rights, or (2) in lieu of such a trial, enter into a *marital settlement agreement* intended to resolve the issues that would have been tried, but for the agreement, as the basis for entering a dissolution judgment in the action.

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[77] Other statutory provisions govern premarital agreements, Family Code sections 1600-1617, again with no mention of formalized disclosure requirements such as those for dissolution proceedings.

Outside of this specific context, the statutory scheme has no application to any other types of property agreements between spouses—premarital agreements, transmutation agreements, agreements during a continuing marriage, or reconciliation agreements. As we now more fully explain, the statutory scheme has no application here.

3. The statutory disclosure requirements have no application here because the Agreement was intended to continue, not dissolve, Ron and Jan's marriage and was independent of any pending dissolution action.

The Agreement here was not a marital settlement agreement or other agreement designed to end a marriage. In entering the Agreement, Jan and Ron weren't seeking (or even contemplating) a judgment ending their marriage or a judgment dividing their property. Rather, they intended to reconcile, to attempt to continue their marriage. (AA V:798; 6/18 RT 171:23-173:12.) On its face, the Agreement's purpose was to facilitate just such a reconciliation, not to dissolve the marriage. (Exh. A:776-777, 779-780 [¶¶ 16-17, 30-31].)

Specifically, Jan and Ron intended the Agreement "to promote increased understanding, harmony and trust by effectively and finally resolving all financial issues, disputes and conflicts they might have now and in the future" and to "increase the probability that they will remain married to each other . . . ." (AA 798, 806 [Stmt of intent; § 2.14].) And, it

achieved that purpose: The couple did in fact reconcile, living together as a married couple for another four years.[78]

At trial, even Jan's counsel agreed that the disclosure statutes would not apply to the Agreement had Jan not filed her initial and subsequently dismissed dissolution petition. (1/21 RT 59:14-21.) But that fortuity is irrelevant. As the trial court found (again, the finding is unchallenged by Jan), "[t]he Agreement was negotiated and entered into while the dissolution of marriage action was in abeyance." (Exh. A:779 [¶ 30].) The Agreement came about as if no petition had ever been filed: The parties placed discovery on hold, and the dissolution proceeding was held in abeyance while the parties worked at restoring the marriage. (See note 3, above.) The reconciliation placed the initial dissolution proceeding into a permanent deep freeze, lasting for six years, before it was finally dismissed. (AA I:4.)

To the extent the Agreement spoke about a divorce proceeding, it did so only in the context of a *future* proceeding, to be commenced anew if the reconciliation did not work out, not in the context of a pending proceeding. (See AA V:804-805 [¶¶ 2.4 ($1 million payments to Jan so long as "neither Party *has filed* a Petition for Dissolution or Legal Separation"), 2.9 ("In the event that either Ron or Jan *files* a Petition for Dissolution of Marriage," Ron has sole possession of Green Acres property); 2.12 ("In the event of either Party *filing* a Petition for Dissolution of Marriage," Ron is to buy Jan

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[78] Jan notes that the Agreement did not *require* reconciliation. (AOB 75.) This misses the point. What matters is that the Agreement unquestionably *contemplated* reconciliation, even if its validity was not conditioned on reconciliation. The fact that a four-plus year reconciliation actually took place was not a coincidence.

a separate house), emphasis added throughout].) No one believed, nor could they rationally have believed, that the initial petition qualified to trigger the Agreement's various provisions tied to the potential filing of a future dissolution petition.[79]

When Jan again separated, she did not seek to revive her old dissolution petition, but filed an entirely new dissolution action, claiming a new April 2002 separation date—four and one-half years after the Agreement—thus confirming the reality that her old dissolution petition had long ceased to have any vitality. (AA I:6.)

For all these reasons, the trial court's unchallenged finding that the Agreement was reached in contemplation of reconciliation, not dissolution, is fully supported. (Exh. A:779 [¶ 30]; see also 1/21 RT 72:12-74:9.) The Agreement was simply not covered by the formal disclosure requirements applicable in dissolution proceedings headed for final judgment.

4. Nothing in the statutory disclosure requirements directs voiding an otherwise valid agreement.

There is not a single word in the statutory scheme setting forth the formal disclosure requirements applicable in dissolution proceedings that states (or even hints) that noncompliance with such requirements would compel vacation of an otherwise valid agreement.

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[79] Jan notes that she had not dismissed her initial dissolution action when she executed the Agreement and that she did not dismiss that action in connection with executing the Agreement. (AOB 75-76.) She elevates form over substance. As demonstrated, both the parties and the Agreement treated that action as abandoned and their reconciliation sealed its abandonment. The Agreement and the abandoned action were independent of each other.

Other than setting forth the procedural steps for obtaining judgment in a dissolution proceeding, the statute nowhere addresses the substantive requirements for determining an agreement's validity. Rather, the sole statutory remedy for failing to comply with the disclosure statutes is to permit the trial court to refuse to enter a property-division *judgment* until there is compliance or to vacate such a *judgment* if already entered without compliance. That this is so is repeatedly demonstrated by explicit statutory language.[80]

Jan argues that the final disclosure provision, section 2105, applies "whenever 'the parties enter into an agreement for the resolution of property or support issues'" or determine spousal rights, regardless whether there is a pending marital dissolution proceeding or contemplated dissolution judgment. (AOB 75.) This, of course, is squarely refuted by

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[80] E.g., Fam. Code, § 2106 ("absent good cause, no *judgment* shall be entered with respect to the parties' property rights without each party" providing a final financial disclosure declaration); see also Fam. Code, §§ 2107, subd. (d) (2005) ("If a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall *set aside the judgment*"); see also §§ 2105, subd. (c) (2005) ("in making an order *setting aside a judgment* for failure to comply with this section, the court may limit the set aside to those portions of the judgment materially affected by the nondisclosure"), 2105, subd. (d)(5) (2005) (in waiving a final disclosure declaration "(e)ach party (must) understand() that noncompliance with (the substantive disclosure) obligations will result in the court *setting aside the judgment*"), emphasis added throughout.

That the scheme was intended to apply only to *judgments* is further revealed in the 2001 amendment to sections 2100, et seq. The amendment made clear that the new provisions (amending, e.g., §§ 2105, 2107) applied only to "any *judgment* that becomes final on or after January 1, 2002." (Stats. 2001, ch. 703, § 8, emphasis added.) Similarly, when initially enacted, the scheme applied only to any "*proceeding*" commenced after January 1, 1993, not to agreements entered before or after any particular date. (Fam. Code, § 2113.)

section 2000, expressly limiting the application of the statutory scheme to dissolution proceedings. Clearly, statutes expressly limited to dissolution proceedings cannot permissibly be applied outside of that context. There is not a word in the statutory scheme that supports Jan's assertion.[81]

Jan argues that not expanding the statutes beyond their intended reach to cover this situation would "leave a loophole of a proffered attempt at marital reconciliation through which a cheating spouse could crawl . . . ." (AOB 76.) But that's not our case. Here, Jan ignores the trial court's finding that Ron genuinely intended to reconcile and that Ron was not a "cheating spouse," but the exact opposite.[82]

Jan's position is not helped by her reliance on *Marriage of Fell* (1997) 55 Cal.App.4th 1058. (AOB 70-72.) Contrary to Jan's assertion, that case does not establish that sections 2100, et seq., govern the Agreement's validity.

First, *Fell* involved a true marital settlement agreement, i.e., one intended to dissolve the marriage and on which a judgment dissolving the

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[81] That the Legislature did not intend the statutory scheme to extend outside the context of dissolution proceedings is further supported by the fact that the Legislature expressed no intention to supersede or implicitly repeal the numerous statutes specifically addressing premarital agreements and the relations of spouses during marriage. One would certainly expect that, if the Legislature intended the all-encompassing and radical revisions in California law that Jan suggests, it would have said *something* in the statutory scheme about the *enforceability of agreements*. (See Fam. Code, §§ 852 [setting forth that marital property transmutation is "not valid" unless certain requirements are met]; 1615 [specifying grounds for not enforcing premarital agreements].) But there is not a word in the statute that supports Jan's position.

[82] If a spouse misrepresents an intent to reconcile, there is ample existing remedy. (See *Fishbaugh v. Fishbaugh*, *supra*, 15 Cal.2d 445; *Lane v. Lane*, *supra*, 78 Cal.App. 326.) There was no such misrepresentation here.

marriage was entered several weeks later. (55 Cal.App.4th at p. 1060.) That is not this case. Here, the Agreement was not executed for the purpose of dissolving the marriage; as the trial court found, it was entered for the purpose of prolonging the marriage in the hope that it would not be dissolved.

Second, in *Fell*, as the opinion itself noted, the parties could have, but did not, obtain a finding of good cause excusing compliance with the disclosure requirements. (*Id.* at pp. 1064-1065.) In our case, the trial court made an express good cause finding.[83]

Third, in *Fell*, the validity of the judgment and the marital settlement agreement were presented to the appellate court as a whole, all or nothing—presumably because there were no disclosures of any type. Nowhere does *Fell* address, hold, or even hint that a valid agreement—one entered by fully informed, represented parties, and without undue influence—must fall just because the judgment is defective.

There is simply no reason to apply sections 2100, et seq., to circumstances for which they were never intended.

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[83] Jan seems to suggest that the parties should have presented the Agreement to a court in 1997 to request it be approved for fairness and incorporated into a judgment then. (AOB 76.) This notion is bizarre. There is no authority or procedure allowing a spouse to present an agreement during marriage to a court for a non-adversarial advisory opinion to confirm both parties' views of its validity. Family courts do not exist to oversee the spouses' efforts in adjusting their rights and obligations during a reconciliation, nor to issue advisory opinions on the validity of spousal agreements executed in contemplation of reconciliation.

5. Even if the statutory scheme applied and even if there were no good cause finding, there still would be no basis for reversing the order.

a. Jan's action is time barred.

Even if the formal written disclosure statutes were somehow applicable, Jan's challenge to the Agreement based on such statutes still must fail. The reason: It is far too late; it is barred by limitations and by laches.

Family Code section 2122, subdivision (f) (2005), provides that any challenge based on a failure to comply with the disclosure requirements must be brought within one year after Jan knew or should have known about the failure to comply. That date occurred before Jan brought the present petition; thus, even if the statutory scheme were somehow applicable, Jan's action would be barred by section 2122. And, as the trial court found, it was barred by laches.[84]

b. Jan has not shown prejudice.

But even if Jan could overcome all these insuperable hurdles (something she cannot do), she still would not be entitled to relief because she has nowhere claimed she suffered prejudice by reason of any noncompliance with the statutory requirements. (Cal. Const., art. VI, § 13; *Marriage of Steiner*, *supra*, 117 Cal.App.4th at pp. 525-528 [failure to

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[84] Section 2122 applies to "judgments" entered after January 1, 2002. Jan did not file the present petition until June 2003.

comply must be prejudicial before appellate court can reverse trial court's judgment].)

Nor could there be any prejudice or miscarriage of justice here, as the trial court found that Ron "complied with . . . his duty to make a true and full disclosure of community assets" and Jan relied on her own investigation, not on any representation by Ron. (Exh. A:780-782 [¶¶ 32, 37, 38].) Jan has not challenged those findings in her Opening Brief.

The Opening Brief assumes Jan would have refused to enter into the Agreement if the disclosures found by the trial court to have been made to her had been formalized in documents that met the strictures of sections 2100, et seq. This is total speculation, unsupported by the record.

Indeed the speculation does not even make sense. Jan testified and the trial court found that she entered the Agreement in reliance on her own investigation, not on Ron.

* * *

For all these reasons, sections 2100, et seq., have no impact on the order determining the Agreement was valid and enforceable. The statutory requirements were not applicable to the Agreement and, even if they would have applied, the trial court's unchallenged good cause finding excused their applicability here.[85]

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[85] Jan's last contention is equally unsupported. She asserts that, if the Court reverses for a retrial, it should also "set aside" the trial court's "order assigning the case to a private judge." (AOB 85.) There is no such order. The court ordered the case assigned to a referee (AA I:181), but then Jan and Ron *stipulated* to a private judge (AA I:226). There is nothing to reverse. Jan entered a stipulation and is bound by it. Period.

CONCLUSION

For all the reasons stated, the order determining that the Agreement is valid and enforceable should be affirmed. The order is supported by findings that Jan never challenged and, thus, they are binding and conclusive on appeal. As a matter of law, therefore, the Agreement is valid and enforceable and Jan's attack on the validity and enforceability of the Agreement was barred by the doctrines of ratification, estoppel and laches.

As part of their reconciliation attempt, Jan and Ron entered into an Agreement designed to enhance their reconciliation effort and to eliminate forever sources of financial friction. Represented by a battery of family-law professionals, Jan—fully understanding the terms of the Agreement, knowing the facts pertinent to the Agreement, appreciating what she was gaining and relinquishing—decided the Agreement was in her best interests and executed it freely and voluntarily and without undue influence, as the trial court found.

Jan bargained for and received exactly what she wanted—a lifetime of financial security, with a millionaire's lifestyle and with minimal financial risk. And Ron bargained for and received exactly what he wanted—the opportunity to invest as he wished in order to amass additional wealth, albeit with risk. Having received exactly what she wanted and having accepted millions of dollars of benefits under the Agreement, Jan had no right to disclaim it years after the fact in order to seize riches that did not belong to her and as to which she was not willing to incur the risk to gain.

These types of agreements are strongly supported by public policy. They should be encouraged, not discouraged. This Agreement is valid and enforceable. The order so holding should be affirmed.

Dated: October 14, 2005

WASSER, COOPERMAN & CARTER
Dennis M. Wasser
Bruce E. Cooperman

GREINES, MARTIN, STEIN & RICHLAND LLP
Irving H. Greines

CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO LLP
Patricia L. Glaser

By: _____
Irving H. Greines
Attorneys for Respondent
Ronald W. Burkle