CASE NO. B172588

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

OCM Principal Opportunities Fund, L.P., Pacholder Value Opportunity Fund L.P., and Pacholder Heron Limited Partnership,

Plaintiffs, Respondents and Cross-Appellants,

v.

CIBC World Markets Corp.,

Defendant, Appellant, and Cross-Respondent;

TCW Shared Opportunity Fund II, LP, TCW Shared Opportunity Fund IIB, LLC, TCW Shared Opportunity Fund III, LP, TCW Leveraged Income Trust, LP, and TCW Leveraged Income Trust II, LP,

Plaintiffs and Respondents,

v.

CIBC World Markets Corp.,

Defendant and Appellant.

Appeal from the Superior Court for Los Angeles County
Case Nos. BC 229069 and BC 250268
The Honorable Wendell Mortimer, Jr., Judge

CROSS-APPELLANT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

In their opening brief, Plaintiffs Oaktree and Pacholder established that prejudgment interest must be awarded under their Corporations Code Section 25500 claims because (1) the statute mandates that such interest be awarded on all recoveries under that provision, and (2) the verdict must be construed as awarding such a recovery. CIBC's opposition brief on this issue presents two baseless arguments against a mandatory prejudgment interest award.

CIBC first argues that Plaintiffs' right to mandatory prejudgment interest under Section 25500 was waived because Plaintiffs asked the jury to award discretionary interest under Civil Code Section 3288. ARB-XRB 72-74. This is a *non sequitur*. An entitlement to mandatory prejudgment interest under one statute is unaffected by a request for discretionary interest under another.

CIBC then asserts that even if prejudgment interest were compulsory, it could not be awarded here because the jury awarded no damages on the Section 25500 claims. ARB-XRB 74-78. This assertion also fails. The jury found that CIBC was liable on the Section 25500 claims, and the verdict is properly construed as determining that Plaintiffs were entitled to their full requested damages on those claims – just as they were on the common law claims with the same measure of damages. In any event, CIBC is estopped to claim otherwise because it succeeded in persuading the trial court not to obtain clarification from the jury of the amounts awarded on that claim – clarification that Plaintiffs had specifically requested.

II. SECTION 25500 PROVIDES FOR MANDATORY PREJUDGMENT INTEREST, AND THE TRIAL COURT HAD NO DISCRETION TO DISREGARD THIS MANDATE

A. The Statutory Language Mandating Prejudgment Interest Is Plain And Direct

When a plaintiff prevails under Corporations Code Section 25500, prejudgment interest is mandatory and is not a matter of discretion for the jury or the trial court:

> [D]amage *shall* be the difference between the price at which [plaintiff] purchased . . . securities and the market value which such securities would have had at the time of his purchase . . . in the absence of such act or transaction, *plus interest at the legal rate.*

Corp. Code § 25500 (emphasis added). The word "shall" establishes that the interest award is mandatory. Corp. Code § 15 ("'Shall' is mandatory").

B. CIBC Has No Viable Response

CIBC contends that Plaintiffs' request for a jury determination that they were entitled to discretionary interest under Civil Code Section 3288 precludes their entitlement to Section 25500's mandatory interest. CIBC is wrong and cites no case suggesting that a court may ignore a mandatory duty. Nor does CIBC cite any authority holding that a request that the jury award discretionary interest under one statute somehow precludes the trial court from fulfilling its duty to award mandatory interest under another statute.

The decisional law refutes CIBC's unsupported contention. The cases hold that a request for discretionary interest under one statute (1) must precede and (2) has no impact on a court's obligation

to provide interest mandated by another statute. *Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 962 (§ 3288 discretionary interest request to jury must precede Civil Code § 3287(a) mandatory interest request to court); *Parvin v. Davis Oil Co.* (9th Cir. 1979) 655 F.2d 901, 904-905 (plaintiff may seek mandatory § 3287(a) interest even if denied discretionary § 3288 interest); *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 19-20 (rejecting defendant's "nonsensical" contention that plaintiff invited error in requesting discretionary § 3288 interest, as well as mandatory § 3287(a) interest); *Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1790 (interest allowed under both §§ 3287(a) and 3288).

These cases are controlling here. The two cases cited by CIBC (*Middlesex Ins. Co. v. Mann* (1981) 124 Cal.App.3d 558 and *Sutter v. Associated Seed Growers, Inc.* (1939) 31 Cal.App.2d 543) do not compel or even suggest that a mandatory duty can be ignored. *Middlesex* and *Sutter* merely hold that when a party agrees to submit an equitable issue to the jury rather than to the trial court, the party waives any objection that the issue should have been determined by the court. *Middlesex, supra*, 124 Cal.App.3d at 566-67; *Sutter, supra*, 31 Cal.App.2d at 548. These cases have no application here because neither dealt with a mandatory statutory duty. In decisive contrast to

these cases, Section 25500 interest is mandatory and does not require any fact-finder to make an interest-triggering finding.[1]

CIBC's further assertion that Plaintiffs waived the right to appeal this issue by not asking the jury to change its interest finding misses the mark. *See* ARB-XRB 73. As the jury never made any determination about an entitlement to mandatory interest, there was no need to ask them to correct such a determination.

Finally, CIBC – without any supporting citation and without even suggesting an alternative interest-commencement date – asserts that Section 25500 interest should not run from the date the securities were purchased. ARB-XRB 78-79. CIBC is wrong. The purchase date is the only date referenced in the statute, which specifically

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[1] CIBC also notes that Plaintiffs' counsel stated in a pre-trial letter that it was "not aware of any authority suggesting that the decision whether to award pre-judgment interest should not be made by the jury." ASA00006, ARB-XRB 72. CIBC contends that this constitutes a waiver of any right to seek mandatory interest. The correspondence, however, does not come close to establishing that conclusion. There is not a word in the letter that implies an intentional relinquishment of a known right, let alone the one CIBC claims. Plaintiffs' counsel's statement addressed the question of *who* should determine whether discretionary interest should be awarded under Section 3288. Indeed, CIBC's counsel itself did not address the question of whether interest should be awarded, but only whether the court or the jury should determine its amount. *See* ASA00005. In this regard, Plaintiffs agreed with CIBC's position that the *amount* of interest should not be submitted to the jury. 33AA09103-4; 23RT4522:25-4523:4 (jury instructed, "You do not need to calculate how much interest should be awarded . . . the Court will calculate the amount of interest under applicable law").

identifies that date as the date when damage is measured. It is therefore the date from which interest runs. *See Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 815 (interest is awarded for loss of use of money from time of loss); *Nordahl v. Department of Real Estate* (1975) 48 Cal.App.3d 657, 665 ("it is proper to have . . . interest run from the time the plaintiff parted with the money or property on the basis of the defendant's fraud").

CIBC's reference to Corporations Code Sections 25501 and 25503 actually helps Plaintiffs. CIBC argues that these provisions specify the purchase date as the date on which interest runs when that is what the legislature intended. ARB-XRB 79. In actuality, these provisions reiterate "the purchase date" as the starting date for interest only when the applicable damage measure, unlike the measure in Section 25500, references *two* dates (the purchase date and the subsequent sale date). In contrast, when the relevant damage measure references only *one* date (the purchase date), these provisions, just as in Section 25500, do not needlessly repeat the only-referenced date as the date on which interest begins to run.

III. THE VERDICT ESTABLISHES THE JURY'S INTENT TO AWARD PLAINTIFFS THEIR FULL DAMAGES ON THEIR SECTION 25500 CLAIMS, AND CIBC'S CONDUCT BARS IT FROM OBJECTING TO SUCH A JUDGMENT

CIBC asserts that prejudgment interest, even if mandatory, cannot be awarded under Section 25500 because the jury supposedly awarded zero damages on that claim and the court may not "revise an unambiguous jury verdict." ARB-XRB 74. This assertion misses the point. The reason: The verdict permits only one rational conclusion,

namely, that it embodied an award of damages under Section 25500. By circling Oaktree's and Pacholder's names in General Verdict No. 1's liability section for the Section 25500 claims, the jury found CIBC liable on those claims. Since the damage measure for the common law claims on which the jury awarded a monetary recovery is the same as the measure on the Section 25500 claims, the only rational reading of the verdict is that the jury must have found the same damages for those claims. As demonstrated in Cross-Appellants' Opening Brief, the jury's allocation of the General Verdict No. 2 "total damages" among the claims was surplusage that is entitled to no weight – so that its "total damages" finding necessarily applied to the Section 25500 claims as well as the common law claims. RB-XAOB 73-82, 84-88.

Even if logic did not conclusively refute CIBC's position, its conduct below precludes it from advancing the argument it now makes. The reason is straightforward. After the jury returned its verdict, but prior to its being discharged, Plaintiffs asked the trial court to obtain jury clarification – through further deliberations – as to the amount of damages it intended to award on Plaintiffs' Section 25500 claims. CIBC opposed clarification and succeeded in convincing the trial court not to direct the jury to further consider and modify its claim-by-claim awards – to address its apparent, albeit improper, allocation. This conduct bars CIBC from objecting to the logical interpretation of the verdict urged by Plaintiffs.

A. When A Jury Allocates Its Award Between Claims Or Defendants, That Allocation Is Properly Disregarded

Cross-Appellants' Opening Brief, relying on developed case law, demonstrated that a jury's surplusage allocation of damages should be disregarded. RB-XAOB 80, 84-88. CIBC presents no cases to the contrary but merely (and unsuccessfully) attempts to distinguish the cases cited by Plaintiffs.

CIBC contends that the Eighth Circuit's decision in *Bird v. John Chezik Homerun, Inc.* (8th Cir. 1998) 152 F.3d 1014 does not address parallel facts. ARB-XRB 77. *Bird*, however, is on all fours:

- A plaintiff established the defendants' liability on multiple causes of action for fraud in the sale of property;
- Each claim's damage measure was the same[2];
- The jury awarded the full amount of damages sought by Plaintiff, but awarded it on certain claims while awarding zero damages on other claims where liability was found;
- Reconciling these awards was necessary because an award on the "zero damages" claim would trigger a secondary recovery not available on the other successful claim (in *Bird*, statutory attorneys fees, here, statutorily-mandated interest);
- The plaintiff timely "requested that the jury be sent back to resume its deliberations"; and
- The trial court refused.

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[2] 32AA9074, 9089-90.

Bird, supra, 152 F.3d at 1015-17.

Faced with this scenario, the Eighth Circuit reached a rational result: "The only plausible explanation for the jury's failure to award damages on [the statutory fraud claim] is that the jury had already awarded Bird damages on [the common law fraud claim] for essentially the same conduct and did not want to award her the same damages twice." *Bird, supra*, 152 F.3d at 1017. To correct the impact of the jury's mistaken allocation, the Eighth Circuit directed the trial court to "enter judgment as a matter of law for the plaintiff on [the statutory fraud claim], with the amount of actual damages on that count being the same as for [the common law fraud claim]." *Id.*

The same rationale applies here. It compels that the verdict be read as including a finding that the jury's finding of "total damages" necessarily applied to Plaintiffs' Section 25500 claims.[3]

Much like *Bird, All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, addressed a jury's allocation of damages across

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[3] CIBC notes that *Bird* involved a series of special verdict findings, while CIBC proposed hundreds of special verdict interrogatories that were not used by the trial court. ARB-XRB 77. CIBC, however, does not explain how the special verdict findings in *Bird* were substantively different from the verdict form responses in this case, in which the jury found CIBC liable on four causes of action and specified the total damages it intended for Plaintiffs to recover. In particular, CIBC does not explain how any of its proposed special verdict interrogatories could have allowed the jury properly to find liability, but no damages, under Section 25500, while awarding millions of dollars on Plaintiffs' common law claims which had the same measure of damages.

three claims. There, as here, all the claims had the same damage measure, and the total amount awarded was equal to the claimed damages. The jury, however, wrote "no further damages" as the award on one claim on which liability was found. The court concluded that the jury had simply allocated the total damages across two of the three claims, leaving "no further damages" for the third successful claim. The court therefore held that the verdict should be interpreted as awarding the full damage amount on each claim. *Id.* at 1223-24. The same is true here.

CIBC's attempt to turn *All-West Design* to its advantage misses the mark. *All-West Design*'s discussion of the meaning of "zero damages" was dicta and was addressed to a different issue. It was only in the context of a hypothetical problem *as to whether exemplary damages might be awarded* that the *All-West Design* court suggested that a jury's award of "no additional damages" might be different from a jury's award of "zero" damages.[4] RB-XAOB 86 n. 262.

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[4] Moreover, in that dicta and in the facts of the other case relied upon by CIBC (*Haydel v. Morton* (1935) 8 Cal.App.2d 730, 737), the jury's award of zero on one claim could be reconciled with its award of damages on another claim. Here, in contrast, the jury's response to General Verdict No. 2 confirms that the jury found Plaintiffs had suffered millions of dollars in damages, and there is no logical way to reconcile this with a finding of liability, but an award of zero damages, on Plaintiffs' Section 25500 claims.

B. California Courts Routinely Ignore Verdict Surplusage In Parallel Contexts

Bird and *All-West Design* are not the only cases that have reached a logical result by construing verdicts to implement the jury's plain intent, while ignoring impermissible allocations. California courts have not hesitated to interpret verdicts as awarding a total damage award against each of a set of jointly-liable defendants, even though the jury improperly attempted to allocate the total among the defendants. RB-XAOB 24, 81, 86; *Sparks v. Berntsen* (1942) 19 Cal.2d 308, 312 ("arbitrary division of the total damages by the jury was not in accordance with law and was mere surplusage which the trial court [properly] refused to effectuate"); *Dauenhauer v. Sullivan* (1963) 215 Cal.App.2d 231, 234 (language apportioning damages among defendants "was mere surplusage which could be disregarded by the trial court"); *Weddle v. Loges* (1942) 52 Cal.App.2d 115, 119-20 (jury's effort to allocate "may be treated as mere surplusage" and the trial court was in error in "granting a new trial upon the ground of the jury's abortive attempt to apportion the damages").

Logic compels that the same approach should apply here, and CIBC offers no tenable reason why it should not. ARB-XRB 76.

C. The Verdict Reflects An Unnecessary Allocation Of Total Damages Among Claims

Cross-Appellants' Opening Brief showed that the verdict reflected the jury's allocation of the total damages among Plaintiffs'

claims.[5] RB-XAOB 73-82, 84-85. CIBC offers no sensible basis for reading the verdict differently.

Moreover, the first and last sentences of General Verdict No. 1 (which CIBC relies upon – ARB-XRB 62, 75), together with the jury's final pre-verdict question, further confirm the logical conclusion that the jury allocated the General Verdict No. 2 damages among the General Verdict No. 1 claims.

On September 3, 2003, after deliberating for three weeks, the jury submitted the following question: "If we have one decision, are we supposed to let the judge know or do we have to answer all five questions before we contact the judge?"[6] This question, when reviewed in light of the verdict form's text, indicated the jury had embarked improperly on a path that led it to allocate damages.

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[5] CIBC suggests that Plaintiffs' argument involves a chain of speculation. On the contrary, Plaintiffs have simply presented what they believe is the only logical understanding of the verdict's import given the evidence, arguments and instruction presented to the jury. *See Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal. 2d 452, 456-457 ("[W]here no objection is made before the jury is discharged, it falls to 'the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.' . . . Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation."). In the present case, unlike in *Woodcock*, Plaintiffs did object before the jury was dismissed, but CIBC successfully prevented clarification – leaving the same interpretive task to the trial court and this Court.

[6] 25RT4646:17-20.

General Verdict No. 1's first sentence instructed the jury to "circle the name of every plaintiff that you find in favor of, or circle 'none' if you do not find in favor of any plaintiff." For the five claims, the jury circled all the plaintiffs or circled "none."[7] Immediately after the grid containing the jury's circles, the verdict form instructed: "if you find in favor of any plaintiff on any claim, please proceed to General Verdict No. 2."[8]

The jury found "in favor" of Plaintiffs on several causes of action and circled as instructed in General Verdict No. 1. It appears that the jury then followed the instruction at the conclusion of General Verdict No. 1 and proceeded to General Verdict No. 2 where the jury set forth the total amount it intended to award each Plaintiff. The jury's September 3 question thus indicated the jury's uncertainty as to whether it was obliged to return to General Verdict No. 1 to enter an award of damages on each of the five claims in light of the fact that it had already answered the liability questions and determined the total amount of damages awarded to each Plaintiff.

In response to the jury's inquiry, the trial court directed the jury that it was supposed to answer all the verdict form questions.[9] The very next morning the jury promptly announced it had reached its verdict – a verdict allocating the total damages among the causes of

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[7] 32AA9205.

[8] 32AA9205.

[9] 25RT4653:2-5.

action. Plaintiffs asked the trial court to obtain clarification as to the jury's intent, but CIBC successfully opposed, as we now further discuss.

D. Before The Jury Was Dismissed, Plaintiffs Sought To Resolve Any Ambiguity But CIBC Used A Baseless, Now-Abandoned Argument To Persuade The Trial Court Not To Ask The Jury To Clarify Its Claim-By-Claim Awards

After the jury returned its verdict, but before it was dismissed, Plaintiffs sought to avoid any disputes about the verdict's meaning and asked the trial court to obtain further clarification from the jury. In asking for clarification, Plaintiffs specifically cited the discrepancy (given that the damage measures were identical) between the award of millions of dollars on the common law claims and the zero award listed on the Section 25500 line in General Verdict No. 1.[10] Plaintiffs moreover specifically asked that the jury be instructed to deliberate further to consider and address this discrepancy.[11]

CIBC, however, "strenuously" objected to anything other than the jury's immediate dismissal without any clarification of its verdict.[12] At the time, CIBC contended that the awards were reconcilable because Section 25500 required a finding of willful

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[10] 1RA005, 006, 009; 25RT4677:25-4678:17, 4694:22-4695:7.

[11] 1RA009.

[12] 25RT4673:2-4675:21, 4678:6-12, 4684:25-4685:1, 4700:11-4701:1; 32AA9224-25 & n.1. As detailed in our prior brief, CIBC was incorrect. RB-XAOB 77 n. 247.

conduct.[13] Cross-Appellants' Opening Brief demonstrated that this argument is untenable as the jury had already found liability under Section 25500 (which necessarily had to include a finding of "willful" conduct) and the jury had already found that a higher *mens rea* requirement was established when it found liability on the intentional non-disclosure claim. RB-XAOB 88. At CIBC's urging and contrary to Plaintiffs' request, however, the trial court ultimately denied Plaintiffs' request for further deliberations.

Before this Court, CIBC's Cross-Respondents' Brief does not even try to defend the argument it successfully used below to avoid further deliberations. Instead, CIBC merely reiterates that the jury entered "$0" on the General Verdict No. 1 damages line for the Section 25500 claims. ARB-XRB 75-76. But that's no answer. CIBC offers no explanation as to how the jury logically could have measured damages differently for that claim than for the common law claims. The lack of any logical explanation confirms that the jury necessarily allocated its total damages among claims.

E. Because CIBC Succeeded In Convincing The Trial Court Not To Obtain Jury Clarification As To Its Intention Regarding Damages Under Section 25500, CIBC Is Estopped From Objecting To The Logical Interpretation That The Damage Award Necessarily Extended To The Section 25500 Claims

Because CIBC successfully persuaded the trial court not to seek further clarification that would have eliminated any doubt regarding the jury's intention as to the amount of damages recoverable under

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[13] 25RT4697:28-4698:12.

Section 25500, CIBC should not be allowed now to oppose the logical interpretation that Plaintiffs have advanced to reconcile the jury's anomalous award of no Section 25500 damages with the verdict as a whole. *See Woodcock v. Fontana Scaffolding Equipment Co., supra,* 69 Cal.2d at 456-57 ("litigious strategy" aimed at reaping "technical advantage" disapproved).

Precisely like the obstructing party in *Brown v. Regan* (1938) 10 Cal.2d 519, CIBC persistently opposed all efforts to allow further deliberations.[14] Its opposition continued in the face of specific warnings that such opposition would constitute a waiver.[15] In *Brown*, as here, the respondent sought clarification of a verdict to avoid any ambiguity, but appellant vigorously and successfully objected. *Brown* held that appellant thereby waived the point on appeal. RB-XAOB 77-78; *Brown v. Regan*, *supra*, 10 Cal.2d at 524.

That CIBC is estopped is further established by the fact that the trial court largely used CIBC's proposed method to confirm the total damages the jury wished to award. Once the trial court expressed its inclination to inquire further of the jury as to the total damages it intended to award, CIBC proposed that the jury be asked a single

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[14] 25RT4677:1-4702:10, 4675:8-21 ("Mr. Soltman: Just for the record, your honor, we objected strenuously to the procedure of not discharging the jury after they've delivered their verdict. . . . The Court: . . . [L]et me just assure you, your objections are noted, whether they're just objections or strenuous objections. It's the same thing either way.").

[15] 25RT4678:13-21.

question, namely, whether it intended to award the General Verdict No. 2 "total damages" or half that amount.[16] In response, the trial court indicated that it was considering use of a slight modification of CIBC's proposal. The trial court proposed to ask the jury foreman whether the jury intended to award the totals set forth in General Verdict No. 2.[17]

CIBC agreed that, if there was to be any inquiry, the trial court's proposed inquiry was "not inappropriate."[18] Having just reiterated their position that "the jury should be permitted to clarify [the verdict]" after proposing a further instruction to guide further deliberations,[19] Plaintiffs acknowledged that the Court's proposal was

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16 32AA9212-13.

17 25RT4701:18-22.

18 25RT4703:5-9.

19 25RT4677:25-4678:17, 4694:22-4695:7; 1RA005, 006, 009.

> [Y]our award of zero damages on the Section 25500 cause of action is inconsistent with my prior instructions concerning the measure of damages for that claim, and with your determination that Oaktree suffered losses of $21,889,633, and Pacholder suffered losses of $3,903,186 resulting from defendant's intentional non-disclosures and negligent misrepresentations. . . .
>
> Now that I have advised you concerning the potential problems with your initial responses, and the relevant law, I ask that you consider the inconsistencies in your answers, and to make any required changes anywhere in the Verdict Form to remove the inconsistencies. I am not suggesting by anything I have said how this should be handled by you or what decision you should make. I am simply pointing out the inconsistencies that appear to potentially exist in the Verdict Form as it is currently filled out.

the "easy way."[20] The trial court then proceeded with its question, and the jury foreman responded that it was the jury's intention to award the "total damages" amounts set forth in General Verdict No. 2.[21] Its conduct in blocking further deliberations estops CIBC from complaining about any ambiguity.

IV. PLAINTIFFS DO NOT DISPUTE THAT PRIOR SETTLEMENTS AFFECT THE CALCULATION OF PREJUDGMENT INTEREST

Plaintiffs do not contest that the amount of prejudgment interest is impacted by their prior settlements. In calculating prejudgment interest, the principal balance on which interest is calculated should be reduced by the settlement payments as of the dates they were received. *Newby v. Vroman* (1992) 11 Cal.App.4th 283, 290.

> I will ask that the original Verdict Form be returned to the foreperson of the jury and ask the jury to conduct further deliberations consistent with these instructions and my prior instructions. If you make any changes, simply line out the answer, put in the modified answer and initial it.

1RA009.

[20] 25RT4700:11-4701:1, 4701:18-24.

[21] 25RT4705:5-19.

V. CONCLUSION

For the foregoing reasons, the judgment in Plaintiffs' favor should be modified to add mandatory prejudgment interest to the claims of Oaktree and Pacholder, the parties who prevailed under Corporations Code Section 25500.

Dated: July 5, 2005

Respectfully submitted,
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CERTIFICATE OF WORD COUNT

The undersigned certifies, pursuant to Rule of Court 14(c)(1), that this brief contains 4,203 words, including footnotes, but excluding the caption page, signature blocks and this Certification page, as counted by Microsoft Word 2002 (10.6612.6626) SP-3, the word processing program used to prepare the brief.

DATED July 5, 2005

Michael Swartz