2d Civil No. B142310
Consolidated with 2d Civil No. B143705

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SUMMIT INDUSTRIES OF NEVADA, INC., et al.,

Plaintiffs, Cross-Defendants and Respondents,

v.

LOS ANGELES COMMUNITY DEVELOPMENT BANK,

Defendant, Cross-Complainant and Appellant.

Appeal from the Los Angeles County Superior Court
Honorable William J. Birney, Judge
Los Angeles Superior Court Case No. VC027696

APPELLANT'S REPLY BRIEF

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INTRODUCTION

When LACDB accelerated Summit's loan in August 1998, Summit was many months delinquent, had made only barely measurable progress in moving into the empowerment zone, showed little prospect of ever being able to repay its loan, and had defaulted on other loan obligations as well.

In ruling that these many delinquencies were excused—and that LACDB's enforcement actions were therefore unjustified—the trial court repeatedly relied on what it found were pre-acceleration breaches of contract by LACDB. That is why we devoted much of the opening brief to exploring every aspect of the parties' pre-acceleration conduct and demonstrating that nothing that happened violated any of LACDB's express or implied contractual obligations.

Summit's response is to attempt to change the ground rules. Apparently recognizing the inadequacy of the trial court's reasoning, Summit seeks affirmance on the basis of legal theories the trial court did not articulate and factual findings it did not make. Instead of trying to support the trial court's contract-based rulings, Summit now declares that they don't matter—"whether the Bank was in contractual breach, prior to August 5, has no bearing on the issue of whether Summit was in breach on August 5." (RB 53, emphasis omitted.) Indeed, says Summit, "[i]t makes little difference whether these acts are described as a technical breach, a breach of the duty of good faith and fair dealing, or negligence." (RB 16, fn. 8.)

These issues *do* matter. LACDB was careful to ask the trial court to detail the reasons for each of its findings, and the trial court issued a lengthy statement of decision. Although in some areas the statement of decision is too vague to allow this Court to rely on it (LACDB properly objected), one aspect is beyond debate: The trial court saw this as a contract case and decided it as a contract case. It is far too late for Summit to suggest that the appeal should be decided on any other basis.

Nowhere is Summit's avoidance of the issues more clear than in its discussion of l'affaire Pine Cobble.

The trial court found that the Pine Cobble problem was the genesis of all of Summit's later woes. From this it necessarily follows that if LACDB bore no responsibility for that problem, Summit's case unravels. However, the only basis the trial court identified for holding LACDB liable was LACDB's failure to run a pre-closing UCC search. That subject is expressly governed by the parties' loan agreement. In clauses that Summit never mentions, the agreement explicitly places *on Summit* the duty to insure clear title to its receivables. Not one of any of the possible frameworks for analyzing this issue—not the loan documents themselves, not general contract principles, not the Uniform Commercial Code—placed any duty on LACDB to conduct a UCC search. Just the opposite: The loan documents *negated* any duty. That leaves Summit arguing—without a shred of legal support—that the Court should apply a negligence theory that the trial court never articulated.

Summit also fails to recognize, as did the trial court, an even more fundamental problem. Nothing LACDB could have done, regardless of what kind of duty it might have had, could have protected Summit against the consequences of Pine Cobble's fraud. If LACDB had conducted a last-minute UCC search and discovered Capital Funding's claim, the result would have been the immediate termination of the loan agreement, leaving Summit to go forward without *any* loan from *anyone*. Summit could not have survived—Austin himself said that it would be "out of business this week if we are not funded today." (Ex. 29.) Some kind of deal with Pine

Cobble and Capital Funding had to be made—as in fact it was made, with Austin's anxious urging.

Instead of pulling the plug on Summit's loan, as it was fully entitled to do when Capital Funding surfaced, LACDB tried to help solve the problem. It threw Summit a lifeline to which Summit would have had no right regardless of whether LACDB had done what Summit says it should have done. LACDB's reward: an $11.7 million judgment.

The judgment is unsupportable and must be reversed.

ARGUMENT

I.

SUMMIT FAILS TO DEMONSTRATE THAT LACDB BREACHED ANY CONTRACTUAL OBLIGATION.

A. Contrary To Summit's Claim, The Correct Issue For Determination Is Whether LACDB Breached Any Express Or Implied Contractual Duty.

1. Excuse of performance requires a breach of the promisee's express or implied contractual obligations.

Although it may be correct that the ultimate question at trial and on appeal is whether LACDB was justified in accelerating Summit's loan (see RB 52), Summit is wrong in suggesting that the answer depends on anything beyond a determination of whether LACDB breached any contractual obligations before acceleration.

Summit relies on the principle that performance of a contract can be excused by conduct that prevents performance, citing Civil Code section 1511 and a handful of cases that long pre-date modern lender liability law. But section 1511 has never been the basis of any lender liability decision.[1]

[1] Section 1511 typically appears on issues of impossibility of performance. (E.g., *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 572.) Our research has disclosed only one lender liability case in which the statute was even cited, and there it

(continued...)

And Summit's cases do no more than state the general rule, under facts that bear no relationship to ours—simple relationships and single acts of prevention.[2] They are, in reality, nothing more than a specific application of the covenant of good faith and fair dealing, although they do not use that terminology—most likely because all but one were decided before the terminology entered California jurisprudence sixty years ago. (*Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 771.) However, as we showed in the opening brief, the reach of the covenant is limited. As the courts have repeatedly confirmed in recent years, the covenant exists only to support the express terms of a contract. It cannot be used to impose obligations that contradict those express terms, and there can be no implied covenant on a subject that the contract expressly addresses. (See AOB 33.)

[1] (...continued)
was in connection with a claim of impossibility of performance. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 154.)

[2] *Pierce v. Lukens* (1904) 144 Cal. 397 (defendant agreed to repurchase bond; plaintiff's late tender was excused by defendant's conduct indicating he would not require timely performance); *McCue v. Bradbury* (1906) 149 Cal. 108 (day-late tender of note payment was excused when creditor induced belief that late tender was acceptable and did not object when performance was tendered); *Pearson v. McKinney* (1911) 160 Cal. 649 (defendant seller of trees was excused from delivering them when plaintiff buyer failed to give timely notice of what kind of trees he wanted delivered); *Taylor v. Sapritch* (1940) 38 Cal.App.2d 478 (plaintiff's compliance with escrow conditions was excused by defendants' refusal to deposit required escrow documents); *Exchequer Acceptance Corp. v. Alexander* (1969) 271 Cal.App.2d 1 (cross-complainant's performance of escrow conditions was excused when cross-defendants caused their company to convey to a third party the property that was the subject of the escrow).

The trial court recognized that contractual obligations were the measure of Summit's claims, although it erroneously used its invented "Workout mode" as a guide. (E.g., CT 1266:19-21, 1277:27-28, 1279:9-10; see AOB 25-26.) Much of the statement of decision is the trial court's response to LACDB's request that the court identify the conduct by which "the Bank breached a contractual duty of good faith and fair dealing" or "breached a contractual obligation to plaintiffs." (CT 1170-1171 [request for statement of decision, items 1 & 3], 1280-1282 [trial court's response].) Summit, as the original author of this response (the court signed Summit's proposed statement of decision without change), is in no position to argue that the trial court was evaluating "excuse" by some standard other than LACDB's contractual performance.

By speaking in generalities about LACDB's "overall conduct" (RB 63, emphasis omitted), Summit tries to avoid the difficult contract questions that the trial court addressed in the statement of decision (albeit erroneously) and that LACDB addressed in its opening brief. But at bottom, Summit's argument amounts to nothing more than a claim that the whole of LACDB's conduct is somehow greater than the sum of its parts.

This can't be right. If none of LACDB's individual actions or inactions amounted to a breach of some express or implied contractual obligation, then its course of conduct as a whole cannot have done so. And if that was the state of affairs on August 5 when LACDB accelerated, then Summit's admitted default was not excused, and the trial court's finding that acceleration was not justified is unsupportable.

Contracts exist to provide guidance and predictability. Obligations that arise from the covenant of good faith and fair dealing, because they must be grounded in a contract's express obligations, further that goal. Summit urges the Court to look elsewhere, perhaps to something its expert called "the spirit of the loan agreement." (RT 4010.) Such an amorphous approach—whose operation Summit's expert did not explain at trial and Summit does not explain here—would sever the parties' contract from its textual moorings. It would leave the parties adrift in performing their obligations, and judges and juries adrift in evaluating their performance. Summit provides no authority for such a result; we know of none.

2. ***Price v. Wells Fargo Bank*, not *System Investment Corp. v. Union Bank*, provides the correct guidance for evaluating lender-borrower contractual obligations.**

The opening brief demonstrated that a bank owes no duty of moderation in enforcing its contractual rights, and that *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465 ("*Price*"), which articulates this principle, is indistinguishable from the present case. (See AOB 34-36.) Summit's response is to ignore the facts of both *Price* and this case.

According to Summit, the lender in *Price* "did nothing other than simply sit back, fold its arms, and say: 'Pay me.'" (RB 57.) Hardly. One of the borrowers' complaints in *Price* was—just as here—that the bank orally assured the borrowers that it would "redo" the promissory notes. (213 Cal.App.3d at p. 472.) Another complaint was—just as here—that the bank was not justified in foreclosing after accepting a large partial payment. (*Id.* at p. 479.) Those complaints did not prevail in *Price*, and they cannot prevail here.

Summit claims that its payments after LACDB's March 19 notice of default "cured that default" and that "the Bank never gave notice that it was going back to insisting on the original course of dealing." (RB 57.)

However, Summit does not claim that there was any *evidence* that LACDB ever intended, much less agreed, to modify Summit's obligations, or that Summit relied on any kind of modification.[3] Rather, Summit claims that as a matter of law, once LACDB accepted late payments, it had to give notice that it intended to enforce its loan documents as written.

The loan documents provide the complete answer. They stated that LACDB's failure to exercise a right would not operate as a waiver of the right, and that to be effective, any claimed waiver had to be in writing. (Ex. 1/208, § 11.14; Ex. 4 ["lender's rights" and "general provisions"].)[4]

[3] Summit correctly does not rely on the trial court's finding that LACDB "modified the loan documents" by accepting payments after default and that "the debtor relied" on this "course of dealing." (CT 1281:27-1282:6.) Code of Civil Procedure section 634 bars any favorable inference on this point, among other reasons because LACDB specifically objected to the vagueness of, and lack of support for, this finding. (CT 1225:24-1226:3; see also CT 1223, 1225, Objections 14, 19, 20 & 21; see § I.D., *post.*)

[4] In full, section 11.14 states:

> "Lender shall not be deemed to have waived any right under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, action or inaction by Lender, nor any course of dealing between Lender and Borrower, or between Lender and Guarantors, shall constitute a waiver of any of Lender's rights or of any obligations of Borrower or of Guarantors as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent in subsequent instances where such consent is required, and in all cases

(continued...)

They also provided that Summit had no right to cure and was not entitled to any notice of default as to payment delinquencies. (Ex. 1/208 §§ 9.14, 10; Ex. 4.) These provisions—which Summit does not even mention, much less challenge—are as unequivocal as they are broad. The conclusion they require is that LACDB's acceptance of late payments did not and could not excuse Summit's delinquency unless LACDB expressly so agreed, and there is no evidence that it did. LACDB never had to notify Summit that "it was going to go back" to the original terms of the loan agreement (RB 57), because it had never abandoned those terms.[5] The trial court made no finding, Summit makes no argument, and we are aware of no authority that allows a court to ignore a no-waiver clause.

Summit's attempt to distinguish *Price* therefore fails. So does its reliance on *System Inv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137 ("*System Investment*") (discussed at RB 57-58).

For one thing, *System Investment* contains no legal discussion whatever on the subject of contractual obligations. It just recites the trial court's factual and legal conclusions (21 Cal.App.3d at pp. 142-151) and then, after discussing an unrelated topic, states that the conclusions were supported by the evidence (*id.* at pp. 154-155).

For another, the basis of the trial court decision that the Court of Appeal affirmed was estoppel (*id.* at pp. 151, 154), a subject never mentioned in the statement of decision here. The *System Investment* court

[4] (...continued)

> such consent may be granted or withheld in the sole discretion of Lender."

[5] *Hunt v. Smythe* (1972) 25 Cal.App.3d 807, 822, quoted at RB 57, does not address the impact of a no-waiver clause; indeed, the opinion does not even indicate whether the loan documents contained no-waiver language.

explained the basis of this decision in detail: Despite Union Bank's knowledge of a wide variety of loan defaults in connection with the borrower's construction of an apartment building, the bank

> "did not declare a default under any of the agreements, 'continually' urged Stewart [the borrower] to invest his own funds in the project (he invested $123,000), stated that Stewart could obtain an extension of the loan for 18 to 24 months, 'congratulated' him on the progress of the project and the workmanship thereon, honored vouchers drawn by Stewart (including vouchers for interest due on loan), never requested that Stewart or System deposit additional funds in the loan account, never advised System or Stewart that a default would be declared if an interest payment was not made, and lulled Stewart and System into a sense of security from which they could reasonably infer that the bank would not declare a default without giving them prior notice and an opportunity to cure it." (21 Cal.App.3d at p. 154.)

The court further found there was evidence that the borrower relied on the bank's representations in proceeding with construction, advancing his own money, and spending substantial time on the project. (*Id.* at p. 154-155.)

Nothing like these things happened here. Summit cites no evidence showing that it did anything *in reliance* on anything LACDB said or did—not surprising, since Summit never did anything it was not already obligated to do under the loan. (See § I.C.1., *post*, regarding the claimed agreement to subordinate.) Even the $65,000 Summit spent in a tepid effort to create the appearance of a business operation in the zone (see AOB 19, RB 56) was no more than the loan agreement required it to do. By then Summit was already seriously in default, and it stayed in default.

B. LACDB Did Not Breach Any Implied Or Express Obligations In Connection With The Initial Funding Of The Loan Or The Amendment Of The Loan Agreement.

Instead of exploring the parties' contractual obligations, Summit argues that each of eight supposed "factual findings" is independently sufficient to support the judgment. (RB 55-56.) Three of these, however (items 2, 6 & 8), are *not* "factual findings" at all—none appears in the statement of decision. We will demonstrate in Section I.D. why this means they are out of bounds as a basis for affirmance, and we will further show that in any event none is supported by substantial evidence.

First, however, we will address the items that do appear in the statement of decision. In the opening brief, we showed why none of these could support liability. (AOB 39-43, 45-46.) We now show why nothing in Summit's brief yields a different result.

In this section, we address items 1, 3, 4 and 5, concerning the UCC search and Pine Cobble settlement. In Section I.C. we will address item 7, concerning LACDB's supposed agreement to subordinate.

1. LACDB breached no obligation in failing to conduct a UCC search (Summit's items 1 and 3).

If there was nothing wrongful about LACDB's failure to conduct a UCC search, then the claimed consequences of that failure—the whole so-called Pine Cobble debacle and its impact on Summit in the following months—cannot be LACDB's responsibility.[6] Whatever other duties might have arisen over the course of the parties' dealings, removing this seminal event as a basis for liability changes everything. Because the trial court's decision depended upon this issue so heavily, there is no way to know how the trial court would have evaluated the parties' other conduct if this issue were off the table. Accordingly, if the trial court was wrong about the UCC search, that fact alone requires a new trial. (See AOB § I.F.)

a. The loan documents negated any duty to conduct a UCC search.

Section 3.5 of the loan agreement states that, as a condition to closing, *Summit* was to provide proof that "any and all Security Interests in the Collateral" have been released except for Pine Cobble's own security interest. (Ex. 1/208, § 3.5.) It also includes a representation *by Summit* that it "ha[d] good title to the Assets free and clear of all Security Interests." (Ex. 1/208, § 4.5) In other words, far from being silent on the subject, the agreement expressly allocated *to Summit* the responsibility for insuring the absence of any security interests in the Collateral.

Moreover, nothing in the agreement suggests that these clauses contemplated any benefit to Summit. The covenants and representations

[6] One of these supposed consequences is Summit's item 3, "[c]ausing Summit's customers to stop paying and to stop placing orders." (RB 55.) However, Summit does not seem to claim, and it cites no evidence suggesting, that LACDB had any responsibility for creating this situation beyond its efforts to secure its rights in receivables in which it was supposed to have received a security interest. (See RB 32.) Nor does Summit cite any record support—there is none—for its statements that LACDB "recognized that its conduct had financially crippled Summit" (RB 2) and "admit[ted] responsibility" (RB 36, capitalization omitted).

protected *LACDB*—they gave it the *right*, not the duty, to have a "first priority lien on all of Borrower's Assets." (Ex. 1/208, § 2.6.) Nor does anything in the agreement limit LACDB's right to waive the benefit of these clauses. (See *Ball v. McDonnell Douglas Corp.* (1973) 30 Cal.App.3d 624, 629 ["A party to a contract can waive a provision therein which is solely for its own protection."].)

Summit's effort to impose some duty in this situation flies directly in the face of settled law to the effect that "there can be no implied covenant where the subject is completely covered by the contract." (*Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 608-609, internal quotation marks omitted; see AOB 33.)

b. The Commercial Code provisions concerning assigned security interests negate any duty to conduct a UCC search.

The essence of Summit's UCC-search argument is that a UCC search is supposed to reveal assignments like the one Pine Cobble gave to Capital Funding. The implicit assumption is that assignees like Capital Funding need to make their own UCC filing in order to perfect their security interest. The assumption is wrong.

Under Commercial Code section 9302, subdivision (2) as it existed when LACDB made its loan to Summit, "If a secured party assigns a perfected security interest, *no filing under this division is required* in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor." (Emphasis added.)[7] Capital

[7] The Commercial Code was substantially revised in 1999 (Stats. 1999,
(continued...)

Funding would therefore have been fully secured against third parties, including LACDB, *without filing anything*. A search of UCC filings therefore provides no assurance against the very kind of assignment Pine Cobble made. If Capital Funding had no need to make a UCC filing, LACDB could not have been under a duty to look for one.

c. There was no non-contractual duty requiring LACDB to conduct a UCC search.

Instead of measuring LACDB's acts against the language of the parties' agreements—and contrary to the contractual basis on which the trial court decided the case—Summit tries to lay them on a Procrustean bed made out of the six-factor test for negligence liability that originated in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650. Summit ignores the fact that this test is designed to evaluate the existence of a duty of care *where there is no privity of contract*. That is how the Supreme Court originally enunciated the test: "The determination whether in a specific case the defendant will be liable *to a third person not in privity* is a matter of policy and involves the balancing of various factors [listing the factors]." (*Ibid.*, emphasis added.) The same was essentially true in *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, which the court relied on in *Nymark v. Hart Fed. Savings Loan Assn.* (1991) 231 Cal.App.3d 1089 ("*Nymark*") (discussed at AOB 40-41 and RB 64-67). In *Connor*, the bank's primary relationship was with a real estate developer, but it also

[7] (...continued)
ch. 991), and current section 9302 covers a different topic. Former section 9302, subdivision (2), now appears as section 9310, subdivision (c), without substantive change. (See generally West CA-STANN97, which shows the code as it existed in 1997.)

made trust deed loans to purchasers in the developer's project. The issue was whether the bank owed a negligence duty to those purchasers with respect to construction defects in their homes. The Supreme Court considered this issue in light of the fact that the bank "*was not in privity of contract* with any of the plaintiffs except as a lender." (69 Cal.2d at p. 865, emphasis added.)

Like *Connor*, *Nymark* was purely a negligence case; the Court of Appeal considered no other claims.[8] Here, in contrast, the trial court analyzed the case solely in terms of contract obligations. Although the result was wrong, the approach was right. When the parties have defined their obligations in a contract, there is no occasion to engage in the kind of policy-based analysis articulated in *Biakanja*, *Connor* and *Nymark*.

But *Nymark* is instructive, as we observed in the opening brief, because it so clearly shows why there could never be a duty here—why, in *Nymark*'s words, it would be "nonsensical." (*Nymark*, *supra*, 231 Cal.App.3d at p. 1100.) Summit's analysis of the six factors fails because Summit assumes its own conclusion—that borrower protection has something to do with conducting a UCC search, and in this connection that "the transaction" to be analyzed is the *loan* transaction. (RB 66.) *Nymark* rejected such a broad approach. In denying a borrower's negligence claim based on a bank's faulty real estate appraisal, the court recognized that the "transaction" to be analyzed was nothing more than the appraisal itself.

[8] In *Connor*, the Court rejected the only non-negligence claim, which was that the lender was a joint venturer with the developer. (69 Cal.2d at pp. 862-863.) In *Nymark*, the court noted that while the complaint was entitled "Breach of Contract, Injunction," its allegations "sound in negligence" and the plaintiff had so characterized it. (231 Cal.App.3d at p. 1093, fn. 2.)

(231 Cal.App.3d at pp. 1099-1100.) So, too, here: The "transaction" in question here is the UCC search, not the loan.

LACDB needed a first-lien position to protect *itself*, not to protect Summit. Summit cites nothing from the record, and we have found nothing, that suggests anything to the contrary. (Summit cites no record support for its statement that the failure to run a UCC search was contrary to "the expectations of the parties," RB 2.) Although good banking practice might dictate running the search, it does not follow that anything about the process is designed to benefit the borrower. In fact, Summit's own expert explained the reason for UCC filings solely in terms of *the lender's* need "to ensure that it has a priority lien on the collateral." (RT 3919.)

d. Summit fails to acknowledge the likely result of discovering Capital Funding's claim—Summit's immediate bankruptcy.

Summit argued, and the trial court believed, that everything would have worked out right if only LACDB had discovered Capital Funding's claim before it funded the loan. That conclusion cannot be squared with the undisputed evidence. To see why, one need only ask, "What would have happened next?"

There are two possible scenarios:

1. LACDB would have had the unquestionable right to refuse to close the loan, not only because it could not acquire a first-lien position, but also because of Summit's breach of its representations. LACDB could have ended the parties' relationship right then and there. What then? Austin gave the answer when he was trying to nail down Pine Cobble on the day the loan funded: "[W]e Will [sic] be out of business this week if we are not

funded today." (Ex. 29.) Unlike the admittedly false "rah rah" statements he made to LACDB during this period (see AOB 12), as to this statement "I wasn't lying" (RT 1574). There is no evidence that Summit had any resources that would have allowed it to avoid bankruptcy.

2. Even if LACDB were inclined to proceed, the loan could no longer proceed on the agreed basis. What then? Capital Funding would have to be dealt with, one way or another, as would the situation of there being "[t]hree creditors . . . calling Summit's customers." (RB 32.) That would mean either litigation (see § I.B.2., *post*) or some negotiated arrangement that would have required enough money to induce Capital Funding to release its claim—*Summit's* money, since the basis on which the trial court found that LACDB should have resolved the problem "with its own assets" (CT 1282:10) would not exist. The trial court itself acknowledged that "[i]t is clear that the original business loan agreement of September 5, 1997 required amendment because of what became known as the Pine Cobble fraud or UCC 'debacle'. . . ." (CT 1276:22-24.)

The only difference between this latter scenario and what actually happened is the timing of the discovery—plus the fact that LACDB's efforts to rescue the situation ended up subjecting it to an $11.7 million judgment.

3. The Pine Cobble Settlement Agreement did not involve the breach of any obligation by LACDB (Summit's items 4 and 5).

In the opening brief, we demonstrated that nothing about the Pine Cobble settlement involved a breach of any obligation. (AOB 41-42.) Summit has offered no substantive response, undoubtedly recognizing that at the time of the events, Austin expressed *gratitude* for LACDB's efforts. The day the Pine Cobble settlement closed, he wrote to LACDB stating that things were looking better for Summit and that "all of this is due to the dedication of the staff of the Los Angeles Community Development Bank and the mission in [*sic*] which it stands." (Ex. 45.)

Despite the lack of argument, Summit includes in its list of "factual findings" that it claims support the judgment two items arising from the settlement: "Using Summit's money (the $470,640 contingency account) to solve the problem created by the Bank" (item 4) and "[d]emanding $160,000+ from Summit's collected receipts to replenish the contingency account for its own comfort" (item 5). (RB 55.) Neither "finding" supports affirmance.[9]

Both the $470,000 payment to Capital Funding and LACDB's use of receivables proceeds to replenish its contingency account were expressly authorized by the three agreements that resolved the Pine Cobble dispute: a settlement agreement (Ex. 44/214), an amendment to the loan agreement (Ex. 2), and an "Accounts Receivable Security Agreement" (Ex. 5). The trial court found that LACDB "extorted" Summit's agreement

[9] The second "finding" does not appear in the statement of decision, and therefore cannot support the judgment in any event. (See § I.D.1, *post.*) At most, it is subsumed in the trial court's finding that LACDB should have used "its own assets" to solve the Pine Cobble problem. (CT 1282:10.)

(CT 1282:23), and Summit describes the deal as a "forced settlement" (RB 34). But neither Summit's record citations (see RB 33-34) nor anything else in the record supports these accusations, and common sense belies them.

Austin was no shrinking violet. His letters to LACDB and others show that he never hesitated to speak his mind, with no minced words. (E.g., Exs. 29, 71/241, 226, 242.) As Summit's brief says, he was "confrontational, blunt and direct." (RB 47, fn. 14.) Yet Summit cites no evidence that Austin voiced a word of objection to the way LACDB was handling the settlement negotiations. Just the opposite—he testified that his instructions to LACDB's lawyers were to "just get it solved" (RT 761; see RT 755-761), and that he spoke with LACDB's attorney "almost daily" and was "at a begging point to get it resolved" (RT 758).[10] Nor does Summit cite any evidence that Austin ever demanded that LACDB solve the problem "with its own assets," as the trial court found it should have. (CT 1282:10.) And, as noted above, on the day the settlement closed Austin thanked LACDB for "the dedication of [its] staff." (Ex. 45.)

This is classic estoppel—"induc[ing] another to take such a position that he will be injured if the first party is permitted to repudiate his acts." (*Elliano v. Assurance Co. of America* (1970) 3 Cal.App.3d 446, 450-451, internal quotations and citations omitted.) Having actively urged LACDB to negotiate an agreement that significantly restructured the parties' relationship, Summit cannot be heard to complain about the result.

Summit argues—without citing record support—that LACDB's lawyer told Austin to stay away from the negotiations (RB 7, 33-34) and

[10] Consistent with this testimony, LACDB's lawyer testified that Austin was "absolutely" in favor of the Agreement—he "voiced his constant support for the deal." (RT 4595-4596.)

that "Austin had no real choice" because litigation "could have taken forever, so Summit would have been out of business either way." (RB 34.) It offers no authority, however, showing why it has any right, long after the fact, to saddle LACDB with the consequence of its own tactical decision not to avail itself of readily available litigation remedies.

Most obviously, Summit could have immediately sought, and would certainly have obtained, the appointment of a receiver to take control of the receivables and sort out the question of who was entitled to payment on them. That is precisely what the debtors were inviting—they told Austin "they would not pay anyone until a court order told them who [*sic*] to pay." (RB 32; see RT 769.) The presence of conflicting claims to property is an express statutory ground for appointing a receiver—"an action . . . between partners or others jointly owning or interested in any property or fund." (Code Civ. Proc., § 564, subd. (b)(1).) Anyone can apply who has a "probable" interest in the property. (*Ibid.*) Summit didn't have to wait the two months it took to negotiate the Pine Cobble settlement. It could have had a receiver appointed *ex parte*, since "nothing more than a probable joint or common interest in the property concerned need be shown." *Maggiora v. Palo Alto Inn, Inc.* (1967) 249 Cal.App.2d 706, 711 [affirming ex parte appointment of receiver].) Further, since the disputed receivables were supposedly to be returned *to Summit* (RB 28-29), Summit had every reason to take the lead. Instead, it took no action, and lodged no protest about the negotiations.

Likewise, if Summit were concerned that LACDB was improperly using loan proceeds to resolve the problem, it had a ready remedy under injunction law. Again, it did nothing, and said nothing. Its silence at the time of the events is irreconcilable with any claim that LACDB breached any obligation toward it.

Besides, even if the Pine Cobble settlement really had been forced on Summit, its criticism of the payment of $470,640 to Capital Funding ignores the fact that *these funds were not supposed to go to Summit anyway*. They were supposed to support a letter of credit to secure LACDB against a potential tax lien claim. (See AOB 7, 9; Ex. 28/209.) The use of this money to settle the Pine Cobble problem therefore could not have had any immediate impact on Summit. And since, as shown below (§ I.D.2.b., *post*), there is no evidence that the tax lien was resolved at any time before LACDB accelerated the loan, Summit would never have had the use of the money. No harm, no foul.

C. LACDB Did Not Breach Any Express Or Implied Obligation After Summit Became Delinquent.

1. LACDB's claimed failure to subordinate to a receivables lender provides no support for the judgment (Summit's item 7).

Summit's main argument regarding post-delinquency events is that Summit and LACDB made a binding agreement that Summit would obtain an accounts receivable lender and that LACDB would subordinate to that lender. (RB 55-56, item 7; RB 58-63.) Tacitly acknowledging the weakness of this position, however, Summit also states that LACDB had already agreed to subordinate. (RB 27, 38.) The first contention is legally unsupportable; the second is contrary to the record.

Since nothing about the fallout from the Pine Cobble problem excused Summit's performance, by May 1998 the only open question was whether Summit was going to cure its payment and other defaults.

LACDB's willingness to subordinate its lien to an accounts receivable lender did not change that situation in the slightest. The delinquency remained, and was never cured. That should be the end of the story. But even if LACDB bore some responsibility for the Pine Cobble problem, there is no basis for Summit's agreement-to-subordinate claim.

a. Neither the Loan Agreement nor the amendment obligated LACDB to subordinate.

Summit states, without citation to the record, that the loan documents included "the promise by the Bank that it would subordinate to Pine Cobble" and "indicated the Bank's promise to subordinate" (RB 27), and that LACDB "had already contractually agreed to subordinate to Pine Cobble and that when the time came, the Bank would subordinate its interest in the accounts receivable to another lender" (RB 38).

Not true. There is nothing anywhere in the loan documents that says anything about subordinating to Pine Cobble or anyone else.

The original loan agreement describes a lien by Pine Cobble as a "permitted lien" (Ex. 1/208, § 1.36) and it allows borrowing from and a lien by Pine Cobble (§ 6.1.1), but it says nothing about subordination and nothing about any other lender. And while it appears that LACDB recognized that accounts receivable lenders require a first lien (e.g., RT 718, 2170-2171), the loan agreement says nothing on the subject.

More importantly, the amendment to the loan agreement *deleted* the relevant provisions of sections 1.36 and 6.1.1 of the original agreement, and stated that LACDB would "have a first priority Security Interest in all of Borrower's accounts receivable," both existing and future. (Ex. 2, § 3.) This first priority security interest was further confirmed—again, with no exceptions—in the concurrently-executed Accounts Receivable Security Agreement. (Ex. 5, ¶ 1.) Summit's own expert admitted that he had seen no document "that after November 19th, 1997, require[d] the Bank to subordinate its first position in accounts receivable to a factoring company." (RT 4006.)

Whatever subordination obligation may have surfaced when the parties expected Pine Cobble to be the receivables lender, it submerged once Pine Cobble left the scene.

b. There was no consideration for any agreement to subordinate in May 1998.

Summit labors to find some kind of detriment it suffered to serve as consideration for LACDB's supposed agreement to subordinate (RB 58-63), but it isn't there. It was LACDB, not Summit, that was offering to give something up.

The loan documents entitled LACDB to a first-lien position on all of Summit's assets, yet in May 1998 it was offering to allow an accounts receivable lender to come ahead of it. Given Summit's admittedly delinquent condition, this was no minor concession. Summit's own record citation (RT 4954, quoted at RB 38) confirms that LACDB believed it was surrendering rights.

It may well be true that this was the only way for Summit to gain the liquidity it needed to cure its delinquencies. But that would not create any *obligation* on LACDB to cooperate. At this point in the parties' relationship, LACDB would have been fully within its rights, in Summit's words, to "sit back, fold its arms, and say: 'Pay me.'" (RB 57.) Yet, as with the Pine Cobble problem, LACDB did not do so, but instead offered flexibility. And, as with Pine Cobble, Summit seeks to transform cooperation into liability.

Summit argues that it was "not obligated to have or maintain [an accounts receivable] line of credit" and that it promised to get one "even if it meant paying the high price of a factoring arrangement." (RB 59, emphasis in original.) What this argument ignores is that Summit was *always* obligated *to pay its loan* in accordance with the loan documents. If in order to do so Summit had to raise money, how it did so was not (or at least did not need to be) any concern of LACDB's. LACDB did not require Summit to get a high-priced receivables loan—all it required was that Summit meet its loan obligations.

c. Even if there was an agreement and LACDB breached it, there no evidence of any consequence that would excuse Summit's delinquencies.

Summit fails to demonstrate, either with evidence or argument, that anything about the May 1998 events had any kind of impact on it, beyond the undisputed fact that it did not get accounts receivable financing. Summit remained seriously in default in multiple areas. (E.g., Ex. 68 [7/9/98 letter from LACDB listing multiple continuing non-monetary defaults].) And within a month, things were limping along exactly as they would have if the subject of accounts receivable financing had never come up. (See Exs. 229 [on 7/1/98, Summit proposes to bring loan "current" by deferring $81,000 in principal payments], 69/238 [on 8/2/98, Summit seeks deferral of interest].) Summit cites no evidence of any actions it took or refrained from taking in reliance on the supposed agreement, or any detriment it suffered. While the non-responsiveness of LACDB's Vincent Pitts may not be a model of customer relations, in terms of the parties' legal relationship it was a non-event.[11] Even the trial court recognized that under its "Workout mode" analysis, the situation constituted "Workout activity" only "until the point where Pitts for whatever reason declines to respond." (CT 1274:3-4.)

There is an even more fundamental failure of proof. Essential to Summit's claim is a chain of causation—if LACDB had agreed to subordinate, Summit would have obtained receivable financing, and that financing would have enabled it to cure its delinquency and stay current on its loan. But Summit never tried to show that the pieces would have come together—that the receivables lender would have been have been able to reach agreement with LACDB on the terms of subordination, and that the lender would have willing to lend enough to bring Summit current and keep it current. Summit ignores this point, and the trial court made no finding on it. (See CT 1273:17-1274:8, 1281:9-12, 1282:11-13 [stating that the proposed factoring company "appeared willing to finance the accounts receivable" and describing LACDB as nonresponsive but describing no consequence]; CT 1173, ¶ 5 [request for statement of decision re whether LACDB caused damage]; CT 1230 [objections to statement of decision].)

The situation presents much the same issues as a claim for interference with a prospective advantage: The plaintiff must prove the probability of the advantage in order to show harm. (E.g., *Youst v. Longo*

[11] Summit also claims that it showed it spent $65,000 in reliance on LACDB's statements that it would "work with" Austin on payments if Summit got into the zone. (RB 36, 56.) But, as noted earlier, Summit was *always* required to get into the zone. And while the trial court did find that Summit spent $65,000 (RT 1274:27-1275:3), it did not tie the expenditure to any statements by LACDB.

(1987) 43 Cal.3d 64, 71 [plaintiff must show "it is reasonably *probable* that the lost economic advantage would have been realized but for the defendant's interference"]; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331 [no liability where expectation is "at most a hope for an economic relationship and a desire for future benefit"].) Here, too, without proof that the financing deal could actually have been made on terms that would have worked for both Summit and LACDB, there is no basis for concluding that Summit would have been able to erase its delinquency, and therefore no basis for concluding that LACDB's conduct excused Summit's performance.

Allowing hindsight judgment to be the standard for imposing obligations on a lender under circumstances like these—no meaningful benefit to the lender, and no demonstrable consequence of its conduct—would place an unreasonable burden on lenders. It would transform a lender's willingness to allow additional financing into an obligation that it must meet on peril of losing the ability to enforce its loan and facing a damage claim all out of proportion to the loan. Such an approach would discourage, rather than promote, cooperation with borrowers.

2. LACDB's motive for accelerating is irrelevant.

Summit attributes sinister motives to LACDB's decision to accelerate, focusing on LACDB's concerns about whether an audit by the Department of Housing and Urban Development ("HUD") would reveal that Summit was not in the zone. (RB 42-43, 46-47.) True or not, the point is irrelevant.

First, the trial court made no finding on the subject, so this Court can make no presumptions. (Code Civ. Proc., § 634; § I.D., *post.*)

Second, "the law generally does not distinguish between good and bad motives for breaching a contract." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516; see *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 58-62 [test for evaluating compliance with covenant of good faith and fair dealing in making discretionary commercial decisions is objective reasonableness, not subjective good faith].) If Summit was in default and not excused, then LACDB had the right to foreclose regardless of why it did so. Besides, LACDB's concern about whether Summit was in the zone was entirely legitimate, regardless of any fear of a HUD audit. Summit's being in the zone was the loan agreement's raison d'être, but its efforts were singularly unsuccessful. The trial court's hindsight finding that Summit made a sufficient effort does not make LACDB's concern over the issue any less legitimate.

Summit's speculation reflects more paranoia than logic. Summit seems to be saying that even with a badly defaulted loan, LACDB held off accelerating until Summit was in the zone in order to protect itself with HUD. But while it may be true that a defaulted loan was better (or less bad) for LACDB's relationship with HUD than Summit's not being in the zone, there is no evidence suggesting that LACDB somehow sought to protect itself against HUD by delaying acceleration. The loan had been in default for months, and if LACDB really wanted to "get rid of the confrontational, blunt and direct Austin" (RB 47, fn. 14), it had plenty of opportunities to do so. Instead, it tried to work with him—and has been paying the price ever since.

D. The Judgment Cannot Be Affirmed On The Basis Of The Three Items Not Recited In The Statement Of Decision.

1. Affirmance based on Summit's items 2, 6 and 8 would violate Code of Civil Procedure section 634.

In its request for a statement of decision, LACDB asked the trial court to describe the conduct it relied on in reaching its conclusion, particularly with respect to breaches of contract (CT 1171-1172) and breaches of the duty of good faith and fair dealing (CT 1170:13-19). Summit's proposed statement of decision responded to each of LACDB's numbered questions. (CT 1280-1286.) The generality of these responses prompted LACDB to object, pointing out many places where the proposed statement of decision provided inadequate factual detail or legal reasoning. (CT 1210 et seq., in particular Objections 5-16, concerning the bases for finding breach of express and implied obligations). (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134.)

The trial court refused to provide any further detail and signed the proposed statement of decision as submitted. (See CT 1264, 1287-1288.) To the extent the trial court did not identify or left unclear any of the grounds Summit now relies on, Code of Civil Procedure section 634 bars Summit's reliance on them, because "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."[12]

[12] Section 634 provides:

> "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to

(continued...)

The statement of decision says nothing about items 2, 6 and 8 of Summit's list—"[t]he failure to demand possession of the negotiable commercial paper; . . . [f]ailing to account for, or to collect the invoices [LACDB] ultimately received from Capital [Funding]; . . . [r]efusing to apply the $160,000+ that it held in the contingency account." (RB 55-56.)[13] Even if there had been evidence that would support the judgment on these points, none can be a basis for affirmance. In fact, however, there was no such evidence.

[12] (...continued)

> the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue."

[13] Summit seems to claim that CT 1266:1-3 represents a finding on the first point (RB 53), but it doesn't. There the statement of decision describes the return of the receivables to Summit as the "[i]nitial intent" of the loan agreement, but it contains no findings about what happened or about LACDB's responsibility.

2. No substantial evidence supports the imposition of liability on the basis of Summit's items 2.6 or 8.

a. Item 2: "The failure to demand possession of the negotiable commercial paper."

Summit evidently seeks to impose liability on LACDB because it did not, in connection with funding Summit's loan, obtain the return of the accounts receivable held by Pine Cobble. (RB 29 [LACDB disbursed loan proceeds "without taking physical possession of the Summit receivables"], 64 [describing LACDB's "failure to obtain possession of the negotiable commercial paper that was to be returned to Summit"].) What most characterizes the record on this issue is silence—the loan documents say nothing on this point, beyond requiring the release of Pine Cobble's interest in the receivables. (Ex. 1/208, § 3.3.) Summit's record citations (RT 730 and Ex. 1/208, §§ 3.0, 3.3, both cited at RB 29) contain no suggestion that LACDB itself was supposed to acquire possession of the receivables. Nor was there a reason for LACDB to do so, since the loan agreement only gave it a security interest in them.

b. Item 6: "Failing to account for, or to collect the invoices [LACDB] ultimately received from Capital."

The collection of accounts receivable following the Pine Cobble settlement was governed by two documents, the settlement agreement (Ex. 44/214) and the Accounts Receivable Security Agreement (Ex. 5). In essence, LACDB was to collect Summit's pre-September 9 accounts receivable (labeled "Existing Accounts Receivable") and divide the proceeds between itself and Capital Funding. (Ex. 44, Bates 251-252; Ex. 5, Bates 56-57.) The Accounts Receivable Security Agreement provided that apart from Capital Funding' share, everything LACDB recovered was to be kept in a "holding account" as security against Summit's tax liens. (Ex. 5, Bates 56-57.) The money so held was to be released "[u]pon Summit's presentation to [LACDB] of documentation satisfactory to Lender executed by the Taxing Authorities evidencing their release of the Tax Liens, or upon Summit's full repayment of the Indebtedness . . . ." (Ex. 5, ¶ 6.2.)

Although Austin claimed that he really had no tax liability, he also admitted that there was never an executed release. (RT 1288-1289, 1643-1644.) That means that regardless of what proceeds LACDB collected, and regardless of whether it accounted to Summit for them, Summit never became entitled to have the proceeds either applied against its debt or released to it. A failure to account for those proceeds therefore could not have had any impact on Summit's delinquencies and provides no basis for excusing them.

But beyond that, there is no evidence that LACDB collected anything for which it could account, beyond an initial $160,000 that apparently went to Austin, who then sent it to LACDB. (RT 1652, 1666.) Although the settlement agreement entitled LACDB to collect the receivables—and to cease collection efforts when, "in its sole discretion," LACDB determined that further efforts "will not yield further meaningful collections" (Ex. 44, Bates 252)—LACDB did not in fact obtain the actual receivables and assumed that Summit had them and was collecting on them. (RT 4349-4354.)

c. Item 8: “Refusing to apply the $160,000+ that it held in the contingency account.”

The preceding discussion resolves this point, too. The “contingency account” into which the $160,000 was deposited was security against tax liens—security that LACDB was supposed to have had in the form of a letter of credit, but did not receive because of the need to use loan proceeds to resolve the Pine Cobble problem. (Ex. 5, ¶ 6 [referring to “holding account”].) Since Summit never became entitled to have anything in the holding account applied against its loan, LACDB’s failure to apply the funds cannot excuse Summit’s delinquencies.

E. Summit’s Damages Cannot Include Any Losses Attributable To The Receiver’s Activities.

In the trial court, Summit vigorously attacked the conduct of the receiver, David Pasternak. Much of Summit’s cross-examination of Pasternak was devoted to trying to show that he lacked expertise and did not take the necessary steps to fulfill his duties. (See generally RT 4851-4927.) The trial court found that Pasternak’s conduct “led to the loss of Summit’s assets in Mexico which were valued in excess of $7 million.” (CT 1279:23-25.) And when Pasternak sought approval of his final report, Summit denounced his conduct in the strongest terms, claiming that *his conduct* was what caused Summit’s losses. (RJN Ex. 11; see also RJN Exs. 6-8.)

Faced with LACDB’s showing in the opening brief that these issues have now been conclusively adjudicated adversely to Summit and that res judicata bars any further claim, Summit’s response is—silence.

Instead of addressing res judicata, Summit shifts back and forth between several theories, none of which solves its problem. Ignoring Pasternak's conduct, Summit talks about everything else—whether LACDB's acceleration and foreclosure were justified, whether Pasternak's appointment was justified, and the incorrect notion, for which Summit cites no authority, that LACDB could have taken over Summit's operation itself because it held a pledge of Austin's stock. (RB 68-69; see Corp. Code, § 702 [pledgee of stock can vote only after transfer of shares into its name].) And, in contrast to its trial court argument that the source of its loss was Pasternak's claimed failure to take over assets in Mexico (e.g., RJN Ex. 11, Bates 330-337 [seeking a personal surcharge against Pasternak for the loss of these assets]), Summit now argues exactly the opposite: Since Pasternak failed to take custody of the assets, LACDB cannot blame him for their loss. (RB 70.)

But LACDB is not the one blaming Pasternak—Summit is. And it is Summit that fails to respond to the fact that a court adjudicated its claims against Pasternak and them claim wanting.

As for Summit's claim that LACDB "attempted to manipulate the receivership proceedings" (RB 72-73), it is enough to say that no such issue has ever been adjudicated and the trial court's statement of decision contains no such finding. The statement of decision correctly notes that LACDB funded the receivership with loans (CT 1283:28-1284:1), but the order appointing Pasternak explicitly authorized him to obtain funding from "any person or parties" (CT 254, ¶ 16). There was no evidence, and Summit offers no authority, that this is even slightly out of the ordinary. Nor does Summit suggest why there should be anything improper about LACDB's taking the lead in pursuing the successful contempt proceedings against Austin. (CT 1284:1-4; RB 73; see CT 595-597.) Although it is true that a receiver is not the agent of either party (RB 73)—which is another reason why LACDB cannot be liable for Pasternak's conduct—the fact remains that here, as in every case involving a receivership over a delinquent borrower, the lender is the one who seeks the appointment of a receiver, and it does so in aid of enforcing the borrower's loan obligations.

What all of this means is that even if LACDB is liable to Summit, the now-final post-judgment exoneration of Pasternak means that damages must be retried, because of the trial court's mistaken belief that Pasternak caused some part of Summit's loss and that LACDB was, in turn, liable for the receiver's actions. In a new trial, damages would have to be measured on the basis of how things stood before Pasternak assumed his position.

II.

AUSTIN FAILS TO SHOW ANY BASIS FOR THE JUDGMENT IN HIS FAVOR.

Austin's entire rationale for the judgment in his favor is that he was "a party to the loan agreement, as a guarantor, and was also a party to the May 27 agreement." (RB 81.) Even if either position supported liability—they don't—the trial court made no finding on the subject. That ends the matter.

LACDB's request for a statement of decision asked "[w]hether the Bank breached a contractual obligation *to plaintiffs*" (CT 1171, emphasis added), but the statement of decision identifies no breach of any kind of obligation *to Austin*. Its only suggestion of any loss to Austin is the statement that the attempted expansion of the receivership, though unsuccessful, "nonetheless resulted in further damages to Austin personally," without identifying any particular damage he suffered. (CT 1279:22.)

Nor has Austin identified any injury that he suffered on his own behalf, distinct from the injury claimed for Summit. Just the opposite: He argues that he suffered a loss as "the 100% shareholder in Summit." (RB 81.) Without even the hint of a rationale, he thus asks the Court to disregard the settled rule that a shareholder cannot sue for injury to his corporation. (See AOB 55.)

III.

SUMMIT FAILS TO SHOW THAT THE DAMAGE AWARD WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Aside from the improbability that a company in Summit's desperate financial straits could be worth $7 million when it was on the verge of going out of business (see AOB 58), the real problem with the trial court's damages finding is that it depends entirely on an indisputably error-ridden financial statement. While Summit attacks the expertise of LACDB's witness and claims that his appraisal of Summit's value was far too low (RB 75-76), it does not take issue with the conclusions most relevant to the present inquiry: that the financial statement was not prepared in accordance with generally accepted accounting principles, and that its failure to include accumulated depreciation inflated Summit's net worth by as much as $4 million (see AOB 57).

That LACDB may have mistakenly relied on this financial statement means nothing. The issue is not what LACDB believed, but *what Summit* *was worth*—a distinction underscored by the testimony of Summit's expert, who criticized LACDB for its credulity. (RT 3913 ["the Bank did not seek to get an appraisal of the Company's assets. They used the Company's balance sheet . . . ."].) The logical extension of Summit's argument is that a borrower could escape liability for submitting a false financial statement because the lender relied on it.

Summit's comment about the propriety of so-called "hybrid" accounting (RB 75-76) is irrelevant to this point, since Summit stipulated that its *balance sheet* was prepared on an accrual basis. (RT 5235-5236.) Summit's cross-examination of LACDB's expert on accrual versus cash basis accounting concerned the expert's conclusions about Summit's *income* statements. (E.g., RT 5515-5517; see RB 75-76.)

IV.

SUMMIT FAILS TO JUSTIFY THE AWARD OF INTEREST.

Even though the trial court explicitly awarded interest only as a proxy for lost profits, and even though Summit never asked for interest dating back to the funding of the loan (see RT 6125), Summit argues that the interest award is appropriate because Summit's claim was supposedly "capable of being made certain by calculation" (Civ. Code, § 3287, subd. (a); see RB 77-78). The basis of this argument is that because LACDB prepared an internal report showing a $7 million net worth (Ex. 218), it "knew exactly what it destroyed" (RB 78).

Yet again, the statement of decision bars Summit's argument. LACDB queried the trial court on this issue (CT 1174:1-6 [request for statement of decision]; CT 1234-1235 [objections to proposed statement of decision]), and the trial court said nothing in response even slightly resembling Summit's theory.

Besides, Summit's argument ignores the logic underlying the only case Summit cites, *Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901 ("*Chesapeake*"). As Summit notes, *Chesapeake* focuses on the "*defendant's* knowledge about the amount of the plaintiff's claim." (*Id.* at p. 907, emphasis in original.) One of the policies supporting this rule, the court observes, is that "interest traditionally has been denied on unliquidated claims because of the general equitable principle that a person who does not know what sum is owed cannot be in default for failure to pay." (*Id.* at p. 906.) Inherent in concluding that a defendant has sufficient knowledge of the amount of a debt is that there is, in fact, some kind of debt. *Chesapeake*, for instance, involved a conventional debt—the rental deficiency owed to a lessor by a vacating lessee. (*Id.* at pp. 904-905; see pp. 907-910 [court denied interest because of the complex accounting required to determine the amount].)

No such debt existed here. *Summit* was supposed to be the debtor, not LACDB, and it was not until entry of judgment that those roles were reversed. Whatever LACDB may have believed about Summit's net worth when it funded the loan, there has never been a suggestion that it began its relationship with Summit believing that it might one day owe Summit anything, much less nearly triple what it was lending. There is accordingly no basis for applying *Chesapeake*'s rule.

This distinction highlights another requirement for the recovery of interest that Summit ignores: The right to recover the debt must be vested in the creditor "upon a particular day." (Civ. Code, § 3287, subd. (a).) Whatever amount Summit might theoretically have had the "the right to recover" (*ibid.*) on the date the loan funded, it was *not* $7.2 million At the funding of the loan, Summit had no right to recover anything against LACDB; it was the other way around. Even giving the broadest possible reach to the trial court's conclusion that what followed immediately afterwards was all LACDB's fault, the most LACDB could have known—not when the loan funded, but over the next couple of months—was that it might find itself obligated to make up the shortfall that Summit claims resulted from the Pine Cobble affair. Dripping wet, this would include only the $470,000 paid to Capital Funding (even though Summit was not supposed to get those funds at the time), and perhaps the collectable portion of the additional $1 million in receivables that Summit says were supposed to be returned to it but were not. (RB 28-29.)

Another part of *Chesapeake* underscores the trial court's error here. In *Chesapeake*, the creditor recovered $50,000 instead of the $115,000 it alleged in its cross-complaint (149 Cal.App.3d at p. 905), and the court held that this "large discrepancy" supported the conclusion that the sum due "was not calculable" (*id.* at p. 910, capitalization omitted). This exemplifies the rule that "[t]he greater the disparity between the complaint and the damages, however, the less likely prejudgment interest is appropriate." (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 961 [interest denied where plaintiff recovered only 25% of its claimed damages].)

The discrepancies in *Chesapeake* and *Wisper* were nothing compared to the discrepancy here. In the First Amended Complaint, Summit sought $50 million (CT 274), some seven times more than it ultimately recovered. In closing argument, it claimed that the award could be as high as $14 million. (RT 6123.) And even now, Summit claims (without record citation) that "[t]he court awarded one-third of the principle [*sic*] amount of the damages." (RB 80, fn. 20.)

It is not surprising that the trial court made no effort to justify its interest award on the ground of certainty—it can't be done. The statement of decision reveals that the trial court had no basis whatever for making an award of interest, beyond its desire to avoid "complex calculations that would become increasingly difficult and argumentative." (CT 1284:24-27.) The award must be reversed.

V.

SUMMIT FAILS TO JUSTIFY THE ATTORNEY'S FEE AWARD.

The opening brief showed that the absence of substantial evidence of time spent, combined with an unsupportable four-times multiplier, combined to make the fee award excessive. Summit has failed to provide a sufficient answer to either argument.

Summit's response underscores the unreliability of the evidence of Mr. Lewin's time. Summit now claims that Mr. Lewin really spent his 2,500 hours over two years rather than 18 months. (Compare AOB 63-64 with RB 79, fn. 19.) However, as the opening brief notes (AOB 64), in the trial court Mr. Lewin also stated that he had worked "6,240 hours over the past two years" (CT2 519:22-23), which is virtually the same as LACDB's estimate of 6,600 hours (AOB 63-64).[14]

[14] Summit says the relevant period extends several months after the end of trial on February 8, 2000. (RB 79, fn. 19.) However, Mr. Lewin's

(continued...)

One does not have to be what Summit caustically calls a "contingent peasant[]" (RB 79, fn. 18) to work hard. But 3,300 or 3,120 *billable* hours a year (or even 2,500 *billable* hours, which is what Mr. Lewin may have meant—but who knows, since he never specified?), year in and year out, is such an extraordinary pace that a court should not accept the number without more substantial evidence than counsel's memory many months after the fact.

As for the four-times multiplier, Summit essentially confesses that the only authority for such a result is *Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal.App.3d 465. (See RB 80.) But it fails to address the later cases that disagree with *Glendora* (see AOB 65, fn. 13), specifically in the context of situations where, as here, the defendant is a public entity. And even if such a multiplier might be permissible in this kind of case, the trial court must—but did not—support it with specific factual findings based on evidence. (See AOB 65.)

Finally, it is a mystery where Summit gets the idea that "California specifically does not adopt the Federal 'lodestone' method." (RB 78.) "'California courts have *consistently held* that a computation of time spent on a case and the reasonable value of that time is *fundamental* to a determination of an appropriate attorneys' fee award.'" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095, emphasis added.) If what Summit really means is that, as a general proposition, detailed time records are not indispensable to a fee award, we do not disagree. But here the oral

[14] (...continued)
declaration supporting the fee award does not identify any particular time period (CT2 17-18), and the clerk's transcript reveals that the months after trial saw only briefing and motion work (CT 1089-1260).

evidence is not credible, and the absence of *any* documentation only underscores its inadequacy.

CONCLUSION

The judgment is flawed at every level—liability, damages, parties, fee award. Summit's claims are sufficiently defective to warrant a reversal with directions to enter judgment for LACDB. But at the very minimum, there must be a new trial on all issues.

Dated: September 11, 2002

Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, Rule 14(c), I certify that this Appellant's Reply Brief contains 10,660 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: September 11, 2002

Robin Meadow