IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

POODLES, INC., et al.,

Plaintiffs and Appellants,

v.

ROGER C. KUHN, et al.,

Defendants and Respondents.
______________________________/

Case no. A161161

San Francisco County Superior Court case no. CGC-16-550634

Honorable Jeffrey S. Ross
Honorable Ronald E. Quidachay

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

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APPELLANT/ PETITIONER: POODLES, INC. et al.; RESPONDENT/ REAL PARTY IN INTEREST: ROGER C. KUHN et al.	

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I.

PRELIMINARY STATEMENT

On many appeals, the parties largely agree what happened in the trial court and debate its correctness. Not this appeal. The main task of respondents Roger C. Kuhn et al. ("defendants") is simply setting the record straight. Material omissions and misstatements abound in the opening brief for appellants Poodles, Inc. et al. ("plaintiffs").

Typical is their first and longest contention, that defendants forfeited any reliance on the statute of frauds. (AOB 22-30) Plaintiffs' central premise is that, "[o]ther than preserving the statute of frauds defense in their Answer (3 AA 848, ¶ 17), defendants raised it initially in the phase two bench trial." (AOB at 22) But plaintiffs' own appendix in this Court proves otherwise. Well before the answer in question — to plaintiffs' fourth amended complaint — defendants had actively pursued their statute of frauds defense by a motion for judgment on the pleadings on plaintiffs' second amended complaint (1 AA 272-73 & 276), and later by a demurrer to their third amended complaint. (3 AA 606, 616 & 621)

Plaintiffs' opening brief never mentions those steps, but they are dispositive as a matter of law under plaintiffs' first cited case, *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544 (review den.). (AOB 22-23) First, it cites authority with approval that demurrers are fully sufficient to preserve a statute of frauds defense. (*Id.* at 552) Second, it holds that other documents can also preserve a

statute of frauds defense — in *Secrest*, an opposition brief — so long as "[t]he issue of the statute of frauds was thus squarely presented to the trial court . . . ." (*Ibid.*)

Still another omission on this issue is an independent ground for rejecting plaintiffs' forfeiture theory. The theory rested below, as here, on the fact that defendants did not pursue their statute of frauds defense at the jury phase of trial. (AOB 22-27) But as the trial court found, defendants were simply complying with its earlier bifurcation decision: to limit the jury phase to the existence and content of alleged oral referral agreements, and have the court then address the statute of frauds defense based on the verdict. (*Post*, pp. 14-21) Remarkably, though, plaintiffs' opening brief does not even mention that bifurcation decision, let alone the trial court's reliance on it to reject their forfeiture claim.

This pattern persists throughout their brief, but we cite only several more examples here:

• On the merits of the statute of frauds defense, plaintiffs suggest there was a dispute below about a writing (AOB 21), when in fact the lack of a writing was undisputed. (6 AA 1453:15-16) They also omit three separate findings by the trial court supporting its determination that the oral agreements were intended to last more than one year. (*Post*, pp. 30-33)

• On the alter ego issue, plaintiffs claim the court failed to consider a distribution of the assets of a corporate defendant. (AOB 35)

But the court considered it extensively, and concluded that plaintiffs failed to prove it reflected any wrongful intent. (*Post*, pp. 36-38)

- On the rejection of their fraud cause of action on res judicata grounds (AOB 44 *et seq*.), plaintiffs omit both their failure to oppose that ground below and an independent discretionary ground for the decision: that it was too late to consolidate their successive lawsuits, as they urged to avoid their res judicata problem. (*Post*, pp. 47 & 53-55)

There is no need to elongate this introduction. Every ruling challenged in plaintiffs' opening brief is fully supported by the record.

II.

STATEMENT OF APPELLATE JURISDICTION

Plaintiffs' opening brief omits the required showing of appellate jurisdiction. (Rule of Court 8.204(a)(2)(B)) Such jurisdiction lies, however, because the judgment appealed from was final as to all parties despite its reservation of costs and attorneys' fee issues. (*E.g.*, *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214 (review den.)) In addition, plaintiffs' subsequent notice of appeal (6 AA 1486) was timely.

III.

THE COURT PROPERLY REJECTED THE ASSERTED FORFEITURE OF THE STATUTE OF FRAUDS DEFENSE

A.

THE RELEVANT RECORD

Given the large number of issues raised in plaintiffs' opening brief, defendants will address the record and law on each issue separately.

We begin by summarizing the history of the statute of frauds defense omitted from plaintiffs' brief. While they dwell at length on defendants' failure to pursue that defense at the jury phase of the trial, they omit (1) defendants' pretrial papers actively pursuing that defense; (2) the court's decision to postpone its adjudication until after a jury resolved significant uncertainties about the alleged oral agreements; (3) the court's rejection of plaintiffs' forfeiture claim for the foregoing and related reasons; and (4) the actual subject of the "blame plaintiffs" ruling they cite on appeal.

1.

Defendants Repeatedly Asserted the Defense Before and During Trial

Plaintiffs' opening brief claims defendants' initial assertion of the defense was in their answer to the fourth amended complaint filed on June 22, 2018. (AOB 22, citing 3 AA 848, ¶ 17) Not so. As set forth in the statement of decision, "[t]hat defendants were asserting a statute of frauds defense to the second cause of action has been a constant throughout the litigation." (6 AA 1451:3-4)

On August 30, 2017, almost a year before the answer cited by plaintiffs, defendants asserted the defense in a motion for judgment on the pleadings as to the second amended complaint. (1 AA 261 *et seq.*) Part III of the motion was entitled "The Second Cause of Action" — the one alleging oral agreements — "Is Barred by the Statute of Frauds" and other grounds. (*Id.* at 272) Defendants argued, in relevant part, that the complaint did not specify the term of the alleged agreements; it only

implied that it was "for a period of one year" (*ibid.*, lns. 12-13); and the statute of frauds would bar recovery "[i]f the agreement was intended for a period greater than a year. . . ." (*Ibid.*, lns. 13-16)

In addition, Part VII of the same motion was entitled "The Sixth Cause of Action for Promissory Estoppel Is Barred by the Statute of Frauds" and other grounds. (*Id.* at 276) Defendants argued that the statute of frauds would bar this claim, too, if the term of the alleged oral agreements was longer than a year.

By order of October 24, 2017 (2 AA 516 *et seq.*), the court granted the foregoing motion, but with leave to amend as to the causes of action alleging oral agreements and promissory estoppel. (*Id.* at 517) Plaintiffs thus filed their third amended complaint on November 15, 2017 (3 AA 537 *et seq.*), hoping to satisfy the foregoing condition. (*Id.* at 538:17 to 539:3; 543 ¶ 17; 555-557; & 560-561) But on February 22, 2018 (3 AA 611 *et seq.*) defendants challenged that attempt in a demurrer on statute of frauds grounds. (*Id.* at 615-617 & 620-621) They pointed out, for example, that the complaint still failed to address "whether the Referral Agreement had any specific term. . . ." (*Id.* at 616:13-14)

On May 17, 2018 (*id.* at 765 *et seq.*), the court sustained the demurrer but again with leave to amend, "to allege facts showing that the referral agreement is not subject to the Statute of Frauds. . . ." (*Id.* at 766) And the fourth amended complaint followed on June 1, 2018 (*id.* at 769 *et seq.*)

Finally, as noted above, defendants asserted the statute of frauds defense in their June 22, 2018 answer to the fourth amended complaint (*id*. at 846-848; 12th and 16th affirmative defenses), and again in a January 23, 2020 memorandum a few days before the commencement of the court trial. (4 AA 1085-1086)

2.

Defendants' Asserted Forfeiture at the Jury Phase Was Actually Their Compliance with a Pretrial Bifurcation Decision

As noted previously, plaintiffs' forfeiture theory rests on defendants' failure to pursue the statute of frauds defense at the jury phase of trial. (AOB 24-26) As the court found below, however, defendants were simply complying with a pretrial bifurcation decision never even mentioned in plaintiffs' opening brief. We begin with the relevant background.

Although the parties began filing motions in limine and other papers about the upcoming trial in October 2019 (6 AA 1513-1514), the court pointed out at a hearing on November 6, 2019, that "[i]t's an unusual situation in which we find ourselves because the case was sent here for trial, and yet we're really at the pleading stages in some respects." (4 RT 90:16-19)

The court was referring, among other things, to substantial uncertainties about the basic allegation of oral referral agreements. One option under discussion was a fifth amended complaint to specify "which plaintiffs are bringing which claims," as stated by plaintiffs'

counsel. (*Id.* at 85:25 to 86:1 He cited a long discussion in chambers the previous day about "the various plaintiffs and which causes of action . . . each of the plaintiffs are connected with and which defendants on which cause of action." (*Id.* at 85:20-22) And a hearing several days later, on November 13, 2019, included a lengthy examination of plaintiffs' counsel about who was suing whom for breach of the alleged oral agreements. (7 RT 275:19 to 284:19) But even at its conclusion there remained uncertainty about one possible defendant. (*Id.* at 284:9-11)

A few minutes later, however, the court also evidenced uncertainty about the alleged timing and very existence of any oral agreements. It asked plaintiffs' counsel whether at the deposition of his lead client, Dr. Jill Williamson, she "allege[d] specific times when the agreements were entered into, [or] . . . a conversation on a certain date with certain people present and certain things were said." (*Id.* at 285:4-8) Those subjects, of course, were essential not only to the existence of such agreements but also their duration for statute of frauds purposes. But counsel could only respond in these very general terms:

> I don't remember specifically if defense counsel asked those particular questions, but they were all made in the same time frame, the summer of 2012, when they were negotiating these transactions. (*Id.* at lns. 9-13)

The uncertainties about oral agreements were even farther from resolution two weeks earlier, on November 7, 2019, when the court announced a bifurcation decision central to the forfeiture issue on

appeal. The parties had submitted fundamentally different proposals for organizing the trial. First, in a motion filed on October 30, 2019 (4 AA 921 *et seq.*), defendants proposed a three-phase trial starting with a court phase on specified "affirmative defenses and issues of law and equity," followed by a jury phase on any "remaining issues," and concluding with a jury phase on punitive damages if necessary. (*Id.* at 925)

Although plaintiffs correctly point out on appeal that the statute of frauds was not on defendants' list or several other pretrial documents (AOB 24-25), the ensuing course of events makes that fact irrelevant. It began with plaintiffs' competing proposal, submitted on November 4, 2019, to start off with a jury phase and let its outcome determine whether a subsequent court phase was necessary. Although the court embraced that proposal three days later, with major consequences for the forfeiture issue on appeal, plaintiffs omit their proposal from their appendix so we include it in our respondents' appendix ("RA").

After vigorously defending their right to a jury trial, plaintiffs argued that the facts relevant to defendants' proposal "are so inextricably intertwined" that they "are not conducive to separation." (RA 9:4-5) Instead, plaintiffs made the following argument fully embraced by the court: that all relevant issues "should be submitted together to the jury, with the jury making necessary findings of fact, and the Court reserving any necessary determinations until after the jury verdict, and based on the facts determined by the jury." (*Id.* at 10:3-5)

While the statute of frauds was not mentioned in either side's briefing, the court fully embraced plaintiffs' proposal three days later and applied it to the statute of frauds as well. At a hearing on November 7, 2019 (5 RT), it stated its decision in the following general terms:

> I have considered — and I think under other circumstances it was a good suggestion [by defendants] — to have the alter ego or some of the alternative defenses tried in advance. But given the situation we're in now — the concern about the holidays; the concern about pushing the jury portion of this case so far out; the overlap which I don't think is overwhelming but does exist, between the issues that the Court will be trying and those that the jury will hear — I do think we can proceed efficiently by having most of the testimony necessary for the affirmative defenses and the alter ego issues heard by the jury with any additional issues heard by the Court. . . . (*Id.* at 181:8-20; emphasis added)

As the court confirmed later, those "additional issues" it had in mind included the statute of frauds defense.

3.

The Court Rejected the Forfeiture Claim for the Foregoing and Related Reasons

The court so confirmed at a hearing on January 27, 2020 (25 RT), in rejecting plaintiffs' claim of a forfeiture. It explained at length that its November 7 bifurcation decision called for the reservation of the statute of frauds defense until after the jury verdict:

> My understanding, although we never discussed it, is that we wouldn't address this issue until we found out whether the jury, as a matter of fact, found that there was an oral

> contract. . . . [¶] So I never expected I would be addressing this issue until after the verdict came in since I think it was a hotly contested issue as to whether or not, first, there was oral contract between the plaintiffs and any of the defendants and, if so, what it was, what its terms and conditions were. (25 RT 2847:5-21)
>
> It was, obviously, the case that [the dispute over oral agreements] is a factual issue that had to be determined before the Court got to the legal issue. . . . (*Id.* at 2848:19-24)

Although the court could not recall a specific discussion to that effect, the record reflects that both sides understood and agreed with the decision as described by the court. To begin with defendants, their counsel stated at the hearing that he agreed with the court's understanding of the decision. (*Id.* at 2847:15) He also stated that "we had always contemplated that the Court would make that [statute of frauds] decision, not the jury." (*Id.* at 2845:24-25)

More importantly, though, defendants <u>complied</u> with that understanding of the bifurcation decision. Despite their active pursuit of the defense before trial, their papers following November 7 naturally focused on the issues to be decided by the jury: the existence and content of the alleged oral agreements. (*E.g.*, 4 AA 938 *et seq.*) And once the jury determined that some oral agreements indeed existed and were breached (4 AA 1027-1030), defendants reasserted the statute of frauds defense four days before the court confirmed the intent of the bifurcation decision on January 27, 2020. (25 RT 2847:5-21) They did

so in a memorandum filed on January 23, 2010 (4 AA 1085-1086), several days before the court phase of trial began.

As for plaintiffs, their counsel stated early at the January 27 hearing that "I don't believe the statute of frauds was part of the bifurcation motion . . . [and] should have been raised prior to the time that issue was submitted to the jury." (25 RT 2836:9-13; emphasis added) But the court never suggested — nor does this brief — that the defense was cited in the motion. It was part of the decision, however.

And once the court so confirmed, plaintiffs' counsel did not dispute either the court's explanation or the decision itself. Moreover, the statement of decision included a finding that "plaintiffs knew that the statute of frauds defense was not being submitted to the jury and would be addressed in the second phase if the jury returned a verdict for the plaintiffs on the second cause of action." (6 AA 1450:26 to 1451:2) As an example, the court quoted — not just "hinted" at (AOB 29) — plaintiffs' agreement to that arrangement during the jury instruction conference. (6 AA 1447:26-1448:12)

Plaintiffs dispute such an agreement but only in conclusory terms, and the quoted language reasonably supports the court's interpretation. Counsel first cited the bifurcation decision, then plaintiffs' intent to pursue an estoppel claim if the statute of frauds defense were upheld, and concluded that "I don't think we need to go the jury on that." (6 AA 1448:11-12) The court reasonably construed that last comment to mean none of that had to go to the jury.

Moreover, neither in their opening brief nor below did plaintiffs dispute another factual finding by the court at the January 27 hearing: that "it was always anticipated by the plaintiffs that there might be a statute of frauds defense" during the trial. (25 RT 2847:2-3) In that connection, the court cited the "extensive" and "unusual" allegations about the statute of frauds (*id.* at 2846:19-20) in plaintiffs' fourth amended complaint, including a paragraph "which goes on for two and a half pages alleging why the statute of frauds shouldn't apply and . . . referring the court to various cases on that subject." (*Id.* at 2846:19 to 22847:1, referring to 3 AA 791:22 to 793:23)

Rather than dispute the foregoing finding, plaintiffs' counsel merely explained the background of the lengthy allegations cited by the court. (*Id.* at 2848:1-15) So the court concluded the discussion as follows:

> I understand. All I'm saying is it seems clear to me that it was always anticipated by the plaintiffs that there would be statute of frauds arguments. . . . And now the jury has made the determination [about the oral agreements]. So now I'll make a determination as to whether or not the statute of frauds applies or whether there's an exception to it. (*Id.*, ln. 16, to 2849:3)

As the court later confirmed in the statement of decision, the foregoing statement constituted its ruling "reject[ing] the claim that defendants waived the statute of frauds affirmative defense." (6 AA 1449:11-12)

Even after that ruling, however, plaintiffs filed a memorandum several days later, on January 31, 2020 (4 AA 1107 *et seq.*), similar to its

opening brief on appeal. The memorandum said nothing about the bifurcation decision or defendants' filings asserting the statute of frauds defense before and during trial. Instead, it simply argued that the defense "should have been raised before the matter was submitted to the jury. . . . by way of motion in limine, motion for directed verdict, or motion for non-suit. . . ." (*Id.* at 1108:9-14)

4.

Plaintiffs Misstate the So-Called "Blame Plaintiffs" Ruling

Plaintiffs' final attempt to support their forfeiture theory misstates the statement of decision. Their heading reads as follows: "The Trial Court Improperly Blamed Plaintiffs for Defendants' Failure Timely to Assert the Statute of Frauds." (AOB 27) Then, they claim, "[t]he trial court went so far as to chastise plaintiffs for not reminding everyone — before or during the jury trial — that defendants had raised the statute of frauds in their Answer." (*Ibid.*)

But on the pages they cite in the statement of decision (6 AA 1449:14 to 1453:10), the court was addressing an entirely different subject. As stated in the relevant heading, the subject was "Plaintiffs' Waiver of a Jury Trial" on the statute of frauds. (*Id.* at 1449:14)

The preceding section of the statement of decision cited three unreported conferences with counsel in December 2019 and January 2020 — all after the jury verdict — about "the issues for the bench trial" (*id.* at 1448:21-23), followed by a similar reported discussion on January

27, 2020. (*Id.* at 1449:5-7) As the next section pointed out, however, at none of those "multiple pretrial conferences" (*id.* at 1450:6) did plaintiffs request a jury trial on the statute of frauds defense. Instead, they "first asserted their right to have a jury decide issues relating to the statute of frauds defense after the court filed its proposed statement of decision, on May 21, 2020. . . ." (*Id.* at 1449:15-16, referring to 4 AA 1190-1193)

The statement of decision went on to hold that plaintiffs had either waived a jury on this defense or were equitably estopped to request one when they finally did. Notably, the court pointed out that, had a timely request been made, "either the jury would have been instructed and asked to address it . . . or the court would have convened a jury for the second-phase trial." (6 AA 1452:19-21)

In short, the court was not blaming plaintiffs for the reservation of the statute of frauds defense until after the jury verdict. The court had so ordered and both sides had agreed.

B.

LEGAL ARGUMENT

1.

Standard of Review

Plaintiffs' opening brief acknowledges that "[t]he trial court's ruling allowing defendants to assert the statute of frauds defense at all — after the jury's verdict — is reviewed for abuse of discretion." (AOB 21, citing *Rubinstein v. Fakheri* (2020) 49 Cal.App.5th 797, 805) Another

case cited by plaintiffs so holds as well. (*Bank of America Nat. Trust & Sav. Ass'n v. Hutchinson* (1963) 212 Cal.App.2d 142, 149)

What plaintiffs fail to acknowledge, however, is the nature of this type of review. First, as held in *Willis v. City of Carlsbad* (2020) 48 Cal.App.5th 1104, 1117 (review den.): "it is a settled appellate principle that we will uphold a trial court's rule or decision if it is right upon any theory of the law applicable to the case regardless of the court's reasoning. . . . [and] even when the matter is governed by the abuse of discretion standard of review." (Cits. and internal quots. omitted) Here, accordingly, the trial court's rejection of plaintiffs' forfeiture theory can and should be affirmed because defendants' demurrer and other filings cited in this brief preserved the statute of frauds defense as a matter of law.

Second, as held in *Mejia v. City of Los Angeles* (2007) 156 Cal. App.4th 151, 158: "[a]n abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice." Here, however, plaintiffs' opening brief does not even mention the most important circumstances.

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2.

Defendants' Filings Preserved the Statute of Frauds Defense as a Matter of Law

Plaintiffs' main legal argument is that a statute of frauds defense must be treated as an evidentiary objection, and is therefore forfeited the way other such objections are. (AOB 22-24) But the cases cited for that proposition cut the other way.

While *Secrest v. Security National Mortgage, supra*, 167 Cal.App. 4th 544, makes a general statement similar to plaintiffs' formulation, it is much broader and the rest of the opinion fundamentally refutes plaintiffs' position. *Secrest* holds that the statute of frauds may be forfeited "if not properly raised" (*id*. at 551; emphasis added), and goes on to cite several different ways to meet that requirement.

As noted earlier in this brief, *Secrest* first approves prior authority that a demurrer on statute of frauds grounds sufficiently preserves the defense:

> "a defendant waives his right to rely upon any provisions of the statute of frauds . . . by failing to (a) demur to the complaint, (b) object to the introduction of testimony to prove the oral agreement . . . , or (c) make a motion to strike such testimony." (*Id*. at 552, quoting *Pao Ch'en Lee v. Gregoriou* (1958) 50 Cal.2d 502, 506; emphasis added)

Second, *Secrest's* ultimate holding is that even an opposition brief in the trial court can and did preserve a statute of frauds defense — and despite the defendants' previous failure to object to declarations asserting an oral agreement. (*Id*. at 552) The opinion concludes that

"[t]he issue of the statute of frauds was thus squarely presented to the trial court and was not waived." (*Ibid.*) That is equally true here given defendants' repeated assertion of this defense by demurrer, motion for judgment on the pleadings, and a subsequent memorandum at the court phase of trial. (4 AA 1085-1086) And that second phase was part of a single trial on the alleged oral agreements — not a separate trial.

Another case cited by plaintiffs, *Bank of America Nat. Trust & Sav. Ass'n v. Hutchinson, supra,* 212 Cal.App.2d 142, is no more helpful to their cause than *Secrest*. In sharp contrast to the repeated assertion of the statute of frauds defense in the present case, the appellants in *Bank of America* "tried their entire case without making any objection whatsoever to the reception of such evidence [of oral agreements]. . . ." (*Id.* at 149) And the opinion mentioned no assertion of the statute of frauds defense before trial, either. While the appellants attempted to do so two weeks after both sides had rested, the trial court made a discretionary decision that it was too late and too difficult then and the Court of Appeal affirmed. (*Id.* at 149-150)

Here, by contrast, the trial court concluded it was timely, feasible, and settled at the outset that the statute of frauds defense would be addressed at the second phase of trial. That exercise of discretion should also be affirmed.

Plaintiffs' other authorities, *Howard v. Adams* (1940) 16 Cal.2d 253 and *Livermore v. Stine* (1872) 43 Cal. 274, are inapposite for similar reasons. Like the *Bank of America* case, both involved a single-phase

trial with no pretrial demurrer or motion asserting the statute of frauds defense — and nothing close to the pretrial bifurcation decision here. While *Howard* deemed the defense "raised" by a general denial in the answer and later abandoned (16 Cal.2d at 257), neither holding supports plaintiffs' position on this issue.

Plaintiffs conclude their argument by citing two cases said to hold that a statute of frauds defense "is usually a question for the jury." (AOB 24) But neither case involved a bifurcated trial as here, and neither supports plaintiffs' broad proposition anyway. *Keller v. Pacific Turf Club* (1961) 192 Cal.App.2d 189 reversed a nonsuit for two case-specific reasons: the terms of the principal contract did not rule out its performance within a year, and there was trial evidence supporting a timely exercise of a related option. (*Id.* at 195-196) Similarly, *Connelly v. Venus Foods, Inc.* (1959) 174 Cal.App.2d 582 reversed a nonsuit because the trial evidence supported "findings of opposite import" as to the term of an oral agreement. (*Id.* at 586) It was those "conflicts in the evidence" and permissible inferences that presented "factual questions for determination by the jury" (*ibid.*), not the broad rule plaintiffs assert.

In sum, the *Secrest* decision compels an affirmance of the trial court's rejection of plaintiffs' forfeiture claim as a matter of law. On the face of defendants' motion for judgment on the pleadings, demurrer, answer, and memorandum at the court phase of trial, "[t]he issue of the statute of frauds was thus squarely presented to the trial court and was not waived." (167 Cal.App.4th at 552)

3.

The Record Amply Supports the Trial Court's Discretionary Rejection of a Forfeiture

While the familiar abuse-of-discretion standard compels an affirmance of the forfeiture ruling below, the circumstances of this case call for even greater deference to that ruling. It was based on the trial court's extensive interactions with counsel on and off the record, its grasp of all the details of this complex case, and its considered judgment that the best way to manage the trial on the alleged oral agreements was the bifurcation method proposed by plaintiffs as to other issues. (*Ante*, pp. 14-21)

The foregoing circumstances invoke the holding of *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1024 (review den.), that "greater deference is warranted whenever the trial judge's 'nether position' in the judicial pyramid makes him a presumptively more capable decision maker . . . because of his observation of the witnesses, [and] his superior opportunity to get 'the feel of the case.'" (Cits. and other internal quots. omitted) Although *Hurtado* was disapproved on a narrow ground in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479, n. 4, involving the type of evidence involved, *Shamblin* fully supports *Hurtado's* principal holding cited above. *Shamblin* holds that, when a trial court "was able to assess credibility and resolve any conflicts in the evidence. . . . [i]ts findings . . . are entitled to great weight. . . . [e]ven though contrary findings could have been made. . . ." (*Id.* at 479)

Even under the more familiar standard, however, it was still a "daunting task" for plaintiffs to demonstrate a lack of support for the court's exercise of discretion on the forfeiture issue. (*Dreamweaver Andalusians, LLC v. Prudential Ins. Co. of America* (2015) 234 Cal.App. 4th 1168, 1171 (cit. omitted)) Yet their opening brief does not even mention the critical bifurcation decision, let alone the evidence that both sides understood and complied with it. (*Ante*, pp. 18-21)

Suffice it to say, then, that the relevant record amply supports the court's conclusion below: that defendants' failure to pursue the statute of frauds defense during the jury phase of trial did not abrogate all their pretrial assertions of the defense or prohibit its reassertion at the court phase; it simply reflected their compliance with the bifurcation decision.

IV.

ON THE MERITS, THE COURT'S DECISION ON THE STATUTE OF FRAUDS IS SUPPORTED BY MULTIPLE FINDINGS IGNORED BY PLAINTIFFS

A.

STANDARDS OF REVIEW

Plaintiffs' argument on the merits of the statute of frauds issue cites an inapposite standard of review. At the outset (AOB 21), they quote a holding in *Westside Estate Agency, Inc. v. Randall* (2016) 6 Cal.App.5th 317, 330, that "[w]hether a writing is sufficient [to satisfy the statute of frauds] is a question of law we review de novo." (Original bracketed phrase) And they conclude the argument by calling for an

"independent review" on that basis. (AOB 33) But their brief makes no argument about any writing — and most likely because, as the trial court found below, "[i]t is undisputed that there was no note or memorandum of the alleged oral agreements between plaintiffs and each of the individual veterinarians." (6 AA 1453:15-16)

Plaintiffs' only contention on appeal involves one element of the oral agreements themselves: that the promised patient referrals would continue at least until a certain promissory note was paid off. They claim the note could possibly have been paid off within one year, and therefore the oral agreements could possibly have been performed within that time. (AOB 32) But they omit a factual finding below contradicting that argument, as well as two other findings independently supporting the challenged ruling.

While such findings are generally subject to review for substantial evidence, plaintiffs' failure to challenge them makes it unnecessary for this brief or this Court to marshall and analyze the supporting evidence. As held in *Danko v. O'Reilly* (2014) 232 Cal.App.4th 732, 745: because the appellant "does not challenge" an alter ego finding, "it is unnecessary to explore the evidence submitted. . . ."

Nor may plaintiffs challenge the omitted findings for the first time in their reply brief. As held in *Reichardt v. Hoffman* (1997) 52 Cal.App. 4th 754, 764: "[o]bvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief." To withhold a point until the closing brief would deprive the respondent of

his opportunity to answer it or require the effort and delay of an additional brief by permission." Moreover, Rule of Court 8.204(a)(2)(C) requires every appellant's opening brief to "[p]rovide a summary of the significant facts. . . ." And it is well settled, as held in *Van de Kamp v. Bank of America NTSA* (1988) 204 Cal.App.3d 819 (review den.), that "[f]ailure to do so waives the error." (*Id*. at 842; cits. and internal quots. omitted)

B.

THE OMITTED FINDING ABOUT THE PROMISSORY NOTE

While plaintiffs' opening brief focuses on the promissory note, they never mention the finding below that there was no "credible evidence that plaintiffs had the means within one year of August 2012 both to pay off the AAEH note and to purchase the property. . . ." (6 AA 1457:1-2) And that circumstance strongly supports the court's conclusion about the intent of the oral agreements: that the parties contemplated from the outset that the patient referrals in question would continue for more than a year.

While there is no need to marshall the supporting evidence here, we note that case law fully supports the court's reliance on plaintiffs' financial circumstances in construing the agreements. One of plaintiffs' own cited cases, *Lacy v. Bennett* (1962) 207 Cal.App.2d 796, holds that the term of an oral agreement can be determined not only by an "express provision" — as plaintiffs insist in their brief — but also "by

clear implication . . . from the subject matter of the contract that a period longer than one year was contemplated by the parties." (*Id*. at 809) Similarly, *San Francisco Brewing Corp. v. Bowman* (1959) 52 Cal.2d 607, 619, holds that "both the express and implied terms of a contract are equally terms of the agreement within the meaning of that phrase as used in the statute [of frauds]."

C.

THE OMITTED FINDING ABOUT LONG-TERM FINANCIAL SUPPORT

The trial court did not rely solely on plaintiffs' inability to pay off the promissory note within a year. Plaintiffs' brief omits the court's reliance on another element of these agreements that could not be performed within a year: an understanding that the promised referrals were meant to support plaintiffs' "long-term financial success." (6 AA 1457:22) As set forth in the statement of decision:

> plaintiffs' witnesses testified that they were relying on continued referrals to assure the success of both the emergency animal hospital and the new veterinary specialty practice (Killing Kevin). Plaintiffs were depending on [defendant] AAEH's good will with its clients and the AAEH shareholders' referral of their patients for emergency and specialty care to achieve long-term financial success. Plaintiffs, Dr Williamson and their witnesses all expected that the referrals would continue for at least five years, and hopefully indefinitely, and, if so, both ventures would succeed. (6 AA 1457:18-24; see also *id*. at 1454:2-17)

While it is too late for plaintiffs to attack the sufficiency of that evidence, we point out that the statute of frauds bars these agreements despite the uncertain duration of their "long-term financial success" element. *San Francisco Brewing Corp. v. Bowman, supra*, 52 Cal.2d 607, involved an equally uncertain "reasonable time" provision in an oral agreement. And the Supreme Court held it would nonetheless be barred by the statute of frauds if the trier of fact determined — as the trier of fact here did — that the term intended was longer than one year:

> [I]f the contract did carry within it an implied agreement that it should endure for a reasonable time, and if in fact such reasonable time amounted to a period in excess of the period allowed by the statute, then the contract being wholly oral could not be enforced. (*Id.* at 619)

D.

THE OMITTED FINDING ABOUT THE JURY'S DAMAGES AWARD

The last finding plaintiffs omit is that the jury's damages award for breach of the oral agreements further confirms their intended duration for more than one year. As set forth in the statement of decision:

> plaintiffs introduced evidence that the damages continued through July 2019, and the verdict reflects that the jury accepted that analysis. . . .There is an implicit — if not an explicit — finding by the jury that the oral agreements which they found to have been breached by the individual defendants extended beyond the term of the [defendant] AAEH note, which was paid in full in April 2016. . . . The

damage calculation on which the total verdict was based included damages through July 2019, seven years after the date of the oral agreements." (6 AA 1457:25 to 1458:10)

For the reasons cited previously, there is no need to provide greater detail about this finding either. We point out, however, that plaintiffs raised no timely objection below that the verdict was ambiguous on this issue, so "it falls to the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions." (*Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 Cal.2d 452, 456 (cit. and internal quots. omitted)

In sum, multiple findings support the ruling in question, and their sufficiency cannot be disputed for the first time in plaintiffs' reply brief.

V.

THE COURT PROPERLY REJECTED PLAINTIFFS' ALTER EGO CLAIMS BASED ON THE INTENT OF A DISPUTED ASSET DISTRIBUTION, AND IN ACCORDANCE WITH PLAINTIFFS' OWN CITED CASES ON THAT ISSUE

A.

INTRODUCTION

Plaintiffs make two principal arguments about the alter ego ruling below. First, they claim the court refused to consider "at all" defendants' distribution of the assets of defendant All Animals Emergency Hospital, Inc. ("AAEH")] to other defendants. (AOB 35) But they omit the record proving otherwise: that the court considered the

asset distribution at great length, and as trier of fact rejected plaintiffs' contention that it reflected wrongful intent for alter ego purposes.

Second, plaintiffs contend the court erred by "requiring plaintiffs to show wrongful intent behind the distribution." (*Id.* at 36-37) But plaintiffs omit the record establishing that they attempted to prove wrongful intent freely and vigorously, and even cited case law making such intent a perfectly appropriate issue in alter ego cases. Accordingly, the settled doctrine of theory of trial bars their contrary appellate contention that such intent is immaterial.

B.

THE RELEVANT RECORD

There was no ruling below requiring plaintiffs to put on a case of wrongful intent at the trial on their alter ego claims. The ruling they cite came at the conclusion of that trial, and it was a factual determination that the case they had voluntarily put on did not carry their burden of proof.

The relevant record begins with plaintiffs' opening trial brief on the alter ego issue. (4 AA 1058 *et seq.*) It argued that "[t]he owners of [defendant] AAEH intentionally made distributions during this lawsuit, and tried to dissolve AAEH seeking to render it judgment proof before trial. . . ." (*Id.* at 1069:6-7) In support of that argument, they summarized one case as follows: "shareholder was alter ego of corporation when he manipulated and depleted its assets to the detriment of creditors and 'produced an inequity.'" (*Id.* at 1079, citing

NEC Electronics Inc. v. Hurt (1989) 208 Cal.App.3d 772, 777-778) In addition, they cited the affirmance of an alter ego finding in *Danko v. v. O'Reilly, supra,* 232 Cal.App.4th 732, because the defendant "knew about the firm's potential liability to the then-potential judgment creditor, and nonetheless distributed all available funds without reserving any, so that by the time of the verdict he had 'gutted' the firm. . . ." (4 AA 1079:20-23)

Then, at plaintiffs' closing argument on the issue a week later, on January 30, 2020, counsel maintained that an "inequitable component" was "the second prong" of the alter ego doctrine, and "in the cases where they find an inequitable result, there's usually some form of bad faith that's apparent." (28 RT 3382:18-21) A short while later, turning to "the issue of making the distribution of $1.5 million" (*id.* at 3407:25 to 3408:1), counsel said "I don't believe it's a coincidence" that it was made "immediately" after he allegedly informed defendants' counsel "that we were going to . . . add new claims . . . and bring in All Animals Emergency Hospital, Inc. as a new defendant. . . ." (*Id.* at 3408:3-13) Rather than a coincidence or reasons cited by defendants, counsel said "I think that was in response to being told that there were new claims coming. . . ." (*Id.*, lns. 14-15) And later: "the distribution that they took in February [was] to deplete the company of a million dollars, when they knew this claim was coming. . . ." (*Id.* at 3415:20-22) "[T]he alter ego is not premised just on the fact that AAEH has no money, but there is bad faith here. . . ." (*Id.* at 3423:15-17)

The next day plaintiffs formalized that contention in an amendment to their fourth amended complaint (4 AA 1102 *et seq*.): "[t]hey used AAEH and [defendant] AAP as a device to avoid liability and for the purpose of substituting a financially insolvent corporation in the place and stead of said defendants, and each of them. The owners of AAEH then voted during this litigation to distribute substantially all of the $1,500,000 that Plaintiff paid AAEH, to render AAEH judgment proof in the event Plaintiffs prevailed." (*Id*. at 1104:2-6)

Finally, plaintiffs' closing brief on this issue a month later (4 AA 1124 *et seq*.) castigated some individual defendants as "the primary culprits implementing the bad faith conduct in this lawsuit, including . . . their decision to distribute AAEH funds while this case was pending." (*Id*. at 1126:22-26) Indeed, a few pages later came an argument captioned "The Improper Distribution of AAEH Funds Supports a Finding of Alter Ego." (*Id*. at 1136:27) And not merely "supports" that finding. Plaintiffs argued that the distribution "is <u>sufficient</u> to find alter ego here." (*Id*. at 1138:14; emphasis added)

Not surprisingly, the trial court hardly refused or failed to consider the distribution. At a hearing on January 31, 2020, for example, the court confirmed that "I am concerned about the distribution of what I think is about $1.5 million. . . ." (29 RT 3489:18-19) And the key question posed by the court addressed plaintiffs' key contention: "were the shareholders, was the corporation, on notice of that potential liability or not? Because if they weren't, then the [distribution] . . . seems to me

totally appropriate and what one would expect. . . ." (*Id.*, ln. 25, to 3490:6)

The statement of decision resolved that question in a lengthy discussion (6 AA 1440:22 to 1442:18), following a review of alter ego criteria including "[u]ndercapitalization of the business" (*id.* at 1439:3) and the doctrine being "founded on equitable principles." (*Id.*, lns. 23-24) The court thus cited plaintiffs' contention that equity demands an alter ego finding because "AAEH distributed most of its assets . . . when AAEH was already on notice that plaintiffs intended to amend the complaint to add AAEH as a defendant." (*Id.* at 1440:22-24)

What followed was hardly a dismissal of that contention as legally immaterial. It was an exhaustive review of the conflicting evidence. And the court rejected the contention for two main reasons: that the information arrived some time after the distribution, not before as plaintiffs claimed, and there were perfectly legitimate reasons for it. On the latter point, for example, the court explained as follows:

> payment of the AAEH note created a taxable event in 2016 which each of the shareholders had to report and for which they had to pay taxes. The distribution provided the shareholders with funds with which to pay that tax liability. Therefore, AAEH filed notice of its intent to dissolve and to distribute its assets and did so. (*Id.* at 1445:12-15)

In sum, the record conclusively refutes plaintiffs' appellate argument that the court "employed the wrong legal standard" on the alter ego issue and "improperly ignored evidence it was required to

consider." (AOB 34) To the contrary, it exhaustively considered conflicting evidence on the plaintiffs' allegation of a bad faith distribution, and concluded that they "have not carried their burden . . . ." (6 AA 1442:17)

C.

LEGAL ARGUMENT

The record cited above amply refutes plaintiffs' attack on the trial court for "not considering the distribution at all" (AOB 35) and "requiring" them to prove its wrongful intent. (*Id.* at 36) Here, accordingly, we address their startling contention that case law actually prohibited any consideration of the bad faith or wrongful intent they had so vigorously attempted to prove below. We first demonstrate that the theory-of-trial doctrine bars that contention, and thereafter that it fails on the merits anyway.

1.

This Court Should Not Allow Plaintiffs To Reverse Course on Appeal as to the Materiality of a Wrongful Intent for Alter Ego Purposes

As stated in *Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1026 (review den.), the theory-of-trial doctrine is "a well-established rule of appellate practice." It provides as follows:

> "Where the parties try the case on the assumption that . . . certain issues are raised by the pleadings, [or] that a particular issue is controlling, ... neither party can change

> this theory for purposes of review on appeal. . . . To permit a change of position in the appeal would, in most cases, be highly prejudicial and accordingly is not permitted." (*Ibid.*, quoting 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 407 at 466–467)

As further explained in *JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178 (review den.): "[b]ait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier.")

Here, for example, plaintiffs ask this Court to reverse "and remand with instructions to consider AAEH's distribution of its assets without regard to AAEH's intent in doing so." (AOB 42) But as documented above, plaintiffs aggressively attacked AAEH's "intent in doing so" at the trial, with both evidence and case law supporting the materiality of that intent for alter ego purposes.

Indeed, one of their citations below casts an especially harsh light on their turnabout on appeal. Their opening brief in this Court relies almost entirely on *Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 Cal.App.4th 811, claiming it absolutely bars any reliance on wrongful intent. But their opening brief on this issue below cited the same *Relentless* case on a different subject, the single-enterprise aspect of alter ego. (4 AA 1077:17-17) They never even mentioned its holding on wrongful intent.

In short, plaintiffs had every opportunity to read and ponder the *Relentless* holding on wrongful intent and forgo any contention about it at trial. Presumably, though, they made a deliberate decision to pursue that colorful contention nonetheless.

All told, indisputable facts make this a classic case to invoke the theory-of-trial doctrine and reject plaintiffs' change of position on appeal. Their vigorous pursuit of a wrongful-intent claim below caused a huge expenditure of time and effort by the trial court as well as their opponents. It would produce an even greater waste of resources to grant them a new trial ignoring intent this time around.

2.

On the Merits, the Great Weight of Authority Rejects Plaintiffs' Contention Anyway

If for any reason the Court decides to entertain plaintiffs' new contention, it should reject it on the merits. The great weight of authority supports the materiality of intent under the equity prong of alter ego law.

One of the cases plaintiffs cited below, *Danko v. O'Reilly, supra,* 232 Cal.App.4th 732, is directly in point and highly persuasive. Division Two of this Court affirmed an alter ego finding based in large part on the intent of defendant O'Reilly to frustrate a likely claim by his former law partner Danko. As the trial court found, "O'Reilly drew out as personal distributions all the firm's available funds without reserving any amounts to satisfy the debt he knew was owed to Danko." (*Id.* at 738) "By the

time of the verdict, O'Reilly had largely gutted the firm. . . .[then] finished the job . . . to make sure that Danko would indeed recover absolutely nothing. . . ." (*Ibid.*) Division Two found substantial evidence of O'Reilly's foregoing intent, and thus held it was perfectly proper to impose alter ego liability on him "to prevent the corporate form from being used by the individual[] to escape personal liability, sanction a fraud, or promote injustice." (*Id.* at 752; cit. and internal quots. omitted)

It is especially persuasive here that *Danko* relied on O'Reilly's knowledge of a likely claim at the time of his asset manipulation. At the trial in the present case, it was hotly disputed whether defendants knew a claim was coming against the corporation in question when they distributed its assets. And the heat of that dispute reflected its centrality in determining the intent and equities of the distribution. *Danko* squarely approves such reliance on intent for alter ego purposes.

Another case plaintiffs cited below, *NEC Electronics Inc. v. Hurt, supra*, 208 Cal.App.3d 772, likewise affirmed alter ego liability predicated in part on inequitable conduct, not just results. Indeed, the opinion expressly rejects the appellant's contention "that the only inequity to NEC is its inability to collect from Ph." (*Id.* at 777) It goes on to affirm an alter ego finding in part because the defendant had "manipulated the assets of Ph to the detriment of Ph's creditors." (*Id.* at 777-778) The plain meaning of "manipulate" in that context, as confirmed by Merriam-Webster, is "to control or play upon by artful,

unfair, or insidious means especially to one's own advantage." (https://www.merriam-webster.com/dictionary/manipulate)

In addition, *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096 affirmed an alter ego finding in part because of the defendant's inequitable conduct: concealing a corporation's lack of assets when inducing the plaintiff to limit its contract to that entity. As the opinion explains:

> . . . MCP told Toho–Towa that the contract would actually be with B.V. . . . [and] assured Toho–Towa that there would be sufficient assets to pay Toho–Towa any monies due under the agreement. Toho–Towa was not told and did not know that B.V.'s financial operations were structured by MCP in such a way that it never received any money from its licensees, and thus would not have funds to meet its payment obligations under the agreement. (*Id*. at 1019)

The opinion thus concludes as follows: "it would be inequitable to permit MCP, the alter ego of B.V., to shift liability to B.V. after ensuring that B.V. would have no funds to pay its debts." (*Ibid*.)

While *Relentless, supra*, appears to rule out any such appraisal of conduct or intent, its only authority, *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486 (review den.), rejects such a crimped view of equity and justice for alter ego purposes. To begin with, *Greenspan* holds that "[t]he essence of the alter ego doctrine is that justice be done. . . . that liability is imposed to reach an equitable result." (*Id*. at 505; cit. and internal quots. omitted) And *Greenspan* neither holds nor implies that "an equitable result" has nothing to do with the conduct and intent of

the defendant. To the contrary, its many examples of permissible grounds for alter ego liability include several involving wrongful intent:

> [9] the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities . . . ; [12] the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another. . . ; [13] the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions. . . . (*Id.* at 513; cit. and internal quots. omitted)

In short, in the unlikely event this Court even considers plaintiffs' attack on their own theory of trial below, it should hold that the great weight of authority supports the materiality of defendants' intent on the equity prong of alter ego law. American law is replete with rules predicating liability not just on a harmful result but on the defendant's conduct and intent as well. Alter ego law is no different.

3.

The Substantial Evidence and Prejudice Issues

As plaintiffs make no attempt to demonstrate a lack of substantial evidence supporting the court's finding on the intent issue below, there is no need to delve further into the evidence on that subject.

Nor is an extended discussion required on the plaintiffs' contention that the two rulings they attack were prejudicial. (AOB 39-

42) They summarize that contention as follows: "Had the trial court considered the distribution of AAEH's assets at all, and not to mention without considering wrongful intent, there is a reasonable probability the trial court would have found alter ego liability." (AOB 39; cit. and internal quots. omitted) As shown previously, though, the court considered the asset distribution extensively, and plaintiffs cannot even be heard to claim prejudice from the court's consideration of their own extensive case for wrongful intent. Their claim of prejudice fails for both reasons.

VI.

THE COURT PROPERLY DENIED PLAINTIFFS' MOTION TO REOPEN THEIR CASE ALLEGING A WRONGFUL INTENT FOR THE ASSET DISTRIBUTION

Plaintiffs acknowledge that their motion to reopen the court trial on the alter ego claims — three months after its conclusion — was subject to the court's "wide discretion." (AOB 43) They also acknowledge that a denial of such motions might constitute an abuse of such discretion if "the additional evidence might well have, and probably would have, rendered a different result upon further hearing." (*Ibid.*, quoting *In re Estate of Horman* (1968) 265 Cal.App.2d 796, 809) But they make no showing even facially supporting an abuse of discretion in the denial of their motion on June 25, 2010 (35 RT 4303) or the probability of a different outcome.

For example, they fail to mention their previous motion to reopen on January 31, 2010, for the same purpose. (25 RT 3537:13 to 3538:7)

There, too, they sought leave to submit more evidence purporting to prove the wrongful intent behind the asset distribution, and the court allowed them to reopen for that purpose over the defendants' objection. (*Id.* at 3539:19-24) Yet they make no showing that the evidence at issue on their second motion was unavailable several months earlier.

Nor do they mention the trial court's reasoning in denying the second motion. As it pointed out during the hearing, for example:

> it's really not simply a question of putting another stack of papers into the binders that you all have accumulated, but rather rehearing testimony and having witnesses come in and restart a trial that concluded three months ago. (35 RT 4238:17-21)

Then, when denying the motion, it added this comment flatly refuting plaintiffs' appellate assertion of a prejudicial effect:

> there is no basis, there is no good cause, to reopen the evidence because even if the evidence were admitted, it would not affect the outcome of this decision given the failure by the plaintiffs to establish the other factors necessary for the court to give equity and find one entity to be the alter ego of the other. (*Id.* at 4303:4-9)

All plaintiffs say on appeal is that their case would have been helped by another email and some telephone records they sought to introduce after the tentative decision came down. (4 AA 1157 *et seq.*) But they make no showing why they waited so long, and it is too late to do so in their reply brief for the first time. Suffice it to say, therefore, that it was incumbent on them to make their best possible case at the original court trial.

Finally, they fail to support their claim that the email in question — from their counsel to his client, not to any defendants or their counsel — might have changed the whole alter ego decision. The email's author had testified at length that he had warned defendants' counsel about suing AAEH prior to the asset distribution, and the court explained at length why it deemed that testimony unpersuasive. (6 AA 1440:20 to 1442:12) It was thus essential for plaintiffs' opening brief to establish how one more email and some phone records might have made the difference despite the trial court's contrary statement quoted above. Yet their opening brief does not even attempt to make such a showing.

VII.

PLAINTIFFS FORFEITED ANY APPEAL FROM THE REJECTION OF THEIR FRAUD CLAIM, BUT THAT DECISION WAS CORRECT ON THE MERITS AND AN APPROPRIATE EXERCISE OF DISCRETION

A.

INTRODUCTION

In their original complaint below, on February 25, 2016 (1 AA 16 *et seq.*), plaintiffs alleged that defendant All Animals Properties, LLC ("AAP") had misrepresented its intent to honor plaintiffs' option to purchase AAP's property in question. (*Id.* at 22-23) In a prior lawsuit, however, known as "Poodles I," plaintiffs alleged a failure to honor that same option but on a breach of contract theory.

When they asserted the fraud theory below, accordingly, AAP moved for judgment on the pleadings against it on res judicata grounds.

(1 AA 56-59) AAP argued it was an improper splitting of the same primary right pursued in Poodles I. (*Id.* at 56-59) And the trial court agreed by order entered on June 30, 2016, ruling that the relevant plaintiff, Poodles, Inc. ("Poodles"), "improperly split his causes of action arising out of defendant's failure to comply with option provision of the lease." (1 AA 149)

Another material omission from plaintiffs' opening brief is the fact that their opposition to the foregoing motion (*id.* at 101 *et seq.*) failed to dispute or even mention AAP's foregoing contention. The closest it came was to say Poodles' new complaint involved different "breaches of the lease" than those involved in Poodles I. (*Id.* at 106:16) And the only breaches it listed involved failure to maintain the property. (*Id.*, ln. 18, to 107:8) Nowhere on the list or elsewhere did the opposition mention the alleged fraud or even a failure to honor the option. As this brief will demonstrate, this complete failure to oppose AAP's res judicata argument about the option forfeited any appeal from the resulting decision.

In case the Court elects to reach the merits, however, this brief will demonstrate that the res judicata decision was both correct on the merits and an appropriate exercise of discretion about how to deal with Poodles' two lawsuits.

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B.

Plaintiff Forfeited Any Appeal from the Res Judicata Decision

The facts causing a forfeiture are undisputed. As documented above, Poodles failed to oppose or even mention AAP's argument that the new fraud claim (and others) violated the rule against splitting a primary right. Citing and quoting the discussion of that rule in *Crowley v. Katleman* (1994) 8 Cal.4th 666 (at 1 AA 56), AAP argued that the new claims about the option agreement were improperly pursuing a "primary right that is common to both cases. . . ." (*Id.* at 57:14)

As Poodles' counsel conceded at a later hearing, the opposition to that motion "didn't even brief the primary rights issue. . . ." (7 RT 328:20-21) Instead, it asserted only two other grounds: that Poodles I was a declaratory relief action and no judgment had been entered yet. (1 AA 101) But the trial court expressly predicated its rejection of the new fraud claim solely on the ground Poodles had failed to oppose:

> Motion is granted without leave to amend as to the cause[] of action for . . . intentional misrepresentation as Plaintiff improperly split its causes of action arising out of Defendant's failure to comply with option provision of the lease. . . . (1 AA 149)

For purposes of the forfeiture rule, accordingly, it is immaterial whether Poodles' arguments about entry of a judgment and declaratory

relief actions were right or wrong.[1] What matters is that it failed to oppose the res judicata contention that the trial court upheld, and therefore it may not dispute that decision on appeal.

The leading case of *In re Marriage of Hinman* (1997) 55 Cal.App. 4th 988 (review den.), decided by Division Two of this Court, explains as follows:

> "An appellate court will ordinarily not consider procedural defects or erroneous rulings where an objection could have been, but was not, presented to the lower court by some appropriate method. . . ." Failure to object to the ruling or proceeding is the most obvious type of implied waiver. (*Id.* at 1001-1002, quoting and citing 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 307 & 394)

Hinman thus rejected an appellate contention about child support because the appellant "failed . . . to raise any of the above-described arguments below, thereby waiving her right to challenge the computation of the child support award on appeal." (*Ibid*)

To date several published decisions have cited and followed *Hinman* on this point. (*San Diego Unified Port Dist. v. California Coastal Com.* (2018) 27 Cal.App.5th 1111, 1145; *Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 478–479 (review den.); *El*

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[1] They were wrong, however. Judgment had been entered in Poodles I on May 18, 2016 (RJN at 23:20), prior to the res judicata ruling of June 30, 2016 (1 AA 148); and the plaintiff in Poodles I sought and obtained specific performance of the purchase option agreement. (1 AA 138, Introduction)

Escorial Owners' Assn. v. DLC Plastering, Inc. (2007) 154 Cal.App.4th 1337, 1363 (review den.))

In sum, *Hinman* is now well settled and unquestionably applies here. Poodles has forfeited any appeal challenging the trial courts' res judicata decision.

C.

THE RES JUDICATA DECISION WAS CORRECT ON THE MERITS AND NOT WAIVED

As a precaution, however, we now demonstrate that the trial court correctly decided the res judicata issue. To begin with, we briefly respond to Poodles' attack on that decision on the grounds that AAP had waived its res judicata defense. (AOB 45-47)

1.

There Was No Waiver of this Defense

Poodles' first argument is that the defense should have been asserted "before or during the trial in Poodles I" in March 2016, "<u>or before judgment was entered in Poodles I on May 18, 2016</u>." (AOB 46; emphasis added) But AAP satisfied the latter deadline. It filed its motion for judgment on the pleadings on April 28, 2016. (1 AA 53)

Poodles next cites language from *Allstate Insurance Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, 910, that a res judicata defense is "generally" waived if the defendant "could have avoided the multiplicity of actions by bringing a plea in abatement in response to the second action while the first action was pending." (AOB 46) Here,

however, Poodles filed its new lawsuit and fraud claim so late during Poodles I that, as the trial court concluded in its discretion, the only sensible way to avoid a multiplicity was to remove the duplicative claim from the new lawsuit. (See discussion *post*, pp. 53-55.) Nothing in *Allstate* contravenes that decision.

Poodles' last argument is that AAP waived its res judicata defense by opposing Poodles' motion to consolidate the two cases rather than reject the new fraud claim. (AOB 47) But Poodles' own quotation from *United [Union] Bank & Trust Co. of California v. Hunt* (1934) 1 Cal.2d 340 requires a "timely" consolidation motion, and here the trial court properly determined, in its discretion, that consolidation made no sense at all when a trial and judgment had already been entered in Poodles I.

2.

The Court Properly Upheld the Defense

While insisting the res judicata issue "requires little analysis" (AOB 48), Poodles fails to address the essence of the primary rights doctrine. It even quotes that essence from *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904: that a primary right "is simply the plaintiff's right to be free from the particular injury suffered." (AOB 48) But it omits *Mycogen*'s explanation of how that statement refutes their position:

> [A primary right] . . . must therefore be distinguished from the legal theory on which liability for that injury is premised: Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. . . . The primary right must

> also be distinguished from the remedy sought: The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other. (28 Cal.4th at 904, cits. and internal quots. omitted)

Boeken v. Philip Morris USA, Inc. (2010) 48 Cal.4th 788,797-798, reconfirmed those principles even more recently.

Poodles relies on a contrary holding in a case preceding *Mycogen* by two decades and *Boeken* by three. *Sawyer v. First City Financial Corp.* (1981) 124 Cal.App.3d 390 rejected a res judicata defense as follows:

> While the monetary loss may be measurable by the same promissory note amount, and hence in a general sense the same "harm" has been done in both cases, theoretically the plaintiffs have been "harmed" differently by tortious conduct destroying the value of the note, than by the contractual breach of simply failing to pay it. (*Id.* at 403)

It is inconceivable, though, that the *Sawyer* court would have placed "harm" in quotation marks and treated that factor so casually had *Mycogen* or *Boeken* already come down. In any event, it is no longer good authority on this issue.

Ignoring the centrality of the harm issue under current law, Poodles simply argues that its new fraud theory differed from its old contract theory. It says "[t]he right to specific performance arising from breach of contract is distinct from the right to be free of fraudulent misrepresentation when negotiating the contract." (AOB 49) But it

never even attempts to prove that those two theories and their associated remedies involved different injuries for purposes of *Mycogen* and *Boeken*. And it is too late to attempt that proof for the first time in their reply brief.

It is readily apparent, however, that the two theories in question were attempts to remedy the same injury: Poodles' inability to purchase AAP's property after exercising its option to do so. It simply sought equitable or declaratory relief for that injury in the first lawsuit and monetary relief in the second. *Mycogen* and *Boeken* render that distinction immaterial and compel an affirmance of the trial court's decision below.

D.

THE DECISION BELOW WAS ALSO AN APPROPRIATE EXERCISE OF DISCRETION ABOUT PLAINTIFF'S TWO RELATED LAWSUITS

If necessary, finally, the Court should affirm the decision below as an appropriate exercise of discretion. Indeed, both sides asked the court to consider the practical and equitable ramifications of the res judicata motion weighed against other possible responses to the plaintiffs' new lawsuit.

Poodles expressly requested an equitable decision in its opposition to AAP's motion for judgment on the pleadings. Citing the fact that no judgment had been entered yet in Poodles I, Poodles stated its intent to file a motion to consolidate the two cases, and asked the court to postpone its ruling on the motion for judgment on the pleadings

until it could consider consolidation as an alternative solution. (1 AA 107) Then, a page later, Poodles "call[ed] on this court to use its equitable powers to fashion a result that would be fair to all parties . . . . [and they] will be agreeable to this Court creating an equitable remedy to resolve this dispute." (1 AA 108:8-10) Similarly, its motion to consolidate filed a week later, on May 23, 2016 (*id.* at 115), "ask[ed] that this Court use its inherent powers to fashion a result that would be equitable to the Parties." (*Id.* at 121:10-11)

AAP implicitly requested a similar equitable decision in its reply supporting its res judicata motion, filed on May 23, 2016 (1 AA 124 *et seq.*), and its opposition to the consolidation motion filed a few days later. (Ex. B to Plaintiffs' Motion for Judicial Notice ["MJN"]) Both documents argued that consolidation was impractical and unfair after the trial in Poodles I had concluded, and even more so now that a judgment had been entered in that case. AAP's reply, for example, argued among other things:

> Rather than seeking a continuance of the trial date [in Poodles I] in order to amend and/or consolidate, plaintiff decided to file a second case. . . . So, too, plaintiff should be made to live with the consequences of filing Poodles II rather than making pre-trial motions to amend and/or consolidate. One of those consequences is that the instant motion should be granted. (1 AA 127:7-15)

Similarly, AAP's opposition to consolidation argued among other things:

> Poodles II has just been filed, and is not ready for trial. . . . On the other hand. Poodles I already has been tried, and judgment rendered. . . . (MJN Ex. B at 4:25 to 5:1)

> [T]he only way now to avoid inconsistent results would be to vacate the Judgment in Poodles I and give Poodles a "do over." (*Id.* at 5:11-12)

On January 30, 2016, having considered the briefing of both parallel motions, the same court rejected consolidation (MJN Ex. D) and granted judgment on the pleadings as to the new fraud claim. (1 AA 148-149) Moreover, the briefing confirms that the latter decision reflected an exercise of the discretion Poodles itself had expressly requested. Nor does its opening brief make any attempt to demonstrate an abuse of that discretion.

VIII.

PLAINTIFFS' ATTACK ON THE RULING BARRING DELAY DAMAGES OMITS ITS KEY PREDICATE AND ITS STRONG SUPPORT IN THE RECORD

A.

THE MOTION AND RULING INVOLVED DELAY DAMAGES, NOT ENTIRE CAUSES OF ACTION

Plaintiffs' attack on the in limine rejection of any evidence of delay damages (AOB 50 *et seq.*) rests on a flawed central contention: that the ruling, and a res judicata ruling preceding it, were based on relevant causes of action taken as a whole. To the contrary, both rulings were carefully limited to the relevant delay damages in whatever cause of action they were alleged.

The very title of defendants' in limine motion in question, filed on October 30, 2019 (4 AA 885 *et seq.*), only sought "to exclude evidence

and argument relating to damages arising from a delay in the sale of the real property" (*id.* at 885) — not exclude any entire claims. Thus, defendants later argued that, [t]o the extent Plaintiffs' claims . . . seek damages caused by the purported 'delay' in the sale of the Property, or any fraud arising from the option to purchase, the primary right in the two lawsuits is clearly the same." (*Id.* at 892:9-12; emphasis added)

We emphasize "to the extent" in that passage because it acknowledged that other categories of damages were being pursued in the relevant causes of actions — and different injuries can of course create different primary rights. More importantly for present purposes, though, both the challenged in limine ruling and its main predicate, a res judicata order on October 24, 2017 (2 AA 516-518), expressly so acknowledged as well.

The judge addressing the in limine motion, Hon. Jeffrey S. Ross, repeatedly emphasized that his only permissible "task" was to apply his predecessor's res judicata rulings, not decide them anew. (7 RT 307:8-23) So we begin with the key ruling of October 2017 by the predecessor, Hon. Ronald E. Quidachay, and then cite the support for that ruling in the relevant pleading.

Judge Quidachay rejected defendants' res judicata challenge to three causes of action because "[a]t least partially they do not arise out of issues that were or should have been previously litigated." (2 AA 517:19-21; emphasis added) In other words, the court ruled that at

least some element of each cause of action precluded its entire rejection on defendants' motion for judgment on the pleadings.

That conclusion is supported by allegations of damages other than delay damages in each cause of action at issue in plaintiffs' second amended complaint. (1 AA 193 *et seq.*) And plaintiffs should have addressed those allegations themselves in their opening brief.

- The first cause of action, alleging breach of the asset purchase agreement, included allegations of "failing to deliver all of the goodwill and going concern value of the pet hospital to Plaintiffs" (1 AA 209, ¶ 62), and that "Plaintiffs and the value of the emergency pet hospital and specialty practice it acquired pursuant to the Asset Purchase Agreement, have been significantly damaged. . . ." (*Id.* at 210, ¶ 63)

- The third cause of action, alleging breach of the lease agreement by "failure to maintain premises and repair roof" (*id.* at 212), alleged that, as a result, "Plaintiffs have been and will be required to expend substantial sums in an amount to be determined" and also suffered "lost income and lost profits. . . ." (*Id.*, ¶¶ 76 & 77)

- Finally, the fourth cause of action, for fraud and misrepresentation, included allegations about the promised referrals (*id.* at 214, ¶ 83), and alleged that "Plaintiffs have suffered the damages alleged above, including lost profits, overpayment of rent, and an inflated purchase price for the hospital." (*Id.* at 214, ¶ 86)

At the hearing on the in limine motion on November 13, 2019 (7 RT 305:13 *et seq.*), plaintiffs' counsel added further support — both

factual and legal — to the ruling announced that day. Counsel cited plaintiffs' allegations of "not just stopping referrals but the retaliatory bad faith conduct, including disparaging comments in the community. . . ." (*id.* at 356:2-4) And he went on to argue that plaintiffs' injury "may not just be the turn-off of those specific referrals, but it may have damaged the value of the business. <u>And I think Judge Quidachay recognized that, that the value of the business is different than delay damages</u>." (*Id.*, lns. 13-17; emphasis added)

Judge Ross expressly approved plaintiffs' pursuit of damages other than delay damages several times. As to the alleged referral agreements, "I don't find anything in Judge Quidachay's rulings that would limit" plaintiffs' claim about them. (7 RT 371:15-16) On the following day, moreover, the court expressly approved a damages claim for "revenues that they didn't recognize" from the referral agreements. (8 RT 416:7-8) Similarly, the court stated that it was a separate primary right to seek relief for the retaliation cited by plaintiffs' counsel (7 RT 371:17-23), and added later that plaintiffs could pursue damages for "actively discourag[ing] referrals." (8 RT 416:20)

Finally, while the court also addressed different causes of action, its ultimate order entered on December 2, 2019 (4 AA 959 *et seq.*) was expressly limited to delay damages. The order provided as follows:

> The court will not admit evidence of damages attributable to defendants' alleged non-compliance with [delay of] the lease option. . . . Any claims or damages based on a breach of either the asset purchase agreement or the lease

> agreement with regard to the defendants' refusal to proceed with the sale of the property after plaintiff exercised her option are precluded. (*Id.* at 964:13-18)

In sum, plaintiffs' exclusive focus on entire causes of action misses the point. In accordance with settled law (*ante*, pp. 51-52), the trial court rejected delay damages under <u>any</u> cause of action and its ruling should therefore be affirmed.

B.

PLAINTIFFS' PRIVITY ARGUMENT SHOULD BE REJECTED SUMMARILY

Plaintiffs' last argument on this issue attacks the underlying res judicata predicate of the ruling on delay damages, claiming a lack of common parties or parties in privity with them in Poodles I and II. (AOB 55-56) But this argument should be rejected summarily for three reasons. First, despite defendants' mention of the privity issue in their motion (1 AA 58:1-3), plaintiffs failed to mention it in their opposition (1 AA 101 *et seq.*) and thereby forfeited an appeal on that issue for the reasons cited previously. (*Ante*, pp. 49-50)

Second, plaintiffs misstate the in limine ruling on this issue, claiming "Judge Ross did not reach the issue of privity in the res judicata context. . . ." (AOB 56) To the contrary, Judge Ross expressly concluded "it could hardly be clearer -- that Patrick & Friends, Inc., is in privity with Poodles, Inc." (7 RT 319:24 to 320:1)

Finally, plaintiffs misstate the same court's alter ego ruling, claiming it "would have foreclosed any finding of privity." (AOB 56) But

as their brief admits elsewhere, "alter ego was rejected primarily because of a lack of wrongful intent" in the asset distribution (*id*. at 40), not unity of interest. Moreover, their brief extensively quotes the court's ruling, on a subsequent mediation issue, that there was indeed a unity of interest among the defendants — including the court's opening comment that it rejected the alter ego claim for different reasons. (Quoted at AOB 41)

Nor does plaintiffs' opening brief address their own privity. As a precaution, however, we note that Dr. Jill Williamson, the lead plaintiff, testified that Poodles, Inc. "was a pass-through entity; it didn't have any assets. It just was a management company." (15 RT 1551:11-16) Moreover, Dr. Williamson was "the majority owner of the various business entities joined here as co-plaintiffs" (1 AA 195, ¶ 3) and was also president of both Poodles, Inc. (1 AA 138, ¶ 4) and Patrick & Friends. (2 AA 346:18)

In sum, plaintiffs' argument about privity comes too late and misstates the relevant record in several important respects.

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IX.

THE EXCLUSION OF EXPERT TESTIMONY ON DELAY DAMAGES WAS PROPER BECAUSE THAT CLAIM HAD BEEN BARRED AND THE TESTIMONY WAS SPECULATIVE

A.

THE TESTIMONY WAS BARRED BECAUSE THE RELEVANT CLAIM WAS BARRED

The caption and concluding paragraph of plaintiffs' argument about the exclusion of expert testimony (AOB 56 & 64) expressly state that the testimony was about delay damages, that is, harm resulting from plaintiffs' delayed purchase of the relevant property pursuant to their option. As they stated in their opposition on this issue below (5 AA 1320 *et seq.*), the bulk of the damages the expert would claim were for defendants' "refusal to sell the Property [which] . . . precluded the Plaintiffs from commencing the expansion project in 2013, as planned, thereby causing the pet hospital business to lose significant expected revenues. . . ." (*Id.* at 1327:25-28) And plaintiffs' counsel confirmed at the hearing on the issue that "the damage analysis is premised" on their delayed purchase of the property. (8 RT 400:6-11)

Indisputably, therefore, a sufficient ground to reject plaintiffs' appellate argument about the expert testimony is that the whole claim of delay damages had properly been removed from the case. As defendants' counsel argued below, the testimony "would be irrelevant based on the order you gave yesterday regarding those primary rights being barred by claim preclusion." (8 RT 390:9-12) And plaintiffs'

counsel agreed: "My understanding of the Court's ruling yesterday was that any damages sought by or associated with or arising out of the delay in acquiring the property and expanding the premises were barred." (*Id.* at 393:25 to 394:3) As a precaution, however, he went on to explain why "I don't believe it's speculative. . . ." (*Id.* at 394:6)

Nor did the trial court find the expert testimony fell outside the scope of the res judicata bar against delay damages. To the contrary, it explained that "I'm ruling without regard to the res judicata effects." (*Id.* at 426:24-25) "I'm ruling exclusively on the question as to whether or not, had there been no res judicata, had there been no prior lawsuits, had there been no motions, whether or not the part B [delay] damages would be admissible." (*Id.* at 426:25 to 427:3)

Finally, this Court can and should affirm the result below, the exclusion of the expert testimony, based on res judicata or any other ground supported by the record. It bears repeating what this brief previously pointed out regarding the statute of frauds issue: "it is a settled appellate principle that we will uphold a trial court's rule or decision if it is right upon any theory of the law applicable to the case regardless of the court's reasoning. . . . [and] even when the matter is governed by the abuse of discretion standard of review." (*Willis v. City of Carlsbad, supra*, 48 Cal.App.5th at 1117)

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B.

THE FOUNDATION FOR THE TESTIMONY WAS SPECULATIVE

If the Court reaches the substance of this testimony, however, the issue presented is not how the expert calculated lost profits. Plaintiffs say the court improperly "truncated" its analysis by not considering the expert's "methodology or reasoning." (AOB 56 & 59) But the ruling below cited a more fundamental flaw in the expert's testimony: its factual premise that plaintiffs would have successfully expanded and improved the hospital they wanted to acquire within a specific time frame and reaped greater profits as a result.

Plaintiffs' opposition relied heavily on their mere "plans" to expand the hospital (5 AA 1324 *et seq.*), and the trial court concluded there was insufficient evidence "that these plans were being pursued to a point of sufficient certainty . . . [to support] a factual predicate upon which her damage calculations were conducted. . . ." (8 RT 428:1-4)

The court deemed it "noteworthy," for example, "that the time frame from the date she would have otherwise acquired the property until April 25th, 2016, is roughly the equivalent of time from April 25th, 2016, to the present. [¶] And so that she still has not pursued the plans that she claims she would have pursued is further evidence — not in and of itself sufficient, but further evidence of how speculative this was." (*Id.* at 428:13-20) As the court added later:

> [T]hat the property could have been expanded and developed in the fashion that she has suggested is unsupported by any evidence. And it would be pure speculation . . . to then predict not only that the property could be developed along the lines proposed but that, having been developed along the lines proposed, it would then yield the kind of profits, revenue that she used to calculate the part B damages. (*Id.* at 429:10-18)
>
> [S]peculation about what this hospital might look like and might have looked like if every veterinarian's dreams had come true and they got to build the state-of-the-art hospital, I think that . . . level of speculation . . . is inadmissible. (*Id.* at 431:5-11

By contrast, the court explained that a different type of claim might pass muster: if plaintiffs were simply "going to make improvements in the building that would allow them to serve clientele consistent with the state of the art, I think that evidence comes in. That doesn't require speculation." (*Id.* at 432:5-9) That could not be said, however, about the predicate for the damages being sought.

The leading case of *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 quotes at length, and with full approval, a lost-profits holding directly in point in *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739. The quotation includes the following:

> The lost profits claim was based on the assumption that [plaintiffs] would have constructed the residence according to the plans and specifications without changes and that the venture would have been profitable. These assumptions were inherently uncertain, contingent,

> unforeseeable and speculative. The proposed real estate development project here involved numerous variables that made any calculation of lost profits inherently uncertain. (Quoted at 55 Cal.4th at 774)

So here. Plaintiffs had not even completed "plans and specifications" for their vision, let alone demonstrated a "reasonable certainty" (*Sargon, passim*) that any new structure would actually be built or would allow them to generate profits. Plaintiffs cite a witness planning to testify that a permit would have issued and what the cost of construction would have been (AOB 58), and several documents — not even proffered by that time — evidencing plaintiffs' interest in this new venture. (*Id.* at 60-61) But such evidence is no substitute for the type required by *Greenwich* and *Sargon*.

In sum, if this Court reaches the merits of the evidentiary ruling below, it should be affirmed as an appropriate exercise of discretion. *Sargon* rejected what it called "a massive verdict based on speculative projections of future spectacular success." (55 Cal.4th at 781) The same is true about the $11,389,858 lost-profit theory below.

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X.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed in full.

DATED: September 9, 2021

Respectfully submitted,

BIEN & SUMMERS
ANDERSON, POOLE & COUCHE, P.C.
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By: /S/
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CERTIFICATE OF LENGTH OF BRIEF

The undersigned, counsel for the respondents named above, hereby certifies pursuant to Rule 8.204(c)(1), California Rules of Court, that the foregoing brief is proportionately spaced, has a 13-point typeface, and contains 13,796 words as computed by the word processing program (WordPerfect 2021) used to prepare the brief.

DATED: September 9, 2021

/S/

ELLIOT L. BIEN

CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above entitled cause. I caused to be served:

BRIEF FOR RESPONDENTS

(1) by requesting TrueFiling service of same on all registered counsel at the time I submitted the document for filing through TrueFiling; and

(2) by enclosing two copies of the same in a postage-prepaid envelope addressed as follows, and placing it for delivery by the United States Postal Service in my usual manner:

Clerk of the San Francisco County Superior Court
Civic Center Courthouse
400 McAllister Street, Room 103
San Francisco, CA 94102-4514
-- For Delivery to Hon. Jeffrey S. Ross and Hon. Ronald E. Quidachay --

The foregoing is true and correct. Executed under penalty of perjury at San Rafael, California.

DATED: September 9, 2021

/S/

ELLIOT L. BIEN