IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

JOHN EMANUELE, et al.,	Case no. A117913
Plaintiffs and Respondents, v.	Alameda County Superior Court case no. RG05-247811 (and consolidated case nos. RG06-252362 & RG06-252359)
ROBERT H. BISNO, et al.,	
Defendants and Appellants. _____/	Hon. Jon S. Tigar Hon. Ronald M. Sabraw

BRIEF FOR RESPONDENTS

ELLIOT L. BIEN (SB# 90744)
BIEN & SUMMERS LLP
23 Palomino Road
Novato, California 94947
Tel. (415) 898-2900

Attorneys for Plaintiffs
and Respondents, JOHN
EMANUELE, et al.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, RULES, AND STATUTES

MISCELLANEOUS

PRELIMINARY STATEMENT

The opening brief for defendants and appellants, Robert H. Bisno, et al. (together, "Bisno"), understates the fraud found below. Bisno claims it was merely an "improper withdrawal" from partnership funds for a personal residence (AOB 1 & 3), as if a refund would solve everything. But the jury found that Bisno had deceptively marketed a real estate venture in fundamental ways. Although Mr. Bisno is a licensed attorney (7 RT 844), the jury found that (1) his formal offering memorandum and marketing brochures affirmatively misrepresented the essential structure and safety of the venture, and (2) he had committed and concealed tax evasion with partnership funds, further jeopardizing the venture he controlled. (*Post*, pp. 5-9) And the jury found, accordingly, that when plaintiffs and respondents John Emanuele, et al. ("the investors"), succumbed to the deceit by purchasing limited partnership units in Bisno's venture, their professed value was illusory.

The fraud, however, is not the only thing Bisno understates. Material omissions from the record undermine his contentions about the fraud damages, prejudgment interest, and a bankruptcy settlement agreement. The main problems are these:

1. Fraud Damages. Bisno contends the investors failed to adduce any "competent evidence" whatsoever (*e.g.*, AOB 9) that the

partnership units they purchased had no market value at that time with the fraud taken into account. But Bisno suggests the investors relied solely on expert testimony, and makes it appear "speculative" (AOB 12) simply by omitting the supporting evidence. The experts and many percipient witnesses established how Bisno's fraud had destroyed the market value of the units. Typical was Bisno's own marketing chief, Mr. Neil Broidy (21 RT 2779-2780), who testified he would have "recommended against investing" in Bisno's venture had he known of the fraud. (21 RT 2809:18 to 2810:2) Similarly, Bisno claims the investors ignored the value of the underlying assets, but he omits the evidence contradicting his claim. The investors demonstrated why the assets were immaterial to the value of the investment units and why, in any event, they had too little value to compensate for the proven unmarketability of the units due to fraud. (*Post*, pp.10-11, 14-20)

2. Prejudgment Interest. Next, Bisno claims the investors' prejudgment interest awards below were "factually unsupported." (AOB 23) Specifically, he argues that the investors never proved they "had or lost a compound interest investment opportunity at the time they invested in the limited partnership." (AOB 2) But Bisno fails to acknowledge he is making this factual argument for the first time on appeal, which settled law forbids. Nor can he be heard to complain of the discretion conferred on the jury below to award compound interest.

(AOB 20-22) Bisno emphatically agreed to an instruction giving the jury that very discretion (17 RT 2125-2128), arguing that "whether you compound or don't compound is absolutely as a matter of law up to the discretion of the jury." (17 RT 2125, lns. 22-26) Accordingly, his elaborate appellate argument to the contrary is not even cognizable.

3. Bankruptcy Settlement. Finally, Bisno attacks an in limine ruling by the trial court, the Honorable Jon S. Tigar, that a settlement agreement in TACMI's bankruptcy proceeding did not release the investors' fraud claims. Bisno argues that the release provisions were in conflict and therefore ambiguous, and that Judge Tigar improperly "refused" (AOB 29) to consider extrinsic evidence proffered by Bisno.

But Judge Tigar *did* consider this evidence, and for the very purpose Bisno cites. (*Post*, pp. 53-55) Moreover, Bisno omits a clause in the agreement that belies his claim of ambiguity. He relies on § 16(a) of the agreement, and his quotation suggests it unqualifiedly released all limited partners' claims (AOB 24) — therefore conflicting with other provisions preserving such claims. But Bisno omits the preliminary clause of § 16(a) that exempted the very claims preserved by the other provisions. (*Post*, pp. 22-24) So these sections were perfectly harmonious. It is only Bisno's misleading quotation that creates the appearance of conflict and ambiguity.

Given his material omissions on every issue, Bisno's appeal fails the threshold test of a fair summary of the record. Nor can such a fundamental defect be cured by reply. (*Post*, p. 31) The appeal should be dismissed on the investors' accompanying motion.

But the appeal fails on the merits, too. First, the investors' damages case finds solid support in the record and case law. One of Bisno's own cases, *Nece v. Bennett* (1963) 212 Cal.App.2d 494, directly supports the investors' reliance on the market value of the units in question. *Nece* held that the term "actual value" as used in the pertinent fraud damages statute (Civil Code § 3343) *means* market value and makes it the *only* permissible way to prove fraud damages. (*Id.* at 497) Second, the "compensable loss" (AOB 19) for prejudgment interest purposes was the proven loss of the investors' money, and California's fixed rate of 7% interest for that loss belies Bisno's demand for proof of contemporaneous rates offered by some other "investment opportunity." (AOB 1) Finally, Judge Tigar's construction of the bankruptcy settlement agreement is fully supported by the text, and the extrinsic evidence Bisno has in mind was not even competent as such.

In sum, if the Court does not dismiss Bisno's appeal for his material omissions from the record, it should affirm the judgment below on the merits.

`

STATEMENT OF THE CASE

A.

INTRODUCTION

A brief like Bisno's, with material omissions contradicting its arguments, presents a quandary for the respondent. When appellants waive a point by understating the record (*post*, pp. 29-32), respondents should not have to spend their time and money detailing the omitted evidence and marshaling it in their appendix. On the other hand, Courts of Appeal sometimes examine a waived point and respondents naturally wish to facilitate that process.

In this case, the investors will rely on the waiver rules by providing enough of a summary of the omitted matters, and appropriate excerpts from the record in their appendix, to assure the Court the outcome below is well warranted.

B.

THE FRAUD FOUND BELOW

The first problem with Bisno's attack on the damages verdict is that he grossly understates the fraud that contaminated the investment units in question. The only fraud he acknowledges is that he had "failed to inform [the investors] . . . that he had improperly withdrawn

$470,000 from the partnership." (AOB 1) Then, Bisno resorts to the same understatement in claiming the investors' "damage theory" was simply "that Bisno's improper withdrawal of $470,000 rendered the units totally worthless. . . ." (AOB 9)

What the investors actually claimed, however, and what the jury presumptively found by general verdict, was that Bisno had affirmatively misrepresented the essential structure and safety of the venture in question, and concealed not only those matters but also tax evasion by Mr. Bisno by manipulating partnership funds. We summarize the relevant record briefly.

1. The Phantom "Escrow." The venture in question was known as Trans-Action Commercial Mortgage Investors, Ltd., or "TACMI." The formal private placement memorandum Bisno prepared (Respondents' Appendix ["RA"] 43-58) represented that the seller "has agreed to leave an aggregate of $1.9 million of [the] down payment in escrow . . . to improve the property and . . . [secure] his initial Gross Rental Income Guarantee. . . ." (RA 51) Mr. David Jefferson, who had performed an independent "due diligence" study of TACMI during its initial marketing phase (6 RT 642-648), testified that the purported escrow was "intrinsic in the structure of the selling of this offering," presented as "one of the big selling points." (6 RT 653, lns. 21-22) Mr.

Bisno told Mr. Jefferson the purported escrow was one of the "major protections built into this offering." (6 RT 653, lns. 20-22) And Mr. Bisno also testified he had marketed the escrow "as one of the safeguards for investors. . . ." (13 RT 1618)

But there was no such escrow, at least not in the ordinary sense when a fund is controlled by a neutral third party. It turned out that Mr. Bisno personally controlled the purported "escrow." He was able to spirit away $470,000 from this fund simply by instructing his own regular bookkeeper to prepare and sign a check, and to use a handy rubber stamp to add the required second signature. (7 RT 887-888) So much for this "major protection" and "safeguard" for investors.

2. The Underfunded "Safety Guarantee." Aside from his unfettered personal access to the so-called "escrow," Bisno marketed TACMI with a representation that the fund consisted of $1.9 million to cover essential construction costs and an income guarantee. (RA 51) But this, too, was a falsehood. By the time the investors in this case purchased their units, Bisno had skimmed away almost 25% of the purported escrow. And with it went 25% of what Bisno touted as one of the "major protections built into this offering." (6 RT 653:21)

3. The Hidden Mark-Up. Another representation in Bisno's marketing materials was that he had acquired the real property needed for the venture "with no markup." (7 RT 847:24) Expert testimony explained that this meant TACMI was obtaining the property for the same price made available to the general partners, strongly supporting the latters' *bona fides* and the overall attractiveness of the venture. (*E.g.*, 15 RT 1943-1944) But the representation was false. It turned out Bisno had insisted on a $900,000 commission, but, instead of revealing the actual price the seller had offered, Bisno increased it by $900,000 in his marketing materials to cover — and cover up — the commission. (5 RT 541-542; 6 RT 657-658)

4. Bisno's Tax Evasion. Still another important matter Bisno concealed from potential investors was a deliberate act of tax evasion in manipulating partnership funds. Referring to the $470,000 withdrawal, Mr. Bisno testified that "I was attempting to get the money without paying taxes on it." (13 RT 1603:17-18) And that alone put the entire TACMI venture in jeopardy. An expert explained that tax evasion by a general partner "could potentially cripple the partnership in terms of future marketability of units. . . ." (15 RT 1947:8-9)

5. The Dishonest General Partners. Citing all the previous facts, the investors' witnesses testified that the ultimate fraud in this case

was misrepresenting and concealing the true character of the general partners who completely controlled this venture. TACMI's private placement memorandum even touted Mr. Bisno's status as a licensed attorney (RA 55), and broker-dealers were impressed by that fact in recommending TACMI to their clients. (*E.g.*, 22 RT 2227-2228 [Eugene Daly]) But both expert and percipient witnesses testified that a general partner as dishonest as Mr. Bisno turned out to be made TACMI units untouchable in the market given the heightened risks. (*Post*, p. 13)

In sum, the multi-faceted fraud in this case infected the core of the TACMI venture. It was not simply an "improper withdrawal."

C.

THE DAMAGES CASE BELOW

Bisno is correct that the investors' damages case featured a claim that the TACMI partnership units they bought had no market value at that time given the undisclosed fraud and tax evasion. (*E.g.*, 16 RT 2078, lns. 15-21 [expert testimony]) Bisno is incorrect, however, that expert testimony was their only support for this claim, and that the expert testimony was "speculative" (AOB 12) and "refuted by reality" and "undisputed facts." (AOB 1) Bisno simply omits the factual predicate for this testimony. And omissions also belie Bisno's principal theme that the investors ignored the asserted value of TACMI's

underlying assets. We address the two components of the actual damages case below in the indicated order.

1.

The Investors' Evidence of the Market Value of the Units

Bisno omits virtually all the evidence adduced below on the market value of the TACMI units. A few examples will suffice to demonstrate the enormity of the omission and the substantiality of the omitted evidence.

At the outset, the experts explained that the investors had purchased nothing but a partnership unit, an investment interest. (15 RT 1937; 26 RT 3427) No investor owned an interest in the underlying assets, or had any right or power to influence the management or disposition of those assets. (26 RT 3364; 26 RT 3369)[1] So even assuming *arguendo* the assets had a net positive value to TACMI itself at the relevant time, that was not the damages issue below. Because the

[1] Bisno suggests the fraud problem could have been "remedied" any time "by removing Bisno as general partner, achievable by a vote of two-thirds of the partnership units." (AOB 11, n. 3) But in fact, that "remedy" became meaningful only in TACMI's bankruptcy proceeding, when a single entity secured control of a majority of the units. (1 AA 162, ¶¶ D & I) Otherwise, the limited partners lived across the country (*e.g.*, 7 RT 765, lns. 1-4) and even in Japan. (31 RT 4137, lns. 7-11)

fraud involved only the partnership units, the damages question was limited to *their* value at the time of purchase.

With that point clarified, the experts testified that the value of a TACMI partnership unit from the investors' standpoint — what they actually received in exchange for their money — was determined by its market or resale value. As Mr. Epstein put it, for example, "the value of their unit is can they turn around and sell it?" (26 RT 3436-3437)

Moreover, other testimony established that a market measure of value made sense because there was a "secondary" market for TACMI and similar partnership units originally purchased by others. Mr. Maine, for example, testified that "the secondary market also had tons of [similar] offerings" (15 RT 1948, lns. 22-23), and TACMI units alone numbered 180. (RA 44) Moreover, percipient testimony confirmed that companies like MacKenzie Patterson were "provid[ing] what is referred to as a secondary market for limited partnership units and [MacKenzie Patterson] . . . rapidly became the largest in the industry doing that." (20 RT 2549-2550) While this market may have been "very slim" compared to established stock markets (20 RT 2550, lns. 24-28), substantial evidence supported the jury's implicit finding that it was not *too* slim to justify the investors' use of a market value analysis in their damages case.

Nor did the experts merely speculate that the units lacked value in the relevant market because of Bisno's concealed fraud and tax evasion. First, the experts relied on their own long experience with real estate investing. While Bisno insists their testimony was "refuted by reality" and so forth (AOB 1), one expert cited the "real world I'm in" for his opinion. Prodded by Bisno's counsel to concede that a TACMI unit would have attracted *some* reasonable price despite the fraud, Mr. Epstein responded:

> [m]y testimony is, that a person would not buy a unit where fraud had been disclosed. If you want me to say would somebody pay a penny for it, the answer is I don't know. If someone would pay a dollar for a $50,000 interest? I don't know. That's not the real world I'm in. [¶] I told you that someone considering buying it, people with whom I have dealt in my experience over the years, would not buy it period. (26 RT 3427, lns. 9-13)

Mr. Maine likewise cited his own experience:

> nobody is going to knowingly buy a unit where they know that the general partner has committed some severe breach of business ethics. . . . [T]he secondary market also had tons of offerings. So why would you bother to buy something like that, let alone recommend it to one of your clients? I cannot see myself approaching a client, a good client, a bad client, and saying I've got this deal for you, it looks like a pretty good piece of property, the general partner is a tax cheat, but we'll ignore that, but I would like

to talk about it anyway. They would look at me like I'm crazy. (15 RT 1948-1949)

But the investors did not rely solely on the experts for this aspect of their case. Bisno omits a parade of percipient witnesses on this issue, featuring not only the broker-dealers who had recommended TACMI units to the investors in this case, but even the president of Bisno's own marketing arm, Mr. Neil Broidy. (21 RT 2778) These witnesses established that Bisno's fraud and tax evasion rendered TACMI units untouchable in the investment community, totally unmarketable. Mr. Broidy testified that, had he known the truth about Bisno and TACMI at the time, he never would have recommended this investment. (21 RT 2809-2810) Nor would the other broker-dealers who testified below. (*E.g.*, 22 RT 2239 [Eugene Daly], 6 RT 712 [Martin Smith], 7 RT 782 [Michael Brodnax], 12 RT 1461-1462 [Allen Hamilton]) Accordingly, a powerful inference arises that no one else in the relevant market would have acted any differently.

In sum, a wealth of evidence below supported the jury's determination that Bisno's concealed fraud and tax evasion made TACMI units worthless paper in the relevant market at the relevant time.

2.

The Investors' Evidence about the Underlying Assets

Although market value is the only proper measure of fraud damages in California (*post*, pp. 32-35), a few examples will refute Bisno's principal theme on this issue, that the investors supposedly ignored TACMI's underlying assets. On the contrary, they adduced persuasive evidence that any underlying asset value did not compensate for the TACMI units' proven lack of market value.

A key witness Bisno omits altogether is David Jefferson, who performed an independent due diligence study of TACMI in the summer of 1986 "from an investor and financial planner standpoint." (6 RT 647, lns. 7-8; 6 RT 642-648) He had been hired for this purpose by Mission Securities, Inc. (RA 65), a company hired by Bisno's own broker-dealer, Trans-Action Securities Corporation, "to act as a wholesaler" of TACMI units, that is, to "locat[e] broker-dealers willing to sell the Units to their clients." (RA 61, ¶ 12) Mr. Jefferson was thus uniquely well positioned and credible in his testimony about TACMI's underlying assets at the relevant time, when the investors bought their partnership units in the months following his study (August 1986 to July 1987).

Mr. Jefferson testified that, wholly aside from Bisno's fraud, the venture itself was "[h]ighly speculative, very risky." (6 RT 673:1) And he

explained, among other things, that TACMI's principal asset, a hotel on the property, was "losing money." (6 RT 675:1-3) But Mr. Jefferson also addressed the value of the assets more directly.

His July 1986 report (RA 63-80) was admitted in evidence below. (6 RT 696) There, he wrote that Bisno's appraiser had estimated only the "potential market value of the project (subsequent to completion and of construction and lease-up. . . ." (RA 70, ¶ D(2); original emphasis) Mr. Jefferson, however, went on to explain that "the demonstrated market value to the acquiring, limited partnerships (who are arm's-length providers of capital) is limited because of the lease-back by an under capitalized Seller." (RA 71; original emphasis) Mr. Jefferson also testified below that Bisno's rosy appraisal "assumed a myriad of things that were to happen to generate that [professed] value of the building. That was not an appraisal of the building as it sat, but an appraisal of the properties if they were leased up." (6 RT 676:1-5; emphasis added) And "the building as it sat" was the asset relevant to the investors' damages case, because that was the state of affairs when they purchased their TACMI units in the months following Mr. Jefferson's report.

Mr. Jefferson also stressed how important it was to differentiate between "potential" value in the future and "demonstrated" value at the

time of Bisno's offering. Mr. Jefferson pointed out, for example, that Bisno's projected retail sales would occur only "when and if the planned conversion of the old Hinks Department Store . . . is accomplished" (RA 67; original emphasis); and "they are behind in development planning," making "the Seller/Lessee's financial position even more precarious." (RA 69, ¶ B) Moreover, this "complex, urban-located development project" was being undertaken by "an under capitalized and 'under experienced' developer." (RA 72, ¶ A)

Mr. Jefferson also warned that a "loss of investor capital" could result — flatly contradicting Bisno's theory that TACMI units had "undisputed" inherent value. Mr. Jefferson wrote:

> [i]f there is a major slipup, the resale value of the project could be substantially less than the 1985 appraisal. In such an event, it may be necessary to obtain a reduction in the Seller carryback notes in order for there not to be a loss of investor capital. [¶] . . . [I]f the project simply does not attain the projected income forecast, it is uncertain what capital value will be achieved and how the notes would be adjusted if the lease-back is maintained for the 10-year term. (RA 71, ¶ D; emphasis added)

Similarly, Mr. Jefferson warned of "a potential dilution of equity" through "a potential 10% capital call to the limited partners" cited in Bisno's private placement memorandum. (RA 71, ¶ E)

And for those and other reasons cited in his report, Mr. Jefferson faulted the private placement memorandum for listing "safety of capital" as TACMI's highest investment objective. (RA 77, ¶ D) Mr. Jefferson believed capital safety should be demoted to third and last place and restated more cautiously: "[r]elative safety of capital given the development risks." (*Id.*)

Bisno also omits expert testimony amplifying Mr. Jefferson's statement that the "demonstrated" value of TACMI's assets was "limited because of the lease-back by an undercapitalized Seller." (RA 71) An expert real estate lawyer, Robert Epstein, Esq., testified that:

> the value of the land depends on how it is burdened. And by that I mean a piece of land with a building on it might be worth a certain number of dollars. But if you add mortgages to it and you add liens and you add perhaps taxes to it and you add the fact that it's owned by and leased to two partnerships where the general partner is doing the wrong things, you have to take that into account because the land itself is not free. [¶] The land and the buildings are not free. They are burdened by these. And that's part of the calculus of what the investment is. It's like a piece of land with a 40-year lease at a low rate. Just that alone depresses the value of the land. (26 RT 3436-37)

Nor did the investors' trial counsel ignore the value of the underlying assets in their closing arguments. Far from leaving it "uncontroverted" (AOB 12) that the assets had substantial value, the investors' counsel, Robert Kahn, Esq., reminded the jury that "this was not just a situation of just buying a hotel that was fully operational[] without the need for refurbishment, and it was not just buying the Hinks shell ready to go with all the stores built out and fully leased. . . ." (34 RT 4599-4600) Then, summing up based on the Jefferson evidence in particular, Mr. Kahn argued that, at the time the investments were made, "[t]here is no value yet. They have to create that value." (34 RT 4604:9-10; emphasis added)

Finally, the investors did not ignore Bisno's theory that distributions and other events *after* the fraud-induced purchases proved, "as a matter of law," that TACMI units had appreciable value at the time of purchase. (AOB 14-15) Bisno simply omits the contrary evidence below:

- A fraudfeasor like Bisno could not be *counted on* to make distributions or comply with his obligations, period. As one expert testified, for example: "when there's fraud you don't know how much there's been. If you see some, there might be more." (26 RT 3378-3379)

- Bisno cites some sales of TACMI units in the $4,500 range, but omits evidence that those sales were not probative for this purpose because the buyer was a "vulture fund" using a unique economic calculus. (16 RT 2013-2017)

- Bisno also cites $35,000 distributions to limited partners at TACMI's wind-up in bankruptcy in 2004, arguing that these proved substantial value back in 1986 or 1987, when the relevant investments were made. But Bisno omits evidence that these payments, too, did not prove value at the relevant time. First, the amounts paled in comparison to the original investments ($43,740 or $55,000; RA 44), especially after factoring in inflation over the many intervening years. (16 RT 2018) Second, the 2004 distributions were hardly certain or even foreseeable in 1986-1987. On the contrary, they were secured only through years of litigation against Bisno both before and during the TACMI bankruptcy proceeding. (1 AA 161-162, ¶¶ C-I) Moreover, as David Jefferson well explained, any asset value helping produce $35,000 distributions in 2004 was hardly a sure thing in 1986-1987, when the entire project was shaky. (*Ante*, pp. 14-17)

- Finally, Bisno admits (at AOB 7) that the investors reduced their damages and prejudgment interest calculations by every penny they received from TACMI (16 RT 2078:15 to 2080:5) and the jury likewise reduced their verdicts. (2 AA 308-325)

In sum, Bisno's impassioned plea that "reality," "common sense," and an "undisputed record" prove the TACMI units were valuable flies in the face of a large body of evidence he omits from his brief. The "reality" pertinent to this appeal is the wealth of substantial evidence credited by the jury below.

D.

BISNO'S POSITION BELOW ON PREJUDGMENT INTEREST

When defending his right to attack the damages verdicts on appeal, Bisno states that he had "pointed out the [asserted] evidentiary shortcomings in plaintiffs' case numerous times during the course of the trial." (AOB 16) But the opposite is true regarding prejudgment interest.

Bisno never argued below that the investors' pursuit of such interest suffered from the "evidentiary shortcoming" he asserts on appeal, a failure to prove that, "but for their investment in TACMI, their funds would have yielded a compound-interest return." (AOB 19) On appeal, Bisno argues "[t]here is no evidence about what they would have done with their money had they decided not to invest in TACMI" (*id.*, n. 5), *ergo* the jury had no power or discretion to award compound interest. (AOB 20-21) In the court below, however, Bisno never suggested such evidence was required for either compound interest or any interest.

Indeed, Bisno maintained the opposite position throughout and even after the trial below. Notably, he agreed unreservedly to a special instruction giving the jury discretion to award compound or simple interest (RA 89), with no caveat about the need for evidence of the kind he now demands on appeal. (17 RT 2125-2128) For example, Bisno's lead counsel, Patricia Glaser, Esq., told Judge Tigar that "whether you compound or don't compound is absolutely as a matter of law up to the discretion of the jury." (17 RT 2125, lns. 22-26; *see also*, 30 RT 4069-4070) Nor did Bisno ever suggest the instruction in question should be withheld pending evidence of an "alternative investment opportunity" offering compound interest.

Moreover, other examples abound of Bisno's position in the trial court contrary to his position on appeal:

- The investors sought prejudgment interest in their complaint without alleging the facts Bisno now deems essential (1 AA 19, lns. 19-20), but Bisno never cited that omission as a bar to prejudgment interest.
- Bisno filed a motion *in limine* challenging various aspects of the investors' anticipated case for prejudgment interest. (RA 18-24) But Bisno said nothing about a want of evidence that the investors "had or lost a compound interest investment opportunity." (AOB 2)

- Bisno filed a trial brief addressing prejudgment interest (RA 32-40), but there, too, said nothing about the evidence he now claims was essential.

- Bisno's opening statement referred to prejudgment interest several times (5 RT 521 & 523) but again without making this point.

- When cross-examining an expert for the investors on this subject, Bisno's counsel read aloud the expert's agreement at his deposition that his calculation was based in part on "what interest they would have received on the money they had invested from the date of the investment. . . ." (16 RT 2104, lns. 23-25) And Bisno never challenged that approach for want of evidence of a particular "compound interest investment opportunity." (AOB 2)

- Bisno's closing argument on prejudgment interest was silent on this point, too. (33 RT 4461, 4523-4524)

- Finally, Bisno filed a motion for new trial limited to the prejudgment interest issue (RA 81-88) but, again, the motion said nothing about the evidence issue Bisno raises on appeal. He *never* treated it as an issue until now.

E.

THE CLAUSE BISNO OMITS FROM THE BANKRUPTCY SETTLEMENT AGREEMENT

As his final contention on appeal, Bisno seeks to revive his defense that a bankruptcy settlement agreement (the "RSA") contained a

release of the investors' fraud claims. Bisno argues that a total, unqualified release of claims in § 16(a) conflicted with the preservation of claims in § 16(d), and similar language in § 2, thus requiring extrinsic evidence to resolve the purported conflict. But Bisno omits an introductory clause in § 16(a) which resolved the asserted conflict. The omitted language limited the release in § 16(a) precisely insofar as §16(d) and § 2 limited it.

Bisno purports to quote the "pertinent part" of the RSA (AOB 24), but his following quotation of § 16(a) creates the false impression of an unqualified release:

> [T]he trustees, on behalf of TACI and TACMI . . . and their limited partners (except Staudenraus) . . . release and discharge TAFC, Bisno and Coxeter . . . from and against any and all claims . . . arising . . . from any other conduct as General Partners prior to the date of this Agreement. (AOB 24, first bullet)

But the full text of § 16(a) appears at 1 AA 166, and Bisno's false appearance of conflict vanishes in the light of its introductory clause:

> Except for the obligations, rights, claims or defenses created or reserved by this Agreement, including without limitation Section 16.d below, . . . (1 AA 166)

Thus, § 16(a) itself recognized the exception contained in § 16 d),[2] and the phrase "including, without limitation" referred to similar language in § 2 of the RSA.[3] So there was no conflict between § 16(a) and the latter sections. On the face of the RSA, the qualified release in § 16(a) had the same scope and effect as the claim-preserving language of § 16(d) and § 2.

F.

THE ALTERNATIVE GROUNDS FOR REJECTING BISNO'S SETTLEMENT DEFENSE

Bisno also omits several rulings below that rejected his settlement defense on alternative grounds. His summary of the record, entitled "[t]he trial court's rulings pertaining to the settlement agreement" (AOB

---

[2] § 16(d) provided: "Nothing contained in the foregoing releases in this Section waives, releases, affects or prejudices any claims, liabilities, rights, objections or defenses that are or may be asserted in the Staudenraus Action by any of the parties in the Staudenraus Action. Additionally, nothing contained herein waives, releases, affects or prejudices any claims, liabilities, rights[,] objections or defenses that TAFC, Bisno, Coxeter or Staudenraus may have against each other in any other action." (1 AA 167)

[3] § 2 provided in pertinent part: "All parties to the Staudenraus Action shall retain any and all rights, claims, causes of action and defenses that they may have in that Action, or any other action that may be brought, including without limitation Staudenraus' claims against the General Partners [*i.e.*, Bisno], either individually, or, despite the General Partners' opposition, as a class representative action, or derivatively on behalf of TACMI, or otherwise. . . ." (1 AA 163)

25), suggests the only such rulings addressed the text and purported ambiguity of the RSA's release provisions. That is not so.

Judge Tigar addressed Bisno's settlement defense at a hearing on November 15, 2006. (4 RT 355 *et seq.*) And while the court rejected the ambiguity claim on that occasion (4 RT 390-392), it also ruled that the investors were not even represented in the RSA, so its release could not possibly be binding on them. Bisno's counsel, Craig Marcus, Esq., was arguing that the RSA reflected "an intentional decision" to exclude the investors from the release. (4 RT 360, lns. 1-8) But Judge Tigar responded, "[w]hose intent is it manifesting?" (*Id.*, ln. 6) "Does it manifest the intent of the persons whose claims were allegedly released?" (*Id.*, lns. 9-10) And the court's ultimate ruling expressly incorporated "the reasons I expressed during my discussion with Mr. Marcus." (4 RT 391, lns. 5-6)

There was no need for Judge Tigar to elaborate further on the representation issue. Only nine days earlier, Judge Ronald M. Sabraw had issued a ruling rejecting Bisno's settlement defense on that ground as a matter of law. (RA 25-31) Bisno's appendix contains only Judge Sabraw's *tentative* ruling on this issue (1 AA 136-137), which identified triable issues precluding a dispositive holding. Indeed, Bisno argued to

Judge Tigar that Judge Sabraw's *tentative* ruling, assuming it became final, compelled a jury trial on the RSA defense. (1 AA 126-130)

But Judge Sabraw's final ruling went the other way and compelled the opposite result. Issued on November 6, 2006 (RA 25), the order held as a matter of law that the bankruptcy trustee who supposedly released the investors' claims in the RSA "represented the [bankrupt] entities [including TACMI], not the limited partners in those entities." (RA 26, ln. 9) Judge Sabraw noted, for example, that "[t]he Order confirming the Revised Plan of Reorganization appears to give the Trustee broad powers to sue 'any person or entity.' However, such claims would be on behalf of the bankrupt, not on behalf of the limited partners of the bankrupt. . . ." (*Id.*, lns. 10-13) Similarly, Judge Sabraw explained that whatever benefits the investors may have received "indirectly" under the RSA "does not make them parties to the bankruptcy proceeding, suggest that they were represented by the Trustee in the bankruptcy proceeding, or suggest that they received consideration for the RSA release." (*Id.*, lns. 17-20)

That is why Judge Tigar did not have to dwell on this point nine days later. Moreover, it is axiomatic that any uncertainty in the transcript must be resolved in favor of the judgment.

Finally, Bisno omits still another alternative ground for rejecting his settlement defense. Judge Tigar issued a written order on November 15, 2006 (RA 41-42), as he had promised to do at the hearing earlier that day. (4 RT 417, lns. 25-27) Although its primary focus was Bisno's defense that the investors' claims had been discharged by the TACMI bankruptcy proceedings, Judge Tigar also ruled that the settlement defense failed for the same reason the discharge defense failed.

Judge Tigar cited a number of bankruptcy court documents that preserved the investors' fraud claims against Bisno. First, TACMI's disclosure statement (RA 11-13) in support of its proposed reorganization plan (RA 15-17) acknowedged that the Staudenraus action had been filed "on behalf of a putative class of similarly situated investors." (RA 12) Second, Judge Tigar cited § 72 of the plan itself, which *defined* the term "Staudenraus" to include "a putative class of similarly situated investors." (RA 16) And the plan expressly preserved the rights of any "parties in interest with standing" to pursue any claims they had against Bisno (RA 17), plainly including the investors as putative class members in the Staudenraus action.

But Judge Tigar also addressed the RSA, observing that it "referr[ed] not only to Staudenraus, but to any other 'parties' to that litigation; 'parties' referr[ing] to the individual plaintiffs. . . ." (RA 41, lns.

16-20) For example, when the RSA first mentioned an action by Ms. Staudenraus, in § 2 (1 AA 163), the same sentence preserved her right to pursue that action "as a class representative action. . . ." (*Id.*) Thus, as Judge Tigar noted at the hearing, it would make no sense to preserve a class action if all the potential class members were releasing their claims. (4 RT 369, lns. 6-16) Thus, the order concluded with this ruling on the RSA:

> the court finds that *each* of the relevant documents . . . contemplate that the claims of individual plaintiffs would be excluded from the resolution of the bankruptcy. [¶] Thus, the exclusion of the Staudenraus class action from the Confirmed Plan *and the RSA* also had the effect of excluding the claims of the individual plaintiffs, leaving them for resolution in the current proceedings. (RA 41; italics added)

In sum, Judge Tigar rejected Bisno's settlement defense on three independent grounds, two of which Judge Sabraw had also invoked previously. (RA 2-3 & 26) But Bisno reveals only one of those grounds.

LEGAL ARGUMENT

I.

BISNO'S CONTENTION ABOUT THE FRAUD DAMAGES FAILS BOTH ON THE MERITS AND FOR WANT OF A FAIR SUMMARY OF THE RECORD

A.

BISNO HAS WAIVED THIS ISSUE BY FAILING TO SUMMARIZE THE EVIDENCE FAIRLY

Bisno's first contention is a classic attack on the sufficiency of evidence to support a judgment. His challenge to the investors' damages case is not based on a legal defense, but rather on his claim that a zero valuation of the partnership units "was never proven by competent evidence." (AOB 9) He argues that the investors' expert testimony about the unmarketability of the units was not "substantial evidence." (AOB 12) Similarly, he argues that "the record showed without contradiction" (AOB 13) that the units had appreciable value because the underlying assets of the partnership "had value." (*Id.*)

In a footnote, Bisno promises he will "recite the evidence in the light most favorable to the judgment." (AOB 3, n. 1) But he violates that pledge and even understates the duty he refers to. Appellants must "fairly summarize *all* of the facts in the light most favorable to the

judgment." (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1658; italics added (*review denied*)) As explained in *Boeken*:

> When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. . . . And we presume that the record contains evidence to sustain every finding of fact. . . . . It is the appellant's burden to demonstrate that it does not.
>
> In furtherance of its burden, the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment. . . . (Italics original; cits. and internal quots. omitted)

Moreover, if an appellant fails to provide a "fair summary" of a point it is deemed waived. As recently held in *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254:

> While defendants . . . challenge the trial court's application of the statute to their lockset labeling, they cite to only bits and pieces of the evidence. To sustain their insufficiency-of-the-evidence claim on appeal, defendants needed to set forth all material evidence. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881. . .; *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317. . . .) In the absence of an adequate summary of the trial record, we deem their evidentiary challenge waived and presume the

> evidence supports the trial court's findings. (*Id.* at 1273; emphasis added)

Finally, a waiver on this ground is established by an incomplete *opening* brief. To avoid prejudice to respondents and courts alike, appellants may not avoid the waiver by discussing the omitted evidence for the first time in their reply brief. As explained in *Paterno v. State of California* (1999) 74 Cal.App.4th 68 (*review denied*):

> It was not the obligation of the [respondent] to show there was evidence supporting foreseeability. The obligation was on Paterno, as the appellant on this branch of the appeal, to establish in his opening brief that there was not, by fairly setting forth the evidence. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. . . . An appellant is not permitted to evade or shift his responsibility in this manner. . . . Paterno's purported attack on the [respondent's] evidence in the reply brief comes too late. . . . Further, it is no more than a rehash of arguments about the strength of the evidence, which is not open on appeal. (Cits. and internal quots. omitted)

Here, Bisno has waived his attack on the fraud damage verdicts by omitting large swaths of evidence directly relevant to his contentions. To cite just one example here, the investors' experts did not merely

opine that the underlying assets were "immaterial" as an offsetting value given Bisno's fraud and tax evasion. (AOB 11, quoting expert witness John Maine) They explained why that was so, and other witnesses so confirmed.

For the foregoing reasons, Bisno's material omissions compel a summary rejection of his opening contention about the fraud damages. Bisno invokes "the integrity of the judicial process" as a reason to insist on substantial evidence before affirming a judgment. (AOB 15, quoting *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652) However, the integrity of the judicial process requires appellants to summarize the record fairly. And here, Bisno provides more information about his own discredited evidence on the damages issue (AOB 11, text & n. 3) than the investors' evidence supporting the judgment.

B.

BISNO'S CONTENTION FAILS ON THE MERITS AS WELL

1.

California Insists on a Market Value Assessment of Fraud Damages

Waiver aside, Bisno's attack on the damages verdicts fails on the merits. As noted earlier, *Nece v. Bennett, supra*, 212 Cal.App.2d 494,

compels affirmance of the fraud damages verdicts based on the proven lack of market or resale value of the TACMI units. *Nece* pointed out that under the statute applicable here, Civil Code § 3343 (hereafter "§ 3343"), the measure of damages is "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received." (212 Cal.App.2d at 497; quoting § 3343)

But *Nece* went on to hold that "actual value" as used in § 3343 means *market* value. *Nece* explained that *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744 had "definitely and finally determined that the term 'actual value,' as used in the statute, was that same market value so frequently defined in actions for condemnation." (212 Cal. App.2d 497) Indeed, *Nece* rejected a fraud damages case because the plaintiff *failed* to prove "market value," relying in vain on "earnings from [the] commercial property." (*Id.* at 497-498) So Bisno's attack on the investors' market value approach stands the law on its head, and *Nece* remains valid to this day. Just recently, *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 675 (*review denied*) cited *Nece* for the proposition that "[t]he term 'actual value' as used in Civil Code section 3343 means market value."

Bagdasarian also makes clear that market value — and therefore "actual value" as used in § 3343 — means the price, if any, for which the subject property could be resold if the whole truth were known:

> in deceit cases the value of an article 'is normally determined by the price at which it could be resold in an open market or by private sale if its quality or other characteristics which affect its value were known.' The theory is that when property is taken, or injured or destroyed by another's wrong, or not delivered pursuant to an obligation, etc., the law will protect the owner's material interest and award him such a sum of money as he could have obtained by selling or as would enable him to secure similar property from others. (31 Cal.2d at 753, quoting The Restatement, Torts, Comment c. to § 549)

Bagdasarian also explained the benefits of a market value approach, noting that "real estate brokers and businessmen usually employ market value as the basic test. . . . [and] market value supplies a relatively objective and easily administered basis of valuation that no other method can supply." (*Id.*)

The investors can hardly be faulted, therefore, for addressing the market value of the TACMI units they bought, and asking knowledgeable experts and percipient witnesses to testify to the price these units would have commanded in the relevant market had the truth about TACMI and Bisno been known. *Bagdasarian* again points the way. It found "no merit in appellant's contention that the farmers, farm appraisers and

real estate brokers who gave expert testimony for respondents on the subject of value were not properly qualified. All of them were shown to be familiar with the value of farming land in the community. . . ." (31 Cal.2d at 754) The investors' comparable witnesses here, both expert and percipient, were equally qualified to testify about the market value of the TACMI units. And Bisno has not even contended otherwise on appeal.

2.

Case Law Does Not Support Bisno's Emphasis on Asset Value

Because California has long insisted on a market value assessment of fraud damages, it is not surprising that the cases Bisno cites do not support his heavy emphasis on TACMI's underlying assets. *Peek v. Steinberg* (1912) 163 Cal. 127, for example — a case predating *Bagdasarian* by 36 years — approved reliance on corporate assets only because a market value for the corporation's stock could not be ascertained. (*Id.* at 134 ["there [was] no established market value for [the] shares"].)[4] Thus, the passage quoted by Bisno (AOB 13-14) was referring only to "the actual or intrinsic value" of the stock, not its market value, when approving consideration of "many facts and circumstances, such as the value of the property and assets owned. . . ."

[4] Here, by contrast, evidence established a reasonable market for TACMI's 180 units and a value of zero in that market. (*Ante*, p. 11)

(163 Cal. 134) Accordingly, even if *Peek* had not been superseded by *Bagdasarian*, but remained good authority today for considering "intrinsic" value in determining fraud damages, it would *still* not support Bisno's thesis that the assets owned by an enterprise can trump the well-evidenced market value of its investment units.

Peek also confirms, though, that the market value of an investment unit can rise or fall independently of any "intrinsic" value of the underlying assets of the enterprise. The passage Bisno quotes from *Peek* is actually a quotation from *Moffitt v. Hereford* (Mo. 1896) 34 S.W. 252. And there, the Missouri Supreme Court aptly stated: [s]tock that has no intrinsic value may bear a good price in the market, while stock that is intrinsically valuable may be, for certain causes, much depreciated in value." (*Id.* at 253) The present case bears that out. Even assuming *arguendo* TACMI's underlying assets were as valuable as Bisno claims they were, the jury still had ample basis to conclude that the market value of its investment units had "depreciated in value" (*id.*) all the way to zero because of Bisno's fraud and tax evasion.

Bisno cites the post-*Bagdasarian* case of *Stafford-Lewis v. Wain* (1954) 128 Cal.App.2d 614, but that was not a fraud damages case subject to the market rule of Civil Code § 3343 and *Bagdasarian,* and neither authority was mentioned. Corporate stock was being valued

only to determine the adequacy of consideration for a contract. And even so, *Stafford-Lewis* approved reliance on the corporation's asset value and other factors mainly because "all its stock was held by one person and did not appear to have been listed on any exchange or to have a value in the open market." (*Id.* at 625) Here, by contrast, substantial evidence supported the jury's implicit finding of a sufficient market for TACMI and other partnership units to support a market value appraisal as required by law. (*Ante*, p. 11)

Finally, Bisno cites three other cases supposedly rejecting "analogous zero valuation claims." (AOB 14) But none involved a fraud damages claim subject to the market rule of § 3343 and *Bagdasarian. County of San Diego v. Assessment Appeals Bd.* (1983) 148 Cal.App.3d 548 and *Board of Supervisors v. Archer* (1971) 18 Cal.App.3d 717 were tax assessment cases and *United States v. Zolp* (9th Cir. 2007) 479 F.3d 715 was a criminal stock fraud case where the value issue involved a sentence enhancement.

In sum, the investors' market-based fraud damages case finds direct support in case law construing the governing statute, while Bisno's asset-based approach finds no support in the cases he cites for it. Nor can his claims of "undisputed" asset value be squared with the testimony summarized in this brief. (*Ante*, pp. 14-17)

II.

BISNO'S CONTENTION ABOUT PREJUDGMENT INTEREST IS NOT EVEN COGNIZABLE ON APPEAL, AND FAILS ON THE MERITS IN ANY EVENT

A.

BISNO FAILED TO PRESERVE THIS ISSUE AND IS ALSO ESTOPPED TO RAISE IT

For two reasons, Bisno may not be heard to attack the prejudgment interest awards below on the grounds the investors failed to adduce evidence of a specific "compound interest investment opportunity." (AOB 2) First, this is a factual issue and he failed to preserve it below. Second, to whatever extent his argument can be construed as legal rather than factual, he is estopped to pursue it because it contradicts the position he consistently took in the trial court.

1.

He Is Improperly Raising a New Factual Issue on Appeal

While points of law can often be raised for the first time on appeal, new factual contentions can not. And in Bisno's own words: "[o]ur appeal on the compound-interest issue . . . asserts the compound-interest award is *factually* unsupported." (AOB 23; italics added) This

he may not do. As stated in *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879 (*review denied*):

> an appellate court may allow an appellant to assert a new theory of the case on appeal where the facts were clearly put at issue at trial and are undisputed on appeal. . . . However, if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial the opposing party should not be required to defend against it on appeal. . . . (Cits. and internal quots. omitted)

Putting it another way, *Richmond* stated that the opposing party must have been "reasonably put on notice to present all [its] evidence" (*id.*) before a factual issue can be raised for the first time on appeal. Here, however, Bisno never put the investors on notice to adduce evidence about alternative investment opportunities and interest rates available at the time of the fraud. Accordingly, Bisno may not be heard to insist on such evidence now.

2.

He Is Improperly Contradicting the Position He Took Below

The same conclusion obtains even if Bisno's new argument could be construed as legal rather than factual. For example, he discusses the proper construction of Civil Code § 3288 and the limits on jury discretion. (AOB 20-21) But even if those portions of the argument

were independent and purely legal, they would still not be cognizable on appeal because Bisno is estopped to raise them.

In the trial court, as this brief has shown (*ante*, p. 21), Bisno expressly and unreservedly agreed that the jury *did* have discretion to award compound interest under § 3288 based on the trial evidence as it stood. Bisno agreed to an instruction to that effect, even informing the court that the relevant jury discretion existed "absolutely as a matter of law." (17 RT 2125, lns. 22-26) And in a myriad of other ways, too, from the pleading stage to his new trial motion, Bisno consistently manifested the position that no evidence about an "alternative investment opportunity" was required. (*Ante*, pp. 21-22) Yet now, on appeal, he argues flatly to the contrary.

To allow this turnabout would be extraordinarily unfair to the investors, the trial court, and the jury. Under the "theory of trial" doctrine, Bisno is estopped to condemn the very assumptions and proceedings he assented to below. As set forth in *Richmond*, *supra*:

> The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. . . . Application of the doctrine may

> often be justified on principles of estoppel or waiver. (*Id.* at 874; cits. and internal quots. omitted)

Ignoring all the other ways he assented to the jury's consideration of compound interest, Bisno offers the weak excuse that "agreeing to such an instruction did not constitute agreement to compound interest awards that are unsupported by the required evidence." (AOB 23) But Bisno uttered no such qualification below. All he said about the instruction, and the investors and court agreed, was that the jury had complete discretion to award compound interest based on the trial record as it stood. Accordingly, he may not turn around now and argue to the contrary.

B.

BISNO'S CONTENTION FAILS ON THE MERITS AS WELL

1.

The Applicable Statute

Bisno's argument about prejudgment interest also fails on the merits for a host of reasons. First, the applicable statute, Civil Code § 3288 ("§ 3288"), simply provides that, "[i]n an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

There is no suggestion that claimants must prove, in addition, the existence and details of an alternative investment opportunity. Nor are courts free to augment statutes in that manner. (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303, 316 ["the expression of certain things in a statute necessarily involves exclusion of other things not expressed"].)

Moreover, Bisno's proposed augmentation of § 3288 would upset its common rationale. Typical is *Nordahl v. Department of Real Estate* (1975) 48 Cal.App.3d 657, 665:

> [w]hen, by virtue of the fraud or breach of fiduciary duty of the defendant, a plaintiff has been deprived of the use of his money or property and is obliged to resort to litigation to recover it, the inclusion of interest in the award is necessary in order to make the plaintiff whole.

Nordahl thus teaches that prejudgment interest is *presumptively* appropriate if the statutory criteria are met. In effect, the award is treated as general rather than special damages, as compensation for a harm "that necessarily or usually result[s] from particular wrongful acts. . . ." (6 Witkin, *Summary of California Law* (10th ed. 2005) Torts, § 1549, p. 1023) There is no need to prove special circumstances such as those Bisno proposes.

2.

The Relevant Loss Was Money,
Not an Alternative Investment

Bisno, reasoning that prejudgment interest is a form of "damages" (AOB 19), argues that the relevant loss must be "proven" and "[t]here is no such proof here." (*Id.*) No proof? It was *undisputed* below that the investors lost the use of their money due to Bisno's fraud. And that is the relevant loss for prejudgment interest purposes. As explained in *Nordahl v. Department of Real Estate, supra*, 48 Cal.App.3d 657, 665, "the reason interest runs from the time the plaintiff pays money to the fraudulent defendant is that if interest were not so paid the plaintiff would not be fully compensated for his loss." (Cits. and internal quots. omitted)

Bisno argues instead — admittedly with no case authority (AOB 20) — that the relevant loss was an alternative and identifiable "investment opportunity" (AOB 20), that is, a particular bank or venture where the investors could and would have earned a particular interest rate with a particular compounding formula. But that would be the "compensable loss" in this case (AOB 19) only if Bisno had tortiously shut down the local bank branch or broker's office he has in mind, or tortiously frustrated an "opportunity" there that the investors would otherwise have invested in. But the tort relevant here was taking their

money in the first place. And it follows that the relevant loss, fully "proven" below, was simply the deprivation of their money.

3.

Compound Interest Has Been Approved in Fiduciary Cases without any Showing of a Lost Investment Opportunity

Since at least *Wheeler v. Bolton* (1891) 92 Cal. 159, California courts have approved compound interest awards against fiduciaries based solely on the wrongfulness of their conduct and the presumed profits they obtained with the plaintiff's money. Accordingly, this long line of authority implicitly rejects Bisno's suggestion of an additional requirement.

In *Wheeler*, where the fiduciary was an executor, the Supreme Court held that compound interest is justified in cases of "willful malfeasance" (*id.* at 173) and because, "in the absence of evidence to the contrary," the defendant is "presumed to have received . . . profits from their use." (*Id.* at 172) Similarly, *Baker v. Pratt* (1986) 176 Cal.App.3d 370 affirmed a compound interest award against a majority shareholder because he had committed "breaches of fiduciary duties" against the minority shareholder. (*Id.* at 384) And *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1586 (*review denied*) affirmed a

compound interest award because the defendant, as the plaintiff's agent, owed him a fiduciary duty.[5]

Here, Bisno was a fiduciary even at the stage of promoting TACMI units for sale. (*Eisenbaum v. Western Energy Resources, Inc.* (1990) 218 Cal.App.3d 314, 322 ["[a] promoter or insider, or a seller of a limited partnership interest, owes a fiduciary duty to the prospective purchaser of such an interest"].) And Bisno of course remained a fiduciary when the investors became his limited partners — as he even proclaimed in TACMI's private placement memorandum. (RA 56) The general partner in a limited partnership is "held to the standards and duties of a trustee" with "the same liabilities to the partnership and to the other partners as in a general partnership." (*Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 424 (*review denied*))

Nor is there any doubt that the *Wheeler* tests for compound interest against fiduciaries are satisfied here. Bisno fraudulently

---

[5] These rules have also been applied in nonfiduciary cases like *Washington Intern. Ins. Co. v. Superior Court* (1998) 62 Cal.App.4th 981 (*review denied*), which held a surety potentially liable for a statutory interest "penalty" for a general contractor's missed payments to a subcontractor. Among other reasons, the court cited the "analogous situation" of fiduciary cases (*id.* at 991,n. 5) where compound interest is assessed to prevent unjust profits.

procured the investors' money, and presumptively profited from it every day he wrongfully withheld it from them.

Wheeler 's rationale would also be undermined by requiring proof of an alternative opportunity to earn compound interest. It would allow a defalcating fiduciary like Bisno to retain unjust profits at the victim's expense if compound interest did not happen to be available or provable in the relevant market at the relevant time.

4.

California's Fixed Rate of Prejudgment Interest in Tort Cases Further Undercuts Bisno's Theory

Bisno's approach also fails for another reason. California prescribes a fixed measure of damages for the tortious loss of use of money or property. It establishes a uniform rate of 7% for prejudgment interest in all tort cases. (*Michelson v. Hamada, supra*, 29 Cal.App.4th 1566, 1585-1586) Bisno's position is untenable, therefore, because the fixed 7% rate makes it immaterial whether a claimant could or would have obtained some other rate, either higher or lower, through some "alternative investment opportunity." It would therefore be pointless to require such proof.

And it would also be unjust. The fixed rate of interest has an important benefit that Bisno's approach would destroy. People like the investors here, fraudulently deprived of money or property, should not be forced to shop around for alternative investment opportunities solely to preserve evidence of the interest rates being offered at that time. When a fraudfeasor has deprived them of money, their compensation should not be jeopardized by such a hollow requirement.

Nor should they be required to shop for irrelevant investment opportunities just to find out if any compounding of interest is available. Because the basic interest rate is immaterial to the right to prejudgment interest awards, so too should be the opportunity for compounding. As Bisno argued emphatically below, the Civil Code leaves that subject to the discretion of the jury. (*Ante*, p. 21)

5.

The Statute Conferring Discretion for Compounding Has Been Upheld Against a Vagueness Challenge

Although Bisno argued emphatically below that juries have discretion to award compound interest, he now insists such discretion renders § 3288 unconstitutionally vague. But his only support is *dictum* in a footnote in *Harsany v. Cessna Aircraft Co.* (1983) 148 Cal.App.3d 1139, 1144 n. 4, raising that question but "not address[ing] [it] here"

(*Id.*) And Bisno does not even tell the whole story about the *Harsany* footnote. It concluded by citing *In re Pago Pago Aircrash of January 30, 1974* (C.D.Cal. 1981) 525 F.Supp. 1007, 1015, fn. 6, where the court *rejected* a vagueness challenge to § 3288:

> Given the gloss on that section by numerous California court decisions, such a standard is no more vague than the general damage standards contained in sections 3300 and 3333 of the Civil Code, or the standards applied with regard to almost all kinds of damage awards. The Court, therefore, holds that section 3288 is not unconstitutionally vague.

Nor does Bisno mention that other Courts of Appeal have cited *In re Pago Pago* and affirmed awards under § 3288 without intimating any vagueness concern. (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 524 (*hearing denied*), and *Cassinos v. Union Oil Co. of California* (1993) 14 Cal.App.4th 1770, 1778 (*review denied*)) Thus, contrary to the impression left by Bisno's discussion, the constitutionality of § 3288 appears well settled.

Finally, the cure for vagueness is notice, and Bisno had it in abundance. Since at least the 1891 decision in *Wheeler* , the judicial "gloss" on § 3288 (*In re Pago Pago*) has included a special authorization of compound interest against fiduciaries. Thus, especially when TACMI's lead general partner, Mr. Bisno, was a licensed attorney (7 RT

844), all appellants had ample notice that compound interest might be assessed for his misconduct as fiduciaries.

6.

Bisno's Own Testimony Supported the Jury's Award of Compound Interest

Finally, the discretion issue is effectively moot in this case because Bisno's own testimony supported the jury's decision to award 7% interest compounded annually. (31 RT 4235, lns. 14-20 [instructions]; 2 AA 234, ¶ 16 [illustrative verdict]) Bisno acknowledges that TACMI's "general partners [*i.e.*, Bisno] charged compound interest on loans they made to TACMI during its operation." (AOB 22) But he does not acknowledge he charged *10%* interest and it was compounded *monthly*. (13 RT 1609) Moreover, Mr. Bisno personally assured the jury it was "fair" to charge such interest (16 RT 1622, ln. 18) because:

> it was less than the cost of the partnerships borrowing from Admiral Insurance, which I believe was 13 and a half percent, less than the cost of borrowings for the partnership from other financial institutions." (*Id.*, lns. 20-24)

Bisno can hardly complain, therefore, of the jury's decision to assess interest at the modest rate of 7% compounded annually.

The fairness of that award was also supported by expert testimony. Accountant Stephen Mayer (13 RT 1664) explained that compounding was "a fair concept" (16 RT 2075, lns. 23-24) because if

"you should have paid" interest but "didn't pay it, . . . we're going to add it to the principal. . . . [I]t's like you borrowed more money. . . ." (*Id.*, lns. 16-22) And here, of course, Bisno defrauded the investors of their principal and failed to pay them any interest, either. Moreover, securities expert John Maine testified that, due to inflation, "people hope to get some sort of return on their money because those dollars are worth so much less. . . . (16 RT 2019, lns. 1-6) The award of compound interest appropriately vindicated that expectation.

For the many reasons set forth in this brief, Bisno's argument about an "alternative investment opportunity" should be rejected on the merits in the unlikely event the Court even deems it cognizable.

III.

BISNO'S CONTENTION ABOUT THE BANKRUPTCY SETTLEMENT AGREEMENT OMITS A CRITICAL CLAUSE AND ALTERNATIVE GROUNDS FOR THE SAME RESULT

A.

THE OMITTED CLAUSE RESOLVES THE PURPORTED CONFLICT IN THE RSA

There is no need to repeat the investors' showing that Bisno, by a surgical omission, creates a false impression that § 16(a) of the RSA set forth a total and unqualified release of the investors' claims. (*Ante*, pp.

22-24) Bisno simply omits the introductory clause of § 16(a), which expressly limited the release in that section by the exceptions set forth in § 16(d) and § 2. Accordingly, the full text of § 16(a) is perfectly harmonious with § 16(d) on the only point Bisno cites on appeal as the reason for reversing Judge Tigar's ruling.

In the trial court, the parties also debated a substantive question, whether § 16(b) and § 2 of the RSA preserved the investors' claims by including them as "parties to the Staudenraus action." (*E.g.*, 1 AA 163, § 2) As Bisno concedes, the investors were "admittedly putative class members in the Staudenraus Action. . . ." (AOB 26, n. 6)

On appeal, however, the only contention Bisno advances in a meaningful way is that § 16(a) conflicted with § 16(d) and § 2 in the manner previously described. Only in a footnote — and supported only by string citations — does Bisno address the scope of the release, arguing that putative class members are not "parties" to an action. (AOB 26, n. 6) But that contention should not even be entertained. As Courts of Appeal have frequently held, "[w]e do not view as adequate to preserve an issue on appeal . . . one footnote mention of [it] . . . ." (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624 (*review denied*); *accord*, *Evans v. Centerstone Develop. Co.* (2005) 134

Cal.App.4th 151, 160 (*review denied*); *In re Joy M.* (2002) 99 Cal.App.4th 11, 22)

Although Bisno has waived this contention, the investors have already demonstrated that it fails on the merits. (*Ante*, pp. 24-28) This brief has cited rulings by both Judge Tigar and Judge Sabraw that the RSA and other bankruptcy court documents consistently treated the investors as parties to the Staudenraus action. And as Judge Tigar pointed out at the hearing on this issue, the RSA's reference to a Staudenraus *class* action would make no sense if, as Bisno contends, the same agreement eliminated any possible class members. (4 RT 369, lns. 6-16) Judge Tigar also cited a holding in *Shapell Industries, Inc. v. Superior Court* (2005) 132 Cal.App.4th 1101, 1111 (*review denied*), that putative class members were "the parties interested in prosecuting the action" when the named plaintiff filed a voluntary dismissal of his personal cause of action. (RA 41, lns. 21-22) *Shapell* also emphasized that "California courts recognize and preserve the rights of absent class members, even before the issue of certification has been determined." (*Id.* at 1109)

Nor do Bisno's string-cited cases compel a different conclusion. His lead case, *Saleh v. Titan Corp.* (S.D. Cal. 2004) 353 F.Supp.2d 1087, is typical. As Judge Tigar pointed out at the relevant hearing (4 RT

392, lns. 1-9), *Saleh* merely held that putative class members may not be enjoined from pursuing a separate action absent personal jurisdiction over them. That hardly prohibits or belies a contractual intent in the RSA to include putative class members as "parties" whose claims against Bisno were being preserved.

In sum, Judge Tigar properly concluded that the RSA was not reasonably susceptible to the meaning urged by Bisno.

B.

THE COURT APPROPRIATELY CONSIDERED BISNO'S OFFER OF PROOF BEFORE CONSTRUING THE RSA

Nor did Judge Tigar commit any error regarding the extrinsic evidence Bisno proffered to support his position. (AOB 26-27) Bisno argues that the court "refused to consider" such evidence (AOB 27) in violation of *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33 ("*PG&E*"). But the court *did* consider this evidence for the purpose set forth in *PG&E*.

At the outset, Bisno cites nothing in the reporter's transcript or elsewhere suggesting that Judge Tigar refused or failed to consider Bisno's offer of proof as *PG&E* required. Indeed, the transcript proves the contrary. Bisno's counsel (Mr. Marcus) made the offer of proof without interruption (4 RT 365-367), the court responded with probing

questions about it (4 RT 367-369), and the intended ruling a few minutes later (4 RT 390:24 to 392:26) expressly acknowledged *PG&E*'s requirement to consider extrinsic evidence. (*Id.* at 391, lns. 23-26) Accordingly, the transcript belies Bisno's complaint that the court "refused" to consider his offer of proof (AOB 27), and any doubt must of course be resolved in accordance with the presumptions favoring a judgment.

Nor does *PG&E* require anything more. In Bisno's own quotation from the opinion (AOB 28), it requires only "a preliminary consideration" of proffered extrinsic evidence. (69 Cal.2d 39) And the purpose is only to determine if the proffered evidence is *admissible* to resolve an ambiguity, that is, if the interpretation advanced is a reasonable one:

> If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for . . . , extrinsic evidence relevant to prove either of such meanings is admissible. (*Id.* at 40; cits. and internal quots. omitted)

And here, Judge Tigar expressly and correctly followed the *PG&E* procedure after considering Bisno's proffered evidence:

> I think that the construction of the language in the RSA that on the one hand Ms. Staudenraus was entitled to maintain a [putative] class action, . . . [a]nd yet on the other hand,

> the RSA purports to have the effect of extinguishing the claims of all the named parties in the action is not a reasonable construction, and therefore the Court does not reach the stage of the analysis under [*PG&E*] and its [progeny] that required the introduction of extrinsic evidence, because I don't believe that construction of the document is a reasonable one. (4 RT 391, lns. 17-26)

Finally, Bisno makes no legal showing that the evidence he proffered was even competent for this purpose. Even if his bare summary of his offer of proof (AOB 26-27) were sufficient to preserve this point, the summary actually refutes it. It speaks of Mr. Bisno's personal "perspectives" and unidentified "discussions" supporting his construction of the RSA; other vague testimony about "releases from the limited partners" and what the release was "intended" to do; and the investors' failure to "object" to the RSA when given notice of it — a fact, as Judge Tigar observed, that proves nothing but a reasonable perception that their claims were preserved. (4 RT 392, lns. 13-17)

Bisno cites no authority supporting the use of such subjective and irrelevant testimony as an aid to contract interpretation, and established case law holds to the contrary. *PG&E* stated, for example: "[a] contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words. . . ." (69 Cal.2d

at 38, n. 4; cit. and internal quot. omitted) (*Accord*, *Smissaert v. Chiodo* (1958) 163 Cal.App.2d 827, 830 ["[t]he intent of the parties is to be determined by an objective standard and not by the unexpressed state of mind of the parties"].)

For all the foregoing reasons, Judge Tigar committed no error by refusing to conduct a mini-trial on Bisno's proffered evidence.

C.

ALTERNATIVE GROUNDS ALSO COMPEL THE REJECTION OF THIS DEFENSE

1.

The Alternative Grounds Are Conclusive

Although the only challenged ruling by Judge Tigar was correct for the reasons shown, Bisno has ignored and therefore waived any challenge to the other rulings by Judge Tigar rejecting the RSA settlement defense on alternative grounds. It is well settled that points not argued in the appellant's opening brief are deemed waived. "It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*review denied*))

Bisno even failed to include Judge Tigar's other rulings in his appendix, waiving any challenge for that reason, too. They were "necessary for proper consideration of the issues" and Bisno "should reasonably [have] assume[d] the respondent w[ould] rely on" them. (Cal. Rules of Court, Rule 8.124(b)- (1)(B)) Thus, a waiver results because an "appellant defaults, if the appellant . . . ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed." (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435)

Because Bisno may no longer challenge the alternative rulings, they stand as conclusive grounds to reject Bisno's RSA defense. The situation is akin to a general verdict resting on two proffered theories. It is settled that one valid theory will compel affirmance even if the other were tainted by error. (*E.g.*, *Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149, 1153) Here, accordingly, although Judge Tigar's ruling on the text of the RSA was unassailable on the merits, the court's other rulings on the RSA are conclusive and independently compel a rejection of Bisno's settlement defense.

Indeed, Judge Sabraw's summary judgment ruling (RA 25-31) confirms that this is so. Immediately after ruling that the RSA could not possibly bind the investors because the bankruptcy trustee did not

represent them, Judge Sabraw started a new paragraph with this conditional clause: "[a]ssuming that the trustee had the authority to compromise the claims of the limited partners. . . ." (RA 26, lns. 24-25) In other words, the court was now assuming *arguendo* that his preceding ruling was wrong. And on that basis, Judge Sabraw went on to address "the issue of contract interpretation" that Bisno raises on appeal. (RA 27, lns. 2-3) After discussing it briefly, Judge Sabraw stated that he "will not resolve the ambiguity question as a matter of law on this motion and will defer that issue to the trial court." (*Id.*, lns. 4-5)

Judge Sabraw thus made clear that "the issue of contract interpretation" — the only RSA issue Bisno raises on appeal — was moot unless the investors *had* been represented in the bankruptcy proceeding. But Bisno has ignored and therefore waived Judge Tigar's ruling on the representation issue (*ante*, pp. 25-26), along with his ruling that TACMI's confirmed reorganization plan had expressly preserved the investors' fraud claims. (*Ante*, pp. 27-28)

In an abundance of caution, though, we can readily demonstrate that the alternative grounds for rejecting Bisno's RSA defense are amply supported by the record.

2.

The Investors Were Not Represented in the Settlement Agreement

First, Judge Tigar was well justified in holding, as Judge Sabraw had nine days earlier, that the investors were not even represented in the RSA so could it hardly have released their claims. (*Ante*, pp. 25-26) To begin with, the investors' papers below cited the absence of any assignment or other arrangement giving the bankruptcy trustee, Ms. Susan L. Uecker, power to represent them or release their individual claims in the RSA. (1 AA 75, lns. 18-19) And that fact is undisputed because Bisno cited no pertinent assignment or equivalent arrangement in his reply.

The RSA also identified Ms. Uecker as only the "Plan Trustee of [TACMI]" (1 AA 161 & 169), not the representative of the investors or anyone else. And *other* limited partners were expressly represented in the RSA by a company called Berkeley Center, LLC (1 AA 161 & 172), which owned or had options to acquire a number of TACMI limited partnership units. (1 AA 164, § 4) Moreover, the investors had to be given separate notice of the RSA and an opportunity to object to it (*see* AOB 27), further confirming that neither Ms. Uecker nor Berkeley Center, LLC represented them in the RSA. (Nor were objections necessary because the RSA preserved their claims.)

Bisno, however, relied on an innuendo of representation. He said Ms. Uecker "represented the interests" of the investors (1 AA 92, lns. 22 & 25) because she argued that the RSA would benefit them. (1 AA 92-93) But suppose she had said it would benefit the public, too. Though one could say she "represented the interests" of the public in doing so, it would hardly empower her to release a potential State Bar or criminal action against Mr. Bisno for his fraud or tax evasion. In like manner, "representing the interests" of the investors is a far cry from representing them legally, with authority to release their individual fraud claims. And as Judges Tigar and Sabraw both ruled, any benefit the investors enjoyed from the RSA was indirect, flowing from the settlement of *TACMI's* claims against Bisno, not their own.

3.

The Bankruptcy Plan Independently Preserved the Investors' Claims

The record also supports the holding of both Judge Tigar and Judge Sabraw that TACMI's confirmed reorganization plan preserved the investors' fraud claims. (*Ante*, pp. 27-28) As shown previously, TACMI's disclosure statement and confirmed plan referred to Ms. Staudenraus's action as a class action, and the plan went on to provide, with original emphasis:

> This plan shall <u>not</u> discharge non-Debtors [such as Bisno]. Without limitation, the Plan will not bar the rights of parties

> in interest with standing to pursue claims, if any, against the Debtors' General Partners [*i.e.*, Bisno], their officers, agents or affiliates. (RA 17, lns. 14-16; original emphasis)

Indeed, TACMI's disclosure statement advocating its plan stated that "[t]he Bankruptcy Court has ruled that this [Staudenraus] litigation may resume in State Court in order to liquidate the claim." (RA 13, ln.1) That litigation could hardly "resume" in its contemplated form, with putative class members, if all the putative class members were releasing their claims. Similarly, the bankruptcy court's subsequent order approving the RSA stated:

> Entry of this Order is consistent with the confirmed Plan of Reorganization, in the best interest of the Debtors and other interested parties, and is without prejudice to those parties holding disputed claims. (Quoted at 1 AA 81, lns. 6-8; emphasis added)

Judge Tigar was unquestionably correct, therefore, in holding that the foregoing bankruptcy court orders preserved the investors' fraud claims against Bisno.

D.

THE ALTERNATIVE RULINGS DEFEAT ANY SHOWING OF PREJUDICE BISNO MAY ATTEMPT, IMPROPERLY, FOR THE FIRST TIME IN HIS REPLY BRIEF

Finally, the alternative rulings Bisno ignores are fatal to his appeal for another reason. As noted previously, his only relevant contention on appeal is that Judge Tigar erred by (supposedly) failing to consider extrinsic evidence before construing the text of the RSA. But whether that ruling is properly viewed as an evidence ruling or a procedural one, any error is moot unless Bisno can establish the requisite degree of prejudice. And he cannot.

Article 6, section 13, of the California Constitution provides in relevant part:

> [n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . improper . . . rejection of evidence, . . . or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

The problem for Bisno, of course, is the presence of alternative rulings compelling the same outcome as the ruling he challenges: the rejection of his settlement defense. Accordingly, Bisno is in no position to claim any prejudice from the ruling he does challenge. Nor can he be heard

to construct a new prejudice theory for the first time in his reply brief. (*Ante*, p. 31)

CONCLUSION

Bisno's appeal should be dismissed outright, either on the accompanying motion or after the conclusion of merits briefing, for his material understatements of the record. They violate a fundamental requirement for a tenable appeal.

In addition, the full record demonstrates that Bisno's appellate contentions fail on the merits. First, his misconduct was far worse than he suggests to this Court, and it completely destroyed the market value of his TACMI partnership units at the time the investors purchased them. The jury's verdict to that effect was supported by compelling expert and percipient evidence about the relevant market *and* the precarious state of TACMI's assets, even though the relevant statute (Civil Code § 3343) provides that market value is the only proper determinant of fraud damages.

Second, the record and case law amply support the jury's award of prejudgment interest because the investors had lost the use of their

money. Moreover, Bisno was their fiduciary at all relevant times, yet he procured and retained their money by fraud.

Finally, considering *all* the relevant contract language and related bankruptcy court documents, the trial court was well justified in rejecting Bisno's settlement defense on several grounds. Nor did it commit any error in the process, let alone reversible error. Despite Bisno's assertion to the contrary, the court fully considered the extrinsic evidence he proffered before making its rulings.

For all the foregoing reasons, this Court should dismiss Bisno's appeal or affirm the judgment in full.

DATED: December 28, 2007

Respectfully submitted,

BIEN & SUMMERS LLP

By: _____

ELLIOT L. BIEN
Attorneys for Plaintiffs and Respondents, JOHN EMANUELE, et al.

CERTIFICATE OF LENGTH OF BRIEF

The undersigned, counsel for plaintiffs and respondents John Emanuele, et al., 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 13,454 words as computed by the word processing program (WordPerfect X3) used to prepare the brief.

DATED: December 28, 2007

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; RESPONDENTS' APPENDIX

by enclosing copies of same in envelopes addressed to:

Patricia L. Glaser, Esq. — Attorneys for Appellants
Craig H. Marcus, Esq.
Christensen, Glaser, Fink, Jacobs, Weil & Shapiro, LLP
10250 Constellation Blvd., 19th Floor
Los Angeles, CA 90067

Irving Greines, Esq. — Attorneys for Appellants
Marc J. Poster, Esq.
Alana B. Hoffman, Esq.
Greines, Martin, Stein & Richland LLP
5700 Wilshire Blvd., Suite 375
Los Angeles, CA 90036

Clerk, California Supreme Court — (4 copies of brief only)
350 McAllister Street
San Francisco, CA 94102

Clerk, Alameda County Superior Court — (brief only)
1221 Oak Street
Oakland, CA 94612

and causing them to be delivered by the United States Postal Service in my usual manner on the date stated below.

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

DATED: December 28, 2007

_____
ELLIOT L. BIEN