No. S262081

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**SIRY INVESTMENT, L.P.**
*Plaintiff & Appellant,*

vs.

**SAEED FARKHONDEHPOUR, et al.**
*Defendants & Appellants.*

*and Consolidated Cases.*

On Appeal from Judgment/Orders of Los Angeles Superior Court
No. BC372362, Hon. Stephanie Bowick & Hon. Edward B. Moreton
After Published Decision by Court of Appeal, Second District, Div. Two
No. B277750; c/w B279009 & B285904

# OPENING BRIEF ON THE MERITS

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## ISSUES PRESENTED

► California's civil theft statute allows "any person" to recover statutory treble damages and attorneys' fees for specified violations; e.g., receiving or concealing stolen property. (Pen. Code, § 496, subd. (c).) The Opinion below holds these civil remedies are limited to the theft of stolen goods. It "respectfully part[s] ways with *Switzer v. Wood* (2019) 35 Cal.App.5th 116 (*Switzer*), which holds to the contrary." (Typed opn. 3.) The issue presented is whether these remedies apply to the theft of any form of property; e.g., theft of partnership funds.

► Whether, or under what circumstances/grounds, a defendant may file a motion for new trial to challenge a default judgment while remaining in default?

## INTRODUCTION

The legislature has used particularly broad language in the Penal Code provisions governing theft-related offenses. In 1972, the legislature added civil remedies to Penal Code section 496, allowing anyone injured by specified theft-related offenses to recover civil damages. Refusing to enforce these critical remedies based on the nature of the stolen property – partnership funds embezzled by a general partner and its alter egos who defrauded their limited partner – the Court of Appeal held this statute should be limited to the theft of goods (e.g., merchandise or cargo). The Court of Appeal rationalized that the legislative

history behind the 1972 amendment shows that the California Trucking Association was heavily involved in seeking to eliminate markets for stolen goods.

While it is true that one of the proposed bills would have expressly limited recovery of civil remedies to public carriers as the only eligible group of plaintiffs, the legislature affirmatively rejected such a limitation by enacting a bill allowing "any person" injured by a statutory violation to seek such remedies. This dichotomy between the proposed bill and the enacted bill, in and of itself, requires reversal.

The rationale applied below – by focusing on the identity of a particular sponsor of legislation – is inherently flawed because it requires courts to limit statutory laws (e.g., consumer protection statutes) based on the perceived agenda of a particular lobbyist. Under the Court of Appeal's rationale, if an industry group or an organization (e.g., AARP) sponsors a bill creating a cause of action for its own constituents (by expressly limiting recovery to senior citizens), the law would be limited to senior citizens, even if the ultimate bill, as enacted, allows "any person" to bring an action. That cannot be the law.

Because the Court of Appeal's decision is also based on the false premise that money does not qualify as personal property within the meaning of the theft statutes, the decision should be reversed for this additional reason.

As for the procedural issue presented here, the threshold question is whether a defendant, after the entry of default judgment, may seek a new trial without moving to set aside the default or the default judgment first. Assuming a defaulted defendant has standing to seek a new trial on certain grounds (depending on which line of authority this Court ultimately adopts), the Court should also resolve the conflict regarding the scope of appellate review when a default judgment is appealed. Because the Court of Appeal employed a symmetrical approach (by seeking to match the grounds for new trial with the grounds allowed on appeal), resolution of these issues will provide significant clarity for lower courts and litigants.

Regardless of how this Court resolves the preceding issues, the Court should reinstate the original $16 million judgment entered in this case. The trial court's elimination of nearly $10 million of that judgment, based on a defective order granting a new trial, requires reinstatement.

Having perceived three categories of damages awarded in the default judgment to be "excessive as a matter of law," the trial court conditionally granted defendants' motion for new trial by invoking Code of Civil Procedure, section 657, subsection five ("excessive" damages). As discussed below, however, this particular statutory ground applies only when the court weighs the factual evidence and concludes the judgment is excessive. Because the court perceived the damages to be excessive (albeit

erroneously) as a matter of law, this ground does not apply, rendering the new-trial order defective.

To be sure, a defective order can be saved on appeal on an alternative ground. This rule, however, applies only if the party that moved for a new trial affirmatively invokes an alternative ground and presents supporting authorities and citations to the record on appeal. Because defendants never mentioned ground seven (a preserved "error in law") in their appellate briefs, the Court of Appeal erred by undertaking defendants' duty in salvaging the new trial order based on ground seven. Therefore, the original judgment should be reinstated.

## STATEMENT OF THE CASE

### A. The Parties

Plaintiff Siry Investment, L.P., is a limited partner in a partnership called 241 E. 5th Street Partnership. (1 SCT-B: 2, ¶1; 14-37 [partnership agreement].) [1] The other three limited

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[1] Consistent with the prior briefing citation format, this petition refers to the record in these consolidated appeals as follows:

(1) Appeal A: a 14-volume incorporated-by-reference Clerk's Transcript ("CT") and 8-volume incorporated-by-reference Supplemental Clerk's Transcript ("SCT") filed in B260560, an appeal from a monetary sanctions award affirmed in 2017; and

(2) Appeal B: a 13-volume CT, 28-volume SCT, and 1-volume Second Supplemental Clerk's Transcript ("SSCT") filed in B277750 (the main appeals challenging the default judgment and the post-judgment reduction of damages).

partners are: The 1993 Farkhondehpour Family Trust, The Neman Family Irrevocable Trust, and Yedidia Investments Defined Benefit Plan Trust. (1 SCT-B: 37.) [2] The general partner of the limited partnership is 416 S. Wall Street, Inc. (1 SCT-B: 36.) The non-Siry parties are referred to collectively as "defendants."

The partnership's main asset was a swap meet building occupied by small businesses, located in downtown Los Angeles. (9 CT-B: 2183.) The partnership generated rental income from commercial tenants on the first floor, and from the motel located on the top floor of the mixed-use property. (*Id.*)

## B. Siry Prevails Against Defendants, Initially Based on a Jury Trial and Ultimately Based on a Default Judgment.

### 1. The original judgment is reversed on a technicality.

In 2007, Siry filed this lawsuit to recover damages based on defendants' misdeeds in handling the partnership. Following the

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We refer to B260560 as "A" and B277750 as "B" based on their chronological/numerical order.

There are no references here to Appeal C (a one-volume CT filed in B279009 which was consolidated with B277750). There are also no references here to Appeal D (a 3-volume CT filed in B285904, the "offset appeal").

[2] Saeed Farkhondehpour is the trustee of The 1993 Farkhondehpour Family Trust while Morad Neman was the trustee of the other two trusts named above. (*Id.*)

first trial, the jury awarded Siry roughly $3.5 million in compensatory and punitive damages. (2 CT-B: 346.) The operative judgment, which reduced the punitive awards following post-trial motions (2 CT-B: 351), was set aside on appeal on a pure technicality. (Typed opn. 5 [March 3, 2020 decision].) Because the verdict form did not specify whether each individual defendant was liable in a personal or trustee capacity, the Court of Appeal remanded the case for a brand new trial. (*Id.*)

### 2. Post-remand proceedings leading to default judgment

Starting from scratch on remand in 2013, Siry sought statutory remedies of treble damages and attorneys' fees under Penal Code section 496, in addition to non-statutory claims. (1 CT-A: 69, ¶6.) Following eighteen months of discovery abuse by defendants, Siry filed the operative complaint, alleging the following: [3]

► Defendants "created a new entity, DTLA, in order to improperly divert rental income away from the 241 Partnership and into DTLA. Defendants facilitated the creation of DTLA and other third-party entities and designed, implemented and/or executed a series of illicit financial transactions" to deprive Siry of its share of the partnership income. (15 SCT-B: 3727, ¶30.)

[3] The parties were engaged in a prior lawsuit involving several partnerships, including the 241 Partnership. Those proceedings and certain pre- and post-remand proceedings (e.g., accounting, dissolution, discovery abuse) are not addressed here as they are not relevant to the issues presented here.

► "Defendants would occasionally deposit a portion of the rental income of the 241 partnership in the partnership's bank account while pocketing the difference in cash, thus treating the partnership funds as their personal funds…." (15 SCT-B: 3729, ¶41.)

► "To avoid being caught, defendants recorded only a portion of the partnership's actual income on the books." (*Id.*, ¶42.) "Defendants also falsely allocated security guard expenses and other expenses of their own/other properties so as to artificially deprive Siry of its full amount of distributions." (15 SCT-B: 3730, ¶ 45.) Having incorporated these allegations in the cause of action under section 496 (15 SCT-B: 3735, ¶85), Siry also alleged the elements of this cause of action. (*Id.*, ¶¶ 86-89.)

### 3. After entering a default judgment based on defendants' discovery abuse, the trial court reduces the damages awarded by nearly 60% in response to defendants' motion for new trial.

The trial court ultimately granted Siry's motion for terminating sanctions based on defendants' discovery abuse. (25 SCT-B: 6176.) After examining Siry's extensive evidentiary submissions, the court issued an eight-figure default judgment. (10 CT-B: 2309.) [4]

[4] Defendants interpreted the judgment to award $20 million just in punitive damages, plus several additional million dollars in actual/treble damages and fees. (11 CT-B: 2464.) Siry interpreted the judgment to award a total of $16 million. (Pet. for Rehearing

Despite being in default, defendants filed two post-judgment motions: a motion for new trial, challenging the judgment as excessive (10 CT-B: 2410; 11 CT-B: 2447) and a motion to vacate the judgment under Code of Civil Procedure section 583.320, the diligent-prosecution statute (10 CT-B: 2345). Defendants did not seek relief under section 473 to set aside the default or the default judgment.

After receiving opposition (11 CT-B: 2571) and reply papers (12 CT-B: 2726), and holdings two hearings (3 RT 6343-6400; 6601-6622), the trial court ruled on the new trial motion. Applying *Don v. Cruz* (1982) 131 Cal.App.3d 695, the court held defendants had standing to seek a new trial by arguing the damages were excessive as a matter of law under subsection 5 in section 657. (13 CT-B: 3009-3010.) The court further held "the judgment consisted of excessive damages as a matter of law under Code of Civil Procedure section 657, subsection (5)" in terms of three monetary awards. (13 CT-B: 3008; 2994.) Specifically, the court ruled it had used the wrong measure of damages in defining "treble" damages; i.e., 3:1 versus 2:1 ratio. (13 CT-B: 3011-3012.) The court also ruled it had applied the wrong measure of damages by awarding *both* treble and punitive damages. (13 CT-B: 3012-3016.) In addition, the court deemed the punitive damages as constitutionally excessive. (13 CT-B: 3018-3020.)

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15-16.) The components of this original judgment are itemized in the chart below.

Adopting the contrary line of authority that precludes defendants from attacking the judgment while remaining in default, the court held conversely that defendants had no standing to invoke the diligent-prosecution statute. (13 CT-B: 3000.) The court denied that motion procedurally and on the merits. (13 CT-B: 3000-3003].)

### 4. Based on Siry's election of remedies, the Court enters an amended judgment.

Following Siry's election of treble damages over punitive damages based on the court's order requiring an election (13 CT-B: 3036; 3012-3016), the court entered an amended judgment. The initial default judgment and the amended one are summarized below:

| | **original judgment** (10 CT-B: 2309) | **amended judgment** (13 CT-B: 3104) |
|---|---|---|
| actual damages | $534,118 | same |
| pre-judgment interest (2003-2016) | $422,369 | same |
| treble damages | $2,869,461 | $1,912,974 |
| attorneys' fees | $4,010,008 | same |
| costs | $187,109 | same |
| punitive damages | $4,000,000 as to *each* of two sets of defendants | none |

### 5. Both sides appeal.

Defendants appealed, arguing the terminating sanctions were excessive. (Neman-AOB 42-58; SF-AOB 26-53.) [5] Defendants also argued section 496 does not apply in this case. (Neman-AOB 76-77; Neman-ARB/X-RB 76-80; SF-AOB 58-66; SF-ARB/X-RB 33-36.) [6]

Siry cross-appealed, challenging the post-judgment reduction of damages. (Siry-RB/X-AOB 156-160; X-ARB 12-27.) Siry focused its arguments on procedural defects infecting the order granting a new trial.

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[5] Listed in chronological order here, "Neman-AOB" refers to the opening brief filed by the Neman parties; i.e., Morad Neman individually and as a trustee of his two trusts as identified above. "SF-AOB" refers to the opening brief filed by (1) Saeed Farkhondehpour, individually and as a trustee of his trust listed above and (2) the general partner, 416 S. Wall Street, Inc.

"Siry-RB/X-AOB" refers to the combined brief initially filed by Siry. "ARB/X-RB" refers to the subsequent, combined brief filed by each set of defendants. "X-ARB" refers to the final, reply brief filed in support of Siry's cross-appeal.

[6] Defendants pursued other arguments on appeal that are not relevant to this petition. Similarly, the parties had pursued various appeals since the inception of this lawsuit that are not relevant here. Accordingly, we do not address them.

### 6. The Court of Appeal affirms the judgment as to liability issues while eliminating Siry's $4 million attorneys' fee award and $2 million statutory treble damages.

#### a. Disposition of defendants' appeal

In a published opinion, the Court of Appeal rejected the various arguments presented by defendants as to liability issues. (Typed opn. 14-32.) The Opinion, authored by Justice Hoffstadt, extensively reviewed defendants' "fulsome history of discovery abuse." (Typed opn. 17.) Condemning defendants' strategy "to bury Siry and the court with 'document dump[s],'" the Opinion confirmed defendants' "conduct was both willful and, worse yet, calculated." (*Id.*)

As to the amount of recovery, the Opinion cut the amended judgment by more than half (reducing it to roughly $3M). First, in deciding defendants' appeal, the court held that section 496 does not apply in this case, thereby eliminating the $4M attorneys' fee award *and* the $2M statutory treble damages—a $6M haircut. (Typed opn. 40-47.) Given "the unavailability of treble damages under Penal Code section 496, Siry's election to receive treble damages over punitive damages is a nullity; in its place, Siry is entitled to receive the $1 million in punitive damages assessed against each Farkhondehpour and Neman," the Opinion held. (Typed opn. 47.)

The Opinion thus reinstates the $2M punitive damages award reflected in the amended judgment in lieu of the $2M statutory treble damages. (Typed opn. 47, 56.) Finally, the court eliminated the same fee award under another fee-shifting provision; i.e., Code Civ. Proc., § 1029.8. (Typed opn. 47-55.) [7]

### b. Disposition of Siry's cross-appeal

Rejecting Siry's cross-appeal which sought to reinstate the original judgment, the Opinion holds defendants had standing to seek a new trial while they remained in default. (Typed opn. 33-38.) The Court of Appeal adopted Siry's position (RB/X-AOB 159-160; X-ARB 12-27) that the trial court had erroneously used an inapplicable ground in the new-trial-motion statute to reduce the original judgment—a $9 million error. (Typed opn., pp. 38-39, fn. 10.) Nonetheless, the Court of Appeal held this error could be fixed on appeal. (*Ibid.*)

Although defendants' appellate briefs invoked two particular grounds in the new-trial-motion statute to salvage the order on that motion (Neman ARB/X-RB 90-91; SF ARB/X-RB 46), the Court of Appeal used an *entirely different* ground that was not invoked on appeal to save the admittedly-defective order. (Typed opn., pp. 38-39, fn. 10.) Although this substitute ground

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[7] This statute allows fee shifting where the defendant engages in unlicensed activities. While the court held defendants' sale of the partnership interest did not involve the sale of "securities" – thus eliminating the application of this statute – Siry is not challenging this ruling.

(referred to as ground 7) requires an "[e]rror in law*, occurring at the trial and excepted to by the party making the application*" (Code Civ. Proc., § 657, subd. (7)), the Court of Appeal held defendants had properly invoked this ground in the *trial* court by abridging/revising it as "error in law" – while eliminating the italicized legal requirements. (Typed opn., pp. 34, 38-39, fn. 10; 10 CT-B: 2411, ¶6.) [8]

### 7. Siry's rehearing petition is denied.

Siry filed a rehearing petition, pointing out additional statutory provisions for fee-shifting omitted from the opinion. (Pet. for Rehearing, pp. 7-15.) Siry also explained the new trial order could not be salvaged based on ground 7 because defendants failed to properly invoke this particular ground in the trial and appellate courts. (*Id.* at pp. 16-17.)

Denying the rehearing petition, the Court of Appeal modified the opinion by eliminating the alternative grounds for fee shifting advanced by Siry. (PFR, Ex. 2, pp. 2-3.) The court did not address the critical defect discussed in the rehearing petition as to the new trial order. (Pet. for Rehearing, p. 16, fn. 5.) The

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[8] Defendants invoked on appeal only ground 5 (excessive damages) and ground 6 as italicized here ("[i]nsufficiency of the evidence to justify the verdict or other decision, or *the verdict or other decision is against law*") under section 657. (Neman-ARB/X-RB 92-93; SF-ARB/X-RB 46-48.) It is undisputed the trial court invoked ground 5 as the sole and exclusive ground for reducing the damages under section 657. (13 CT-B: 3006.)

court also declined to quantify the total amount of the original judgment, as it was superseded by the amended judgment. (PFR, Ex. 2, p. 4.)

Defendants did not seek rehearing.[9]

### 8. This Court grants review.

In response to Siry's petition for review challenging the Court of Appeal's interpretation of section 496 and its view on defendants' standing to seek a new trial while in default, this Court granted review. No answer or other petitions for review were filed by the other side.

## LEGAL DISCUSSION

### I. Once the Crime of Theft of Partnership Funds Is Established, the Civil Remedies in Penal Code Section 496 Are Triggered.

While the Court of Appeal agreed with Siry that Siry had "properly alleged a violation of Penal Code section 496 in its operative complaint" (typed opn. 47), the Court of Appeal refused to apply this statute as inapplicable. (*Ibid.*) We nonetheless

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[9] Although Neman argued section 496 does not apply to partnership disputes, he has sued co-defendant Farkhondehpour for violating section 496 based on literally the same allegations Siry raised against both Neman and Farkhondehpour. (Siry-RB/XAOB 139-140.)

summarize the pertinent allegations, before explaining the application of this statute, to provide context for challenging the notion that section 496 does not apply to the theft of partnership funds.

### A. The factual allegations deemed true by entry of default

Siry alleged various forms of theft in the operative complaint. For example, besides "engaging in or facilitating a series of illicit financial transactions in addition to committing fraud" (15 SCT-B: 3720:6-7), defendants "took advantage of their power and control over the partnership's bank accounts and financial records," orchestrating "a pattern of deceit in a well-formulated and complex scheme that required continuous manipulation of the partnership's rental income[.]" (3729, ¶44.) Consistent with their "concealment and misrepresentation of the management of the partnership and their concealment of their personal business activities" (15 SCT-B: 3725:11-12), defendants "intentionally deprive[d]" Siry of its rights (3728:25), based in part on their fabrication of bogus expenses to "artificially deprive" Siry of its distributions (3730:4) while committing "misappropriation of income." (3730:25.) Defendants also "diverted" the partnership's rental income into other entities they owned; i.e., non-partnership bank accounts *they* controlled. (3727, ¶30.)

After incorporating these allegations (15 SCT-B: 3735, ¶85), Siry once again explicitly alleged "theft or fraud" in the statutory cause of action under section 496. (*Id.*, ¶86.) Based on these allegations, each defendant "engaged in *fraudulent* self-dealing and enriched himself and his companies" (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 13) by "diverting partnership funds" to their own entities "without the knowledge of the other partner[.]" (*Id.* at p. 12.)

Siry went even further, alleging additional prongs for violating section 496. By (1) concealing and (2) withholding from Siry the money defendants stole from the partnership or (3) by "aiding others" to do so (15 SCT-B: 3736:1-2), the operative complaint alleged defendants violated section 496 in three *additional* ways. (See *People v. Brown* (2019) 32 Cal.App.5th 726, 732 [each of these prohibited acts are "separate and distinct offenses"].) All of these factual allegations as to defendants' conduct were deemed true by entry of their default.

### B. The expressed rationale for rejecting the application of section 496 to the theft of partnership funds is inherently flawed.

The Court of Appeal held that section 496 does not apply here "where the underlying conduct did not involve trafficking in stolen property, but rather the improper diversion of a limited partnership's *cash distributions* through fraud, misrepresentation, and breach of fiduciary duty[.]" (Typed opn.

40 [framing this issue as the question presented; emphasis added].) The underlying premise of this rationale is that embezzling *money* does not give rise to a violation of this statute. A related assumption is that monetary funds do not qualify as property within the meaning of section 496. Both assumptions are legally flawed.

### 1. The Court of Appeal's decision resurrects an antiquated view of the Penal Code by disregarding the 1951 legislative changes to section 496 and the 1927 consolidation of theft crimes.

The premise that section 496 applies only to stolen goods is simply obsolete. "Prior to 1951 section 496 applied only to stolen goods[.]" (*People v. Kunkin* (1973) 9 Cal.3d 245, 250, fn. 7.) The Court of Appeal's view, however, disregards this statutory change, erroneously assuming the 1972 enactment of civil remedies in section 496 turned the clock back by more than two decades to the pre-1951 era.

In seeking to segregate what types of property (stolen goods versus funds) can trigger a violation of section 496, the Opinion also disregards the legislature's consolidation of all theft-related crimes into the single crime of theft—the term used in section 496. "[L]arceny, embezzlement and obtaining property under false pretenses" all entail the unlawful act of "converting to one's own use of the property of another." (*People v. Vidana* (2016) 1

Cal.5th 632, 648 [discussing the 1927 consolidation of these theft-related offenses into the single crime of theft; internal citation omitted].) [10]

Just as goods/merchandise can be the object of larceny, funds can be embezzled or obtained under false pretenses. Any one of these three violations (larceny, embezzlement or obtaining something by false pretenses) is deemed as theft within the meaning of section 496. Section 496's "broad language is intended to include property which has been obtained not only by theft by larceny (i.e., stealing) but also by such other forms of theft as embezzlement." (*Kunkin, supra,* 9 Cal.3d at p. 250.) While embezzlement generally signifies theft of funds rather than theft of goods, the Court of Appeal's view that section 496 covers only the theft of goods is flawed, as evidenced by a related statutory equivalency. (See Pen. Code, § 490a [if a law or statute "refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor"].)

Another civil case under section 496 illustrates this point. In *Bell v. Feibush* (2013) 212 Cal.App.4th 1041 [Fourth Dist., Div. Three], the defendant engaged in a scam by inducing plaintiff to lend him money based on the false pretense the defendant owned a trademark. (*Id.* at p. 1043.) Defendant also made false representations that "his business plan was to launch

[10] Larceny requires the physical taking of property; embezzlement does not. (*Id.* at pp. 644-645.)

a national" business "that would earn millions of dollars." (*Id.* at p. 1044.) Noting section 496 "extends to property 'that has been obtained in any manner constituting theft'" (*id.* at p. 1048 [quoting subdivision (a)]), the court reviewed the statutory definition of theft which includes theft by false pretense. (*Ibid.* [quoting § 484].) The court held that, given the consolidation of separate, theft-related offenses into section 484 in 1927, the legislature must have known that section 496's reference to "theft" encompasses this particular form of theft when it later enacted the civil remedies in 1972. (*Id.*) The court concluded that theft by false pretense triggers the civil remedies in section 496. Accordingly, *Bell* upheld a default judgment awarding section 496 damages where the defendant fraudulently obtained a loan. In sum, the notion that section 496 is limited to stolen goods is flawed.

### 2. The Court of Appeal's decision also erroneously assumes money is not property within the meaning of theft laws.

While the legislature has amended section 496 several times since the 1972 enactment of its civil remedies, the legislature has never seen fit to reduce the scope of this statute by limiting it to the sale of stolen goods (as it originally read before 1951) or to limit it to the theft of cargo to protect the trucking industry (as it was previously proposed and rejected in 1972, a point amplified below). To the contrary, "the Penal Code defines property to include 'both real and personal property' and further defines personal property to include 'money, goods,

chattels, things in action, and evidences of debt.'" (*People v. Gonzales* (2017) 2 Cal.5th 858, 871 [citing Pen. Code, § 7, subds. (10), (12)].) Section 496 "employs a definition of property consistent with section 7. There is no indication of an intent to use the term 'property' in section [496] more narrowly than the definition of the same term already existing in the Penal Code." (*Ibid.* [rejecting the argument that shoplifting statute was limited to theft of stolen goods or "tangible merchandise," as opposed to entering a bank to cash stolen check; although another theft statute used broader language by specifically banning theft of "money, labor, real or personal property," this did not justify limiting scope of shoplifting statute where defendant engaged in shoplifting by cashing stolen check at bank].) The Penal Code's treatment of money as property is nothing unique. (See Civ. Code, § 14, subd. (b)(1), (3) [same as Penal Code section 7].)

Other decisions by this Court and lower courts have similarly held that the Penal Code's reference to property is not limited to traditional forms of property; e.g., tangible goods. (See, e.g., *People v. Romanowski* (2017) 2 Cal.5th 903, 913 ["theft of access card information falls within [section 484's] definition" of theft]; see also *People v. Conners* (2008) 168 Cal.App.4th 443, 446, 450, 453 [receipt of stolen funds by cashing check where defendant knew the funds used to pay the check were stolen]; *People v. Truong* (2017) 10 Cal.App.5th 551, 560 [applying section 496 to stolen credit cards]; *Caretto v. Superior Court* (2018) 28 Cal.App.5th 909, 912 [stolen debit cards].) Section 496 is not limited to stolen cargo either. (See *Naftzger v. Am.*

*Numismatic Society* (1996) 42 Cal.App.4th 421, 432-434 [stolen coins]; *People v. Schroeder* (1968) 264 Cal.App.2d 217, 225 [prescription drugs]; *People v. Towery* (1985) 174 Cal.App.3d 1114, 1119-1120 [stolen oil].)

In sum, adoption of defendants' view would require this Court to essentially overrule roughly a dozen cases decided in the past few decades interpreting section 496. Principles of *stare decisis* alone require rejection of such an extreme approach. By defendants' own admission, section 496 applies here: "engage in monetary theft and be subject to treble damages. Period." (12 CT-B: 2739:23-24.)

### C. Siry's interpretation of section 496 is directly supported by other published cases and the legislature's adoption of particularly broad language in enacting the civil remedies in this statute.

Partnership disputes involving *criminal* conduct – e.g., theft of funds – naturally trigger section 496 as reflected in the case law. In a case decided by the Fifth District during this appeal, the parties formed an entity such that "income from their business enterprises would flow to [the entity], then after certain reimbursements and expenses were paid, profits would be distributed in equal shares" to plaintiff and defendant. (*Switzer, supra,* 35 Cal.App.5th at p. 121.) The defendant "deceitfully took possession of, converted, and withheld for himself large sums of

money or income" as well as inventory belonging to plaintiff and the entity. (*Ibid.*)

Applying section 496 to claims for "lost partnership profits" (*id.* at p. 122) and other damages arising from "a partnership or joint venture arrangement" (*id.* at p. 121), the court rejected the argument that section 496 should not apply "in the context of a joint venture or preexisting business relationship where ordinary fraud and breach of contract remedies would be available." (*Id.* at pp. 119-120, 128.) The court reasoned "the issue of whether a wrongdoer's conduct in any manner constituted a 'theft' is elucidated by other provisions of the Penal Code defining theft, such as section 484." (*Id.* at p. 126.) Examining the various forms of conduct that qualify as theft under section 484, the court held that plaintiff had established a violation of section 496. (*Id.* at pp. 127-128.) The court reasoned section 496 "makes no exception for cases involving preexisting business relationships, nor does it limit applicability to violations involving common carriers or truck cargo, and we are not at liberty to insert such omitted terms into the statute." (*Id.* at pp. 129-130.)

After reviewing the legislative history pertaining to the civil remedies, the court noted that while "one of the goals of the bill was the elimination of markets for stolen property or cargo … this narrower version of the remedial section in the bill … was short-lived." (*Id.* at p. 131 [discussing the second version of the bill, supported by California Trucking Association, which would have limited the civil remedies only to plaintiffs that are "for-hire

carriers"].) However, a "subsequent amendment restored the earlier [first] version of the bill by expanding the civil remedy of treble damages to '*any person*' who had been injured by a violation." (*Ibid.* [emphasis/brackets added].) As shown in the following chart, the arguments raised by defendants here are infected with the same analytical flaw – reliance on a superseded bill that was affirmatively rejected by the legislature in identifying the eligible plaintiffs:

| | **Eligible Plaintiffs** | **Citation** |
|---|---|---|
| Original version as introduced | "Any person who has been injured" | (Sen. Bill No. 1068 (1972 Reg. Sess.) § 1, ¶ 4, March 15, 1972.) |
| First proposed amendment | "Any for-hire carrier operating under the jurisdiction of the [PUC] who has been injured" | (Sen. Amend. to Sen. Bill No. 1068 (1972 Reg. Sess.) § 1, ¶ 5, May 30, 1972.) |
| Second proposed amendment | "Any person who has been injured" | (Sen. Amend. to Sen. Bill No. 1068 (1972 Reg. Sess.) § 1, ¶ 4, June 26, 1972.) |
| Third proposed amendment | "Any person who has been injured" | (Assem. Amend. to Sen. Bill No. 1068 (1972 Reg. Sess.) § 1, ¶ 4, July 27, 1972.) |
| Final version as enacted | "Any person who has been injured" | (Stats. 1972, ch. 963, § 1, p. 1740.) |

As confirmed by *Switzer* and *Bell*, the first proposed amendment is relevant here only because it *failed*. "[W]hile [this] early version of the bill limited the plaintiffs who may bring civil actions to *public carriers* injured by the knowing purchase, receipt, concealment, or withholding of stolen property (Sen. Bill No. 1068 (1972 Reg. Sess.) as amended in Senate, May 30, 1972), the bill was subsequently amended to expand the class of potential plaintiffs to include '[a]ny person who has been injured by' the knowing purchase, receipt, concealment or withholding of stolen property." (*Bell, supra,* 212 Cal.App.4th at p. 1047 [citing Sen. Amend. to Sen. Bill No. 1068 (1972 Reg. Sess.) June 26, 1972]; emphasis in original.)

Besides limiting the civil remedies only to carriers (e.g., those transporting cargo), the superseded (May 30) bill would have imposed various record-keeping requirements on flea market owners and others who furnished space to vendors to offer "personal property for sale in such market place[.]" (Sen. Amend. to Sen. Bill No. 1068 (1972 Reg. Sess.) § 3, ¶ 4, May 30, 1972 [Siry's Motion for Judicial Notice [MJN 18], Ex. 2.) Thus, while this particular bill was focused on minimizing the theft of goods/merchandise, the absence of such provisions in subsequent versions (and, in particular, in the enacted version) conclusively shows section 496 was not limited to the sale of stolen goods *as enacted*.[11]

[11] The next version of the bill, proposed on June 26, 1972, also made it illegal to *sell* stolen property. (Sen. Amend. to Sen. Bill No. 1068 (1972 Reg. Sess.) § 1, ¶ 1, June 26, 1972.) While this

The Opinion below, however, insists the legislature was concerned with reducing "the incentive to hijack cargo from common carriers." (Typed opn. 45.) While it is true the California Trucking Association sponsored/proposed the bill – by unsuccessfully seeking to allow recovery only for cargo carriers – interpreting a statute based on its sponsor's identity is perilously flawed. Fee shifting statutes should not be defeated based on the identity of the original sponsor of legislation, especially if the legislature rejected a lobbyist's proposed version by ultimately enacting a different version of the proposed bill.

Defendants, however, will rely on *Lacagnina v. Comprehend Systems, Inc.* (2018) 25 Cal.App.5th 955 to support their position. Consistent with Siry's view, *Lacagnina* first observed the Penal Code "defines personal property to include money" and other tangible property. (*Id.* at p. 969 [citations and quotation marks omitted].) Addressing only employment claims, the court rejected a former employee's claim of theft of *labor* because the court believed "labor is not 'property.'" (*Ibid.*) Unlike the actual theft of partnership funds here, "the 'property' in question (Lacagnina's labor) was not 'stolen'; rather, he *received* a contractually *agreed-upon* salary, and had a dispute with his

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additional proscribed act remained in the final version of the bill as subsequently enacted, the *sale* of stolen property is not limited to stolen goods. For example, stolen debit cards, credit cards, checks, etc. can be sold just like merchandise—even easier. Therefore, this particular amendment does not support defendants' narrow view.

employer about the amount of commissions and other compensation due him on termination." (*Id.* at pp. 970-971.)

While *Lacagnina* does not apply here, its reasoning is flawed. Erroneously focusing on the superseded version of the bill that made "public carrier[s]" the only eligible group of plaintiffs under section 496 as proposed (*id.* at p. 972), the court found it "difficult to fathom … how imposing treble damages in an employment dispute over unpaid sales commissions could advance the legislative purpose to 'dry up the market for stolen goods.'" (*Ibid.*) As discussed above, the court's reliance on a *superseded* bill renders its rationale inherently flawed.

### D. The new grounds presented in the decision below – for limiting section 496 to stolen cargo or stolen goods – are flawed for multiple reasons.

In rejecting Siry's position, the Opinion advances additional reasons that defendants had not bothered to invoke. None of those novel grounds provide a basis to judicially revise the text or scope of section 496.

For example, the Opinion holds that applying the literal language of this statute – by allowing recovery by "any person" injured – would constitute a "significant change" in the law. (Typed opn. 43.) The Opinion reasons the remedies for fraud-related torts are traditionally "limited to the amount of damages actually caused by the fraud" rather than treble damages. (*Id.*) This is simply incorrect. The legislature has repeatedly

authorized various remedies, besides actual damages, to combat fraud. [12]

The Opinion also holds that allowing treble damages for fraud claims would "eclipse" the various formulas used to measure damages for fraud. (Typed opn. 43-44.) This is wrong, both generally and as applied in this case.

As to the former point, the law does not limit fraud damages to actual damages; besides punitive damages (Civil Code, § 3294), as shown in the preceding footnote, various forms of damages may be recovered for different types of fraud. As applied to this particular case (which does not involve the statutory claims listed in the footnote), this Court has adopted the following rule: "When a statute recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears." (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215; see also *Greenberg v. Western Turf Assn.* (1903) 140 Cal. 357, 363-

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[12] (See, e.g., Ins. Code, § 1871.7, subd. (b) [authorizing treble damages plus "civil penalty" to be imposed "in addition to any other penalties that may be prescribed by law" for specified insurance fraud]; Gov. Code, § 12651, subd. (a) [treble damages plus "civil penalty" under False Claims Act]; Civ. Code, § 1780, subds. (a)-(c) [actual plus punitive damages in all CLRA cases plus "treble actual damages" for CLRA overcharging violations]; see also *Clark v. Superior Court* (2010) 50 Cal.4th 605, 609 ["Civil Code section 3345 authorizes the trebling of a remedy" if such a remedy "is in the nature of a penalty"—essentially authorizing trebling *punitive* awards in actions governed by this statute].)

364 [where statutory penalty is imposed for wrongful act, punitive damages may *also* be recovered if malice or oppression is shown].) Furthermore, because there are "many differences" between statutory damages and punitive damages (*Hill v. Superior Court* (2016) 244 Cal.App.4th 1281, 1287 [addressing double damages under Probate Code section 859]), allowing section 496 relief does not "effectively repeal the punitive damages statutes" (typed opn. 44). (See *Estate of Ashlock* (2020) 45 Cal.App.5th 1066, 1077 ["There is nothing punitive about requiring a thief to return stolen property to its rightful owner"; reviewing conflicting authorities under section 859 as to calculation/definition of double damages].)

There are more basic flaws in the Court of Appeal's reasoning. "Unless expressly provided, statutes should not be interpreted to alter the common law[.]" (*Borg-Warner Protective Services Corp. v. Superior Court* (1999) 75 Cal.App.4th 1203, 1208.) "Accordingly, a statute will be construed in light of common law principles unless it contains clear and unequivocal language that discloses an intent to depart from, alter, or abrogate the common law rule concerning a particular subject matter." (*Ibid.* [citation omitted].) [13] There is no clear and unequivocal language that, in enacting the civil remedies in

[13] This principle goes back more than four centuries. (See *Dr. Foster's Case* (K.B. 1614) 77 Eng. Rep. 1222, 1232 [statutes "ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated"] (Coke, L.J.).)

section 496, the legislature sought to alter or abrogate the common law rule governing *punitive* damages.

In articulating the implied-repeal argument, the Opinion also rationalized that recovery of treble damages under section 496 would "effectively" allow plaintiffs to recover enhanced damages while bypassing the requirements imposed by Civil Code section 3294. (Typed opn. 44.) "The problem with [this] argument is that it erroneously equates punitive damages with statutory damages, and assumes the two are awarded based on the same standards." (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1597.)

Despite noting the "strong presumption" against an implied repeal of the common law, the Opinion further held that Siry's interpretation would "effectively repeal the punitive damages statutes" by allowing recovery of treble damages based on the preponderance of the evidence. (Typed opn. 44.) Under this theory, every single treble-damage statute on the books would have to be invalidated as inconsistent with the clear-and-convincing standard applied to punitive damages. After all, while treble damages are generally not designed to be punitive, they *can* have some deterrent effect. Besides, any concern as to a dual standard for recovery can be eliminated by requiring plaintiffs to establish entitlement to treble damages by clear and convincing evidence, the same standard for punitive damages. [14]

[14] Because Siry obtained treble damages by default, Siry would be entitled to treble damages under any standard—be it

Finally, the Opinion held in a footnote that Siry's interpretation is inconsistent with Code of Civil Procedure section 1021 by allowing attorneys' fees for tort claims. (Typed opn. 44, fn. 11.) Section 1021 adopts the American rule (no fee-shifting) unless otherwise "specifically provided for by statute." Because section 496 specifically provides for fee shifting, there is no inconsistency. Otherwise, other statutes that allow fee shifting for *tort* claims would have to be invalidated. (See, e.g., Code Civ. Proc. § 1021.9 [fee shifting for trespass]; Civ. Code, § 1780, subd. (e) [fee shifting for misrepresentations listed in section 1770 governing CLRA cases].)

In sum, the novel grounds presented in the Opinion should be rejected.

### E. The public policy arguments advanced by defendants do not justify judicial revision of section 496.

As for defendants' argument that applying section 496 here would "open[] the door for creditors to claim that any breach of contract constitutes fraud," Penal Code section 484 "describes acts constituting theft in rather specific terms, likely precluding any such abuse." (Barton & Spurling, *Bell v. Feibush* Portends Higher Stakes in Fraudulent Lending Cases (Dec. 2013) L.A.

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preponderance of the evidence, clear and convincing, or beyond a reasonable doubt. (See *Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361–362 [error to apply usual preponderance-of-evidence standard at default prove-up hearing because plaintiff need only make a prima facie showing as defendant admits material allegations of the complaint by defaulting].)

Lawyer, 44.) This significantly minimizes the possibility of mischief. Furthermore, a "victim's status as a creditor of a debtor defendant, without more, does not establish that such person has a proprietary interest in any specific property." (*Tisch v. Tisch* (Colo. Ct.App. 2019) 439 P.3d 89, 103 [applying civil theft statute where defendant diverted company profits for personal use].) Therefore, a pure breach-of-contract claim does not give rise to section 496 liability. Furthermore, because enhanced damages are assessed by the court rather than by the jury, there is no risk of passion or prejudice either.

Moreover, "policy concerns about the potential consequences of our interpretation of section 496(c)" do not provide a basis for judicially narrowing this statute. (See, e.g., *Bell, supra,* 212 Cal.App.4th at p. 1049 [rejecting defendant's argument that civil remedies are triggered only upon criminal conviction].) Courts "may not rewrite the statute to bring about a contrary result even if that result could be argued to be socially desirable. That is for the Legislature." (*Fagundes v. Am. International Adjustment Co.* (1992) 2 Cal.App.4th 1310, 1316.)

In any event, these concerns are simply inapplicable here because the legislative imposition of "criminal penalties for embezzlement and breach of fiduciary duty" (*Bardis, supra,* 119 Cal.App.4th at p. 24) shows Siry's case did not involve an ordinary breach-of-contract case. As *Bardis* held in another real estate partnership case, "California also imposes substantial criminal penalties for embezzlement and breach of fiduciary

duty." (*Id.* [citing Pen. Code § 484 and sentencing laws].) None of these criminal laws deterred defendants from designing and implementing an unusually covert and complicated scheme to defraud Siry by misappropriating and diverting funds—or subsequently hiding their theft in an equally brazen manner. (15 SCT-B: 3725, ¶20; 3727, ¶¶30-31; 3729, ¶¶41-42, 44; 3730:25.) Applying section 496 is thus justified in this particular case. (See *Heritage Cablevision of Cal., Inc. v. Pusateri* (1995) 38 Cal.App.4th 517, 522 [treble damages allowed where criminal laws provided no deterrence].) While "a remedial statute is to be liberally construed on behalf of the class of persons it is designed to protect" (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 860-861), there is no reason to arbitrarily limit the scope of section 496, given its broad language. (See Pen. Code, § 7, subd. (12) [money is personal property].) Because defendants engaged in criminal conduct, this reinforces the need for enhanced remedies as prosecutors typically do not prosecute such white collar crimes. [15]

[15] Even in non-fiduciary cases involving purely contract-based misconduct, there is no legislative ban against treble damages. (See, e.g., Civ. Code, § 1738.15 [imposing treble damages against distributor that "willfully fails to enter into a written contract as required by this chapter or willfully fails to pay commissions"].) After all, a contractual relationship is not a license to commit crimes.

### F. Other states have allowed recovery in similar circumstances under their respective civil theft statutes.

Although California has adopted some of the broadest and most comprehensive civil remedies in the entire nation, adoption of defendants' view would place California far behind other states. Other states with similar civil theft statutes allow recovery for the types of damages sought here under their statutes. (See *Tisch, supra,* 439 P.3d at pp. 95, 103-105 [controlling shareholder's use of company funds or profits for personal use triggered treble damages for civil theft]; *Discover Leasing v. Murphy* (1993) 33 Conn.App. 303, 311 [financing company entitled to pursue claim under Connecticut's civil theft statute where defendant used company's funds for his own benefit without authorization]; *Zinn v. Zinn* (Fla.Dist.Ct.App. 1989) 549 So.2d 1141, 1142 [treble damages allowed under Florida law where "defendants used the corporation for their personal, illegal, fraudulent purposes"]; see also Wis. Stat. § 895.446 [allowing three times actual damages plus attorneys' fees for concealing or misusing business funds under § 943.20(1)(b)].) The concern raised below regarding proliferation of such statutory claims has not materialized to stop other courts from allowing recovery for damages far beyond the theft of goods. (See, e.g., *Ashburn v. Caviness* (Tex.Ct.App. 2009) 298 S.W.3d 401,

402-403 [allowing recovery for killing plaintiff's dog under Texas's civil theft statute as form of theft by misappropriation].)[16]

Other states similarly allow the recovery of enhanced remedies without the artificial distinction drawn by defendants here between the theft of goods versus money. (See Colo. Rev. Stat. §§ 18-4-401(1), 18-4-405 [treble damages and attorneys' fees for theft of "all property"]; S.C. Code Ann. § 16-13-181 [treble damages and attorneys' fees for receiving or possessing stolen goods or other property under § 16-13-180(A)]; Ohio Rev. Code Ann. § 2307.61(A)(1)(b)(ii) [treble damages for "theft, embezzlement, wrongful conversion … deceit, or fraud" under § 2913.01(K)(3)]; Utah Code Ann. § 76-6-412(2) [imposing treble damages and attorneys' fees when defendant "receives, retains, or disposes of the property of another knowing that the property is stolen" or "conceals, sells, withholds, or aids in concealing, selling, or withholding the property from the owner" as proscribed by § 76-6-408(2)]; Mich. Comp. Laws § 600.2919a [authorizing treble damages and attorneys' fees for theft-related offenses as to property]; see also *Dept. of Agriculture v. Appletree*

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[16] These states' statutes provide as follows: Conn. Gen. Stat. § 52-564 (2019) ["Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages"]; Fla. Stat. § 772.11(1) [treble damages and attorneys' fees for civil theft based on misuse of "funds, assets, or property" of disabled or elderly victims under section 825.103, among various other violations]; Tex. Civ. Prac. & Rem. Code Ann. §§ 134.001-.005 [defining theft as "unlawfully appropriating property or unlawfully obtaining services" in § 134.002(2)].

*Marketing, LLC* (Mich. 2010) 779 N.W.2d 237, 240-242 [applying treble damage statute where defendant "wrongfully spent the money held in trust" after failing to remit funds it had collected for plaintiff].)

While a few states have imposed certain limitations on the categories of plaintiffs that can recover civil theft damages when stolen goods are not implicated, section 496 has no such limits. (See 720 Ill. Comp. Stat. 5/17-56(g) [imposing liability for "treble the amount of the value of the property obtained, plus reasonable attorney fees and court costs" for financial exploitation of elderly or disabled individual]; Miss. Code Ann. § 11-7-165 [treble damages for conversion, embezzlement, extortion, theft or fraud as to vulnerable adults].) Similarly, section 496 does not limit the availability of enhanced remedies to criminal cases. (But see R.I. Gen. Laws § 11-41-3 [imposing fines in criminal cases for "three times the value of the money or property … embezzled or converted" by a fiduciary or those entrusted with money].) Against this background, the Court of Appeal's decision wipes out California's civil remedies in the critical context of business and consumer litigation, putting California far behind a number of other states.

The Court of Appeal's decision should be reversed based on its evisceration of section 496.

## II. The Court of Appeal Erred by Upholding the Elimination of Nearly Ten Million Dollars from the Original Judgment Based on a Defective New-Trial Order.

### A. Procedural and analytical summary

The procedural issue presented here relates to the trial court's defective order granting a new trial. Although the trial court invoked ground five (excessiveness of damages) under Code of Civil Procedure section 657 to reduce three categories of damages as a matter of law, this ground does not apply to such legal challenges. While the trial court's order was defective by invoking the wrong ground in conditionally granting a new trial, Siry concedes that appellate courts can salvage a defective new trial order on an alternative ground. However, to enable the appellate court to conduct this rescue operation, the burden is on the party who sought a new trial to invoke an alternative ground by (1) affirmatively identifying the alternative ground and (2) presenting supporting authorities and citations to the record in support of that alternative ground.

While defendants invoked ground six as an alternative ground (claiming the original judgment was "against law"), that ground was implicitly (and correctly) rejected by the appellate court, as evidenced by the appellate court's failure to apply ground six as an alternative ground to affirm the new trial order. Applying this Court's prior decisions requiring the party seeking a new trial to discharge its burden on appeal for affirming a

defective new trial order on an alternative ground, defendants' failure to invoke ground seven (the one advanced and adopted *sua sponte* by the appellate court) requires reinstatement of the original judgment. Before reaching these procedural issues, however, we address the preliminary issue as to whether defaulted defendants have standing to seek a new trial in the first place.

### B. First scenario: Defendants could not seek a new trial on certain grounds while remaining in default.

#### 1. As a threshold matter, the Court should resolve the conflicting lines of authority regarding the standing issue.

The following chart summarizes the evolution of key decisions by this Court and the intermediate appellate courts on this point.

| Year | Holding | Citation |
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| 1912 | "A defendant against whom a default is entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action. He cannot thereafter, nor until such default is set aside in a proper proceeding, file pleadings, | *Title Insurance & Trust Co. v. King Land & Improvement Co.* (1912) 162 Cal. 44, 46 [internal citation and |

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| | or move for a new trial, or demand notice of subsequent proceedings." | quotation marks omitted] |
| 1950 | "until such default is set aside in a proper proceeding," a defaulted defendant cannot "move for a new trial…" | *Howard Greer Custom Originals v. Capritti* (1950) 35 Cal.2d 886, 888-889 [citing *Title Ins.* and two other decisions by this Court from 1919 and 1947] |
| 1957 | "We conclude … that a motion for a new trial is proper procedure in any of the classes of judgments mentioned in the first group of cases above cited [including default judgments] whether the judgment is based on law or fact or both, *except possibly in the case of default judgments* or judgments by agreement or confession *where there may be the question* of the right of the | *Carney v. Simmonds* (1957) 49 Cal.2d 84, 90 [overruling prior cases that had barred the use of new trial motions to resolve *legal* issues]; brackets and emphasis added |

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| | moving party to make any objection to the judgment." | |
| 1966 | "The passage quoted above suggests that in the case of a default judgment, where the right of the moving party to make an objection to the judgment *has not been forfeited,* bargained away, or *otherwise lost*, he may use a motion for new trial…" | *Jacuzzi v. Jacuzzi Bros., Inc.* (1966) 243 Cal.App.2d 1, 22 [referring to *Carney*'s quote above]; emphasis and ellipses added |
| 1982 | "The only conceivable basis for action by the trial court to vacate a default judgment on the ground of excessive damages is the statutory motion for new trial. Subdivision 5 of section 657 specifically provides that a new trial may be granted for the cause of 'excessive or inadequate damages,' and subdivision 6, which applies where 'the verdict or other decision is against law' includes instances where the damages are either excessive or inadequate as a matter of law." | *Don, supra,* 131 Cal.App.3d at p. 703 [internal citations omitted] |

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| 1984 | "A defendant against whom a default has been entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action; he cannot thereafter, *until such default is set aside in a proper proceeding*, file pleadings or *move for a new trial* or demand notice of subsequent proceedings." | *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-386 [quoting *Brooks v. Nelson* (1928) 95 Cal.App. 144, 147-148]; emphasis added [17] |

Given these conflicting views, the Court should first decide which, if any, of the grounds specified in section 657 may be invoked by a defaulted defendant to seek a new trial. If the court decides that a defendant may seek a new trial without having to move to set aside the default (or the default judgment), the issue becomes a purely statutory one in identifying which particular ground(s) may be invoked to challenge a default judgment.

The resolution of this issue may also eliminate the confusion as to the proper procedure for challenging a default judgment (by direct attack versus collateral attack). This Court

[17] Another court has erroneously cited *Devlin* for the proposition that "the entry of the default terminates [defendant's] rights to take any further affirmative steps in the litigation until either the default is set aside or a default judgment is *entered*." (*City of Riverside v. Horspool* (2014) 223 Cal.App.4th 670, 681 [emphasis/brackets added]; see also *People v. One 1986 Toyota Pickup* (1995) 31 Cal.App.4th 254, 259 [same].)

held three years ago that a "motion for a new trial is 'a new statutory proceeding, collateral to the original proceeding' and constitutes a new action brought to set aside the judgment." (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 336 [internal citation omitted].) If the motion for new trial is a collateral attack on the judgment, that eliminates certain challenges such as "a failure to state a cause of action, insufficiency of evidence, abuse of discretion, and mistake of law." (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950 [internal citations omitted].)

On the other hand, if a new trial motion is a direct attack (just like an appeal), the answer to the question presented (as to the grounds for attacking a default judgment by a new trial motion) would presumably depend on the grounds allowed on *appeal* from a default judgment. This was the rationale adopted by the appellate court below. (Typed opn. 34-35.) The problem with this approach, however, is that appellate courts are not consistent in defining the grounds for challenging a default judgment on appeal, as shown below.

### 2. Regardless of which view is adopted by this Court, the result would be the same here: reinstatement of the original judgment in Siry's favor.

After summarizing the conflicting views as to the scope of *appellate review* of default judgments (the yardstick used by the

appellate court here to decide whether a new trial motion should be allowed), we apply each view to the procedural history of this case:

- "Where, as here, the defaulting party takes no steps in the trial court to set aside the default judgment, appeal from the default judgment presents for review only the questions of jurisdiction and the sufficiency of the pleadings." (*Corona v. Lundigan* (1984) 158 Cal.App.3d 764, 766-767 [internal citations omitted].) Under this view, defendants' inability to challenge the default judgment as excessive on appeal would require reinstatement of the original judgment because defendants did not seek to set aside the default judgment here.

- "In an appeal from a default judgment, review of the default judgment is limited to questions of jurisdiction, sufficiency of the pleadings and excessive damages, if the damages awarded exceed the sum sought in the complaint." (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 824 [internal citations omitted].) Under this view, because the damages awarded to Siry do not exceed the sum sought in the complaint, the original judgment would have to be reinstated. (See *id.* [highlighting defendant's failure to move "to set aside the default"].)

- In an appeal from a default judgment, "the issue of speculative damages is subject to review where … the damages awarded are unsupported by sufficient evidence." (*Scognamillo v.*

*Herrick* (2003) 106 Cal.App.4th 1139, 1150.) By contrast, the sufficiency of the evidence to support liability cannot be challenged in an appeal from a default judgment. (*Id.*) Under this view, because the trial court granted a new trial by deeming the damages excessive as a matter of law (rather than based on insufficiency of the evidence), the original judgment would have to be reinstated. (13 CT-B: 2994-2995.)

- Consistent with *Scognamillo*, other courts have held that damages awarded in a default judgment may be challenged on appeal "where the damages awarded are totally unconscionable and without evidentiary justification." (*Uva v. Evans* (1978) 83 Cal.App.3d 356, 364.) Because the trial court did not grant a new trial based on insufficiency of the evidence (X-ARB 15 & fn. 6), the original judgment would have to be reinstated under this view again.

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While the Court of Appeal also cited a case allowing a defaulted party to "appeal [the] refusal to set aside verdict" as "contrary to law" (typed opn. 34 [citing *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127, 139]), importing the standards governing other types of post-trial motions into the new-trial statutory scheme by this analogy would exacerbate the procedural minefield found in section 657. Because this statute already includes two grounds that sound confusingly similar (despite their legal differences) – "against law" and "error in law" – importing the "contrary to law" ground for appealing a default judgment or motion to vacate such

a judgment would cause even more confusion. Furthermore, "it has uniformly been held that an order granting a new trial is in excess of jurisdiction and void if, for example, it is made … on a ground not prescribed by statute[.]" (*Mercer v. Perez* (1968) 68 Cal.2d 104, 118 [citations omitted]; *Diamond v. Superior Court* (1922) 189 Cal. 732, 739-740 [same].) This eliminates *Lasalle* as a reference point in this analysis.

To summarize, while the Court of Appeal sought to employ a symmetrical approach (typed opn. 34-35) as to the availability of a motion for a new trial and the scope of appellate review of a default judgment – in terms of the possible grounds for a new trial and the scope of such an appeal – the divergent views discussed above lead to the same conclusion: reinstatement of the original judgment in this particular case. Because the cases are in conflict on this point, the Court should resolve this issue.

### C. Second scenario: Assuming defendants had standing to seek a new trial on all statutory grounds while remaining in default, the trial court's order granting a new trial is defective, requiring reversal.

As used in section 657, "the words 'ground' and 'reason' have different meanings." (*Mercer, supra,* 68 Cal.2d at p. 112.) "The word 'ground' refers to any of the seven grounds listed in section 657." (*Oakland Raiders v. Nat'l Football League* (2007) 41 Cal.4th 624, 634.) The statute then "requires the court to specify its 'reason or reasons' for granting the new trial 'upon each

ground stated.'" (*Mercer, supra,* 68 Cal.2d at p. 112.) We apply these requirements below.

### 1. The sole ground invoked by the trial judge for granting a new trial does not actually exist.

Given the trial court's holding that "the judgment consisted of excessive damages as a matter of law under Code of Civil Procedure section 657, subsection (5)" (13 CT-B: 3008; 2994), this ruling is erroneous if subsection/ground five ("excessiveness") requires weighing the evidence—as opposed to making a ruling "as a matter of law." (Siry-RB-XAOB 159; X-ARB 21.) "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of **excessive** or inadequate **damages**, unless *after weighing the evidence* the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (§ 657, 3d par. [emphasis added].)

As explained by this Court, in direct "contrast to the grounds of insufficient evidence and excessive or inadequate damages, the phrase 'against law' does not import a situation in which the court weighs the evidence and finds a balance against the verdict, as it does in considering the ground of insufficiency of the evidence." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 [internal citation and additional quotation marks omitted].) Thus, ground five (excessive damages) applies only

where the court weighs the evidence factually. By definition, there is no weighing of the evidence in reducing damages "*as a matter of law*." Because the trial court deemed the damages excessive as a matter of law, the court erred by invoking ground five as the sole basis for reducing the original judgment, thus rendering the new trial order defective.

### 2. It is impossible to salvage the defective order on an alternative ground in this particular case.

#### a. The first part of ground six, "insufficiency of the evidence to justify the verdict or other decision," does not save the order.

We acknowledge that an appellate court can nonetheless affirm a new trial order that was issued based on the wrong statutory ground, but there are caveats/exceptions to this general, harmless-error approach. For example, new trial orders "may not be affirmed on the ground of insufficiency of the evidence or on the ground of excessive or inadequate damages unless that ground is specified in the order." (*Oakland Raiders, supra,* 41 Cal.4th at p. 634.) "Here, the trial court's order does not state it granted the new trial motion on the ground of insufficient evidence…. Because the order does not specifically state it is granted based on insufficiency of the evidence, we cannot affirm the order on that basis." (*Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138, 151.)

Having eliminated the insufficiency-of-evidence ground, we are left with only two other potential grounds that could conceivably apply here: the last part of ground six (a judgment being "against law") and ground seven ("error in law, occurring at the trial and *excepted to by the party making the application*"). [18] Neither one can save the order in this particular case.

### b. The "against law" ground does not apply here.

While defendants invoked the "against law" ground as the only other possible/alternative ground for salvaging the defective new trial order (Neman ARB/X-RB 90-91; SF ARB/X-RB 46), that ground does not apply here. Here's why.

The "against law" ground does not "include in that phrase all or any of the other several distinct and separate grounds of the motion, which are specified in [section 657]. Whatever may be the class of cases to which that phrase was intended to apply, it is clear that it has no application to cases falling within either of the other subdivisions, into which the grounds for a new trial are divided by the statute." (*Brumagim v. Bradshaw* (1870) 39 Cal. 24, 35 [brackets added].)

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[18] Ground six includes two independent grounds for granting a new trial: "Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is *against law*." (§ 657.) Based on the elimination of the insufficiency ground above, the focus here is on the "against law" ground, referred to as the sole remaining "ground six" below.

The original judgment "was 'against law' only if it was unsupported by *any* substantial evidence, i.e., if the entire evidence was such as would justify a directed verdict against the parties in whose favor the verdict was returned." (*Sanchez-Corea, supra,* 38 Cal.3d at p. 906 [emphasis added; brackets and internal quotation marks omitted].) Because the trial court expressly rejected the argument that Siry had failed to present "sufficient evidence of Defendants' financial condition" to obtain punitive damages (13 CT-B: 3017 [ruling]; 11 CT-B: 2463; 12 CT-B: 2739), the reduction of punitive damages could not have been made on this ground.[19]

Likewise, reducing treble damages based on the legal definition of this term (3:1 versus 2:1 ratio to actual damages) does not involve a determination as to whether there is any substantial evidence; neither does the legal determination of whether one may recover both treble and punitive damages. Consequently, the original judgment was not "against law," and this alternative ground does not provide a basis to salvage the new-trial order. (See *Fergus v. Songer* (2007) 150 Cal.App.4th 552, 567 [decision is "'against law' only if it was unsupported by any substantial evidence"]; emphasis added; internal quotation marks partially omitted; *Chakalis v. Elevator Solutions, Inc.* (2012) 205 Cal.App.4th 1557, 1573 [jury verdict deeming non-

[19] "A constitutional reduction, on the other hand, is a determination *that the law does not permit the award.*" (*Gober v. Ralph's Grocery Co.* (2006) 137 Cal.App.4th 204, 214 [emphasis in original].) The court reduced the punitive damages as beyond the constitutional maximum. (13 CT-B: 3018-3021.)

party doctor contributed to plaintiff's injury was against law as lacking substantial evidence where no expert testimony *whatsoever* was presented to show such medical causation].)

### c. Ground seven, limited to a preserved "error in law," does not apply here.

Ground seven does not apply here on its face. It only covers "[e]rror in law, occurring at the trial *and excepted to by the party making the application*." (§ 657.) While it is true that the entry of defendants' default precluded them from participating in this case (or objecting to Siry's prove-up evidence), this ground does not include a futility or impossibility exception. The Court of Appeal's adoption of such an exception "in effect, seeks, under the guise of judicial construction, the elimination, as unnecessary, of an express requirement of the section." (*Mercer, supra,* 68 Cal.2d at p. 117.) "The power of the legislature [in] specifying procedural steps for new trials is exclusive and unlimited. [Citations.] The wisdom of or necessity for certain requirements are matters for legislative and not judicial consideration and the judiciary, in its interpretation of legislative enactments may not usurp the legislative function by substituting its own ideas for those expressed by the legislature." (*Id.* at pp. 117-118.) Having failed to either allege or establish the preservation requirement imposed by ground seven, defendants failed to properly invoke this ground (10 CT-B: 2411: 20) "and it is too late to raise the point for the first time in this Court." (*Brumagim, supra,* 39 Cal. at p. 43 [failure to properly invoke insufficiency-of-evidence

ground in trial court precluded such assertion in this Court].)

**d. Even if ground seven applied here, defendants' failure to affirmatively invoke it on appeal requires reversal of the new trial order.**

The Court of Appeal disregarded Siry's argument (Pet. for Rehearing 17) that *defendants* had the burden (1) to argue on appeal that ground seven ("error in law") applies here and (2) to show why this alternative ground "*legally requires*" a new trial. (*Sanchez-Corea, supra,* 38 Cal.3d at p. 905 [emphasis added].) Despite defendants' utter failure to mention ground seven in their appellate briefs as an alternative ground for salvaging the new trial order, the Court of Appeal unilaterally undertook this duty for them. (Typed opn. 37-38 & fn. 10.) The appellate court shifted the burden on appeal to Siry—by faulting Siry for not challenging on appeal the substantive merits of the reductions made in the new trial order (typed opn. 33, fn. 9) and by essentially requiring Siry to preemptively eliminate other potential grounds for a new trial.

The Court of Appeal's unorthodox burden-shifting approach violates the rules articulated by this Court in *Oakland Raiders, supra,* 41 Cal.4th 624. In deciding which party has the burden in challenging or defending a defective new trial on appeal, this Court began with the premise that "a party who seeks a court's action in his favor bears the burden of persuasion thereon." (*Id.*

at p. 640.) By contrast, "when a party … asks a reviewing court to sustain a *defective* trial court order, relying upon a ground stated in the new trial motion but not supported by a statement of reasons, the situation is reversed." (*Id.* at p. 641 [emphasis in original].) "Now the burden is on the *movant* to advance any grounds stated in the motion upon which the order should be affirmed, and a record and argument to support it and to persuade the reviewing court that the trial court should have granted the motion for a new trial." (*Ibid.* [internal quotation marks and citation omitted; emphasis added].) Applying these rules, this Court held that if the trial judge grants a motion for new trial based on a particular ground but fails to specify the reasons for granting a new trial as required by section 657, the party seeking to sustain the defective order has the burden on appeal to show why the order should be affirmed.

While the trial judge issued a timely specification of reasons in Siry's case (unlike *Oakland Raiders*), the Court of Appeal's approach here violates *Oakland Raiders*' burden-shifting rules. After all, defendants were the ones seeking to sustain the defective order on appeal. Because the new trial order was admittedly defective by invoking an inapplicable ground for granting a new trial (typed opn. 38, fn. 10), defendants had the burden to advance ground seven as an alternative ground to salvage the order. "[I]f the trial court specified the grounds … for granting a new trial but the order cannot be affirmed on those grounds …, the *moving party* bears the burden on appeal to show that the order should be affirmed on another ground stated in the

motion…." (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1127 [citations omitted; emphasis/ellipses added].) Accordingly, appellate courts "will consider only the grounds … asserted by [the party that sought new trial] on appeal." (*Ibid.* [brackets/ellipses added].) [20]

The Court of Appeal's novel approach defeats the legislative safeguards added to section 657. Before the 1965 amendments to this statute, "an appellant challenging an order granting a new trial tended to have great difficulty in presenting his case." (*Mercer, supra,* 68 Cal.2d at p. 113.) This was particularly true where "the notice of motion was predicated on all or most of the statutory grounds, and the subsequent order specified neither the ground or grounds found applicable nor the reasons therefor; in that event, the appellant was left in the dark as to which aspect of the trial to defend, and quite understandably struck out blindly in several directions at once." (*Ibid.*) The statute was amended to eliminate this problem by imposing various procedural requirements in granting a new trial. (*Id.* at p. 115.) "In view of this purpose [in the legislative amendments to this

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[20] Ellipses are added here because there is no need to address whether an order granting a new trial may be affirmed based on new *reasons* (as opposed to grounds). We simply note that "on appeal from an order granting a new trial … upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (§ 657, last par.)

statute] there should be no hesitancy in placing the burden on the respondent to furnish a record and argument to support the order granting the new trial on any grounds not set forth in the order." (*Tagney v. Hoy* (1968) 260 Cal.App.2d 372, 377 [discussing *Mercer*'s review of such legislative changes and reversing order granting new trial]; brackets added.)

The Court of Appeal's approach, by contrast, effectively requires Siry to have preemptively attacked every potential alternative ground for salvaging the defective new trial order. Because defendants invoked nearly all of the statutory grounds in their notice of intention to move for new trial (10 CT-B: 2411), this approach is particularly flawed. This Court's prior "decisions have frequently overturned orders granting a new trial based on a conclusion that to do otherwise would frustrate the purposes of section 657's requirements." (*Oakland Raiders, supra,* 41 Cal.4th at p. 637.) "The right to move for a new trial is a creature of statute and the procedure prescribed by law must be closely followed." (*Donlen, supra,* 217 Cal.App.4th at p. 151.) "Strict construction of the [new trial motion] statute ensures protection of the litigant's rights." (*Wagner v. Singleton* (1982) 133 Cal.App.3d 69, 72.)

Furthermore, allowing an appellate court to undertake *sua sponte* the moving party's duty to present an alternative ground for affirming a new trial order raises major institutional problems. The orderly procedures prescribed by statute for granting a new trial are designed to ensure a meaningful right of

appeal for all litigants. The Court of Appeal's approach, by contrast, violates society's "manifest interest in avoiding needless retrials" which necessarily "cause hardship to the litigants, delay the administration of justice, and result in social and economic waste." (*Mercer, supra,* 68 Cal.2d at p. 113.) This lawsuit, filed in 2007, was originally tried to a jury eleven years ago, remanded for a new trial in 2012, leading to a new trial ruling based on the defective order at issue in 2016—illustrating the significant judicial costs.

Finally, affirming a defective new trial based on a brand new ground advanced by the appellate panel violates the principle of party presentation: parties "know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." (*United States v. Sineneng-Smith* (2020) 140 S. Ct. 1575, 1579.) For all of these reasons, the appellate court's rescue operation should be rejected in this particular case. (See *Brooks v. Harootunian* (1968) 261 Cal.App.2d 680, 685 ["nor in respondent's brief, is there so much as a hint of any … 'error in law, occurring at the trial and excepted to by the defendant' that would have supported the grant of a new trial…"].)

## CONCLUSION

The original judgment should be reinstated in its entirety.

Respectfully submitted,

Dated: October 30, 2020

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: */s/ Robert Cooper*
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## CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this petition consists of 12,384 words as counted by Microsoft Office Word 2013, the word-processing program used to generate this document.

Dated: October 30, 2020

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: */s/ Robert Cooper*
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## PROOF OF SERVICE

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By: */s/ Rolando Castellanos*
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