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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The answer brief is fundamentally flawed for several reasons. First, it seeks to carve out a special exception to liability under Penal Code section 496 for the theft of partnership funds. While defendants erroneously argue that embezzlement is not covered by this statute, this is a moot point because section 496 covers other offenses that were alleged by plaintiff Siry Investments ("Siry"). Second, in seizing on a few pieces of the 1972 legislative history to override the actual text of this statute – so as to limit its application to the theft of goods – defendants seek to turn the clock back to the pre-1951 era when "section 496 applied only to stolen goods[.]" (*People v. Kunkin* (1973) 9 Cal.3d 245, 250, fn. 7.) Defendants also ignore the fact that the operative text is the statutory text as enacted–not some piece of correspondence found in the legislative file. Finally, defendants have erroneously equated statutory treble damages with punitive damages in a last ditch effort to suggest double recovery based on these distinct remedies.

With respect to Siry's cross-appeal, defendants have not challenged the Court of Appeal's holding that the trial court invoked "the wrong statutory ground" in slashing the judgment. (Typed opn. 38, fn. 10.) Because the order granting a new trial invoked an inapplicable ground to eliminate nearly ten million dollars from the original judgment, and given defendants' failure to invoke the alternative ground used *sua sponte* by the Court of Appeal to salvage the defective new-trial order, reinstatement of the original judgment is required. Reversal is particularly

justified here because the orderly procedures required by law for granting a new trial are intended to protect the courts and society from unnecessary retrials of claims that have already been tried to verdict/judgment. Otherwise, an erroneous or unjustified new trial order undermines the constitutionally protected right to trial by jury (Cal. Const., art. I, § 16) and vitiates the judicial system's investment – here, a nine-year-long investment as of the new trial ruling entered five years ago – in adjudicating litigants' disputes. (OBOM 66; 2 CT-B: 346 [2009 verdict].) This is not an issue just for the plaintiffs' bar or just for the defense bar. This is an issue affecting all litigants and the court system itself. Therefore, strict application of the rules governing motions for new trial is absolutely critical—not only here but in all civil cases.

LEGAL DISCUSSION

I. Defendants' Requests for Judicial Revision of Section 496 Should Be Rejected.

A. The civil remedies in section 496 apply to various theft offenses, including embezzlement.

1. The act of embezzlement triggers civil liability under section 496.

Defendants argue extensively that section 496 does not apply to theft by embezzlement. (ABOM 23-29.) This Court's decision in one of the key cases cited by Siry (OBOM 29) rejects this notion: "Embezzlement is a recognized form of theft within

the meaning of section 496." (*Kunkin, supra,* 9 Cal.3d at p. 250, fn. 7.)

Refusing to even acknowledge *Kunkin*, defendants insist that Siry's claim for "fraudulent diversion of business funds" is essentially one for – and limited to – embezzlement. (ABOM 24-25.) In their view, section 496 does not apply to embezzlement. But this statute covers "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*, at p. 250.) Without even attempting to question *Kunkin* or the various cases that preceded or postdated it, defendants seek to radically change the law by removing embezzlement from the scope of section 496. Doing so would wreak havoc in both criminal and civil arenas. (See CALJIC No. 1750 [for purposes of section 496, "[t]heft includes obtaining property by larceny, embezzlement, false pretense, or trick"].)

Defendants also "presume[] that the Legislature did not intend section 496(c) to apply to embezzlement" because "the Legislature housed section 496(c) in a statute titled 'receipt of stolen property.'" (ABOM 27-28.) This argument is flawed because "section 496 applies by its terms to the receipt of property obtained by embezzlement." (*Kunkin*, at p. 251.) [1]

Defendants further argue that section 496 is a general theft statute while the embezzlement statutes are more specific,

[1] "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." (§ 503.)

thereby precluding the application of section 496. (ABOM 22-29.) But the general theft statute is section 484, not section 496. As this Court explained in a decision invoked by defendants (ABOM 10), the term "theft" as used in section 496 includes the forms of theft "in the general theft statute (Pen. Code, § 484), i.e., theft committed by means of larceny, embezzlement, or false pretenses." (*People v. Allen* (1999) 21 Cal.4th 846, 863 [discussing the 1992 amendment to section 496 which precludes dual convictions for both theft and other offenses proscribed by this statute]; parentheses in original.) "Although embezzlement is proscribed in a self-contained statute in a chapter of the Penal Code that is separate from that addressing larceny, embezzlement is also proscribed by section 484(a)." (*People v. Vidana* (2016) 1 Cal.5th 632, 648.) Because embezzlement is covered by section 484, it is also covered by section 496 under *Allen*.

As for defendants' claim that section 514, the statute listing the "punishment" for embezzlement, is more specific than section 496 (ABOM 23, 27-29), defendants ignore that section 496, subdivision (c) is the more recent enactment. But "whether the canon invoked is that the specific statute prevails over the general or that the latest statutory expression prevails, such canons share the requirement that the enforcement of one duly enacted statute at the expense of another on the same subject only applies when the two statutes cannot be reconciled." (*Medical Board of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1014 [footnotes omitted].) Here, however, the

statutes can be easily reconciled: section 514 provides the criminal "punishment" for embezzlement (ABOM 27-28) while section 496 provides *civil* remedies. Even in the criminal context where there is no such distinction between criminal punishment and civil remedies, courts have rejected defendants' specific-versus-general argument. (See *People v. Artis* (1993) 20 Cal.App.4th 1024, 1026-1027 [embezzlement of property by tenant under section 507 is theft and may be charged under section 484; rejecting claim that the former is a special statute that precludes prosecution under the latter as a putative general theft statute].)

Furthermore, because section 496 expressly targets property "obtained *in any manner* constituting theft" (§ 496, subd. (a)), there was no need for the legislature to copy and paste the civil remedies of this statute into each and every theft-related statute; e.g., section 514 (ABOM 28). (See Pen. Code, § 9 ["The omission to specify or affirm in this code any liability to damages, penalty, forfeiture, or other remedy imposed by law and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same"].) This also eliminates the need for the Penal Code to expressly authorize cumulative remedies every time this code provides a civil remedy. (ABOM 34.) In fact, by authorizing civil remedies for "a violation of subdivision (a)," subdivision (c) of section 496 incorporates by reference the broad language of subdivision (a) by allowing civil remedies as to property "obtained *in any manner* constituting

theft." In sum, section 496 governs civil liability for embezzlement.

2. Defendants' argument that section 496 does not cover embezzlement misconstrues the impact of the legislative amendments to the theft statutes.

Following the 1927 consolidation of theft crimes, "[t]heft was defined expansively to include" various crimes, including "larceny, false pretenses, and embezzlement." (*People v. Gonzales* (2017) 2 Cal.5th 858, 865.) Although the 1927 consolidation of theft offenses was intended to "obviat[e] the necessity of amending several sections which relate to the crimes … consolidated into the new crime of theft" (*Vidana, supra,* 1 Cal.5th at p. 641), by requiring an amendment to every single theft statute (e.g., section 514) to reiterate the civil remedies found in section 496, defendants' view would necessarily defeat the legislative goal behind consolidation. (ABOM 28.)

Contrary to defendants' approach, "[t]he purpose of the consolidation was to remove the technicalities that existed in the *pleading* and *proof* of these crimes at common law." (*Gonzales,* at p. 865 [emphasis added].) While the substantive elements of these crimes were not changed (ABOM 26), the consolidation made it procedurally easier to both allege and obtain a conviction based on these crimes. "In other words, the crime is called theft, but to prove its commission, the evidence must establish that the property was stolen by larceny, false pretenses, *or*

embezzlement." (*Gonzales,* at pp. 865-866 [emphasis added]; accord, *People v. Nor Woods* (1951) 37 Cal.2d 584, 586 ["since by the verdict the jury determined that he did fraudulently appropriate the property, it is immaterial whether or not they agreed as to the technical pigeonhole into which the theft fell"].) Because the 1927 amendment "relieve[d] the courts of the necessity of drawing fine distinctions as to whether the particular crime charged had been prove[n]" (*People v. Fewkes* (1931) 214 Cal. 142, 149), "a judgment of conviction must be affirmed if there is sufficient evidence to support a theft conviction on *any* theory." (*People v. Kagan* (1968) 264 Cal.App.2d 648, 658 [emphasis added].)

This rule should apply with greater force in civil cases where the defendant's liberty is not at stake. Applying this framework here, Siry was not required to plead a particular form of theft. The general reference to "theft" is adequate. (15 SCT-B: 3735-3736, ¶ 86.) To summarize, one can recover under section 496 based on *any* form of theft; e.g., embezzlement, etc.

B. In any event, whether the embezzlement statutes supersede section 496 is a moot point because Siry alleged and established other offenses covered by section 496.

Besides embezzlement, the default-admitted allegations of the operative complaint encompass (and establish by default) other forms of theft, including larceny. "Larceny is committed by every person who (1) takes possession (2) of personal property (3)

owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away." (*Vidana, supra,* 1 Cal.5th at p. 639 [internal quotation marks omitted].) [2] In contrast to defendants' apparent assumption, the theft of funds can qualify as larceny. (See, e.g., *People v. Fenderson* (2010) 188 Cal.App.4th 625, 635-638 [caregiver given power of attorney over elderly patient's bank account guilty of theft by larceny for diverting account proceeds to personal use].) Because defendants also engaged in larceny, a separate form of "theft" (15 SCT-B: 3735, ¶ 86) which defendants do not bother to contest, defendants' brief focuses on a moot, academic point (whether embezzlement is covered by section 496).

Although section 496 also covers theft by false pretense (*Bell v. Feibush* (2013) 212 Cal.App.4th 1041, 1047-1048), defendants argue that the operative complaint does not adequately allege theft by false pretense because Siry did not allege that "defendants fraudulently *induced* Siry to pay them money or provide property." (ABOM 24 [emphasis added].) [3]

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[2] As for the asportation element, a defendant's conversion to his own use of money fraudulently obtained from the victim is "tantamount to [] asportation," thus satisfying this requirement. (*People v. Edwards* (1925) 72 Cal.App. 102, 115, disapproved on another point in *In re Estrada* (1965) 63 Cal.2d 740, 748.)

[3] Theft by false pretenses "requires only that (1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance

While an inducement allegation would ordinarily refer to the initial contribution/investment in a partnership, Siry presented unrefuted *evidence* of inducement. After describing the various defalcations by defendants that were discovered after a decade of litigation – including an arbitration and two lawsuits (2 CT-B: 321-322; 325, ¶¶ 27-28) – Moe Siry confirmed that he "would have never invested with them" if he had known about defendants' misconduct. (2 CT-B: 329, ¶45.) Because the unrefuted evidence in the record satisfies the inducement element of theft-by-false-pretense – the element challenged by defendants – it is immaterial whether the complaint included an inducement allegation. (See *Mankin v. Southwestern Auto Ins. Co.* (1931) 113 Cal.App. 243, 246-247 [failure to amend complaint to conform to proof did not require reversal when there was no miscarriage of justice]; *Lompoc Produce & Real Estate Co. v. Browne* (1919) 41 Cal.App. 607, 613 ["if the complaint had been amended to conform to the proof, the result would have been the same, and no good would result from sending the case back for a new trial, as it is apparent that the result would necessarily be the same"]; see also *Alpine Ins. Co. v. Planchon* (1999) 72 Cal.App.4th 1316, 1320 ["if there is a finding of fact that is

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on the representation." (*People v. Williams* (2013) 57 Cal.4th 776, 787 [internal citation marks omitted].)

dispositive and necessarily controls the judgment, the presence or absence of findings on other issues is inconsequential"].) [4]

To summarize, because section 496 covers larceny and theft by false pretense, it applies here regardless of defendants' separate offense of embezzlement.

C. Section 496 is not limited to the receipt of stolen property.

Continuing with their attempts to narrow the scope of section 496, defendants suggest this statute governs only receipt of stolen property.[5] Their rationale is that section 496 is "titled 'receipt of stolen property.'" (ABOM 28-29.)

While the title is not limited to this particular offense – it also encompasses "concealing stolen property" as a separate offense alleged by Siry – the title is irrelevant. (15 SCT-B: 3736:1.) "Division, chapter, article, and section headings contained [in the Penal Code] shall not be deemed to govern, limit, modify or in any manner affect the scope, meaning or intent of the provisions of any division, chapter, article or section

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[4] Defendants also ignore the allegations of "fraudulent" conduct or "causing injury" (i.e., inducement-equivalent) found under this statutory cause of action. (15 SCT-B: 3736, ¶ 89.)

[5] "[T]o sustain a conviction for receiving stolen property, the prosecution must prove (1) the property was stolen; (2) the defendant knew the property was stolen; and, (3) the defendant had possession of the stolen property." (*People v. Land* (1994) 30 Cal.App.4th 220, 223.) "Physical possession is also not a requirement." (*Id.* at p. 224.)

hereof." (*People v. Tufunga* (1999) 21 Cal.4th 935, 948 [internal citation omitted].)

Defendants, nonetheless, insist that "[n]othing in section 496(a) or section 496(c) (title or text) provides notice that section 496(c) applies other than in the case of 'receiving stolen property.'" (ABOM 37.) This is odd because, in challenging the award of punitive damages as constitutionally excessive, defendants previously argued that "Penal Code § 496 gives the relevant notice: engage in monetary theft and be subject to treble damages. Period." (12 CT-B: 2739:23-24.) Having initially argued that the act of theft is covered by section 496 and that such conduct (engaging in the theft itself) triggers treble damages, defendants' change of heart seems opportunistic.

Their contradictions do not end there. After arguing that "section 496(a) prohibits only '[t]he receipt of stolen property'" (ABOM 2), defendants change their mind later, arguing that "section 496(c) was solely intended to create civil liability for the receipt *or withholding* of 'stolen goods.'" (ABOM 18 [emphasis added].) These are not the only offenses covered by this statute.

For example, "the actual thief may be convicted of violating section 496" under the last paragraph of subdivision (a). (*Allen, supra,* 21 Cal.4th at p. 861.) Because subdivision (c) provides civil remedies to anyone "injured by a violation of subdivision (a)," it follows that the civil remedies are not limited to cases involving *receipt* of stolen goods—a separate offense alleged by Siry. (15 SCT-B: 3735, ¶86; 3730:25 [alleging "misappropriation,"

additional offense covered by section 496 – i.e., the act of embezzlement as one form of theft]; 3735, ¶85 [incorporating factual allegations into statutory cause of action].)

Section 496 covers additional offenses by targeting a party "who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner…." (§ 496, subd. (a).) "Concealing or aiding in concealing the stolen property is manifestly not the same offense as receiving or aiding in receiving stolen property." (*People v. Feldman* (1959) 171 Cal.App.2d 15, 24.) While the statute also requires knowledge of the property's character (ABOM 11, 24) – "knowing the property to be so stolen or obtained" in "any manner constituting theft" – Siry alleged that additional fact. (§ 496, subd. (a).) Specifically, Siry alleged that "Defendants violated Penal Code section 496 by receiving property belonging to others (e.g., plaintiff) by theft or fraud, *knowing that the property was so obtained*." (15 SCT-B: 3735, ¶ 86 [emphasis added].) Although this was certainly sufficient to establish a violation (given that defendants' default confessed this allegation), Siry immediately juxtaposed other allegations to the preceding one: "In addition, defendants violated this statute by concealing or withholding the property or by aiding others (e.g., one another) in doing so, knowing that the property was so obtained." (*Ibid.*) In sum, because the entry of defendants' default "necessarily admits every element of the crime of grand theft" (*In re Basinger* (1988) 45 Cal.3d 1348, 1363 [addressing guilty plea]), Siry adequately alleged multiple forms of violating section 496.

D. Defendants' interpretation of the appellate court's decision and their approach to statutory construction are both flawed.

Seeking to rewrite the Court of Appeal's decision (typed opn. 40), defendants argue that the Court of Appeal did not hold that theft of money – as opposed to goods – falls outside the purview of section 496. (ABOM 30.) But other courts have interpreted the decision, as did Siry (OBOM 28-29), to adopt this erroneous view. (See *Otte v. Naviscent, LLC* (N.D. Cal. 2021) 624 B.R. 883, 913 ["*Siry* thus provides the strongest support for Otte's argument that stolen money is not stolen property, and that therefore section 496 should not apply" but ultimately applying this statute to embezzled money].) While defendants claim that money can qualify as stolen property in some cases but not others (ABOM 30), this argument is logically flawed—they cannot have it both ways.

Defendants' mastery of the cut-and-paste feature, by presenting multiple pages of excerpts from the Court of Appeal's opinion as their own argument (ABOM 19-21), is no more productive as they disregard Siry's response to those arguments. (OBOM 38-42.) While the Court of Appeal believed that the legislature was primarily concerned with the theft of cargo, "statutory prohibitions 'often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" (*Smith v. LoanMe, Inc.* (2021) 11 Cal. 5th 183, 199 [citation omitted].) As this Court explained last

month in interpreting another civil-remedy statute in the Penal Code, even if "one might infer from some committee analyses of [Senate] Bill [1068] that the prospect" of cargo theft "was front-and-center in legislators' minds as they considered the bill" (*id.* at p. 198), that "does not mean section [496] applies only in those circumstances." (*Id.* at p. 199 [brackets added].) "Because the Legislature … expressly removed" language that would have limited the availability of the civil remedies to public carriers "from its proposed amendment to section 496, we cannot read the phrase back into the resulting statute." (*Allen, supra,* 21 Cal.4th at p. 863 [addressing unrelated 1992 amendment]; OBOM 35 [noting such omission].) This renders moot defendants' inaccurate discussion of legislative history. (ABOM 13-17.)

For example, citing the original version of the bill that led to the ultimate enactment of the civil remedies (ABOM 13 [referencing MJN 12]), defendants erroneously suggest that those remedies were aimed at for-hire carriers (the trucking industry) from the inception of the legislative process. In reality, however, with the exception of the second bill (dated May 30, 1972 as the first proposed amendment to the original bill), *every single bill* that was considered by the legislature authorized recovery of civil remedies by "any person" without limiting such recovery to the trucking industry. (OBOM 35 [tracing the chronology/language of each amendment].) But setting that aside, "legislative history is not the law." (*Epic System Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1631.) Because "[e]xpressions of committees … cannot be equated with statutes enacted" by the legislature (*Tennessee Valley Auth.*

v. Hill (1978) 437 U.S. 153, 191), allowing snippets of legislative history to do the work that statutory text does not would be pernicious here. This approach would set a dangerous precedent in other cases by enabling "unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – [with] both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." (*Exxon Mobil Corp. v. Allapattah Services Inc.* (2005) 545 U.S. 546, 568.) [6]

Furthermore, defendants' selective reliance on certain legislative materials is inconsistent with judicial decisions from other jurisdictions that modeled their civil theft laws based on section 496. (See MJN 94 [Colorado attorney requesting "a copy of the [California] legislation so that we may use it as a guide" while seeking "to propose similar legislation in Colorado"].) The Colorado legislature enacted "the remedy of treble damages in response to testimony from witnesses in the trucking industry who testified that a treble damages recovery would allow trucking companies to recoup losses due to employee theft in those cases where the government failed to bring criminal charges." (*Itin v. Ungar* (Colo. 2000) 17 P.3d 129, 134.) Despite this historical background, the Colorado Supreme Court has applied this statute to the diversion of funds where the defendant "disbursed [plaintiff's] funds from the [defendant's] trust account

[6] Equally flawed is defendants' reliance on post-enactment correspondence in seeking to divine legislative intent retroactively. (ABOM 16-17 [citing such correspondence by U.S. senator].)

to other companies." (*Id.* at p. 131 [noting jury's finding that defendant "committed acts that constitute the crime of theft when he knowingly exercised control over the funds of plaintiff … without authorization and with the specific intent to permanently deprive him of his property"].) This further refutes defendants' position.

Finally, in advancing general rules of statutory construction (ABOM 12, 18) and their brand new argument based on the rule of lenity (ABOM 37), defendants suggest that section 496 should be construed strictly. But "[t]he rule of the common law, that penal statutes are to be strictly construed, has no application to this code." (Pen. Code, § 4.) Furthermore, "[t]he legislative history, the purpose of the statute, general public policy concerns, and logic all favor" Siry's interpretation (OBOM 29-31, 42-44), thus eliminating the application of the rule of lenity here. (*Smith, supra,* 11 Cal. 5th at p. 202.) [7]

Accordingly, defendants' approach to statutory construction is flawed for multiple reasons.

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[7] While *People v. Gardeley* (1996) 14 Cal.4th 605 (ABOM 18, 37) acknowledged a general "policy of this state to have courts construe penal laws as favorably to *criminal defendants* as reasonably permitted by the statutory language," the court declined to apply this policy even in the criminal context. (*Id.* at p. 622 [explaining the statute was not subject to two constructions; emphasis added].)

E. Defendants' extensive reliance on unpublished decisions should be disregarded.

Citing unpublished federal district court decisions, defendants also argue that "when the property in question comes into the defendant's hands, it must already have the character of having been stolen." (ABOM 11.) While the courts are "divided" on this issue according to one of the decisions cited by defendants (*Instant Brands, Inc. v. DSV Sols., Inc.* (C.D. Cal. Aug. 20, 2020, No. EDCV 20-399 JGB) 2020 WL 5947914 at *7), defendants fail to argue how the application of this proposed rule would bar recovery in this particular case, thus waiving this point. (ABOM 11.) But even if the Court were to adopt this rule for other cases or apply it here, Siry satisfied this requirement. Specifically, as soon as defendants diverted the partnership's money (15 SCT-B: 3727, ¶¶ 30-31) – allowing them to use money that did not belong to them personally – the money was stolen at that point; i.e., before the money came "into the defendant's hands." (ABOM 11.)[8]

Defendants also discuss various unpublished California appellate decisions addressing the two issues presented in this

[8] Moreover, after alleging theft (15 SCT-B: 3735: 26-27), Siry alleged that defendants concealed or withheld the property or aided others in doing so, "knowing that the property was so obtained." (3736: 1-2.) This allegation, consistent with the actual language found in section 496 and its sequence, refers back to the application of the statute to property "that has been obtained in any manner constituting theft"—the same offense referred to in the immediately-preceding sentence of this cause of action. In other words, the property was already stolen by the time defendants received it, concealed it, withheld it, or aided others in doing so.

appeal. (ABOM 42 [section 496 issue]; 52 [new trial issue].) The Court should disregard such violations of the basic rules governing appellate briefing. (See *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 885-886 [sanctions assessed against appellant's counsel for citing depublished case, among other violations].) [9] In violation of other rules, defendants assert, without any citation to the record, that "Siry continues to partner up with defendants on other partnership investments" at the present time. (ABOM 25.) While Siry is regrettably stuck with defendants in other partnerships "to date" (*id.*), the suggestion that Siry continues to conduct business with them (e.g., voluntarily) is simply false.

As shown above, the underlying conduct in this case is the crime of embezzlement, the crime of larceny, and the crime of receiving of stolen property, among others. The underlying conduct was not just a tort or breach of contract as defendants euphemistically claim. (ABOM 39.) Their attempt to distort the facts should be rejected.

[9] Although defendants' dual-punishment argument (ABOM 34-35) is based on verbatim discussion found in another unpublished decision (*Paletz v. Adaya* (Dec. 29, 2014, No. B247184) [2014 Cal. App. Unpub. LEXIS 9239]), their repetition of this unpublished decision without citing to it does not violate the rules.

F. Defendants' argument that section 496 is a punitive damage statute, based on their erroneous characterization of the remedies provided by this statute, is totally flawed.

1. Defendants misconstrue the different remedies provided by statutory and tort law.

Erroneously calling treble damages as "civil penalties" (ABOM 34), defendants confuse statutory treble damages with civil penalties. These two remedies, however, are inherently distinct. (See, e.g., *City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 801 [noting "False Claims Act permits the recovery of civil penalties and treble damages" by allowing public entities to "recover three times damages … plus a penalty of $10,000 for each false claim"].) But even if we assume erroneously that statutory treble damages are civil penalties (ABOM 34), "[d]efendants err in equating statutory penalties with punitive damages, which involve fundamentally different principles." (*People v. First Federal Credit Corp.* (2002) 104 Cal.App.4th 721, 731 [emphasis omitted].) In fact, the availability of one statutory remedy (e.g., the punitive-damage statute) does not necessarily preclude another remedy (trebling the same punitive damages under another statute).

For example, if certain statutory findings are made in litigation where a statute authorizes "either a fine, or a civil penalty … or any other remedy the purpose or effect of which is to punish or deter," the trial court "may impose a fine, civil

penalty or other penalty, or other remedy in an amount up to *three times greater* than authorized by the statute, or, where the statute does not authorize a specific amount, up to three times greater than the amount the trier of fact would impose in the absence of that affirmative finding." (Civ. Code, § 3345, subd. (b) [addressing cases involving unfair or deceptive practices against senior citizens]; see also Civ. Code, § 3345.1, subd. (b) [same for commercial sex exploitation cases].) Other combinations of different remedies are also allowed. (See Health & Saf. Code, § 1428, subd. (g) ["assessment of civil penalties … shall be trebled" for repeat offenders in healthcare industry]; Food & Agr. Code, § 21855 [quadruple damages for killing cattle plus punitive damages under Civil Code section 3340].) In fact, even where one statute imposes a "civil penalty," another civil penalty – the identical remedy – may be imposed on top of the first civil penalty. (See, e.g., Bus. & Prof. Code, § 17206.1, subd. (a) ["In addition to any liability for a civil penalty pursuant to Section 17206," another "civil penalty" can be imposed "for each violation" under section 17206.1 in designated cases].)

The availability of these various remedies in the multifaceted combinations identified here refutes defendants' position that section 496 damages should not be available under California law as duplicative "punitive damages"—a disputed label refuted below. But even if the availability of both punitive and "statutory" damages (including treble damages, civil penalties, liquidated damages, etc.) yield duplicative damages in a particular case, judging by defendants' arguments below, the

solution would be to require plaintiffs to elect remedies. Here, for example, the trial court required Siry to elect remedies between section 496 damages and punitive damages, one of the issues implicated in Siry's cross-appeal. (13 CT-B: 3021.) [10]

To summarize, defendants' treatment of statutory treble damages as punitive damages is flawed. "The numerous statutes specifically providing for treble damages testify to the fact that the Legislature never intended Civil Code sections 3294 and 3295 to restrict its ability to set the appropriate damage award in particular areas." (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1598.)

[10] As previously explained (OBOM 63-65), however, Siry's election of remedies would not help defendants here for a *procedural* reason: After the trial court ordered reduction of damages by granting defendants' motion for new trial (unless Siry consented to reducing the damages by making an election of remedies), Siry challenged the new trial order on purely procedural grounds in its cross-appeal. (RB-XAOB 157-160.) The defendants failed to discharge their burden in their cross-respondent's brief below by offering the particular ground invoked by the appellate court *sua sponte* for salvaging the defective new trial order. (OBOM 63.) As explained in the cross-appeal section of this brief below, this procedural ground requires reinstatement of the original judgment here, irrespective of the substantive ground as to whether section 496 duplicates punitive damages.

2. The distinctions adopted by statutory and decisional law further illustrate that statutory treble damages – e.g., section 496 damages – and punitive damages represent apples and oranges.

As shown in the following chart, the distinguishing factors between punitive damages and treble damages have existed for decades, making it easier to recover the latter by imposing lower standards for treble damages. These long-held distinctions preempt defendants' attempt to equate these two distinct remedies:

Punitive damages	Treble damages
"Evidence of the defendant's financial condition is a prerequisite for an award of punitive damages." (*Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, 452.)	"[E]vidence of the defendant's wealth is unnecessary since the court must award the amount set by statute and cannot use evidence of wealth or poverty to calculate a proper damage award." (*Beeman, supra,* 216 Cal.App.3d at p. 1601.)
Not automatic. "Upon the clearest proof of malice in fact, it is still the exclusive province	Either mandatory once the statutory criteria are satisfied or, alternatively, imposed in

Punitive damages	Treble damages
of the jury to say whether or not punitive damages shall be awarded." (*First Federal, supra,* 104 Cal.App.4th at p. 732.)	the court's discretion, depending on the statute.
Not recoverable for breach of contract "even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious." (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 61.)	Can be awarded even for contract-based violations. (See, e.g., Civ. Code, § 1812.94 [treble damages for health studio contracts that violate statutory requirements for such contracts]; Civ. Code, § 1738.15 [treble damages for willful failure to enter into written contract required by statute].)
Not recoverable from public entities. (Gov. Code, § 818.)	Recoverable from public entities. (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 145.)
Requires clear and convincing evidence. (Civ. Code, § 3294, subd. (a).)	Presumably requires preponderance of evidence but this Court can impose a higher

Punitive damages	Treble damages
	standard for section 496, if deemed necessary.
Are not insurable. (*City Products Corp. v. Globe Indemnity Co.* (1979) 88 Cal.App.3d 31, 35.)	No express legislative ban against insurance coverage for treble damages (except for treble damages based on select licensing violations under Ins. Code § 253).
Awarded by the jury.	Awarded only by the judge. (See, e.g., *Pollock & Riley, Inc. v. Pearl Brewing Co.* (5th Cir. 1974) 498 F.2d 1240, 1242 ["the jury should not be advised of the mandatory tripling provision" under federal antitrust law].) "Runaway jury verdicts cannot occur when there is no jury to inflame." (*First Federal*, *supra,* 104 Cal.App.4th at p. 733.)

Judging by these critical differences, the notion that all statutory treble damages can be painted with the same brush – by deeming them as the equivalent of punitive damages – is

flawed. (ABOM 32-35.) Statutory damages are enacted for many reasons. Although one reason may be to compensate the plaintiff for a particular harm, others include incentivizing suits in low-value cases, compensating the plaintiff for harms that are difficult to quantify, or deterring bad conduct.

Completely ignoring these differences, defendants argue extensively that section 496 and section 3294 "are both punitive statutes." (ABOM 32.) This assertion erroneously assumes that the treble damages under section 496 are punitive rather than remedial. To resolve this issue, the Court should adopt the test used in another context.

Specifically, this Court has held that "damages which are punitive in nature, but are not simply or *solely* punitive in that they fulfill legitimate and fully justified compensatory functions, have been held not to be punitive damages" in deciding whether such damages may be imposed against public entities. (*Kizer, supra,* 53 Cal.3d at p. 145 [emphasis added; citations omitted].) Applying this test here, even if the treble damages under section 496 could be deemed as punitive in nature, the fact that they are not *solely* punitive refutes defendants' argument that section 496 is a "punitive statute[]." (ABOM 32.)

Instead of being punitive (solely or otherwise), section 496 allows victims to find counsel that would otherwise reject difficult cases by authorizing attorneys' fees to successful plaintiffs. In balancing the exposure faced by risk-averse plaintiffs to the defendant's attorneys' fees, the legislature enacted a one-way fee

shifting provision, as it has in numerous consumer protection contexts, thus illustrating the intent to provide a judicial forum for crime victims to seek relief in civil courts. Because many theft crimes are not prosecuted – particularly white collar crimes such as the theft of partnership funds – such parties would have no practical remedies absent such relief.

More importantly, by tethering the amount of treble damages to the actual harm (rather than basing it on an artificial statutory minimum), the statute does not function as a punitive one. Because the treble damages are in proportion to the loss suffered by the plaintiff, and not measured by the *degree of culpability of the defendant*, the treble damages under this particular statute are remedial. By allowing relief beyond the predicate harm, the civil remedies simply incentivize victims of crimes to pursue claims (rather than relying on the speculative hope of collecting restitution in a criminal case that may never be filed). Finally, while all non-punitive remedies – including treble damages, attorneys' fees and even compensatory damages such as noneconomic damages – admittedly have an incidental deterrent effect, that does not render such remedies as punitive. Accordingly, section 496 is a remedial statute, consistent with the *Kizer* test.

Alternatively, in evaluating whether statutory treble damages are remedial or punitive, this Court can adopt the three-prong test applied in *Murphy v. Household Finance Corp.* (6th Cir. 1977) 560 F.2d 206. Under the *Murphy* test, courts weigh three factors: "1) whether the purpose of the statute was to

redress individual wrongs or more general wrongs to the public; 2) whether recovery under the statute runs to the harmed individual or to the public; and 3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered." (*Id.* at p. 209.) When the balance of these factors favors (1) redressing public wrongs, (2) compensating the public, *and* (3) disproportionately imposing damages, treble damages are primarily punitive.

Applying the *Murphy* test to section 496, the treble damages awarded here are remedial. The purpose of section 496 is to redress individual wrongs (not public wrongs) by focusing on the harm to the plaintiff; recovery under this statute runs to the injured individual rather than the public; and the amount of the recovery is proportional to the amount of harm suffered (e.g., there is no minimum, statutorily-predetermined award). As a result, the treble damages allowed under this statute are remedial under this test as well. "The remedial purpose of treble damages, as distinguished from punitive damages, is particularly apparent given the fact that the treble damages provision of [section 496] authorizes the court to treble damages without the plaintiff having to establish anything beyond the [statutory] violation itself." (*Modern Management Co. v. Wilson* (D.C. 2010) 997 A.2d 37, 57.)

Because section 496 is remedial, it follows that this statute is not a punitive damage statute as defendants claim, thereby eliminating the argument against "double punitive recovery."

(ABOM 32 [arguing section 496 and section 3294 "are both punitive statutes"]; ABOM 33-35 [same].)

3. Applying the distinctions between treble and punitive damages to this case, defendants' arguments about duplication of Siry's damages should be rejected.

While the preceding discussion focused on the nature of section 496's remedies in general, the following discussion addresses the application of this statute to this particular case.

Advancing their duplication argument, defendants claim that Siry is improperly invoking section 496 in addition to common law claims "for recovering punitive damages for [the] same injury." (ABOM 35.) Contrary to defendants' representation (ABOM 35), however, Siry did not assert a common law claim for conversion. (15 SCT-B: 3719.) While Siry sought punitive damages under the common law fraud and fiduciary-breach claims (15 SCT-B: 3732-3735), defendants' argument based on the primary rights doctrine is refuted by their own case authority. (ABOM 34 [citing *Crowley v. Katleman* (1994) 8 Cal.4th 666].) As confirmed by *Crowly*, "[t]he primary right must also be distinguished from the *remedy* sought: The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." (*Id.* at p. 682 [emphasis in original; citation omitted].) Therefore, even if all of the acts

alleged in the common law and statutory claims involved the identical primary right (a disputed point), Siry would still be entitled to different remedies (compensatory, punitive and treble damages, etc.).

Other courts have not hesitated to impose both treble and punitive damages – e.g., in partnership disputes – where the conduct was much less sinister than the defendants' conduct in this case. (See, e.g., *Rhue v. Dawson* (Ariz.Ct.App. 1992) 841 P.2d 215, 224, 234 [defendant "failed to bring to [partner's] attention the insertion" of buyout provision and locked plaintiff out of partnership office after unilaterally exercising disputed contractual buyout provision].) As the District of Columbia's highest court held in *Wilson*, where (as here) statutory damages are recoverable by simply proving actual damages "without further findings" (*Wilson, supra,* 997 A.2d at p. 57 [internal citation omitted]), "[b]oth the treble damages, which under [section 496] 'serve as a remedial rather than punitive purpose,' and the separate punitive damages" are justified. (*Ibid.* [brackets added; internal citation omitted].) In sum, the remedies are distinct and, as such, both are recoverable. (See *Piluso v. Spencer* (1918) 36 Cal.App. 416, 424 [$50 penalty set by statute did not preclude punitive damages for malice or oppression].) [11]

[11] Although Siry did not challenge in its cross-appeal the trial court's order requiring an election of remedies on substantive grounds (i.e., by addressing whether Siry was legally required to make an election between treble and punitive damages), Siry did so from a procedural standpoint in the cross-appeal. While Siry is not arguing the substantive point in its cross-appeal in this Court

II. By Clarifying and Enforcing the Rules Governing New Trial Motions, the Court Should Reinstate the Original Judgment While Providing Guidance to Lower Courts.

A. Defendants' novel challenges to the scope of this Court's review should be summarily rejected.

Having failed to answer Siry's petition for review, defendants use their answer brief on the merits as a disguised answer to that petition by seeking to limit the scope of review. For example, defendants argue that "review should not be granted" to decide whether the lower courts erred "on certain issues other than the two issues before the Court." (ABOM 59.) Defendants also claim that "the only issue affecting the new trial order that is now before the Court is the issue of standing." (ABOM 58.)

The rules governing the scope of review, cited by defendants, ironically refute their position. For example, defendants acknowledge that "[u]nless the court orders otherwise, briefs on the merits must be limited to the issues stated" in the "statement of issues in the petition for review" and "any issues fairly included in them." (Cal. Rules of Court, rule 8.520(b)(3), (b)(2)(B); ABOM 57, fn. 8.) The statement of issues in

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or in the Court of Appeal, defendants have opened the door as to this particular point by attacking the application of section 496 based on their duplication argument to justify the appellate court's adoption of their argument in deciding *defendants' own appeal*. As a result, Siry responds to this argument only here without raising it in the cross-appeal portion of this brief.

Siry's petition for review presented the following procedural issues:

> Whether, *or under what circumstances/grounds*, a defendant may file a motion for new trial to challenge a default judgment while remaining in default? The published Opinion "respectfully part[s] ways with these decisions" holding "that a defaulting defendant may not file a motion for new trial under any circumstances."

(PFR 8 [emphasis added; citation omitted].) Thus, in addition to the standing issue (i.e., *whether* defaulted defendants may seek a new trial), the petition for review specifically sought review as to what "grounds" may be invoked by defaulted defendants. This eliminates defendants' suggestion of waiver.

Defendant, however, argue that "Siry's cross-appeal was limited to the lone argument that a defaulting defendant has no standing to move for a new trial." (ABOM 57.) But the pages cited refute this assertion. After challenging the new-trial order based on lack of standing in the first section of the cross-appellant's opening brief (Siry-RB/X-AOB 157-158), Siry argued in an entirely new section that the particular ground invoked by the trial court to reduce the judgment ("excessive damages") did not apply to reductions made "as a matter of law." (*Id.* at pp. 159-160 [new heading asserting that "the sole ground for slashing the damages does not actually exist"]; capitalization omitted.) Siry thus sought reinstatement of the original judgment based on

"these two independent reasons" in its first appellate brief on the cross-appeal—Siry's first opportunity to raise this issue in the appellate court. (*Id.*, at p. 159.) Siry also devoted multiple pages to the wrong-ground argument in its cross-appellant's reply brief. (X-ARB 20-24.)[12]

Consistent with their mischaracterization of the briefing below, defendants seem to argue that the petition for review omitted the related issue regarding whether appellate courts can invoke an alternative ground *sua sponte* for upholding a defective new-trial order. (ABOM 58-60.) Defendants are wrong again.

Explaining the need for review on this subsidiary issue, the petition for review argued "the Opinion erroneously extends *Don* [*v. Cruz* (1982) 131 Cal.App.3d 695] and even allows reviewing courts to come up with a brand new ground that was never advocated by the defendant on appeal as an alternative ground for affirming a defective new trial motion ruling." (PFR 31.) "As a result, the published Opinion exacerbates the pre-existing conflict on the standing issue while also causing confusion on the subsidiary procedural (preservation) issue. *Either one is a sufficient ground for review.*" (PFR 32 [emphasis added].) This eliminates any suggestion of waiver, even if we disregard defendants' inability to challenge the petition for review for the first time at the merits stage. (See *Shulman v. Group W*

[12] Siry's rehearing petition explained that Siry had challenged the new trial order by arguing in both the cross-appellant's opening and reply briefs that the order invoked an inapplicable ground for granting a new trial. (Rehearing Pet. 18, fn. 6.)

Productions, Inc. (1998) 18 Cal.4th 200, 233, fn. 13 [whether or not issue was "reasonably comprehended" in issues raised in petition for review, "we have found it necessary to address this point in order to state and decide fairly and accurately the legal questions inherent in the case"]; Cal. Rules of Court, rule 8.516(b)(1) & (2).) [13]

Defendants, nonetheless, maintain this Court should not decide the nearly ten-million dollar question presented here regarding whether appellate courts can salvage a defective new trial order by invoking *sua sponte* a brand new ground under section 657. (ABOM 58-59.) In contrast to the Court of Appeal's published decision, other courts have required the party seeking to save a defective new-trial order to affirmatively advance the alternative ground on appeal. (PFR 31-32; OBOM 62-66.) Such discord on a recurring issue of civil/appellate procedure undermines the judicial process and litigants' faith in just results. Given this Court's responsibility to oversee the even-handed and consistent functioning of the state judiciary, the

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[13] Even if Siry had never sought review regarding appellate courts' inability to *sua sponte* invoke a new ground to salvage a defective new-trial order, this would be subject to review as an "issue[] fairly included" in the petition's broad statement of issues. (Cal. Rules of Court, rule 8.520(b)(3).) After all, when a new-trial order is defective based on the inapplicability of a particular ground (Code Civ. Proc. § 657, subsection 5), this presents for review by this Court the propriety of harmless-error review where the other side has claimed no-harm, no-foul by invoking another ground (subsection 6) in the intermediate court and the Court of Appeal adopts harmless-error review by choosing yet another ground (subsection 7).

uncertainty created by the published decision below is intolerable. Based on this Court's institutional oversight function (ABOM 58-59), the Court should decide this issue – as it has sought to do by granting review – in order to alleviate the "procedural minefield" faced by litigants, trial judges and appellate courts in seeking, opposing or adjudicating new trial motions. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 911 (dis. opn. of Kaus, J.).)

Defendants' remaining arguments lack merit again. In "opposing the motion for new trial" (ABOM 60) – which naturally preceded the ruling – it was literally impossible for Siry to ascertain the ground *subsequently* invoked by the trial court to reduce the judgment. Likewise, without a crystal ball, Siry was not required to anticipate the Court of Appeal's deviation from existing law – particularly its failure to follow a prior decision by the same *division* of the same appellate district in *Brooks v. Harootunian* (1968) 261 Cal.App.2d 680, 685 – in salvaging the defective order based on a new ground invoked *sua sponte*. While Siry was admittedly required to bring this issue to the Court of Appeal's attention in a post-decision petition (Rehearing Pet. 17; Cal. Rules of Court, rule 8.500(c)(2)), the Court of Appeal denied rehearing without any comment on this particular point. (PFR, Ex. 2.) To summarize, defendants' arguments regarding the proper scope of review are futile. [14]

[14] In seeking to limit the scope of review, defendants also quote the Opinion's comment that Siry did not challenge in the Court of

B. Reinstatement of the original judgment is required based on defendants' waiver and Siry's presentation of the procedural challenges to the defective new trial order.

Subscribing to the notion that the best defense is a good offense, defendants argue that Siry waived the right to contest the trial court's reduction of damages by failing to challenge the substantive merits of those reductions. (ABOM 56.) But where the new trial order is inherently defective, for example, by invoking the wrong ground to reduce damages – which also triggers burden-shifting to salvage such an order on appeal (*Oakland Raiders v. Nat'l Football League* (2007) 41 Cal.4th 624, 640-641) – the party challenging such a defective order is not required to also establish a substantive flaw to obtain a reversal. If the procedural flaw mandates a reversal – e.g., because the trial court used the wrong ground to reduce damages, the alternative ground invoked by the moving party to salvage the order is inapplicable and/or the moving party otherwise fails to discharge its affirmative burden to invoke a proper, alternate ground for saving the order – the right to such a procedural reversal renders moot the need to address the substantive merits of the new-trial order. Just as missing an appeal deadline entitles the other side to seek dismissal of the appeal regardless of the substantive merits of the trial court's ruling/error, Siry was not

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Appeal "the offset for costs defendants incurred during the prior appeal." (ABOM 56.) Siry has not sought review of this issue.

required to address the merits of the reductions of damages on appeal. (Rehearing Pet. 18.)

While Siry did not commit waiver, defendants did, judging by their own argument. Specifically, they argue that even if the new-trial order was procedurally flawed in reducing Siry's damages, the Court of Appeal could have reduced the "excessive" damages as part of defendants' appeal from the *original* judgment because the original judgment was substantively flawed by awarding excessive damages. (ABOM 56; SF-ARB/X-RB 48-49.) [15]

This argument requires a quick review of the arguments raised in the parties' respective briefs in connection with Siry's cross-appeal. In response to the cross-appellant's opening brief filed by Siry challenging the three sets of reductions on purely procedural grounds, defendants' cross-respondents' brief did not bother to advance a back-up argument justifying those reductions on the merits—e.g., by attacking the perceived excessiveness of the damages awarded in the original judgment. (Siry-RB/X-AOB 159-160; SF-ARB/X-RB 45-49.) But *defendants* are the ones who seek appellate/excessiveness review of the original judgment that included the full amount of damages. As such, once Siry challenged the reductions on procedural grounds, in order to preserve their request for appellate review as to the excessiveness of the original judgment, defendants had the burden to argue that, even if the post-judgment reductions were procedurally improper as Siry contends, the original judgment

[15] "SF" refers to defendant Saeed Farkhondehpour and his affiliated co-defendants. (PFR 21, fn. 7.)

should still be reduced as excessive for other, non-procedural reasons. Specifically, defendants should have argued in their cross-respondents' brief that, regardless of any errors in the new trial order, (1) the punitive damages in the original judgment were constitutionally excessive; (2) recovery of both treble and punitive damages under the original judgment was duplicative; and (3) the definition of treble damages as used in the original judgment was wrong.

However, instead of attacking the original judgment as a back-up to their arguments regarding the new-trial order, the entire cross-respondents' brief was predicated solely on the *amended,* post-reduction judgment. While defendants have argued that the Court of Appeal could have reviewed the excessiveness of the original judgment in their appeal from the original judgment (SF-ARB/X-RB 48-49; ABOM 56), defendants' failure to challenge the alleged excessiveness of the original judgment in their cross-respondents' brief precludes such relief. Having put all of their eggs in the new-trial-order-is-valid basket, defendants are stuck with that choice.

C. Because the new trial order does not effectively state the ground for reducing the judgment by nearly ten million dollars, it should be reversed, given defendants' utter failure to attempt to carry their burden to salvage the defective order on appeal.

Defendants have not challenged the Court of Appeal's holding that the trial court invoked "the wrong statutory ground

for relief" in reducing the judgment. (Typed opn. 38, fn. 10.) Defendants neither sought rehearing nor questioned the validity of this holding in their answer brief.

Defendants also fail to acknowledge – let alone address – the rules governing this appeal:

> If an order granting a new trial *does not* ***effectively*** *state the* ***ground*** or the reasons, the order [shall be] reversed on appeal where there are no grounds stated in the motion other than insufficient evidence or excessive or inadequate damages. If, however, the motion states any *other* ground for a new trial, an order granting the motion will be affirmed if any such other ground *legally requires* a new trial.

(*Sanchez-Corea, supra,* 38 Cal.3d at p. 905 [citations omitted; initial and final emphasis added].) In order for the appellate court to decide whether an alternative ground "legally requires" a new trial, the party prevailing on the new trial motion must affirmatively identify and advocate such an alternative ground on appeal. (See *id.* at p. 906 [refusing to consider ground of "error in law excepted to at trial" where "[n]o attempt has been made to show that the order should be affirmed on this ground"].)

While defendants argued in the Court of Appeal (SF-ARB/X-RB 46) that the order can be alternatively affirmed based on subsection 6 in section 657 (meaning the original judgment was "against law"), this ground applies "only if [the original

judgment] was unsupported by any substantial evidence[.]" (*Sanchez-Corea,* at p. 906 [internal quotation marks and citations omitted; brackets added].) Although the appellate court properly and implicitly rejected defendants' reliance on this alternative ground (typed opn. 38, fn. 10; OBOM 59-61), the Court of Appeal erred in unilaterally invoking the "error in law …" ground to salvage the new trial order. (Typed opn. 37.) It is undisputed that defendants never bothered to mention – let alone establish – this particular ground (subsection 7) on appeal. (OBOM 25, fn. 8; 63-65.) This requires reversal of the new trial order.

"While section 657 places upon the judge the sole duty of composing his order, in practice, equal responsibility rests upon the party who is granted a new trial to assure himself that the order complies with the statutory procedure." (*Gaskill v. Pacific Hospital of Long Beach* (1969) 272 Cal.App.2d 128, 133 [order granting defendants' new trial motion reversed where defendants failed to discharge their burden on appeal to present adequate record for salvaging defective new-trial order].) Where, as here, the new-trial order is defective, the prevailing party on such a motion must discharge its appellate burden to save the order on another ground. (See, e.g., *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 63 ["Neither defendant contends that the order can be sustained on another ground; it must therefore be reversed"; new trial order, "based solely upon the ground of excessive damages," was defective for failing to specify reasons].)

The imposition of this affirmative burden – i.e., to advance an alternative ground for salvaging the order – on the party that

obtains a defective new trial order makes sense. The motion for new trial is a creature of statute; as such, "the procedural steps prescribed by law for making and determining such a motion are mandatory and must be strictly followed." (*Linhart v. Nelson* (1976) 18 Cal.3d 641, 644 [citations omitted].) Because "a motion for new trial can be granted only as provided in the applicable statutes" (*Maroney v. Iacobsohn* (2015) 237 Cal.App.4th 473, 484), the inapplicability of the ground invoked by the trial court to reduce Siry's judgment requires reversal. (13 CT-B: 3008; 2994 [citing "excessive damage" ground as sole basis for three sets of reductions made as a matter of law].) In contrast to the trial court's ruling, the excessive-damage ground applies only where the court *weighs the evidence* and finds the damages excessive instead of deeming the damages excessive as a matter of law. (See *Stevens, supra,* 9 Cal.3d at p. 61 [confirming that "the ground of excessive or inadequate damages" is similar to "the ground of insufficiency of the evidence" because they all involve a judicial determination that "the *evidence* does not justify the amount of the award"]; emphasis added; OBOM 57-58.) This renders the new-trial order procedurally defective.

Because the defective order cannot be salvaged in this particular case on other grounds (OBOM 58-62), reversal of the new trial order requires reinstatement of the original judgment. (See *La Manna v. Stewart* (1975) 13 Cal.3d 413, 425 [where an order granting a new trial is reversed on appeal, the judgment is automatically reinstated].)

CONCLUSION

The original judgment should be reinstated.

Respectfully submitted,

Dated: May 11, 2021

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: */s/ Robert Cooper*
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 9,453 words as counted by Microsoft Office Word 2013, the word-processing program used to generate this document.

Dated: May 11, 2021

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: */s/ Robert Cooper*
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