No. S262081

IN THE

Supreme Court of the State of California

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SIRY INVESTMENT, L.P.

Plaintiff/Petitioner

vs.

SAEED FARKHONDEHPOUR, et al.

Defendants/Respondents

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And Consolidated Cases

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On Appeal from Judgment/Orders of the Los Angeles Superior Court Case No. BC372362, Hon. Stephanie M. Bowick and Hon. Mark A. Borenstein
After Published Decision by Court of Appeal, Second District, Division Two, No. B277750 Cons. w/ B279009 and B285904

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ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

This case presents an opportunity for the Court to reaffirm well-established procedures utilized by California courts in challenging a trial court's award of excessive damages on a motion for a new trial under section 657 of the California Code of Civil Procedure. The petition also presents an opportunity to curb the un-intended flooding of new litigation abuse created by a mis-interpretation and a mis-application of the California Penal Code section 496(c) to cases ranging from a simple breach of contract, to employment relationships, to partnership transactions, among other business disputes, which is inconsistent with the language, legislative intent and or purpose of that statute.

II. ISSUES PRESENTED

A. Issues For Which Review Was Requested And Granted.

The Court granted review to address a split of authority on two issues:

1. Is Penal Code section 496 limited to the theft of goods or does it also apply to the theft of other forms of property? (PFR, p. 8.)

2. Do defaulted defendants have standing to file new trial motions? (PFR, p. 12.)

With respect to the first issue, Penal Code section 496(c) was added in 1972 to punish for the violation of section 496(a). The statute that houses

section 496(a) and section 496(c) is titled "Crimes and Punishments," "Larceny – Receiving Stolen Property." Consistent with its title, the plain language of section 496(a) prohibits only "[t]he receipt of stolen property." Which is to say, when the property in question comes into the defendant's hands, it must already have the character of having been stolen. This reading is consistent with section 496(c)'s legislative history and the Legislature's purpose "to dry up the market for stolen goods."

Even if *assuming* section 496(a) is amenable to two alternative interpretations, the Siry Court of Appeal's[1] reading and interpretation is the one that conforms to the Legislature's intent and that will promote more reasonable results than the alternative. The Court should not create a judicial exception that would broaden the application of "receiving stolen property" as used in section 496(c) to encompass a dispute among sophisticated businesspeople, such as a claim of fraudulent diversion of business funds. Long standing tort remedies already allow an injured party to recover both compensatory and punitive damages. Over-stretching section 496 to broadly allow treble damages in run-of-the-mill breach of contract, conversion, and fraud claims would significantly alter the universe of remedies available for

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[1] Whenever referring to the "Siry Court of Appeal," reference is made to the appellate court's decision in this case (*Siry v. Farkhondehpour* (2020) 45 Cal.App.5th 1098.)

such claims and violate public policy.

As to the second issue, the plain language of section 657 dictates that a party can move for a new trial where the damages awarded were excessive or because the judgment is legally erroneous. Section 657 does not exclude from its application a judgment entered by default; and, the Legislature has not taken any steps to limit the statute's scope as to exclude default judgments since its enactment. It would be anomalous to hold that the trial court has the power to grant a new trial where a fairly contested trial has resulted in an award which is excessive as a matter of law but not where the excessive award results from an *ex parte* proceeding. Moreover, trial court remedies – such as the new trial motion – are ordinarily speedier and require a smaller expenditure of public and private resources than an appeal. Fewer appeals would be filed if an adequate remedy exists in the trial court, which benefits courts and litigants alike: "[a]llowing a defaulting party to bring excessive damages based on errors in law to the trial court's attention in a new trial motion puts those potential errors before the court with greater familiarity with the case, does so in a manner likely to yield a faster result, and may thereby altogether obviate the need for an appeal." (Typed opn. 35.)

As discussed more fully below, the Court of Appeal approached both issues on review correctly, applied the correct analysis, and reached the correct

and well-grounded result. The Court of Appeal's decision should be affirmed.

B. Siry's Laundry List Of Issues For Which Review Was Not Granted Should Be Disregarded.

Siry has occupied a substantial part of its brief on the merits with arguments that could and should have been, but were not, included in its opposition to the motion for new trial; were not brought to the trial court's attention in a motion for reconsideration; were not raised in its cross-appeal; and/or have been abandoned or forfeited by its failure to present them in its petition for review.

The Supreme Court does not grant review to correct errors, no matter how egregious or how prejudicial. In fact, to the extent Siry argues the appellate opinion manifests clear error, review on this ground alone should be denied because an error can exist only if the law is clear. And where the law is clear, there is no need for Supreme Court review. Instead, the Supreme Court's perspective is that review is necessary to improve the civil justice system by resolving conflicting case law and important questions of law.

The policy calculus does not change merely because one of the issues on appeal is whether the trial court abused its discretion or power in entertaining defendants' motion for new trial. Indeed, Siry cites no authority for the proposition that it may assert additional facts or theories *for the first time to this Court*. (*Reynolds v Bement* 36 Cal.4th 1075, as modified (Sept. 7,

2005), abrogated on other grounds by *Martinez v. Combs* (2010) 49 Cal.4th 5 [this Court held that leave to amend was properly denied where Plaintiffs first raised additional facts in a petition for rehearing before the Court of Appeal, much less in merits briefing before this Court].)

It remains, no matter how wrong other rulings or actions of the trial and appellate court may be, the error can be waived – and Siry did waive it – by failing to take the right action at the right time in the right way. (*Tisher v. California Horse Racing Bd*. (1991) 231 Cal.App.3d 349, 361 ["we decline to consider either argument under the rule that an issue is waived when not raised in appellant's opening"].) Of course, an exception to that general rule exists where the issue presented could not have been decided below as it asks the Supreme Court to overturn one of its earlier decisions. (See, *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1.) But Siry has not asked the Court to overrule one of its prior decisions, and instead is asking that the Court resolve a split of authority in the appellate court.

This answer brief shall adhere to the Court's rules and procedures and to the two issues for which review was granted -- unless this Court orders otherwise.[2]

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[2] Defendants reserve the right to contest the surplusage issues added to Siry's brief should the Court order briefing on such issues.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background Relevant/Limited To Issues Presented For Review.

Siry's recitation of the facts spins a narrative that is not entirely supported by the trial record and that is irreconcilable with the history of the dispute. It remains that there truly are two sides to every story. However, at the same time, Respondents are mindful of the fact that this case involves a default judgment and that this Court, as a "policy matter," accepts the Court of Appeal's statement of the issues and facts and will not "normally" consider any issue or fact omitted or misstated by the Court of Appeal.

B. Procedural Background Relevant/Limited To Issues Presented For Review.

1. Nature Of Case; New Trial Order; And Judgment.

This case stems from a partnership dispute among three longtime friends and sophisticated businessmen over a claim of fraudulent diversion of business funds. After terminating the case for discovery violations, the trial court entered a default judgment on Siry's conversion, fraud, breach of fiduciary duty and section 496(c) causes of action. (10 CT-B:2309.)[3] Defendants moved for a new trial on the ground that the damages awarded

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[3] The citation format in this answer brief shall be consistent with the briefing citation format in the Court of Appeal and in Siry's BOM.

were excessive and on the ground of errors in law. (10 CT-B:2410; 11 CT-B:2447.) The court ruled that the defaulting defendants had standing to move for a new trial on the stated grounds. It corrected its errors and recalculated and reduced some of the damages in the original default judgment. (13 CT-B:3008-3020.) These corrected errors included: (1) the court's recalculation of treble damages, which reduced quadrupled damages to treble damages; (2) the court's reduction of punitive damages, which was grounded in constitutional principles defining when such damages become excessive as a matter of law; and (3) the court's ruling that plaintiff must elect between treble and punitive damages, which addressed a question of law. (*Id.*)

2. Both Sides Appealed To The Second District Court Of Appeal.

Following entry of the amended judgment, both sides appealed. Relevant to this petition are (1) defendants' appeal challenging the application of section 496(c) to Siry's claims (Neman-AOB 76-77; ARB/X-RB 76-80; SF-AOB 58-66; SF-ARB/X-RB 33-36.); and (2) Siry's cross-appeal challenging the court's power to entertain a motion for a new trial following a default judgment. Although Siry's notice of appeal challenged the court's recalculation and reduction of damages, (Siry-RB/X-AOB 156-160; X-ARB 12-27) Siry abandoned that challenge by failing to argue it on cross-appeal. (BOM, p. 22.)

Following the Court of Appeal's decision, Siry petitioned for rehearing, which resulted in the appellate court modifying its opinion while denying rehearing. (PFR, Ex, 2.)

3. Siry's Petition for Review.

Siry petitioned this Court for review. Siry's petition presented two issues (see Section II supra.). (PFR, pp. 8, 12.) The Court granted review as to the two issues presented.

IV. LEGAL ARGUMENT

A. THE SECOND DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT SIRY'S CLAIM FOR "RECEIVING STOLEN PROPERTY" UNDER CALIFORNIA SECTION 496(c) DOES NOT APPLY TO A CLAIM FOR FRAUDULENT DIVERSION OF BUSINESS FUNDS.[4]

1. As A Starting Point, The Court Of Appeal Never Evaluated The Pleadings Nor Determined That Siry Had Properly Stated A Cause Of Action Under Section 496(c).

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[4] Although Siry frames the section 496 question as one limited to a dispute over "money" v. "goods," the split of authority among the Courts of Appeal is much wider and is rather centered around the nature and context of the dispute itself, not only its subject matter ("money" v. "goods"). In its petition and brief on the merits, Siry has indirectly touched upon the real issues. This brief directly answers the section 496 issues as framed in the conflicting opinions in Bell, Lacagnina, Switzer and the Siry cases (in addition to unpublished opinions). To the extent any of the arguments presented herein may be considered a new issue, the Court has discretion to consider a new issue that the Court deems important or integral to the issues presented. (See e.g., *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654-655; and *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 662.)

The first point Siry attempts to make in its brief on the merits is a claim that the Court of Appeal allegedly "agreed with Siry that Siry had `properly alleged a violation of Penal Code section 496 in its operative complaint,'" citing typed opn. 47. But, that is not what the Court of Appeal said. Notwithstanding the fact that the Court of Appeal never reached the pleading issue on the merits, it appears that Siry has misread the words pronounced by the Court of Appeal, which stated: "Siry's final salvo is to assert that it properly alleged a violation of Penal Code section 496 in its operative complaint. That may be true, but it is irrelevant because, as we now hold, Penal Code section 496 - no matter how well it is pled - does not provide the remedy of treble damages based on the underlying allegations in this case." (Typed opn. 47.) That statement by the court is not the same as a determination that Siry has properly pleaded its cause of action. The statement is no different from the court saying: "Even if Siry had properly alleged a violation of Penal Code section 496 in its operative complaint, it would not make any difference because section 496 does not apply in this case."

2. The Section 496 "Receipt Of Stolen Property" Requirement.

a. The Governing Statutes.

California Penal Code section 496(a) makes it a crime to "buy[] or receive[] any property that has been stolen or that has been obtained in any

manner constituting theft or extortion, knowing the property to be so stolen or obtained," or to "conceal[], sell[], withhold[], or aid[] in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained." (See Pen. Code § 490(a) (emphasis added).)

"Theft" is defined in section 484 of the Penal Code as encompassing any "person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her." (Pen. Code § 484(a).)

Although section 496(a) limits itself to criminal punishment for violators, section 496(c) gives rise to a civil cause of action for violations of section 496(a). Section 496(c) reads: "Any person who has been injured by a violation of subdivision (a) . . . may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney's fees." (Pen. Code § 496(c).)

b. The Plain Language Of Section 496(a) Prohibits Only The "Receipt Of Stolen Property."

The plain language of section 496 prohibits only the "[r]eceipt of stolen property." It "prohibits buying or receiving stolen property-the customary business practices of one who acts as a fence." (*People v. Allen* (1999) 21 Cal.4th 846, 854.) Very recently, the United States District Court for the Central District meticulously dissected the language of section 496: "While the

statute is not a picture of clarity, its first sentence prefaces the defined criminal violation by describing its subject in the past tense: `[e]very person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft.' Id. Section 496(a) (emphasis added). Later, the statute follows the sentence '[any person] who conceals, sells, withholds[] any property from the owner[]" with the modifying condition that the individual `know[s] the property to be so stolen or obtained[.] Id. (emphasis added). `Which is to say, when the property in question comes into the defendant's hands, it must already have the character of having been stolen.' *Grouse River*, 2016 WL 5930273, at *14 (emphasis in original) (citing *Worldwide Travel*, 2016 WL 1241026, at *6). Indeed, for precisely that reason, the First District of the California Court of Appeal recently held that disputed property must be `"stolen" at the time' it was obtained or withheld to provide the basis of a section 496(a) claim. *Lacagnina*, 25 Cal. App. 5th at 971 (emphasis in original). In so ruling, the First District found `no ambiguity in the statutory language, and therefore no need to consult [section 496(a)'s] legislative history. Id." (See *Instant Brands, Inc. v. DSV Solutions, Inc.*, 2020 WL 5947914, at * 10 (decided on August 20, 2020) ("Instant Brands").)

c. Section 496(c)'s Legislative History Reflects That Section Was Introduced To Create Civil Liability For The "Receipt Or Withholding Of Stolen Property."

California decisional law - both state and federal - is divided in interpreting the plain meaning of section 496(a). “[A] split between the Courts of Appeal reflects uncertainty over [a] reading of [a] statute[,]” and warrants resort to the statute's legislative history. (*People v. Indiana Lumbermens Mut. Ins. Co*. (2010) 49 Cal.4th 301, 308.) Even assuming the plain language of section 496(c) was not restricted to "receipt of stolen property," the "`plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose." (*Lungren v. Duekmejian* (1988) 45 Cal.3d 727, 735 (“Lungren”).) The court's role in interpreting or construing a statute is to ascertain and effectuate the legislative intent "as to effectuate the purpose of the law." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379.) "Courts are increasingly willing to consider other indicia of intent and meaning from the start rather than beginning their inquiry by considering only the language of the act." (*Sutherland on Statutory Construction*, Section 46.07.) As such, "[i]f the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy" (*Imperial Merchant Services Inc. v. Hunt* (2009) 47 Cal.4th 381, 388 (Imperial Merchant)) and the interpretation "that leads to the more reasonable result will be followed." (*Lungren*, 45 Cal.3d at 735.)

Turning to section 496's legislative history, the California Courts of Appeal appear to at least agree "that the treble civil damages provision in that section `was introduced... with the goal of eliminating markets for stolen property, in order to substantially reduce the incentive to hijack cargo from common carriers.' Bell, 212 Cal.App.4th at 1047 (emphasis added); Lacagnina, 25 Cal.App.5th at 971. `[T]he Legislature had a... targeted goal in mind when it enacted Penal Code section 496's treble damages remedy - namely, 'to dry up the market for stolen goods.'" (Typed opn. 44-45.) We take a look at the legislative history materials lodged by Siry:

- Section 496(c) of the Penal Code was introduced in 1972 (through SB No. 1068) and added to the section 496 "receipt of stolen property." By then, section 496 had been existence for 100 years. The section 496(c) aimed goal was to secure civil remedies in favor of "any for-hire carrier operating under the jurisdiction of the Public Utilities Commission…." (MJN-012, 042.)

- The Bill was amended on May 30, 1972, to provide "for-hire carriers with a civil action for damages against operators of `flea markets' who fail to maintain required records of persons selling property at their facilities, when such failure results in the sale of property which has been stolen from trucks that are operated by the carrier." (MJN-115) "It is contended that the

provisions of this bill are necessary to eliminate a commonly used market for disposing of property which has been stolen from cargo carriers." (MJN-060.)

- The Bill was amended again on June 26, 1972. Its "purpose" never changed: "(1) Existing law makes it a felony/misdemeanor to knowingly purchase, receive, conceal, or withhold stolen property. No criminal sanction applies to persons who knowingly sell property which they know has been stolen or extorted. The bill provides felony/misdemeanor sanctions for this latter class of persons. (2) It is contended that the criminal and civil sanctions created by this bill are necessary to eliminate markets through which stolen property is sold. It is felt that elimination of these markets will substantially reduce the incentive to hijack cargoes from common carriers." (MJN-061-62.)

- The following language appeared in an Assembly Committee Analysis (Statement) (MJN-064-066.):

"Statement. The purpose of this Bill with amendments is to take the profit out of cargo thievery by making persons who steal, fence, or receive stolen property, civilly liable in damages for their acts to for-hire carriers from whom the property was stolen.

The Bill provides such carriers can sue for $1,000 or three times the amount of actual damages, whichever is higher. Punitive damages are provided to afford carriers who pay the brunt of losses for cargo theft an opportunity to

recover losses and costs and at the same time tighten up the shady market area where thieves sell their stolen goods.

Certainly, if a thief does not have a buyer to purchase or "fences" for resale his stolen or "hot" cargo, then his market will dry up.

[The purpose of the statute is also to reach the final purchaser] The number of times ... where a criminal action may be successfully prosecuted against all but the final purchaser is well known in the trucking industry.

The Bill places a duty on person furnishing temporary space in a market place open to the public to keep a record of the name and address of each tenant vendor, a description of the property offered for sale and the name and address of the person from whom the tenant vendor acquired the property offered for sale.

The goal of this provision is to include vacant lot sales, etc.. at which stolen goods are often sold and which cannot be effectively policed without the information. Just the requirement to keep these records will discourage these places as fences to sell stolen goods." (Statement on Sen. Bill No. 1068 (1972 Reg. Sess.) p. 1; Sen. Com. on Judiciary, com. on Sen. Bill No. 1068 (1972 Reg. Sess.) as amended June 26, 1972, p. 2.)

- Another Statement explained the July 27, 1972, amendment: "The transportation industry, airlines, ships, railroads and trucks, loses millions

of dollars of goods to thieves every year. This measure, SB 1068, is pointed at restricting one of the outlets of stolen property - the flea market...." (MJN-089.)

- On August 1, 1972, California Legislature Senate George N. Zenovich wrote a letter to then Governor Ronald Reagan urging him to consider his SB 1068: "A growing concern to the transportation history, has been the increased use of flea markets as an outlet for stolen property. This measure is directed at closing this outlet. .... I believe the threat of civil action will help to limit the market for stolen goods. The final purchaser of stolen property may think twice before buying stolen goods which could bring a suit for three times the value of the goods." (MJN-080.)

- On December 27, 1972, the United States Senate Select Committee on Small Business wrote a letter to the California Trucking Association which again identified the purpose of SB 1068 "to deal on an intrastate basis with enactment of new laws to control fencing." (MJN-097.) Attached to Chairman Bible's letter of December 27, 1972, was a copy of his letter that "had gone forward to 49 Governors and Governors-elect, suggesting that they might want to recommend a California-type treble damage bill to their state legislatures next year." Chairman Bible explained:

"Our focus has been on operations of the country's criminal

redistribution or `fencing' system which supports the thievery of commodities from business. Our elementary finding is that without a `fence' to "purchase stolen goods, thievery becomes a meaningless, profitless act. If a thief does not have a buyer or a `fence' to resell the stolen goods, the stolen or `hot cargo' is more difficult to disperse profitability."" Our committee's work led to my introduction last year of an amendment of the Victims of Crime Compensation Act of 1972 which would provide a federal civil remedy to reach the purchasers and sellers of stolen goods by making them liable in treble damages for their acts. Because this legislation is designed to reach only interstate thievery, comparable laws to curb intrastate fencing within the several state would be essential to close the whole door." "Last year our Committee's work in this field stimulated the State of California to enact a similar law to reach fencing operations on an intrastate basis there." (MJN-099-101.)

Section 496(c)'s legislative history confirms the legislative intent to prohibit and curb the trade of "stolen property." That intent is also manifested in section 496(c)'s title, which specifies that it deals with "receiving stolen property." "[S]ection headings [of an act] may properly be considered in determining legislative intent, and are entitled to considerable weight" (*People v. Hull* (1991) 1 Cal.4th 266, 272 (internal quotations omitted).)

Siry fails to explain – nor could it explain – how permitting treble

damages in a partnership dispute involving a group of sophisticated businessmen over partnership distributions could advance the legislative intent to "dry up the market for stolen goods." The legislative history and intent plainly supports the proposition that, regardless of literal interpretation, section 496(c) was solely intended to create civil liability for the receipt or withholding of "stolen goods."

d. Even If Assuming Section 496(a) Is Amenable To Two Alternative Interpretations, Defendants' Interpretation Is The One That Comports With The Legislature's Intent And That Will Promote More Reasonable Results Than The Alternative.

The Court has granted review to resolve the split of authority created by conflicting judicial opinions in this state. When "a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed." (*People v Shabazz* (2006) 38 Cal.4th 55, 68.) This is particularly important in interpreting a criminal statute. The Court has repeatedly stated that when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt the interpretation that is more favorable to the defendant. (E.g., *People v. Garcia* (1999) 21 Cal.4th 1, 10 (Garcia); *People v. Gardeley* (1996) 14 Cal.4th 605, 622 (Gardeley).)

As the Courts of Appeal aptly explained in the *Lacagnina* case and this

case, interpreting section 496 in accordance with the legislative intent will promote more reasonable results than the alternative; and, conversely, adopting Siry's reading of section 496(a) would engender unreasonable results:

> "If every plaintiff in [a business/partnership relationship] could also seek treble damages and attorneys' fees on the ground that the defendant received `stolen property,' such claims would become the rule rather than the exception, parties would more frequently assert claims for `theft' in run-of-the-mill commercial disputes, and cases would be harder to settle. [¶] We cannot believe the Legislature contemplated, much less intended, those consequences when it enacted section 496, subdivision (c). (See, *Corley v. San Bernardino County Fire Protection District* (2018) 21 Cal.App.5th 390, 397 [in interpreting a statute, `[courts] must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.'" (*Lacagnina v. Comprehend Systems, Inc*. (2018) 25 Cal.App.5th 955, 972-973 ("Lacagnina").)

> The Siry Court of Appeal likewise explained:[5]

> "Accepting Siry's interpretation of the statute would "transmogrify the law of remedies for those torts," since treble damages would "eclipse" the typical remedies and "effectively repeal the punitive damages statutes. "Until now, the damages remedy for these torts has been limited to the amount of damages actually caused by the fraud, misrepresentation, conversion or breach of fiduciary duty. [citations omitted] Treble damages under Penal Code section 496, if held applicable to these torts, would all but eclipse these traditional damages remedies." (Typed opn. 43-44.)

> "[R]eading Penal Code section 496 to apply in theft-related tort cases would effectively repeal the punitive damages statutes. *California*

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[5] In this answering brief, Defendants heavily rely on and quote from the Court of Appeal's well-analyzed and written published opinion.

Cannabis Coalition v. City of Upland (2017) 3 Cal.5th 924, 945 [222 Cal.Rptr.3d 210, 401 P.3d 49] [noting "strong presumption" against "implied repeal"].) "Until now, a plaintiff seeking greater than compensatory damages had to prove, by clear and convincing evidence, that the defendant was `guilty of oppression, fraud, or malice.' (Civ. Code, § 3294, subd. (a).) If Penal Code section 496 applied to these torts, a plaintiff could obtain treble damages merely by proving the tort itself by a preponderance of the evidence. (Evid. Code, §§ 500, 115 [preponderance of the evidence is the default burden in civil cases]." (Typed opn. 44.)

"As a general rule, California follows the so-called "American rule" when it comes to attorney fees: Parties in civil litigation bear their own unless a statute or contract provides otherwise. (§ 1021; *Eden Township Healthcare Dist. v. Eden Medical Center(*2013) 220 Cal.App.4th 418, 425 [162 Cal.Rptr.3d 932].) "Because Penal Code section 496, subdivision (c) authorizes an award of attorney fees along with treble damages, extending its reach beyond the context of stolen property would have a third significant effect: It would authorize fee shifting in nearly every tort cause involving fraud, misrepresentation, or breach of fiduciary duty, thereby creating a gaping exception to the general rule against such fee shifting. (Code Civ. Proc., § 1021.)" (Typed opn. 47.)

"What is more, our Legislature has not shouted, stated, or even whispered anything about Penal Code section 496 effecting such a `significant change' to the universe of tort remedies. Rather, the Legislature had a far more targeted goal in mind when it enacted Penal Code section 496's treble damages remedy-namely, `to dry up the market for stolen goods.' (*Bell*, supra, 212 Cal.App.4th at p. 1047.) Penal Code section 496's focus on stolen goods is reflected in the statute's title, which specifies that it deals with receiving stolen property. (*People v. Hull* (1991) 1 Cal.4th 266, 272 [2 Cal.Rptr.2d 526, 820 P.2d 1036] [`section headings' `are entitled to considerable weight' `in determining legislative intent' (citation omitted)].) It is reflected in the traditional understanding of the crime defined in Penal Code section 496, subdivision (a), which requires proof that "(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 [35 Cal.Rptr.2d 544].) And it is reflected in Penal Code section 496, subdivision (c)'s legislative history,

which is replete with discussions about how best to achieve the `goal of eliminating markets for stolen property, in order to substantially reduce the incentive to hijack cargo from common carriers.' (*Citizens of Humanity, LLC v. Costco Wholesale Corp*. (2009) 171 Cal.App.4th 1, 17-18 [89 Cal.Rptr.3d 455], overruled on other grounds as stated in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337 [120 Cal.Rptr.3d 741, 246 P.3d 877] (Kwikset).) Although the Legislature ultimately opted not to limit the treble damages remedy to actions against `public carriers,' its focus never strayed from drying up the market for stolen goods. (*Citizens of Humanity*, at p. 18, italics omitted.) Because imposing treble damages in cases alleging fraud, misrepresentation, breach of fiduciary duty and other torts outside the context of stolen property does nothing to "advance the legislative purpose to `dry up the market for stolen goods,' we cannot even infer any legislative intent to affect this significant change." (Typed opn. 44-45.)

"The Legislature's silence is even more deafening when contrasted with other statutes that speak with a much clearer voice in creating the extraordinary remedy of treble damages. [citing statutes]." (Typed opn. 46.)

"Because we cannot presume that our Legislature intended to so significantly alter the universe of tort remedies without saying anything about its desire to do so, we conclude that Penal Code section 496's language sweeps more broadly than its intent and hold that it does not provide the remedy of treble damages for torts not involving stolen property. We recognize that *Switzer*, and to a lesser extent, *Bell*, came to the contrary conclusion based on their view that Penal Code section 496's language was controlling. *Switzer* took an additional step, noting that legislative intent can sometimes trump a statute's plain language, but choosing to focus on whether extending treble damages to all tort cases involving "theft" was such an outlandish outcome as to be deemed "absurd." (*Switze*r, supra, 35 Cal.App.5th at pp. 129-131.) As explained above, we take the path *Switzer* chose not to take and conclude that Penal Code section 496's language diverges from the Legislature's intent and that its narrower intent is controlling." (Typed opn. 46-47.)

e. A Claim For Misappropriation Of Property By A Person To Whom It Was "Entrusted" Is Not The Same As A Claim Against A Third Party Who "Received Stolen Property."

(1) Applicable Statutes.

California's first Penal Code recognized the distinction between the various theft-related crimes, containing separate provisions for each type of theft. Former section 484 defined larceny as "the felonious stealing, taking, carrying, leading, or driving away the personal property of another." (See 1872 Pen. Code, former § 484.) Larceny was a crime against one's possession of property. By contrast, embezzlement involves "an initial, lawful possession of the victim's property, followed by its misappropriation." (See *People v. Williams* (2013) 57 Cal.4th 776, 786-787, 789 (Williams).) Section 503, unchanged since the original Penal Code, defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been [e]ntrusted." (Pen. Code, § 503.)

The Legislature amended section 484 in 1927 to define a general crime of "theft." Theft was defined expansively to include all the elements of larceny, false pretenses, and embezzlement. The amended provision stated in relevant part: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another [larceny], or who shall fraudulently appropriate property which has been entrusted to him [embezzlement], or who

shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property [false pretenses] . . . is guilty of theft." (Stats. 1927, ch. 619, § 1, p. 1046.)

The Legislature also enacted section 490(a), stating that "[w]herever any law or statute of this state 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." (Stats. 1927, ch. 619, § 7, p. 1047, italics added.) "The purpose of the consolidation was to remove the technicalities that existed in the pleading and proof of these crimes at common law." (See *People v. Fewkes* (1931) 214 Cal. 142, 149.)

The "punishments" statutes as to each theft-related offense have always been separated, including to date. Notably, while the theft by false pretenses statute incorporates the larceny punishments by reference (section 532 [“(a) … punishable in the same manner and to the same extent as for larceny of the money or property so obtained.”]), the embezzlement punishments statute does not. (Penal Code, § 514.) The Code’s embezzlement punishments are unique to section 514 and do not appear in any other theft-related statute: “… [i]f the embezzlement or defalcation is of the public funds of the United States, or of this state, or of any county or municipality within this state, the offense is a

felony, and is punishable by imprisonment in the state prison; and the person so convicted is ineligible thereafter to any office of honor, trust, or profit in this state. (Amended by Stats. 1976, Ch. 1139.)"

(2) Siry's Claim Is For Fraudulent Diversion Of Business Funds.

Siry recounts a laundry list of the complaint's conclusory allegations that it claims show various forms of "theft." (OBM, pp. 27-28.) Siry's alleged facts do not meet the standard that the defendant knowingly bought or received stolen property or knowingly obtained property by theft. There is no factual allegation that defendants fraudulently induced Siry to pay them money or provide property. (See *Bell v. Feibush* (2013) 212 Cal.App.4th 1041, 1043-1044 (Bell) [plaintiff paid money to defendant because of fraudulent/illegitimate loan scam].) Nor are there allegations that funds came into the partnership from theft. (See *Adtrader, Inc. v. Google LLC* (N.D. Cal. July 13, 2018, 17 cv-07082-BLF) 2018 WL 3428525, *9 (Adtrader) [applying *Bell* and dismissing section 496 claim because the alleged fraud concerned defendant's refund policy, not that defendant fraudulently obtained property from plaintiff or that the money flowing into defendant resulted from theft].) Nor does Siry claim its partnership agreement with the defendants was a scam. On the contrary, the principal of Siry (Mohamad Siry) and Defendants are longtime friends. (2CT-B:310-320; 3SCT-B:750-4SCT-B:772.) Siry admitted

defendants paid it its share of the partnership distributions for years prior to the underlying dispute. To date, Siry continues to partner up with defendants on other partnership investments.

In a nutshell, Siry alleges that it was in a fiduciary relationship with its partner defendants; its partner defendants were entrusted with collecting partnership revenues from legitimate sources; and its partner defendants breached their fiduciary duties by denying it partnership profits. Even after accepting Siry's allegations as true *for purposes of the default judgment only*, Siry's allegations boil down to a claim that is closer to embezzlement, but not one for "receipt of stolen property" (notably, throughout its brief, Siry consistently refers to its partner defendants as embezzlers).

(a) Irrespective Of The Penal Code Amendments, "Larceny" And "Embezzlement" Continue To Have Their Distinctive Meanings In The Penal Code.

The Legislature did not intend section 490(a) to remove the distinctive meanings of larceny and embezzlement from the Penal Code because such a broad interpretation would lead to absurd and legally incorrect results. Applied literally, as Siry suggests, would render several theft-related provisions nonsensical and contrary to undisputed law. For example, applying section 490(a) to section 503 would change that provision to read that "[theft] is the fraudulent appropriation of property by a person to whom it has been

[e]ntrusted." However, that is not the definition of all "theft"; it is the definition of embezzlement alone. (See *In re Basinger* (1988) 45 Cal.3d 1348, 1363-1364 [embezzlement is the type of theft that requires appropriation of entrusted property].) Similarly, applying section 490(a) to section 509 would alter that provision to read that "[a] distinct act of taking is not necessary to constitute [theft]." (sections 490a, 509.) This is the law for embezzlement but not for larceny. (See *People v. Davis* (1998) 19 Cal.4th 301, 305 (Davis) [The 1927 legislation consolidated the "formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses" into the "single crime of `theft,'" but did not abolish their substantive distinctions; theft by larceny requires taking].)

The 1927 amendment to section 484 was not intended to have such a far reach. Instead, as this Court has said numerous times, the 1927 amendments simply grouped theft crimes into a general definition of theft - or, as one court put it, "assembled" the 'several crimes' under the term 'theft'" (*People v. Sanders* (1998) 67 Cal.App.4th 1403, 1416) - and did not change the substantive differences among those crimes. (See *People v. Darling* (1964) 230 Cal.App.2d 615, 620; *People v. Myers* (1929) 206 Cal. 480, 483 (Myers).) Section 484 as amended "merely ... amalgamate[s] the crimes of larceny, embezzlement, false pretenses and kindred offenses under the cognomen of

theft. No elements of the former crimes have been changed by addition or subtraction." (*Myers*, 206 Cal. at 483-4; accord, *Williams*, 57 Cal.4th at 786-787, 789 ["the 1927 legislation enacting section 490(a) and the theft consolidation statute [citations] left unchanged the elements of theft"; [the reference in the definition of robbery to a "felonious taking of personal property" refers only to larceny, not false pretenses, so that robbery is not committed by the crime of false pretenses and the subsequent use of force or fear]; *Davis*, 19 Cal.4th at 304 [the 1927 legislation consolidated the "formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses" into the "single crime of `theft,'" but did not abolish their substantive distinctions].)

(b) Irrespective Of The Penal Code Amendments, The Penal Code Continues To Punish "Embezzlement" Differently From Other Theft-Related Offenses.

i. The Penal Code Sets Forth A "Unique" Set Of Punishments For Embezzlement.

The Legislature has dedicated a distinct statute to "punish" the act of embezzlement. (Pen. Code, § 514.) That statute is both specific and self-contained.

- The separate larceny and embezzlements statutes existed for a full century before section 496(c) was introduced in 1972. It is presumed that the Legislature did not intend section 496(c) to apply to embezzlement,

otherwise it would have so stated. Instead, the Legislature housed section 496(c) in a statute titled "receipt of stolen property." It is presumed that the Legislature would not have been inartful as to extend the 496(c) punishments to embezzlement under the wrong heading.

- Section 514 does not suggest that its stated punishments are in addition to or independent of other remedies that may be available under the other theft-related statutes. At the same time, not all of section 514's punishments apply to other theft-related offenses. For example, section 514 imposes specific injunctive relief-like remedies that do not appear anywhere else or in any of the other theft-related punishments statutes [when "the embezzlement or defalcation is of the public funds ... the person so convicted is ineligible thereafter to any office of honor, trust, or profit in this state"].).

- Section 514 states that its *criminal* punishments are similar to other theft-related offenses *criminal* punishments. But, it does *not* mention civ*il* punishments included in other theft-related offenses. *Remarkably*, section 514 was amended years after adopting section 496(c), but the Legislature still did not refer to section 496(c) or its civil penalties in the amended section 514. The sound of the section 514 amendment's silence on this issue is the most deafening sound of all.

- Section 514 requires a prior "guilty" conviction before any of its

punishments would apply. On the other hand, section 496(c) does not require a prior criminal conviction. (See *Bell,* 212 Cal.App.4th at 1045.)

- *Notably*, section 496(c)'s legislative history does not mention acts that constitute embezzlement or any Penal Code statute other than its section 496, titled "receipt of stolen property."

ii. The Embezzlement "Specific" Punishments Statute Controls.

According to the general rules of construction of statutes, when a "special" and a "general" statute are in conflict, the former controls. (Code Civ. Proc., § 1859; see, *People v. Tanner* (1979) 24 Cal. 3d 514, 521 ["A specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates"].)

Siry advances that section 496 is a catch-all, general statute and that section 496(c)'s civil penalties apply to all theft-related offenses. (BOM, pp. 29-31) That proposition is not supported by either the language of section 496 ("receipt of stolen property") or, in this instance, that of section 514 (embezzlement). Because section 514 and section 496(c) collide and cannot be reconciled on this issue, and because section 514 is the "specific" statute for the alleged wrongful conduct, section 514 controls.

f. Siry's Remaining Arguments Are Equally Flawed.

(1) Nothing Suggests That The Court Of Appeal Assumed "Money" Is Not Property Within The Meaning Of Section 496(a).

Siry contends that "the Court of Appeal's decision erroneously assumes `money' is not property within the meaning of theft laws." (BOM, p. 31.) But, that language does not appear in the Court of Appeal's Opinion. Instead, the Court of Appeal correctly stated that money in the context of a claim for fraudulent diversion of business funds is not the type of "property" or conduct contemplated by section 496(c), the statute that punishes "receipt of stolen property." (Typed opn. 40-47.)

(2) A Section 496(c)'s Treble Damages Recovery Irreconcilably Clashes With, And Would "Effectively Repeal," Long-Established Punitive Damages Statutes.

"Reading Penal Code section 496 to apply in theft-related tort cases would effectively repeal the punitive damages statutes. ... Until now, a plaintiff seeking greater than compensatory damages had to prove, 'by clear and convincing evidence, that the defendant was 'guilty of oppression, fraud, or malice.' (Civ. Code, § 3294, subd. (a).) If Penal Code section 496 applied to these torts, a plaintiff could obtain treble damages merely by proving the tort itself by a preponderance of the evidence. (Evid. Code, §§ 500, 115 [preponderance of the evidence is the default burden in civil cases]." [12]

What is more, our Legislature has not shouted, stated, or even whispered anything about Penal Code section 496 effecting such a "significant change" to the universe of tort remedies." (Typed opn. 44) Siry disagrees. (BOM, p. 41.)

In a section 496(c) claim, it is the plaintiff's obligation to prove the case by a preponderance of the evidence; that is, the plaintiff must be able to prove, by the evidence presented in the court, that what she is required to provide is more likely to be true than not true. This means that the plaintiff must show there is a greater than 50% chance that the defendant caused her the harm or injury. (See CACI No. 200.) On the other hand, for punitive damages, the plaintiff's obligation is to prove the case by clear and convincing evidence, which is a higher standard burden of proof. This means the plaintiff must be able to prove that it is highly probable that the fact is true and there is a substantial likelihood that the defendant committed the illegal act. (See CACI No. 201.) It is axiomatic that the two burdens of proof involved are significantly different, and the two may not be reconciled.

(3) There Is No Need For Two Separate Punitive Damages Statutes Where The Legislature Intended No Double Punitive Recovery.

(a) The Goal Of A Punitive Damage Award Is To Deter, Not Crush, The Defendant Financially.

Punitive damages are intended to punish, and thereby deter, wrongful

acts. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13.) "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65.) Thus, the goal is deterrence, not to crush the defendant financially. "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 112.) California, therefore, requires that, before punitive damages may be awarded, the plaintiff must present evidence of the defendant's ability to pay the award. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916-918; *Adams,* 54 Cal.3d at p. 119; *Tomaselli v. Transamerica Ins. Co*. (1994) 25 Cal.App.4th 1269, 1282-1284.) Forcing the section 496(c) automatic "treble damages" award into the adequate tort remedies, where it does not fit nor belong, would effectively repeal the well-established punitive damages statutes that have been in existence since the California Civil Code was first introduced in 1872. In other words, "***if it ain't broke, don't fix it***."

(b) Civil Code Section 3294 And Penal Code Section 496(c) Are Both Punitive Statutes. No Double Punitive Recovery Is Allowed.

"(T)he purpose of punitive damages `*is a purely public* one. The public's goal to punish wrongdoing and thereby to protect itself from future

misconduct, either by the same defendant or other potential wrongdoers.'" (*Power Standards Lab, Inc. v. Federal Express Corp.* (2005) 127 Cal.App.4th 1039, 1047, citing *Adams v. Muakami* (1991) 54 Cal.3d 105, 110.) In *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1172, the Court explained that "damages provision allowing for an exemplary award of up to treble the actual damages suffered with a statute minimum amount reveals a desire to punish intentional and morally offensive conduct." The Court expressly called the treble damages provision "a punitive award." (*Id*. at p. 1152 fn. 5.) As Penal Code section 496 is punitive, we must determine whether (1) the Legislature intended for a double recovery of punitive damages under that statute, and (b) if not, whether the punitive damages at issue were based on the same conduct (Siry has all along maintained that it is entitled to recover both treble and punitive damages).[6]

- The presumption is that, absent a specific indication otherwise, the Legislature did not intend to allow for double recovery of punitive damages under section 496(c). (See *Imperial Merchant*, 47 Cal.4th at 387; and *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228

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[6] Siry has recited a list of California statutes that have, in other contexts, allowed recovery of treble damages. (OBM, pp. 27-28 fn. 13.) However, Siry omitted that the statutes in question spoke with a much clearer voice in creating the extraordinary remedy of treble damages.

["We are of the opinion that had the Legislature by Civil code sections 3294 (permitting punitive damages) and 1794 (permitting a civil penalty), intended a double recovery of punitive and penal damages for the same willful, oppressive and malicious acts, it would in some appropriate manner have said so."].) Section 496(c) does not state that its civil penalties are in addition to or independent of other remedies provided elsewhere. To the contrary, it expressly limits their application to a "violation of subdivision (a) or (b)" of section 496.

- This is particularly true where, as here, the plaintiff alleges a violation of a single primary right giving rise to a single cause of action for punitive damages. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) "Although 'the phrase "causes of action" is often used indiscriminately … to mean counts which state differently the same cause of action' [citation], its more precise meaning 'is the right to obtain redress for a harm suffered.' [citation]. "Even where there are multiple legal theories upon which recovery might be predicated, *one injury gives rise to only one claim for relief*." [Citations.]." (*Hayes v. Count of San Diego* (2013) 57 Cal.4th 622, 631.) Meaning, where one primary right has been violated, i.e., one injury occurred,

a plaintiff can only be awarded punitive damages once. (See *Plotnik v. Meihaust* (2012) 208 Cal.App.4th 1590, 1611-1612 [Where the plaintiff suffers a single injury, the jury's special verdict awarding emotional distress damages on several separate theories of negligence, trespass, negligent infliction of emotional distress, and intentional infliction of emotional distress, was impermissible double recovery.].)

Accepting the facts alleged in Siry's pleadings as true *for purpose of this default judgment* case, the record shows that Siry suffered a violation of a single primary right – one injury. Defendants misappropriated funds, denying Siry his right to partnership funds. Siry suffered the same primary right violation. Siry's operative causes of action for conversion, fraud, breach of fiduciary duty and under Penal Code section 496(c) are simply four different legal theories for recovering punitive damages for that same injury.

(4) Application of Section 496(c) To All Theft Related Offenses Would Be Contrary To Public Policy.

The Siry Court of Appeal was not the first appellate court to express section 496(c) public policy concerns. Since section 496(c) has forced its way into the civil law arena, courts have been uneasy in applying it in the commercial context; and the ones that did apply it acted hostages to their (*albeit* erroneous) interpretation of the language of that statute. For example, the *Bell* court stated: "Feibush argues that permitting Bell to recover treble

damages under section 496(c) is contrary to public policy and permits litigants to circumvent limitations on remedies. Our decision to affirm the default judgment is based on straightforward statutory interpretation. … We are not unmindful of Feibush's policy concerns about the potential consequences of our interpretation of section 496(c). But it is the task of the Legislature to address those policy concerns. It is not this court's role to replace the word "violation" with the word "conviction" in the statute." (See *Bell*, 212 Cal.App.4th at 1049.)

The *Lacagnina* court echoed *Bell*'s public policy concerns but acted on them by refusing to follow *Bell*: "Finally, we note that significant adverse consequences would likely follow from Lacagnina's proposed interpretation of the statute. ... If every plaintiff in an employment or contract dispute could also seek treble damages and attorneys' fees on the ground that the defendant received "stolen property," such claims would become the rule rather than the exception, parties would more frequently assert claims for "theft" in run-of-the-mill commercial disputes, and cases would be harder to settle. We cannot believe the Legislature contemplated, much less intended, those consequences when it enacted section 496, subdivision (c)." (See *Lacagnina*, 25 Cal.App.5th at 972.)

In addition, applying section 496(c) outside of its tight-fit "receipt of

stolen property" statute would be unconstitutional -- procedurally and as applied. Nothing 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." At the same time, nothing in section 514 gives notice that the specific punishments set forth therein are not exclusive. (See argument in Section A-2e(2)(b)(I) supra.) There may be no dispute that, to the extent section 496 was intended to apply to embezzlement or any theft-related offense beyond "receipt of stolen property (which is not apparent from that statute's language or legislative history), there is a glaring legislative contradiction that must be remedied. Until remedied, the application of section 496 beyond the offense of "receipt of stolen property" would be *unconstitutional*. The notion that the Legislature drafts ambiguous language so courts may interpret that language as they see fit is itself suspect as a matter of the separation of powers: our Constitution does not allow a delegation of legislative power to the executive. But, the notion that Legislature commits that same folly by drafting directly conflicting statutory language is ludicrous. When resolving conflicting criminal statutes, courts look to the "rule of lenity." That rule provides that, in construing ambiguous criminal statutes, courts should resolve the ambiguity in favor of the defendant. (E.g., *Garcia,* 21 Cal.4th at 10; *Gardeley,* 14 Cal.4th at 622.)

Moreover, section 496(c)'s relaxed preponderance of the evidence burden, coupled with its fee-shifting provision, would flood section 496(c) filings and litigation in California, which would further increase the burden on the state's already-congested civil system. (See the latest 2020 Court Statistics Report Statewide Caseload Trends available @ https://www.courts.ca.gov/documents/2020-Court-Statistics-Report.pdf .) This type of cases generally slows state and federal dockets in all other cases as well, increasing the delay and cost of unrelated litigation. These delays impose a cost-increasing cycle: an increase in filings increases court dockets, which leads to lengthier times to disposition, which increases the value of the threat of a frivolous lawsuit, which encourages additional filing. The additional value from frivolous lawsuits encourages additional frivolous threats, and the cycle begins itself anew. That does not include the appeals that would correspondingly ensue. In standard civil cases, a plaintiff weighs her costs of litigation against the prospective benefits when determining whether to file suit; typically, these costs are significant enough that they discourage plaintiffs from needlessly exposing the public to the negative externalities accompanying frivolous litigation. However, regular and automatic attorney's fees awards under section 496(c) reduce plaintiffs' costs to bring suit, subsidizing additional, often frivolous, claims.

g. Decisional Law Interpreting Section 496(c).

As stated above, it is no secret that courts that have applied section 496(c) to business disputes typically governed by breach of contract, conversion, and fraud causes of action did so reluctantly, felt compelled to do so, and submitted as a hostage to the statute's literal language while expressing uneasiness with their ultimate ruling. The Siry Court of Appeal refused to follow path, holding that nothing in the language of section 496(c) or in the legislative history leading to it, affords relief in ordinary business disputes like this one as opposed to a case involving trafficking in stolen property. The Legislature could not possibly have intended section 496 to apply in all circumstances, including an ordinary contractual dispute arising in the course of an ongoing, legitimate business relationship, such as that of the parties in this case; nor does the language of knowing purchase, receipt, concealment, or withholding of stolen property the Legislature had in mind when it enacted section 496(c). Instead, the underlying transaction was a legitimate business transaction involving parties with a long business relationship in which defendants at minimum partially performed. Applying the remedies provided in section 496(c) in this context would not serve the legislative purpose of eliminating markets of stolen property. At its core, this case is about a supposed breach of contract. Siry managed to dress up its claims as fraud.

However, Siry has never claimed that defendants were trafficking in stolen property. Section 496(c) does not apply, and the Court of Appeal rightly dismissed this claim.

In analyzing *Bell* (a case involving a business scam where the plaintiff paid money to defendant because of a fraudulent/illegitimate loan scam), the Siry Court of Appeal found the application of *Bell*'s reasoning to the breach of contract, conversion, and fraud claims involved in that case yields an unreasonable and mischievous result, Penal Code section 496 should not be read literally. It reinforced its conclusion by the legislative history underlying the treble damages provision. That provision was added in 1972 (Stats. 1972, ch. 963, § 1.) Its purpose was to eliminate the markets through which stolen property is sold by making persons who steal, fence, or receive stolen property, civilly liable for treble damages, thereby taking the profit out of cargo thievery (Statement on Sen. Bill No. 1068 (1972 Reg. Sess.) p. 1; Sen. Com. on Judiciary, com. on Sen. Bill No. 1068 (1972 Reg. Sess.) as amended June 26, 1972, p. 2.) The legislative history reflects a narrow and specific purpose having nothing to do with making treble damages available to plaintiffs who creatively plead breach of contract, conversion, and fraud claims. (*People v. Vidana* (2016) 1 Cal.5th 632, 638 [noting propriety of looking to legislative history in construing statutes].) (Typed opn. 44-46.)

The Siry Court of Appeal also addressed *Switzer v. Wood* (2019) 35 Cal.App.5th 116 (Switzer), where a jury found that the defendant had violated section 496, but the appellant did not challenge those findings on appeal. (*Id*., at p. 128). The sole appeal issue in *Switzer* was whether courts could juridically carve out exceptions to the treble damages provision depending on the type of section 496 violation, such as certain business disputes. The *Switzer* court held they could not. (*Id*., at pp. 119-120, 128-132.) The Siry Court of Appeal took the path *Switzer* chose not to take in concluding section 496's language diverges from the Legislature's intent and that its narrower intent is controlling. (Typed opn. 47.) It held section 496 is not available "where the plaintiff merely alleges and proves conduct involving fraud, misrepresentation, conversion, or some other type of theft that does not involve `stolen' property." (Typed opn. 42.) (See argument in Section A(2)(d) supra, addressing the court's reasoning and analysis on the issue.)

The Siry Court of Appeal sided with *Lacagnina*, a case that involved "wages theft" claims in an employment dispute. The *Lacagnina* court stressed, "[i]t is difficult to fathom, to say the least, 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.' Moreover, we note that to the extent that the statutory treble damages provision was intended to

deter misconduct, the punitive damages claim that Lacagnina asserted served the same function." (*Lacagnina*, 25 Cal.App.5th at 972.)

- Other California appellate court cases after *Bell,* but before *Switzer*, rejected the application of section 496(c) to commercial contract disputes. See, *Kayne v. Mense*, 2016 WL 1178671, *5 (Cal. Ct. App. March 25, 2016) [commercial contract dispute arising in a legitimate business transaction, trial court appropriately vacated jury's award of treble damages under § 496(c)]; and *Nguyen v. Fuke*, 2017 WL 2839540, *4-5 (Cal. Ct. App. July 3, 2017) [car repair dispute, court awarded economic damages, emotional distress damages, fees, costs, interest; declined to award treble damages as beyond traditional limits on remedies and applying the literal terms of § 496(c) led to an unreasonable result].

- Plaintiffs in federal court cases, applying section 496(c), have not fared much better. For example, federal courts have declined to apply section 496(c) in *Agape Family Worship Center, Inc. v. Gridiron* (C.D. Cal. 2018) No. 15-cv-1465, 2018 WL 2540274, *5-6; *AdTrader,* supra, 2018 WL 3428525, *9.

- Since the Siry Court of Appeal published its opinion, two district courts have considered the application of section 496(c) in a commercial context, and both cited the Court of Appeal's opinion in this case:

In *Instant Brands,* supra, the court issued a thoroughly written and strong opinion refusing to follow *Bell* or *Switzer* and siding with *Lacagnina* and the Siry Court of Appeal. In *Aimsley Enterprises, Inc. v. Merryman*, 2020 U.S. Dist. LEXIS 60295 (decided on April 6, 2020), the court took note of the pendency of this petition and agreed to revisit its decision case after this Court has decided this petition, if necessary, at a later juncture. Very recently, on February 26, 2021, in an *unpublished opinion,* the Ninth Circuit Court of Appeal reversed an order sustaining a motion to dismiss a section 496 claim based on pre-Siry California law, noting that the Siry Court of Appeal's decision on the issue "has no binding or precedential effect because the opinion is pending review before the California Supreme Court." (See *Grouse River Outfitters v. Oracle Corp.,* 2021 U.S. App. LEXIS 5756, fn. 2, **3, 9.)

These state and federal cases disclose a reluctance to use the *Bell* or *Switzer* approach in commercial contract disputes in which a fraud claim is premised on the same core facts underlying a breach of contract claim.

h. Siry's Citation To Treble Damages Statutes In Other Jurisdictions Is Equally Irrelevant And Of No Guidance.

Siry has identified a small number of other states that have adopted theft statutes that provide for treble damages. (OBM, pp. 9-10.) It remains, our Legislature has limited treble damages to the specific offense of buying or

receiving stolen property (see Section A(2)(b), (c), *ante*). Moreover, not only has Siry not explained how the rest of the country – the states it has not named -- treats this issue, but it also has not explained the legislative history, purpose or intent of the few out-of-state statutes it has cited. Its argument is of no guidance and does not help.

B. THE SECOND DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT A DEFAULTED DEFENDANT MAY MOVE FOR NEW TRIAL ON LIMITED GROUNDS.

1. The Court Of Appeal's Decision Is Supported By Well-Established Law.[7]

The question in the Court of Appeal was whether a party in default may move for a new trial when, by virtue of the default, there was no trial in the first place? The court answered "yes," at least when the party is seeking to move for a new trial on the ground that the court made an "error in law" in calculating damages. The court explained that, although the entry of default precludes the defaulting defendant from further participation in the proceedings (and thus from excepting to the error during the prove-up hearing) the plaintiff still bears the burden of proving its entitlement to damages to the court. (See *Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 302; § 585, subd. (b).) (Typed opn. 34.)

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[7] Once again, in this Section, defendants cite to and quote from the Court of Appeal's well-written opinion.

More to the point, the Court of Appeal further explained that an entry of default does not entirely render a defaulting defendant *persona non grata*. Even a defaulting defendant may appeal the resulting default judgment on the grounds that the damages award (1) "is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption" (*Uva v. Evans* (1978) 83 Cal.App.3d 356, 363), (2) "is so out of proportion to the evidence that it shocks the conscience of the appellate court" (*ibid.*), or (3) is "contrary to law" (*Lasalle v. Vogel* (2019) 36 Cal.App.5th 127, 139 [defaulting party may appeal refusal to set aside verdict on these grounds]). (Typed opn. 34.)

"Because a defaulting defendant can appeal a default judgment on these grounds, '[w]e see no reason to preclude [that defendant] from seeking a new trial (or, more precisely, a new judgment hearing) on th[ose] ground[s]...' (*Don v. Cruz* (1982) 131 Cal.App.3d 695, 704 [182 Cal.Rptr. 581] (Don); see *Jacuzzi v. Jacuzzi Bros*.(1966) 243 Cal.App.2d 1, 23-24 [52 Cal.Rptr. 147]; *Misic v. Segars* (1995) 37 Cal.App.4th 1149, 1154 [44 Cal.Rptr.2d 100].) Allowing a defaulting party to bring excessive damages based on errors in law to the trial court's attention in a new trial motion puts those potential errors before the court with greater familiarity with the case, does so in a manner likely to yield a faster result, and may thereby altogether obviate the need for

an appeal. (Accord, Don, at p. 705.) Our Supreme Court has held that parties may not 'challenge [a] damage award on appeal ... without [first making] a motion for a new trial'; to do otherwise is to 'unnecessarily burden the appellate courts with issues which can and should be resolved at the trial level.' (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919 [114 Cal.Rptr. 622, 523 P.2d 662].) That logic applies with equal force here." (Typed opn. 35.)

In addressing Siry's arguments on the issue, the Court of Appeal explained:

"Siry resists this conclusion with four arguments.

"First, it cites language from *Howard Greer Custom Originals v. Capritti* (1950) 35 Cal.2d 886 [221 P.2d 937], where our Supreme Court stated that a defaulting defendant "`cannot ... move for a new trial'" because it "is out of court and is not entitled to take any further steps in the" case. (*Id*. at pp. 889, 888.) Seven years later, however, the Supreme Court in *Carney v. Simmonds* (1957) 49 Cal.2d 84 [315 P.2d 305] (Carney), retreated from *Howard Greer*'s sweeping language when it held that a new trial motion is appropriate in many different situations "except possibly in the case of default judgments ... where there may be the question of the right of the moving party to make any objection to the judgment." (*Id*. at p. 90.) Because defaulting defendants may

appeal the damages award of a default judgment in the three circumstances delineated above, they have the "right ... to make an[] objection to the judgment" (ibid.) and thus, under *Carney,* may also move for a new trial in those same circumstances.

"Second, Siry urges that a close reading of the cases allowing defaulting defendants to move for a new trial reveals a four-part classification scheme, and that under that scheme, only defendants who challenge damages as being excessive due to insufficiency of the evidence (rather than due to legal errors) may file a motion for new trial. This makes sense, Siry continues, because the plaintiff at a default prove-up hearing can be faulted only for presenting insufficient evidence but not for errors in law made by the court. None of the cases Siry cites even hints at the rule Siry purports to draw from them; indeed, some have nothing to do with excessive damages at all. More to the point, Siry's proffered rule is wholly inconsistent with the judicial economy-based rationale for allowing defaulting defendants to file a motion for new trial as to legal errors they can challenge on appeal because Siry's rule would preclude new trial motions for issues that are clearly subject to challenge on appeal. What is more, Siry's proffered blame-based rationale for its rule is a fiction, as the facts of this case vividly illustrate. Siry is the party who urged the trial court to award quadruple damages on top of punitive damages and who then

offered a spirited defense of that position in opposing defendants' motion for new trial, rendering hollow its claim on appeal that plaintiffs are invariably blameless for a trial court's legal errors.

"Third, Siry contends that a defaulting party's right to challenge disproportionate or legally erroneous damages awards on appeal should, at best, authorize that party to file a motion for relief under section 473, but not a motion for new trial. But section 473 provides relief for mistakes made by a party or its counsel (§ 473, subd. (b)) and for void judgments (id., subd. (d)), and provides no relief for errors of law by a court in awarding "damages which are excessive as a matter of law." (*Don*, supra, 131 Cal.App.3d at p. 703.) The proper vehicle for getting such issues before the trial court that entered the default judgment is a motion for new trial.

"Fourth, Siry cites cases holding that a defaulting defendant may not file a motion for new trial under any circumstances. (E.g., *Devlin*, supra, 155 Cal.App.3d at pp. 385-386; *Brooks v. Nelson* (1928) 95 Cal.App. 144, 147-148 [272 P. 610].) We respectfully part ways with these decisions, which did not consider the rationale we adopt-namely, that there is no reason to deprive the trial court of the power to consider challenges to the excessiveness or legal propriety of damages when those very same issues can undoubtedly be raised on appeal.

"In this case, defendants' challenges to the damages awarded in the original default judgment all constitute "error[s] in law" properly subject to a motion for a new trial. The court's recalculation of treble damages reduced what was effectively quadrupled damages down to treble damages; the court's reduction of the punitive damages award was grounded in the constitutional law defining when such damages become so excessive as a matter of law as to deny a defendant due process; and the court's ruling that Siry must elect between treble and punitive damages involved construction of the law. (Cf. *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507 [15 Cal.Rptr. 161, 364 P.2d 337] [only trial court may sit as a "thirteenth juror" in evaluating the amount of damages].)[11]" (Typed opn. 35-38.)

a. *Don v. Cruz* And Abundant Other Authorities Are Directly On Point.

The lower courts in this case correctly recognized a trial court's authority per *Don v. Cruz* to grant a new trial or remittitur. A default is not a license for a prevailing party to overreach on damages. "[A] trial court has authority to grant a new trial after a default judgment on the ground that damages are excessive as a matter of law …." (*Don v. Cruz* (1982) 131 Cal.App.3d 695, 706 (Don v. Cruz(.) There is "no reason to preclude a defaulting party from seeking a new trial (or, more precisely, a new judgment hearing) on the ground that damages are excessive as a matter of law when the

same contention may be urged on direct appeal from the default judgment." (*Id.*, at p. 704.) "It would be anomalous to hold that the trial court has the power to grant a new trial where a fairly contested trial has resulted in an award which is excessive as a matter of law but may not do so where the excessive award results from an ex parte proceeding." (Id. at pp. 704-705.)

*Don v. Cruz'*s on-point holding comports with the fact that new trial motions are "`in the nature of a new and independent proceeding collateral to the judgment in the action.'" (*Estate of Simmons* (1914) 168 Cal. 390, 396 (Simmons); accord, *Neff v. Ernst* (1957) 48 Cal.2d 628, 634 (Neff).) Although defaulted defendants cannot participate in the default proceedings leading up to the default judgment, they can participate in collateral proceedings, such as new trial motions and appeals.

The primary authority supporting *Don v. Cruz* is *Carney v. Simmonds* (1957) 49 Cal.2d 84 (Carney). In *Carney,* after a lengthy discussion and analysis of existing case law, the Supreme Court concluded "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 moving party to make any objection to the

judgment." (*Id*., at p. 90.) This holding was subsequently clarified in *Jacuzzi v. Jacuzzi Bros., Inc*. (1966) 243 Cal.App.2d 1, 22 (Jacuzzi): "[I]n 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 to secure a reexamination of such questions of law, fact, or law and fact as were involved in the proceedings which culminated in the order for the entry of his default and the ensuing judgment."

b. Published State Court Opinions That Followed *Don v. Cruz* Are In Accord.

Not surprisingly, the holding in *Don v. Cruz,* that a defaulted party may move for a new trial, has been repeatedly cited as correct. *Scognamillo v. Herrick* (1996) 106 Cal.App.4th 1139, 1150; *In re Marriage of Dunmore* (1996) 45 Cal.App.4th 1372, 1377; *Misic v. Segars* (1995) 37 Cal App.4th1149, 1154 (Misic) ["'Although in default, defendant[s] can attack the default judgment in the trial court by motion for new trial on the ground of `excessive or inadequate' damages or `because the verdict or decision is against the law[.]'" ; accord, *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1746; *Jacuzzi.* 243 Cal.App.2d at 22 ["in the case of a default judgment, . [a defendant] may use a motion for new trial to secure a reexamination of such questions of law, fact, or law and fact as were involved in the proceedings which culminated in the order for the entry of his default and the ensuing

judgment"].

c. Unpublished State Court Opinions That Followed *Don v. Cruz* Are Also In Accord.

Don v. Cruz was cited and followed in each of the following California unpublished opinions: *Bagby v. Davis*, 2020 Cal. App. Unpub. LEXIS 526, at *11; *Stutz Artiano Shinoff & Holtz, APC v. Larkins*, 2014 Cal. App. Unpub. LEXIS 4276, 2014 WL 2765732 at *26; *Mertens Heavy Equip. Repair v. Mts. by the Sea, Inc*., 2012 Cal. App. Unpub. LEXIS 6503, 2012 WL 3835816 at *19; *Semendinger v. Cal. Dep't of Corr. & Rehab.*, 2012 Cal. App. Unpub. LEXIS 814, 2012 WL 274482 at *8; *Erdman v. Dromy Int'l Inv. Corp*., 2009 Cal. App. Unpub. LEXIS 8641 at *35; *Rose v. Urdanivia*, 2006 Cal. App. Unpub. LEXIS 1752 *22; *Ostling v. Loring*, 27 Cal. App. 4th 1731, 33 Cal. Rptr. 2d 391, 1994 Cal. App. LEXIS 912, 94 Cal. Daily Op. Service 6931, 94 D.A.R. 12661 at *1746; and *Cantrell v. Chatoian,* 228 Cal. Rptr. 718 *10-11 [review granted, depublished by *Cantrell v. Chatoian*, 231 Cal.Rptr. 212, 726 P.2d 1287, 1986 Cal. LEXIS 258].

d. Respected Treatises Uniformly Agree With *Don v. Cruz.*

Respected California Treatises uniformly acknowledge a defaulted defendant's standing and right to move for a new trial to challenge excessive or inadequate damages. (See, e.g., 8 *Witkin*, Cal. Procedure (5th ed. 2008)

Attack on Judgment in Trial Court, § 144, p. 737 ["[r]elief for judicial error respecting default judgments may be obtained in the same manner as with respect to judgments after a contested trial, e.g., by motion for new trial for excessive or inadequate damages," italics added]; *Wegner et al*., Cal. Practice Guide: Judgments Entered Without Trial (The Rutter Group 2020) ¶ 18:126, p. 18-31 [new trial motion available to attack default judgment "where the ground for the motion is `excessive or inadequate' damages or `because the verdict or decision is against the law,'" citations omitted]; *Cal. Judges Benchbook*: Civil Proceedings After Trial (CJER 2018) Motions Attacking Verdict or Judgment After Trial, § 2.3, p. 103 [new trial motion may be brought to contest "default judgment that awards damages that are excessive as a matter of law"]; *Thomas, Cal. Civil Courtroom Handbook & Desktop Reference* (2019 ed.) Default and Relief From Default, § 19:39, pp. 644-645 [same]; *Weil & Brown, Cal. Practice Guide*: Civil Procedure Before Trial (The Rutter Group 2020) ¶ 5:477 [§ 657, subds. (5) and (6) authorize a defendant in default to "attack the default judgment in the trial court by motion for new trial on the ground of 'excessive or inadequate' damages or because 'the verdict or other decision is against law").

e. No Authority Supports Siry's Position.

Title Ins. & Trust Co. v. King Land Improv. Co. (1912) 162 Cal. 44.

Relying on *dicta* in the century-old *Title Ins.* Supreme Court decision, Siry claims that a defaulted defendant may not move for a new trial. In *Title Ins*., no issue was raised as to moving for a new trial. The issue rather was the timeliness of a CCP section 473 motion. More important, Siry ignores *later Supreme Court precedent* holding that a new trial motion is a collateral attack on the judgment: "The motion for new trial is `in the nature of a new and independent proceeding collateral to the judgment in the action.'" (*Simmons,* 168 Cal. at 396; accord *Neff,* 48 Cal.2d at 634 ["A motion for new trial is recognized to be a matter collateral to the judgment" for that reason "the trial court retains jurisdiction to hear and determine a motion for new trial after an appeal has been taken from the judgment."]; *Carney,* 49 Cal.2d 84 [after a lengthy discussion and analysis of existing case law, the Court concluded "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"].) Even a defendant in default has standing to collaterally attack a judgment. (E.g., *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493 [setting aside judgment on collateral attack].)

Howard Greer Custom Originals v. Capritti (1950) 35 Cal.2d 886, 888-889. *Howard Greer* does not hold that trial courts lack new-trial-motion power to find a default-judgment damages award excessive as a matter of law.

Howard Greer never addressed that issue. It did not address a new trial on damages at all. It held that a court could not order a new trial on liability where the default remained intact. More important, seven years after *Howard Greer* was decided, the Court in *Carney* eliminated any doubt as to a defaulting defendant's standing to move for a new trial (holding it does, contrary to defendants' interpretation of the *Carney* holding as explained hereinbelow).

Carney v. Simmons, supra. As stated above, *Carney* supports defendants' position, not Siry's, on the issue of standing. In fact, *Carney* is the primary authority sporing *Don v. Cruz*, supra, holding that use of the new trial motion after a default judgment is not precluded by the absence of a trial in the traditional sense, but it may be precluded if the ground of the motion is one which a defaulting party is not permitted to assert. (*Id.* at 20-22)

Even cases reciting the *Howard Greer* language that Siry emphasizes (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc*. (1984) 155 Cal.App.3d 381, 384, 386) recognize that appellate courts must reverse default judgments where "the damages are determined to be excessive as a matter of law." And, *Devlin's*, a pre-*Don v. Cruz* case, contrary "dictum `is unsupported by any recent authority, and is believed to be incorrect.' [Citation.]" (*Misic,* 37 Cal.App.4th at 1154.)

2. Siry's Cross-Appeal Did Not Challenge The Trial Court's Damage Recalculation Or Reduction Of Damages. Those Deductions And Reductions, Thus, Cannot Be Disregarded.

In its cross-appeal, Siry did not contest the substantive merits of the trial court's excessive-as-a-matter-of-law damages evaluation. Therefore, any review of the original judgment would require vacating the legally-erroneous, excessive damages and reinstating the trial court's damages reductions based on those unrefuted, conceded errors. (See, e.g., *Eisenberg, Cal. Practice Guide*: Civil Appeals and Writs, supra, ¶ 11:73, p. 11-27 ["If the record indicates what the proper judgment or order should have been, the appellate court can reverse with directions to enter that judgment or order"].)

The Court of Appeal specifically held:

> "Defendants do not challenge the trial court's calculation of actual damages, and Siry does not challenge the court's requirement that Siry elect between treble and punitive damages, the reduction in the punitive damages award, or the offset for costs defendants incurred during the prior appeal. And although Siry suggests that the trial court's calculation of treble damages was incorrect, we decline to entertain that suggestion because Siry waited until its reply brief to raise it. (*Garcia*, supra, 16 Cal.4th at p. 482, fn. 10.)" (Typed opn. 33 fn. 9.)

Siry's cross-appeal was little ado (a half-hearted, four-page argument) about nothing. More important, it did not contest that the trial court's damage reductions were substantively correct. Those reductions, thus, cannot be disregarded.

3. Review Should Be Limited To The Two Issues Presented In Siry's Petition For Review and For Which This Court Has Granted Review.

Where, as here, the Court did not issue an order specifying the issues to be briefed, and Respondents did not file an answer to the petition for review, briefs on the merits must be limited to issues stated in the petition for review and any issues fairly included in them. (Cal. Rules of Court, rule 8.520(b)(3).)[8]

Although many issues were raised in the Court of Appeal, Siry's cross-appeal was limited to the lone argument that a defaulting defendant has no standing to move for a new trial. (Siry-RB/X-AOB 156-160)[9] The Court of Appeal commented: "Siry does not challenge" the post-judgment reductions (typed opn. 33, fn. 9) or that "the amendments [to the judgment] were incorrect." (Typed opn. 33.) Siry acknowledges its failure to raise the issue in the Court of Appeal: "We acknowledge that we did not challenge the substantive merits of all reductions; we focused on procedural challenges

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[8] "Unless 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" unless the Court has issued "an order specifying the issues to be briefed." (Cal. Rules of Court, rule 8.520(b); see *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481 ["We do not consider this argument because defendants did not raise it in the trial court, in the Court of Appeal, or in their petitions for review."].)

[9] This, Siry acknowledges in its OBM at p. 21.

because, if successful, procedural challenges would necessarily eliminate the need for substantive challenges." (PFR, p. 18.) Siry may not now, in this Court, bring up issues it failed to raise in the Court of Appeal. Cal. Rules of Court, rule 8.500, subd. e.

Likewise, although the only issue affecting the new trial order that is now before the Court is the issue of standing, Siry has raised a laundry list of additional issues that are beyond the scope of the review requested. These additional issues exceed the scope of the review granted, were not raised in the trial court, and or were not raised in the Court of Appeal (or, if raised in the Court of Appeal, they were belatedly raised for the first time in Siry's petition for rehearing and Siry has abandoned them by not presenting them in its petition for review). More importantly, the additional issues raised in the opening brief on the merits have no bearing on the Court's review of the two straightforward issues presented.

a. Siry's Surplusage Offending Arguments Allege Errors That Have No Bearing On The Issues For Which Review Was Granted.

The Supreme Court is generally not concerned with whether the trial court or the Court of Appeal decided the case correctly. Its institutional role is not to correct lower-court errors; it is to ensure clarity and consistency in the law and address substantial public policy or institutional importance. "The

most important goal of the higher appellate courts is not simply to ensure that litigants in the particular case received a fair, error-free trial, but to develop a clear, consistent, coherent body of law that can be followed and applied by the lower courts." *Dick v. New York Life Ins. Co*. (1959) 359 U.S. 437, 452 (Frankfurter, J., dissenting) ["No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people []. Passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal."].

Accordingly, if the basis for Siry's petition is that the trial or appellate court got it wrong on certain issues other than the two issues before the Court, review should not be granted.

b. Siry's Other Surplusage Issues Are Deemed Abandoned And Or Forfeited In This Court.

As stated above, Siry's lone argument in its 4-page opening brief on the cross-appeal was that the trial court had no power to entertain defendants' motion for a new trial because of their default status. (Siry-RB/X-AOB 156-160.) And, the Court of Appeal deemed all other issues affected by the new

trial order waived as Siry had failed to timely present them in its cross-appeal. (Typed opn. fns. 5 & 9.)

Siry is now asking this Court to consider issues it never argued in the trial court (in opposing the motion for new trial or in the form of a motion for reconsideration (which it did not file)) and issues it did not raise in its 4-page cross-appeal. All such issues should be disregarded. Likewise, the Court should disregard other forfeited issues that Siry raised for the first time in its petition for rehearing but still did not present them in its petition for review.

V. CONCLUSION

Defendants respectfully submit this Court should affirm the Second District Court of Appeal's decision in its entirety and award them such other relief as appropriate. If the Court is inclined to entertain any of the surplusage issues argued in Siry's opening brief on the merits that were beyond the scope of the review granted, defendants respectfully request an opportunity to file a

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supplemental brief to answer them.

Dated: March 1, 2021

Respectfully Submitted,

KNICKERBOCKER
LAW FIRM

By: /s/ Richard L. Knickerbocker

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1))

The text of the foregoing answer brief consists of 13967 words as counted by Word Perfect, the word-processing program used to generate this document.

Dated: March 1, 2021

KNICKERBOCKER
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By: /s/ Richard L. Knickerbocker

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PROOF OF SERVICE

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I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to this action. My business address is c/o 2425 Olympic Boulevard, Suite 4000W, Santa Monica, California.

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Service upon the Court of Appeal was effectuated via TrueFiling.

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Hon. Stephanie Bowick
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

Hon. Mark A. Borenstein
Los Angeles Superior Court
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Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 1st day of March, 2021, at Malibu, California.

/s/ Saloi A. Jaoude'

_____
SALOI A. JAOUDE'

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **SIRY INVESTMENT v. FARKHONDEHPOUR**
Case Number: **S262081**
Lower Court Case Number: **B277750**

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