CASE NO. S275843

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JJD-HOV ELK GROVE, LLC,

Plaintiff and Appellant,

v.

JO-ANN STORES, LLC,

Defendant and Respondent.

On Review From the Court of Appeal for the Third Appellate District,
Division One, Case No. C094190

After an Appeal From the Superior Court for the State of California,
County of Sacramento, Case No. 34-201900248163,
Hon. Shama H. Mesiwala

RESPONDENT JO-ANN STORES, LLC'S RESPONSE BRIEF ON THE MERITS

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I. ISSUES PRESENTED

1. What analytical framework should apply in determining the enforceability of co-tenancy provisions in retail lease agreements?

Answer: The parties' contractual intent when reduced to writing should be controlling and enforced, particularly as applied to the commercial leasing market in arms-length negotiations and transactions. Co-tenancy provisions do not reflect "damages," "breaches" or "defaults" but instead reflect agreed-upon contractual terms for different or alternative rent structures in the event certain contingencies occur. The courts should not rewrite co-tenancy provisions in retail lease agreements that the parties enter into freely and voluntarily, as such contracts are, by their very nature, specifically agreed-upon allocations of risk, responsibility and rent payments between the parties. As such, the Third District's analytical framework in *JJD-HOV Elk Grove, LLC, v. Jo-Ann Stores, LLC* (2022) 80 Cal.App.5th 409 should apply to co-tenancy provisions in retail lease agreements.

2. Did the Court of Appeal correctly determine that the co-tenancy provision in this case is enforceable?

Answer: Yes, the Court of Appeal in *JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC* (2022) 80 Cal.App.5th 409 correctly determined that the specific co-tenancy provision in the parties' 2003 commercial lease agreeing to different or alternative rent structures is valid and enforceable.

In this case, both parties negotiated the co-tenancy provision in their 2003 lease with the assistance of counsel, and expressly agreed to two different rental rates ("Fixed Minimum Rent" or "Substitute Rent") based on different types of levels of occupancy in the shopping center. The parties agreed that if the co-tenancy provision is satisfied, tenant Jo-Ann owes Fixed Minimum Rent to landlord JJD, and if it is not satisfied, Jo-Ann owes Substitute Rent to JJD. The parties agreed the co-tenancy provision could be satisfied by either three anchor tenants or 60 percent of the shopping center's space leased. The parties agreed that Substitute Rent would be the greater of $12,000 or 3.5 percent of tenant Jo-Ann's sales. All of these co-tenancy terms in the parties' 2003 lease were actively negotiated and there is no suggestion that either party was unaware of or did not understand any portion of the co-tenancy provision, or failed to consider the risk of reduced occupancy in the shopping center. The parties also conducted themselves as tenant and landlord for a period of over fifteen (15) years under the 2003 lease without any question as to the validity or enforceability of the co-tenancy provision.

Further, Civil Code section 1671 is inapplicable to this case because there is no suggestion or evidence that reduced occupancy in the shopping center resulted in landlord JJD's "breach" of, or "damages" under, the parties' 2003 lease, as landlord JJD's counsel conceded at oral argument before the Court of Appeal. Likewise, Civil Code section 3275, which was

not discussed or analyzed by landlord JJD in its Court of Appeal briefing or at oral argument, is inapplicable to this case, as the parties' co-tenancy provision in the 2003 lease is not an unenforceable penalty or forfeiture under applicable law.

II. INTRODUCTION

In its opening brief, landlord JJD-HOV Elk Grove, LLC ("Landlord JJD" or "JJD") seeks to be relieved of its agreed-upon contractual obligations under the co-tenancy term in its 2003 commercial lease with long-term tenant Jo-Ann Stores, LLC ("tenant Jo-Ann" or "Jo-Ann") (the "2003 Lease") on the basis that the provision constitutes an unenforceable penalty or forfeiture under California law.[1]

In doing so, Landlord JJD in its opening brief asserts "new" factual positions and "new" reliance on statutory and case law before this Court not previously argued in the trial court or Court of Appeal, and now specifically seeks relief under the "general rule" of forfeiture in Civil Code section 3275. Indeed, for the ***first*** time in this litigation, JJD argues the applicability of Civil Code section 3275 to co-tenancy provisions in retail lease agreements. Yet, as the Third District noted in *JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC* (2022) 80 Cal.App.5th 409, 422 ("***JJD-HOV***"),

[1] The caption and signature blocks for Landlord JJD's opening brief to this Court erroneously refers to appellant "JJD-HOV Elk Grove, LLC" as appellant "JJD-ELK Grove, LLC".

Civil Code section 3275 was not cited in the trial court by either party, not referenced in the trial court's decision, and only quoted by JJD in its brief before the Court of Appeal without any discussion or explanation of its applicability to the specific co-tenancy provision in the parties' 2003 Lease.

Based on the evidence presented by the parties, the agreed-upon terms of the 2003 Lease taken as a whole, and the parties' lengthy course of dealings under that Lease, the trial court and the Court of Appeal in *JJD-HOV* correctly held that the co-tenancy provision in parties' arms-length, negotiated 2003 Lease that has governed the relationship between Landlord JJD and tenant Jo-Ann for ***now*** over nineteen (19) years is valid and enforceable under California law. The trial court and the Court of Appeal both reached this conclusion based on their review and analysis of the undisputed facts, and documents and evidence presented by the parties, including key factual findings as follows:

- Landlord JJD has repeatedly affirmed in writing the enforceability and applicability of the co-tenancy provision in the parties' 2003 Lease, including during the course of litigation against tenant Jo-Ann over the provision's meaning in 2007;
- at the time the 2003 Lease was entered, Landlord JJD and tenant Jo-Ann "specifically discussed Substituted Rent and referenced Jo-Ann's sales," "the amount was negotiated up

from 3% to 3.5% of sales," and whether the occupancy percent should be 60 percent, 70 percent or 80 of gross leasable area (AA at 1028-30), reflecting the parties' discussion of anticipated risks and payment of different rents at the time of contract negotiations; and

- the plain terms of multiple provisions in the 2003 Lease show that the co-tenancy provision provides Landlord alternatives for compliance and reflects the parties' contractual intent as to payment of different rents, as expressly negotiated between the parties in 2003 and 2004. (AA at 1028-30.)

In its opening brief to this Court, Landlord JJD's "new" core argument is that Civil Code section 3275 directly applies to the analysis of co-tenancy provisions in general, and to the parties' negotiated co-tenancy provision in the 2003 Lease in particular. In doing so, Landlord JJD shifts its focus from the factually distinguishable *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332 ("***Grand Prospect***") case, and instead heavily relies (for the first time) upon *Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970—an inapplicable case involving a pre-prepayment loan penalty conditioned upon a borrower's earlier payment default, as discussed below.[2] Thereafter, Landlord JJD uses

[2] While *Ridgley* is inapplicable to co-tenancy provisions in retail lease agreements, and specifically inapplicable to the co-tenancy provision in the

emotional "slippery slope" and "prevention of future evils" arguments to attempt to compare the parties' arms-length, negotiated co-tenancy provision in the 2003 Lease to unenforceable and illegal contracts under California law regarding gambling, rent discrimination, usurious loan rates, unfair competition and covenants not to compete, thus undercutting its own credibility. Further, Landlord JJD attempts to confuse and misapply the terms "default," "breach," "damages," "losses," and "forfeiture," as used in statutory and case law, to the specific co-tenancy provision in the 2003 Lease, as well as attempts to confuse and intermingle cases which discuss Civil Code sections 1671 and 3275, both of which are inapplicable here.

Notably, in its opening brief, Landlord JJD no longer takes the position that the co-tenancy provision in the parties' 2003 Lease and the co-tenancy provision in the *Grand Prospect* case involved an "identical contract clause." (Appellant's opening brief filed in the Court of Appeal ("Appellate brief"), at pp. 8-9.) This position was factually incorrect for multiple reasons, as explained by the trial court and the Court of Appeal: "*Grand Prospect* does not assist JJD. . . . [I]n contrast to *Grand Prospect*, the subject co-tenancy provisions in the Lease are markedly different," and "It thus appears the *Grand Prospect* court equated an unenforceable penalty with a forfeiture with the meaning of Civil Code section 3275. Based on the

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parties' 2003 Lease, its holdings and analysis support tenant Jo-Ann's positions, as also discussed below.

record before us, we decline to do the same." (AA at 1028-29, and *JJD-HOV, supra,* 80 Cal.App.5th at 422.)

Landlord JJD also mischaracterizes the trial court and the Court of Appeal's references to the more recent *Constellation-F, LLC v. World Trading 23, Inc.* (2020) 45 Cal.App.5th 22 decision, which is properly cited for its enunciation of "general principles regarding commercial leases," as well as its applicable guidance for determining when a commercial lease term should be considered an unenforceable penalty under California law. (AA at 1032, and Opening brief at p. 12 ["The *Constellation-F* court refused to relieve the tenant of the volitional choice it made, functionally finding it a valid form of alternative performance"].) Further, the reasoned guidance applied in *Constellation-F* has recently been reiterated by a court upholding a deed term that would allegedly result in a $36 million loss, as cited in the *JJD-HOV* decision. (*Southern California School of Theology v. Claremont Graduate Univ*. (2021) 60 Cal.App.5th 1, 8.)

In sum, the trial court and the Court of Appeal applied the correct legal standard, carefully analyzed the relevant facts and documents, and properly held that the co-tenancy provision in the parties' arms-length, negotiated 2003 Lease that allows long-term tenant Jo-Ann to pay a reduced "alternative" or "Substitute Rent" under specific, agreed-upon circumstances is valid and enforceable. Landlord JJD's efforts to now rewrite its long-standing 2003 Lease with Jo-Ann and reap an unjustified

windfall based wholly on its mischaracterization of the record and of the trial court and Court of Appeal's review of the *Grand Prospect* decision should not be sanctioned. As the record shows, Landlord JJD was made specifically aware of Jo-Ann's co-tenancy provision in the 2003 Lease, and priced the co-tenancy term into its purchase price when it bought the shopping mall at issue in 2007. (See AA at 0679-80.)

The Court of Appeal's correct, well-reasoned decision in *JJD-HOV* upholding the trial court's granting of Jo-Ann's motion for summary judgment and denying JJD's cross-motion for summary judgment should be affirmed.

III. STATEMENT OF THE CASE AND FACTS

A. The Undisputed Facts, Stipulated Documents and Supporting Evidence Show that the Co-Tenancy Term in the Parties' 2003 Lease is Reasonable and Enforceable, and that Landlord JJD Accepted the Validity of the Co-Tenancy Term for Over Fifteen Years.

The relevant facts and stipulated documents in this case are straightforward and, as the trial court and Court of Appeal recognized, undisputed. (AA at 1027 ["In essence, the facts here are undisputed and the issue boils down to whether the provisions are valid or not"]; *JJD-HOV, supra,* 80 Cal.App.5th at 414 ["As found by the trial court, the facts are largely undisputed. Indeed, the separate statements filed by the parties in support of their respective motions [for summary judgment] contain very similar facts."].)

Tenant Jo-Ann (via its predecessor-in-interest FCA of Ohio, Inc.) and Landlord JJD (via its predecessor-in-interest Elk Grove Marketplace, LLC) entered into an original "Lease Agreement" dated June 13, 2003. (AA at 208-241.) Landlord JJD is the owner of the shopping center real property located at 8529 Bond Road, Elk Grove, California (the "Premises"). (AA at 0944.)

As part of the lengthy negotiation of the terms of the original 2003 Lease Agreement, the parties specifically discussed, negotiated, and agreed upon the written terms of the "Co-Tenancy" provision contained in Sections 15 and 2(u) of the Lease. In response to Landlord's original "Letter of Intent" dated October 8, 2002, Jo-Ann provided Landlord with a "Lease Information Sheet" dated December 4, 2002 noting "Substitute rent of $2,000 or 3% of sales," and a "1st draft lease" on December 10, 2002. (AA at 0945 [Separate Statement of Undisputed Material Facts ("SSUMF"), No. 3]; AA at 0554-0562.) Thereafter, on February 25, 2003, the parties (with counsel) discussed "what is substitute rent?" and reflected in handwritten notes that the "substitute rent" had been negotiated up, i.e., increased from "(i) 3 % of sales . . . (ii) $2000/mo." to "3.5% . . . $12,000.00". (*Id.*; AA at 0567.)

The parties continued to negotiate the terms of the original Lease Agreement into the Spring of 2003. On March 26, 2003, Landlord's counsel sent Jo-Ann's counsel a letter which provided a "handwritten mark-up" of

the latest draft, and stated "I have included some of the major points we discussed, but were not addressed during our conference call . . . and hope that we can address and massage them ourselves, so only a few need to be addressed by our clients." (AA at 0945 [SSUMF, No. 4]; AA at 0571, 0574-75.) After further conference calls with the parties (and counsel), on May 23, 2003, counsel confirmed that "We are done !" (AA at 0575.)

The original 2003 Lease Agreement was executed on June 13, 2003, with fully executed copies provided by Landlord to tenant Jo-Ann on June 30, 2003. (AA at 0945 [SSUMF, No. 5]; AA at 0579.) Section 2(u) of original Lease Agreement (under "Definitions") provides that "Substitute Rent" was agreed to be:

> "an ***amount equal*** to the ***greater*** of (x) ***Three and One-Half percent (3 1/2%)*** of Tenant's Gross Sales of all goods and services, except patterns, and zero percent (0%) of pattern sales ***or*** (ii) ***an amount equal to Twelve Thousand and No/100 Dollars ($12,000.00) per month***, ***in lieu of the Fixed Minimum Rent and Percentage Rent*** required to be paid hereunder."

(AA at 0946 [SSUMF, No. 6], emphasis added.)

Further, Sections 15(a) and 15(b) of the original 2003 Lease (titled "Co-Tenancy"), provide in pertinent part:

> "(a) ***To induce Tenant to enter into this Lease and to fulfill its obligations hereunder***, Landlord represents that is has entered into or shall enter into binding leases (cancelable only in the event of the tenant's default ore condemnation) for the use and occupancy of either: (x) at least three (3) spaces (other than the Premises) with national retailers who shall each occupy at least twenty-four thousand

(24,000) square feet of space, or (y) four (4) spaces (other than the Premises) with at least four (4) retailers, three (3) of which must be nation and one (1) may be national or regional, who shall each occupy at least eighteen thousand (18,000) square feet of space (collectively the "Anchor Tenants" and individually as "Anchor Tenant") in the Shopping Center premises as shown on the Site Plan (the "Anchor Tenant Premises'). So long as Tenant is open and operating during the Term of this Lease, except for reasons of condemnation, remodeling, damage and destruction, or is otherwise allowed under this Lease, in the event that , at any time during the Term any Anchor Tenant shall not be open for business with retail customers during regular Shopping Center hours. ***Tenant shall be obligated to pay only Substitute Rent for so long as such vacancy or cessation continues***. In the event such vacancy or cessation continues for a period of six (6) months, and is not correct by a single comparable substitute tenant which uses and occupies said Anchor Tenant's space for the same retail use and is open for business with customers within said six (6) month period, the Tenant shall have the right and option (i) to continue its tenancy upon the terms and co-tenancy requirement, or (ii) to terminate this Lease by giving a thirty (30) days' prior written notice to Landlord. Failure to exercise (ii) above shall not waive Tenant's continuing right to do so as long as said vacancy or cessation continues. In the event Tenant elects to terminate this Lease, all further obligations hereunder shall terminate effective thirty (30) days following the date of Tenant's notice, and in such event any Rent paid in advance shall be immediately refunded to Tenant, and Tenant shall have and additional thirty (30) days, Rent free, within which to remove its property from the Premises. A tenant that succeeds an originally named Anchor Tenant by operating in the whole of that Anchor Tenant's Premises for the same retail purpose shall be deemed to be an "Anchor Tenant" following the commencement of such substitute operation.

(b) ***To further induce Tenant to enter into this Lease and to fulfill its obligations hereunder***, Landlord represents that is has entered into or shall enter into binding leases (cancelable only on the event of the tenant's default or condemnation) with multiple retail tenants for the use and

> occupancy of their space in the Shopping Center for various retail purposes. The "Threshold Requirement" shall be defined as the date tenants occupying ***at least sixty percent (60%) of the Gross Leasable Area of the Shopping Center***, excluding the Premises, are open and operating for business from the Shopping Center. If at any time during the Term the Threshold Requirement is not met, ***then Tenant shall be obligated to pay only Substitute Rent for so long as such Threshold Requirement is not met***. In the event the Threshold Requirement is not met for a period of six (6) months, then Tenant shall have the right and option (i) to continue its tenancy upon the terms and conditions of this Lease subject to the obligation to pay only Substitute Rent until the satisfaction of the Threshold Requirement, or (ii) to terminate this Lease by giving thirty (30 days prior notice to Landlord. Failure to exercise (ii) above shall not waive Tenant's continuing right to do so as long as said Threshold Requirement is not satisfied. In the event Tenant elects to terminate this Lease, all further obligations hereunder shall terminate effective thirty (30) days following the date of Tenant's notice, and in such event any Rent paid in advance shall be immediately refunded to Tenant. And Tenant shall have an additional thirty (30) days, Rent free, within which to remove its property from the Premises."

(AA at 0946 [SSUMF, No. 7]; AA at 0221-22, emphasis added.)

On September 8, 2003 and October 1, 2003, only a few months after the original Lease was executed, and given an upcoming increased "traffic impact fee" from the City of Elk Grove, Landlord sent a letter and email to tenant Jo-Ann "asking for [an] Amendment to the Lease because I have commitments for almost the entire center other than the last 50,000 square foot user," and explaining that:

> "I [Landlord] have been working with Macy's Home Store and Toys R Us to occupy that space. I am very confident the tone of the two will occupy the entire space. However, I need to protect myself for the worst case

> scenario. That is why I am requesting JO-ANN sign the Amendment. I apologize I am requesting a change to the Lease, but the fee increase has taken us completely by surprise. I am doing whatever I can to keep the project alive, and I appreciate your assistance.
>
> Please give me a call if you would like to discuss this dilemma in more detail."

(AA at 0947 [SSUMF, No. 8]; AA at 0580-81.)

Soon thereafter, and at Landlord's request, the parties executed the First Amendment to Lease dated September 8, 2003 (together, as amending the original Lease, the "***2003 Lease***" or "***Lease***"). (AA at 0947 [SSUMF, No. 9]; AA at 0240-41.) The impact of the 2003 Amendment was to ***decrease*** the total square feet of space required to be leased by Landlord under Section 15(a), and thus make it ***less likely*** that Jo-Ann could ever exercise its contractual right to "pay only Substitute Rent for so long as such vacancy or cessation continues." (*Ibid*.)

Section 4 of the First Amendment revised Section 15 of the original Lease (titled "Co-Tenancy"), as follows:

> "4. In Section 15(a), subsections (x) and (y) are deleted in their entirety and replaced with the following, "(x) Sports Chalet, who shall occupy at least Thirty Thousand (30,000) square feet of space, Sacramento Food Cooperative, Inc., who will occupy at least twenty thousand (20,000) square feet of space and a tenant who shall occupy at least Eighteen Thousand (18,000) square feet of space (collectively the "anchor Tenant Premises") or (y) sixty percent (60%) or more of the gross leasable area of the Shopping Center (excluding the Premises)."

(AA at 0948 [SSUMF, No. 10]; AA at 0240.)

As amended by the First Amendment to Lease, the operative Section 15(a) of the 2003 Lease (titled "Co-Tenancy"), provides in pertinent part:

> "***To induce Tenant to enter into this Lease and to fulfill its obligations hereunder***, Landlord represents that it has entered into or shall enter into binding leases . . . for the use and occupancy of ***either***: (x) Sports Chalet, who shall occupy at least Thirty Thousand (30,000) square feet of space, Sacramento Food Cooperative, Inc., who shall occupy at least Twenty Thousand (20,000) square feet of space and a tenant who shall occupy at least Eighteen Thousand (18,000) square feet of space (collectively the "Anchor Tenants" and individually an "Anchor Tenant") in the Shopping Center as shown the [sic] on the Site Plan (the "Anchor Tenant Premises") ***or*** (y) ***sixty percent (60%) or more*** of the gross leaseable area of the Shopping Center (excluding the Premises). ***So long as Tenant is open and operating during*** the Term of this Lease, . . . , in the event that, at any time during the Term ***any Anchor Tenant shall not be open for business*** with retail customers during regular Shopping Center hours, ***Tenant shall be obligated to pay only Substitute Rent for so long as such vacancy or cessation continues***. . . ."

(AA at 0949 [SSUMF, No. 11], emphasis added.)

As expressly (and twice) negotiated, the operative Sections 15(a) and 2(u) of the 2003 Lease reflect the parties' mutual, agreed-upon intention regarding tenant Jo-Ann's potential payment of "only Substitute Rent" during a ***specific*** time period during the Term of the Lease, and ***only*** when ***specific*** factual circumstances exist. Further, the first sentence of Section 15(a) makes clear that Jo-Ann's potential payment of "only Substitute Rent" was an expressly bargained for "inducement" from Landlord JJD to Jo-Ann to enter into the 2003 Lease.

As also found relevant by the trial court, Section 41 of the Lease (titled "APPLICABLE LAW AND CONSTRUCTION") provides, in pertinent part, that "[a]ll negotiations, considerations, representations and understandings between the parties are incorporated herein and may be modified or altered only by agreement in writing between the parties. . . . This Lease has ***been negotiated by Landlord and Tenant and the Lease***, together with all of the terms and provisions hereof, shall not be deemed to have been prepared by either Landlord or Tenant, but by both ***equally***." (*Id.*; AA at 949-50 [SSUMF, Nos. 12, 13], emphasis added.) Further, Section 54 of the 2003 Lease (titled "BINDING EFFECT OF AGREEMENT") provides that "[t]his Lease and all of the covenants, conditions, provisions and restrictions herein contained shall inure to the benefit of and be binding upon the heirs, executors, administrators, devisees, legatees, personal representatives, ***successors and assigns***, respectively, of Landlord and Tenant." (*Id.*, emphasis added.)

After the language of the Section 15 "Co-Tenancy" provision of the 2003 Lease was finalized, the parties confirmed and "established" the Term and other key dates of the Lease via a co-signed letter dated September 28, 2004, including that the Commencement Date of the Initial Term—after which Jo-Ann would commence paying rent—would be September 17, 2004. (AA at 0951 [SSUMF, No. 15]; AA at 0191.)

Following that Commencement Date of September 17, 2004, tenant Jo-Ann sent a letter to Landlord dated September 23, 2004, stating:

> "It has come to my attention that the Anchor Tenants at the above-referenced location are not yet open for business and that the Threshold Requirement for the Shopping Center, as defined in Section 15(b) has not yet been met. . . . Therefore, in accordance with Section 15 of our Lease, [tenant Jo-Ann] is exercising its right to ***pay only Substitute Rent in lieu of Fixed Minimum and Percentage Rent until such time as the terms and conditions of Section 15 of the Lease have been met***."

(AA at 0951 [SSUMF, No. 16], emphasis added.)

On November 10, 2004, Landlord sent a letter to tenant Jo-Ann ***agreeing*** with Jo-Ann's position on the payment of "Substitute Rent" under the 2003 Lease, stating that:

> "the Anchor Tenant at the above mentioned location have not yet opened for business. Therefore, ***please pay the Substitute Rent*** until November 15, 2004, at which time Toys R Us, Sports Chalet and Rogers Jewelry will be open for business."

(AA at 0951 [SSUMF, No. 17]; emphasis added.)

Accordingly, at various times through 2004 and 2005, in certain months tenant Jo-Ann paid "% Rent/Substitute" rent and other months Jo-Ann paid "full rent"—as reflected on Landlord's "Statement" or ledger for Jo-Ann's premises dated September 19, 2005. Landlord's document titled "Store 2033 Substitute Rent *Greater of 3.5% of Gross Sales or $12,000*" broke down and determined the exact amount of rent to be paid by Jo-Ann under the 2003 Lease. (AA at 0952 [SSUMF, No. 18].)

On or about March 29, 2007, original Landlord and current Landlord JJD entered into a "Purchase and Sale Agreement" for the Elk Grove Marketplace for the purchase price of $40,250,000.00. (AA at 0952 [SSUMF, No. 19]; AA 0113-37.) The next day, March 30, 2007, Landlord JJD's agent was provided with the ***existing leases*** at the Elk Grove Marketplace, with a cover letter that specifically referenced "Gross Sales Information" for Jo-Ann regarding its 2003 Lease. (*Ibid.*; AA at 0662-63 [referencing document at AA 0664-65].)

Thereafter, on May 9, 2007, tenant Jo-Ann sent a letter to Landlord stating the following:

> "It has come to my attention that Sacramento Food Cooperative, our Anchor Tenant at the above-referenced location, closed for business in the Shopping Center on or before January 15, 2007.
>
> Per Section 15(a) of the First Amendment to Lease dated September 8, 2003, Sacramento Food Cooperative shall occupy at least Twenty Thousand (20,000) square feet of space, otherwise Tenant shall be obligated to pay only Substitute Rent for so long as such vacancy or cessation continues.
>
> By copy of this correspondence, I am instructing our Real Estate Accounting department to cease payment of [fixed monthly] rent and commence payment of Substitute Rent effective June 1, 2007. We will also be processing a credit for any overpayment of Fixed Minimum rent, Percentage rent and other monetary obligations retroactive to January 15, 2017."

(AA at 0952 [SSUMF, No. 20]; AA at 0159.)

Also, in conjunction with Landlord JJD's purchase of the Elk Grove Marketplace, on June 21, 2007, Jo-Ann signed a tenant "Estoppel Certificate" (to be provided to the buyer) which stated that the 2003 Lease was "is full force and effect" and stated that:

> "Tenant is not paying fixed monthly rent. Rather, Tenant is paying Substitute Rent, as defined in the Lease. The monthly Substitute Rent varies each month according to store sales or is a fixed amount of $12,000 per month, whichever is greater. Substitute Rent has not been prepaid. Landlord is currently disputing Tenant's right to pay Substitute Rent."

(AA at 0952 [SSUMF, No. 20]; AA 0149-50.) Thus, at the time of purchase of the shopping center in 2007, Landlord JJD was specifically made aware of and necessarily must have ***priced the co-tenancy*** term in the 2003 Lease that it is now seeking to avoid into their agreed upon purchase price of the property. (See AA at 0662-63 [referencing document at AA 0664-65 that explains Jo-Ann's substitute rent]; see also AA at 0679-80.)

Importantly, Landlord's dispute over tenant Jo-Ann's right to pay Substitute Rent under the 2003 Lease was solely based upon whether the Landlord's "replacement" Anchor Tenant (i.e., Grocery Outlet) ***was*** a "comparable substitute rent" under Section 15(a) of the Lease—i.e., the dispute was whether the "Substitute Rent" provision ***was*** triggered and/or satisfied, ***not*** whether it was enforceable or valid (to which the parties had no dispute). As stated by Landlord's counsel to Jo-Ann in his July 20, 2007, letter:

> "When read along with the original language of Section 15(a), it is clear that this Amendment [the First Amendment to Lease] gives Landlord two alternative means through which to satisfy the demands of the Section: either maintain the three named Anchor Tenants (or suitable replacements) or continually lease sixty percent or more of the Gross Leasable Area of the Shopping Center. The second option set forth in Paragraph 4 of the First Amendment has always remained satisfied. Today, more than 90% of the total 198,000 square feet of the Shopping Center is fully leased, and my client has therefore not breached Section 15(a) as modified by the First Amendment. That is, the departure of Sacramento Food Cooperative as an anchor tenant is not relevant so long as sixty percent of the Gross Leasable Area of the Shopping Center remains leased. Since that percentage is easily met, you do not have the right to pay Substitute Rent."

(AA at 0953 [SSUMF, No. 21], emphasis in original; AA at 0181-85.)

On August 3, 2007, Landlord filed a Complaint for declaratory relief against tenant Jo-Ann in Sacramento County Superior Court regarding whether the "Substitute Rent" provision ***was triggered and/or satisfied*** under Section 15(a) of the 2003 Lease—and quoted within the Complaint the express controlling "Substitute Rent" provisions of Sections 15 and 2(u) of the Lease. Further, Landlord's Complaint acknowledged that the "Lease provides that if Plaintiff fails to meet its Co-Tenancy Obligations, then Defendant [tenant Jo-Ann] is ***entitled to pay*** 'Substitute Rent.'" (AA at 0954 [SSUMF, No. 22], emphasis added.)

On or about August 10, 2007 (with an "Effective Date" of August 21, 2007), in order to resolve the parties' dispute regarding satisfaction of the "Substitute Rent" provision in the 2003 Lease, Landlord and tenant

Jo-Ann entered into a "Settlement Agreement and Mutual Release" whereby Landlord agreed in Section 1 as follows:

> "1. Payment. The Marketplace [Landlord] shall pay and/or credit to Jo-Ann a total amount of $242,000.00 ("the Settlement Payment") in exchange for Jo-Ann's release of any and all claims to pay Substitute Rent after Grocery Outlet opens for business on the ground that Grocery Outlet is not a comparable substitute Anchor Tenant to Sac Food Co-op or that Grocery Outlet's use and occupancy is not a normal retail use customarily conducted in a first-class shopping center. . . ."

(AA at 0954 [SSUMF, No. 23]; AA at 0287.)

The 2007 Settlement Agreement also expressly stated in Recital I that ". . . it is the intent of the Parties in entering this Agreement that neither of them is waiving their respective contentions regarding how the Co-Tenancy requirements of Section 15(a) are ***defined*** and ***satisfied*** under the terms of the Lease and the Amendment." (AA at 0955 [SSUMF, No. 24], emphasis added.)

On August 22, 2007, Jo-Ann received notification that the Elk Grove Marketplace had been sold to "JJD-HOV ELK GROVE, LLC", the current Landlord and the plaintiff/cross-defendant in this matter. (AA at 0955 [SSUMF, No. 25].) Thereafter, on March 6, 2009, Jo-Ann advised Landlord that by operation of law effective on July 5, 2009, the 2003 Lease would be assigned within the Jo-Ann corporate structure. (AA at 0955 [SSUMF, No. 26].)

Over nine (9) years ***later***, on July 5, 2018, Jo-Ann sent a letter to Landlord stating the following:

> "JOANN Stores, LLC, hereby notifies Landlord that per Section 15 of the Lease dated June 13th, 2003, and per the replacement Co-Tenancy language in Section of the 1st amendment dated September 08, 2003, that the Ongoing Co-Tenancy requirement is not met. . . .
>
> Sports Chalet, a named anchor, closed in mid-2016 and remains vacant. Toys-R-Us closed June 30, 2018 and therefore neither the anchor tenant provision nor the 60% occupancy requirement provision is met.
>
> By copy of this correspondence, we are instructing our Real Estate Accounting department to cease the payment of Fixed Minimum Rent and Percentage Rent and to implement the payment of Substitute Rent as defined in the Lease, effective as of July 01, 2018 and until such time as the Landlord meets either the Anchor Tenant provision or the 60% occupancy provision."

(AA at 0956 [SSUMF, No. 27]; AA at 0199.)

On July 16, 2018, Landlord responded via email to Jo-Ann's July 5, 2018, letter as follows:

> "We received your attached letter dated July 5, 2018 regarding the occupancy of the center and Jo-Ann's intent to pay percentage rent. Please note, Toys-R-Us sold their location to Scandinavian Designs effective June 30th and the former Sports Chalet location has been leased to the Halloween Superstore through November 2018. At this time the center is fully leased and therefore Section 15(a) as referenced in your attached letter would not be applicable. Please advise your accounting department to continue paying the full rent and CAM in accordance with the Lease terms."

(AA at 0956 [SSUMF, No. 28]; AA at 0197.)

On July 17, 2018, Jo-Ann responded via email to Landlord's July 16, 2018, email as follows:

> "Thank you for your email response to JOANN's letter regarding Substitute Rent. Please note that the language in section 15(a) notes that a replacement anchor must be "open for business with customers" and section 15(b) requires that the tenants "are open and operating for business" before the violation is cured. Additionally, Scandinavian will not qualify as a replacement anchor because a replacement anchor must use the space for the "same retail purpose" as also noted in section 15 of the Lease. Therefore JOANN feels that their reasoning is sound to continue paying Substitute Rent . . ."

(AA at 0957 [SSUMF, No. 29]; AA at 0196.)

In letters dated September 18, 2018 and October 11, 2018, and for the ***first time*** during the (as of then, 15-year) term of the parties' 2003 Lease, Landlord JJD advised tenant Jo-Ann that Sections 15 and 2(u) of the Lease were no longer valid or enforceable between the parties. (AA at 0374-75, 0377-78.) Specifically, Landlord JJD's October 11, 2018 letter states that the entire Section 15(a) "cotenancy provision is an unenforceable penalty under the holding of *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332 . . . ." (AA at 0957 [SSUMF, No. 30]; AA 0377-78.)

In response letters dated October 4, 2018 and October 31, 2018, tenant Jo-Ann advised Landlord JJD that, for numerous reasons, Landlord JJD's position was erroneous, as the *Grand Prospect* case is factually distinguishable from the specific facts of this matter and the express terms

of the parties' 2003 Lease and course of dealings under the Lease. (AA at 0186, 0188-90.) Specifically, counsel for Jo-Ann's October 31, 2018 letter states, in pertinent part:

> "First, a significant factor in the *Grand Prospect* case was that the "opening" co-tenancy provision was virtually ***incurable*** because it did not provide the landlord with the opportunity to satisfy the opening co-tenancy condition with a substitute retailer. The Lease at issue is completely different – Section 15(a), as amended, provides that Tenant (notwithstanding any dispute about comparable substitute Anchor Tenants) may ***not*** pay only Substitute Rent in the event that "sixty percent (60%) or more of the gross leaseable area of the Shopping Center" is leased by Landlord. Indeed, in Recital H of the parties' "Settlement and Mutual Release Agreement" dated August 21, 2007, as regarding its position under Section 15(a) as to ***when*** Tenant could only pay "Substitute Rent," Landlord stated in writing this exact "sixty percent (60%) or more of the gross leaseable area of the Shopping Center" argument. In and of itself, this alternative language in Section 15(a) distinguishes the Lease at issue from the Court's ruling in *Grand Prospect*.
>
> Another significant factor in the *Grand Prospect* case was the tenant's remedies under the "opening" co-tenancy provision (i.e., ***zero*** rent, or full rent abatement, and the right to terminate the lease without ***ever*** paying rent), and particularly after the landlord had provided tenant with the right to possession of the space for over a year and landlord had lost all rental income under the lease for that period. Again, the Lease at issue here is completely different – Section 15(a) does not provide for the potential payment of zero rent to Landlord, and instead requires the monthly payment of the "greater" amount between two "Substitute Rent" options. Moreover, commencing in 2004, Tenant Jo-Ann has paid Landlord over $8,000,000 in Fixed Minimum Rent and other charges under the terms of the Lease, or settlements relating to the Lease. As such, the parties' determination of the "greater" Substitute Rent number is reasonably related to Tenant's potential lost sales, lost profits, or other damages that Tenant anticipated that it

> might suffer should Section 15(a) not be satisfied by Landlord.
>
> There is simply no reported case in California that has ***ever*** extended the *Grand Prospect* decision to a factual scenario and/or the express Lease provisions in this case, nor anything even close. As the Court stated in *Grand Prospect*: "The variation of cotenancy requirements, and the remedies given to a tenant when the requirements are not met, prevents the application of a categorical rule of law regarding enforceability. . . . Instead, the validity of a cotenancy provision depends upon the facts and circumstances proven in a particular case." *Grand Prospect, supra*, 232 Cal.App.4th at 1344. Applied here, Section 15(a) of the Lease is enforceable as consistent with the parties' mutual intent, and the parties' benefit of the contractual bargain, as factually and legally distinguishable from the *Grand Prospect* case."

(AA at 0958-59 [SSUMF, No. 31]; AA at 0379-81.)

Landlord JJD never responded to tenant Jo-Ann's counsel's detailed letter dated October 31, 2018, nor refuted the factual statements or legal positions therein. Instead, on January 10, 2019, Landlord JJD filed its Complaint for declaratory relief and breach of contract against Jo-Ann in Sacramento County Superior Court, seeking a declaration that the co-tenancy provisions in the 2003 Lease constitute unenforceable penalty provisions and damages of $90,332.58. (AA at 0391-99.) On March 27, 2019, tenant Jo-Ann filed its Cross-Complaint for declaratory relief against Landlord JJD. (AA at 0959 [SSUMF, No. 32]; AA 0407-13.)

As of January 15, 2021, tenant Jo-Ann had paid Landlord JJD (or its predecessor-in-interest) ***over $9,000,000*** in rent and other charges for its

tenancy at the Premises under the 2003 Lease. (AA at 0960 [SSUMF, No. 33].) As of January 1, 2023, Jo-Ann has now paid Landlord JJD over ***$10,490,00*** in rent and other charges under the 2003 Lease.

IV. STANDARD OF REVIEW AND LEGAL FRAMEWORK

A. Landlord JJD Bears the Burden and Cannot Raise New Factual Disputes or Arguments on Appeal.

It is well-settled under California law that the party seeking relief from forfeiture bears the burden of proving all facts that would justify that relief. (*Amoruso v. Carley* (1949) 93 Cal.App.2d 422, 427; see also *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.* (9th Cir. 1996) 75 F.3d 1401, 1413 ["Civil Code § 3275 provides for relief, under certain circumstances, where a party's ***failure*** to comply with the provisions of a contract results in a forfeiture. The party in ***default*** must plead and prove facts entitling it to relief under the section."]; emphasis added.) Here, Landlord JJD alleges that the co-tenancy provisions in the 2003 Lease are now unenforceable, and thus bears the burden to prove the facts entitling it to relief.

Further, "[g]enerally, the rules relating to the scope of appellate review apply to appellate review of summary judgments." (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676.) "An argument or theory will not be considered if it is raised for the ***first*** time on appeal," and in "reviewing a summary judgment, the appellate

court must consider only those facts before the trial court, disregarding any ***new*** allegations on appeal." (*Ibid.*; emphasis added.) "[U]nless they were factually presented, fully developed and argued to the trial court, potential theories which could theoretically create 'triable issues of material fact' may not be raised or considered on appeal." (*Peart v. Ferro* (2004) 119 Cal.App.4th 60, 70; see also *San Francisco Print Media Co. v. Hearst Corp.* (2020) 44 Cal.App.5th 952, 965.) While there is a limited and discretionary exception to these general rules, the exception applies only where a new argument raises "pure questions of law" (*Insurance Co. of the State of Pennsylvania v. American Safety Indemnity Co.* (2019) 32 CalApp.5th 898, 922-23) that are "determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence." (*In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 510-11; see *People v. Lowery* (2020) 43 Cal.App.5th 1046, 1054, review den. Mar. 11, 2020 [noting the rule that "a party must raise an issue in the trial court if they would like appellate review"]; *Sander v. Superior Ct.* (2018) 26 Cal.App.5th 651, 670 ["It is axiomatic that arguments not raised in the trial court are forfeited on appeal."].)

Here, Landlord JJD's opening brief asserts "new" factual positions and "new" reliance on statutory and case law which were not previously argued in the trial court or Court of Appeal, and now specifically seeks relief under the "general rule" of forfeiture in Civil Code section 3275.

Indeed, for the ***first*** time in this litigation, JJD argues the applicability of Civil Code section 3275 to co-tenancy provisions in retail lease agreements. As stated by the Third District in *JJD-HOV*: "Other than quoting Civil Code section 3275, both in its brief and at oral argument, JJD ***never*** discusses that statute or ***explains*** its applicability to this case. Moreover, it was not cited in the trial court by the parties, or in the trial court's decision." (*JJD-HOV*, *supra*, 80 Cal.App.5th at 422; emphasis added.)

Accordingly, the Third District's decision in *JJD-HOV* to "decline" any forfeiture argument under Civil Code section 3275 "[b]ased on the record before us," should not be disturbed—Landlord JJD waived the issue under well-established California law by failing to make the argument in the trial court at all, or to develop it beyond a bare citation during its appeal. Landlord JJD's attempt to now argue "new" factual and legal positions before this Court regarding Civil Code section 3275 is improper.

V. ARGUMENT

A. The Third District's Analytical Framework in *JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC* (2022) 80 Cal.App.5th 409 Should Apply to Co-tenancy Provisions in Retail Lease Agreements.

On numerous grounds, the Third District's analytical framework in *JJD-HOV* should apply to co-tenancy provisions in retail lease agreements. The parties' contractual intent when reduced to writing should be controlling and enforced, particularly as applied to the commercial leasing

market in arms-length negotiations and transactions. As noted above, co-tenancy provisions do not reflect "damages," "breaches," or "defaults" but instead reflect agreed-upon contractual terms for different or alternative rent structures in the event certain contingencies occur. The courts should not rewrite co-tenancy provisions in retail lease agreements that the parties enter into freely and voluntarily. Such contracts are, by their very nature, specifically agreed-upon allocations of risk, responsibility and rent payments between the parties.

Specifically, the Third District in *JJD-HOV* declined to follow the reasoning in *Grand Prospect*, explaining that a co-tenancy provision in a retail lease agreement is not a liquidated damages clause subject to Civil Code section 1671 because such provision is not triggered by a party's "breach" or "default". (*JJD-HOV, supra,* 80 Cal.App.5th at 421.) Although never quoted by Landlord JJD in its opening brief, the language of Civil Code section 1671 states as follows, in full:

> (a) This section does not apply in any case where another statute expressly applicable to the contract prescribes the rules or standard for determining the validity of a provision in the contract liquidating the ***damages*** for the ***breach*** of the contract.
>
> (b) Except as provided in subdivision (c), a provision in a contract liquidating the ***damages*** for the ***breach*** of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.

> (c) The validity of a liquidated damages provision shall be determined under subdivision (d) and not under subdivision (b) where the liquidated ***damages*** are sought to be recovered from either:
>
> (1) A party to a contract for the retail purchase, or rental, by such party of personal property or services, primarily for the party's personal, family, or household purposes; or
>
> (2) A party to a lease of real property for use as a dwelling by the party or those dependent upon the party for support.
>
> (d) In the cases described in subdivision (c), a provision in a contract liquidating ***damages*** for the ***breach*** of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of ***damage*** sustained by a ***breach*** thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual ***damage***.

(Emphasis added.)

In upholding the parties' co-tenancy provision in the 2003 Lease, the Court of Appeal in *JJD-HOV* explained that the *Grand Prospect* decision misapplied Civil Code section 1671 to co-tenancy provisions because that court did not look at the context and meaning of the statute. As quoted above, Section 1671, by its express terms, only applies to "a provision in a contract liquidating the ***damages*** for the ***breach*** of the contract." (*JJD-HOV, supra,* 80 Cal.App.5th at 420-421; emphasis added.) The Court of Appeal in *JJD-HOV* further explained that the co-tenancy provisions in both *Grand Prospect* and this case were not triggered by a ***breach*** of contract but by an expressly negotiated condition precedent, i.e., the closure

of certain anchor tenants or a reduction of space occupied by other tenants. (*Id.* at 421.) According to the Court of Appeal, the *Grand Prospect* court erred in finding that a condition precedent could operate as an unenforceable penalty. Specifically, the *Grand Prospect* court was mistaken when it found that the co-tenancy provision "was substantially equivalent to a liquidated damages provision" and that its enforceability should be evaluated using a section 1671 review or analysis. (*Id.* at 421.) Rather, the *JJD* court held that the co-tenancy provision did not impose damages for breach of contract but instead simply provided for a different rent structure or alternative rent payments in the event certain, agreed-upon contingencies occurred. (*Id.* at 426.)

In supporting its decision, the Court of Appeal in *JJD-HOV* also relied on *Constellation-F, LLC v. World Trading 23, Inc.*, 45 Cal.App.5th 22, *McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, and *Boca Park Marketplace Syndications Group, LLC v. Ross Dress for Less, Inc.* (D. Nev., June 20, 2019, No. 216CV01197RFBPAL) 2019 WL 2563814, order amended by (D. Nev., May 31, 2020, No. 216CV01197RFBBNW) 2020 WL 2892586, each of which include an instructive analyses of commercial lease provisions for alternative rent performance. In citing to these cases, among others, the *JJD-HOV* court grounded its decision on the bedrock principle that courts should not "alter a contract by construction or . . . make a new contract for the parties". (*Id.*

at 423-426.) The Court of Appeal thus expressly found that "the parties considered and agreed to allocate the risk of reduced occupancy to JJD, and agreed JJD would receive substantially reduced rent if that risk occurred. JJD has received precisely the Substitute Rent it agreed to receive, and we find no basis for relieving JJD from the burden of its agreement." (*Id.* at 426.)

Landlord JJD's new reliance on Civil Code section 3275, as well as this Court's decision in *Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970 ("*Ridgley*"), fares no better than its earlier reliance on Civil Code section 1671. Although (once again) not quoted by Landlord JJD in its opening brief, the language of Civil Code section 3275 provides as follows:

> Whenever, by the terms of an ***obligation***, a party thereto incurs a ***forfeiture***, or a loss in the nature of a forfeiture, by reason of his ***failure*** to comply with its provisions, he may be relieved therefrom, ***upon making full compensation to the other party***, except in case of a grossly negligent, willful, or fraudulent breach of duty.

(Emphasis added.)

First, Civil Code section 3275 requires and conditions any relief from forfeiture on "***making full compensation to the party,***" a requirement that Landlord JJD makes no effort to apply to co-tenancy provisions in commercial leases—or specifically to the parties' 2003 Lease in this case. Simply stated, such language is wholly inapplicable to a co-tenancy

provision in a retail lease agreement. Such provisions do not contain any "obligation" by a landlord that is failed, breached or defaulted such that any "***full compensation***" could be made to a tenant. This required language makes no sense in this context.

Second, Landlord JJD's new reliance on *Ridgley* and its purported application of Civil Code section 3275 to loan prepayment penalties and late payment fees likewise does not support JJD's position. In fact, it does the opposite—*Ridgley* supports tenant Jo-Ann's position that the specific co-tenancy provision in the 2003 Lease is valid and enforceable.

In *Ridgley*, this Court held that a $113,000 loan prepayment penalty that was expressly conditioned on the borrower's ***default*** in making timely loan payments was not enforceable as a ***liquidated damage penalty*** under Civil Code section 1671. However, Landlord JJD cites to *Ridgley* as a pure Civil Code section 3275 analysis, which is misleading given that the decision makes little reference to section 3275, but makes repeated references to Civil Code section 1671. As one of many examples, page 10 of Landlord JJD's opening brief makes passing reference to section 3275, and then quotes a section 1671 liquidated damages discussion from *Ridgley* as follows (but omits *Ridgley's* preceding sentences referencing section 1671):

> "A penalty provision operates to compel performance of an act [citation] and usually becomes effect only in the event of ***default*** [citation] upon which a forfeiture is

> compelled without regard to the ***damages*** sustained by the party aggrieved by the ***breach*** [citation]. The characteristic feature of a penalty is its lack of proportional relation to the ***damages*** which may actually flow from failure to perform under a contract. [Citations.]"

(*Ridgley, supra*, 17 Cal.4th at 977; emphasis added.)

Applied here, *Ridgley* is entirely distinguishable from the co-tenancy provision in the parties' 2003 Lease. Unlike *Ridgley,* in this case there is no "default," "breach," or "damages" arising from the parties' co-tenancy provision which set forth alternative rent scenarios as based on specific, agree-upon contingencies.

In support of tenant Jo-Ann's position in this case, *Ridgley* makes clear that a loan prepayment penalty which is ***not*** conditioned on the borrower's default or breach in making earlier rent payment is an ***enforceable*** provision. As stated by this Court in *Ridgley*, and analogous to co-tenancy provisions in a commercial lease:

> "In contrast to late payment fees, contractual charges for *prepayment* of the loan principal are generally considered ***valid*** provisions for ***alternative*** performance, ***rather*** than penalties or liquidated damages for ***breach***. Payment before maturity is not a breach of the contract, but simply an ***additional*** mode of performance on the borrower's part; the prepayment charge is ***not*** a penalty imposed for ***default***, but an agreed form of compensation to the lender for interest lost through prepayment, additional tax liability or other disadvantage."

(*Ridgley, supra*, 17 Cal.4th at 978; bold italics emphasis added.)

Further, in a direct reference to Civil Code section 3275, *Ridgley* states as follows: "The ***breaching*** party may raise section 3275 as an equitable defense to enforcement of the contractual provision or as grounds for relief in an action for restitution of the property forfeited." (*Ridgley, supra,* 17 Cal.4th at 976; emphasis added.) Again, in this case, neither party suggests that the co-tenancy provision in the 2003 Lease relates to any "breach" of that Lease, as opposed to being a negotiated, agreed-upon alternative rent provision.

In addition, on page 9 and pages 35-36 of its opening brief, Landlord JJD twice quotes the entirety of (lengthy) footnote 5 in the *Ridgley* case—which makes passing reference to both Civil Code sections 1671 and 3275—for the general position that arm's length transactions may still result in contractual penalties or forfeitures. However, given that neither Civil Code section 1671 nor section 3275 apply to the specific co-tenancy provision in the 2003 Lease, this footnote has no applicability to this case.

Accordingly, the Third District's analytical framework in *JJD-HOV* should apply to co-tenancy provisions in retail lease agreements.

B. The Court of Appeal Correctly Determined that the Co-tenancy Provision in the Parties' 2003 Lease is Valid and Enforceable.

The Court of Appeal in *JJD-HOV* correctly determined that the co-tenancy provision in the parties' 2003 Lease agreeing to different or alternative rent structures is valid and enforceable. As noted above, in this

case both parties negotiated the co-tenancy provision in their 2003 Lease with the assistance of legal counsel, and expressly agreed to two different rental rates ("Fixed Minimum Rent" or "Substitute Rent") based on different types of levels of occupancy in the shopping center. The parties agreed that if the co-tenancy provision is satisfied, tenant Jo-Ann owes Fixed Minimum Rent to landlord JJD, and if it is not satisfied, Jo-Ann owes Substitute Rent to JJD. The parties agreed the co-tenancy provision could be satisfied by either three anchor tenants or 60 percent of the shopping center's space leased. And the parties agreed that Substitute Rent would be the greater of $12,000 or 3.5 percent of tenant Jo-Ann's sales. All of these co-tenancy terms in the 2003 Lease were actively negotiated. There is no suggestion that either party was unaware of or did not understand any portion of the co-tenancy provision, or failed to consider the risk of reduced occupancy in the shopping center. The parties also conducted themselves as tenant and landlord for a period of over fifteen (15) years under the 2003 lease without any question as to the validity or enforceability of the co-tenancy provision.

Again, Civil Code section 1671 is inapplicable to this case because there is no suggestion or evidence that reduced occupancy in the shopping center resulted in Landlord JJD's "breach" of, or "default" under, the 2003 lease, as JJD's counsel conceded at oral argument before the Court of Appeal. Likewise, Civil Code section 3275, which was not discussed or

analyzed by Landlord JJD in its Court of Appeal briefing or at oral argument, is inapplicable to this case, as the co-tenancy provision in the 2003 Lease is not an unenforceable penalty or forfeiture under applicable law.

The trial court and the Court of Appeal in *JJD-HOV* properly analyzed the undisputed facts, stipulated documents, and applicable law, and held that the specific co-tenancy provisions in the parties' 2003 Lease regarding paying reduced "alternative" or "Substitute Rent"—but only in certain, specific circumstances—are valid and enforceable as between the parties for at least three key reasons.

First, the trial court and the Court of Appeal in *JJD-HOV* explained that California law is well-settled that "the parties' contractual intent when reduced to writing should be controlling and enforced, particularly as applied to the commercial leasing market in arms-length negotiations and transactions." (*JJD-HOV, supra,* 80 Cal.App.5th at 422.) *Second*, the trial court and the Court of Appeal held that Landlord JJD's sole reliance on *Grand Prospect* is misplaced, as that case is clearly distinguishable on its facts and when properly applied results in upholding the co-tenancy provision in the 2003 Lease. Unlike in *Grand Prospect*, for example, the 2003 Lease (as shown by the many years of tenant Jo-Ann's performance under the Lease) specifies ***when*** and under ***what circumstances*** tenant Jo-Ann would pay reduced "alternative" or "Substitute Rent" as opposed to

full rent. Contrary to Landlord JJD's argument in its opening brief, the trial court and the Court of Appeal did not hold that the co-tenancy term at issue here is enforceable simply because it was negotiated, but rather because it expressly reflects the parties' agreed-upon intent ***at the time*** the 2003 Lease was made. (AA at 1028-29; *JJD-HOV, supra,* 80 Cal.App.5th at 422-423.) And *third*, the trial court and the Court of Appeal correctly applied more recent appellate decisions analyzing forfeitures and penalties, in which courts have found analogous terms enforceable despite substantial alleged losses by the party seeking to avoid enforcement, including but not limited to *Constellation-F, LLC v. World Trading 23, Inc.* (2020) 45 Cal.App.5th 22 and *Southern California School. of Theology, supra,* 60 Cal.App.5th 1. (*See JJD-HOV, supra,* 80 Cal.App.5th at 423-426.)

1. California law is well-settled that commercial landlords and tenants in arms-length transactions are freely able to contract for lease terms in their own best interest, and those agreed-upon contractual terms should be valid and enforceable.

As the trial court and the Court of Appeal explained, California law is clear that landlords and tenants "in a competitive market are 'free from obligation to each other' when they enter into their lease contract" for use of commercial premises, and "are freely able to contract in their own best interest" on rental terms and conditions. (AA at 1027, citing C*onstellation-F, LLC, supra,* 45 Cal.App.5th at 27, quoting *Vucinich v. Gordon* (1942) 51 Cal.App.2d 434, 437; *JJD-HOV, supra,* 80 Cal.App.5th at 422-423.) Nearly

80 years ago, the court in *Vucinich* aptly described the deference that courts should give freely negotiated commercial lease terms and transactions:

> "They dealt at arm's length. Deliberately and free from coercion, they made the ***provision for the rental to be paid for the use of the premises*** . . . [t]his they had the right to do. It is universal practice to include such covenants whereby the tenant may determine the extent of his liability. . . . There is ***no reason why the courts should adjudicate that which the parties have determined by their free, solemn and voluntary act***."

(*Vucinich, supra,* 51 Cal.App.2d at 437-38; emphasis added; *see also,* C*onstellation-F, LLC, supra*, 45 Cal.App.5th at 27, quoting *Vucinich* in part.) The *Vucinich* court's reasoning is equally applicable here, particularly given the lengthy course of dealings between sophisticated business parties such as Landlord JJD and tenant Jo-Ann.

These well-established principles counsel that the contractual and economic relationship between landlords and tenants for commercial premises are "established by the lease itself," and that the mutual intention of the parties at the time a contract was formed governs the interpretation of the contract. (*Vucinich, supra*, 51 Cal.App.2d at 436; Cal. Civ. Code § 1636; *Cedars–Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 979.) Further, when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, and where the language of a contract is clear and does not involve an absurdity, it will be followed. (Cal. Civ. Code §§ 1638, 1639; see also Cal. Civ. Code

§ 1643 ["[A] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."].)

The trial court and the Court of Appeal thus properly held that Landlord JJD and tenant Jo-Ann freely entered into the co-tenancy provisions of the 2003 Lease (including an amendment regarding the co-tenancy provision, as requested by Landlord), and negotiated the ***certain, specific circumstances*** under which Jo-Ann would pay reduced "alternative" or "Substitute Rent", as opposed to full rent, taking Jo-Ann's sales data and potential occupancy percentages into account. (AA at 1029-30; *JJD-HOV, supra,* 80 Cal.App.5th at 423-424.) As explained further below, and as the trial court understood and found, the parties had no reason to take sales data and occupancy percentages into account unless it was done in an effort to forecast the possible negative sales impacts that could flow from operating a retail store in a largely vacant mall.[3]

2. The trial court and the Court of Appeal correctly held that Landlord's sole reliance on *Grand Prospect* to invalidate the co-tenancy provision in

[3] Landlord JJD's suggestion that Jo-Ann's categorically could not anticipate harm from being surrounded by vacant retail space, because "[o]ne does not go to the grocery store for eggs then see Jo-Ann's next door and suddenly decide they will pick up quilting," is as non-sensical as it is tone deaf. (Opening brief at p. 43, fn. 7.) Obviously, busy families endeavor to make fewer shopping trips by visiting locations where they can cross multiple needs off their lists in one stop, such as sewing supplies and groceries. Contrary to Landlord JJD's flippant dismissal of quilting, fabric and sewing supplies are a necessity for many people and businesses.

the parties' 2003 Lease is misplaced, as that case is distinguishable on numerous factual, contractual and performance grounds.

Landlord JJD's opening brief relies on *Grand Prospect* to invalidate the co-tenancy provision of the parties' 2003 Lease. This reliance remains wrong—and in bad faith given tenant Jo-Ann's payment of over $10,490,000 in rent and other charges through January 1, 2023, as well as Landlord JJD's knowledge of the co-tenancy term in the 2003 Lease during its purchase negotiations in 2007 for the shopping center. As the trial court and the Court of Appeal found, the *Grand Prospect* case is distinguishable on its facts and not determinative of the 2003 Lease as to ***when*** and under ***what circumstances*** Jo-Ann would pay reduced "alternative" or "Substitute Rent," as opposed to full rent, under such co-tenancy provision.

In summarizing co-tenancy conditions in leases, and of further note, the court in *Grand Prospect* expressly noted that any review of the "***validity of a cotenancy provision depends upon the facts and circumstances proven in a particular case***." (*Grand Prospect, supra*, 232 Cal.App.4th at 1344; emphasis added.) As fully stated in *Grand Prospect*:

> "The ***variation*** in cotenancy requirements, and the ***remedies*** given to a tenant when the requirements are not met, ***prevents the application of a categorical rule of law regarding enforceability***. For instance, there is no general principle of California law holding cotenancy provisions in a commercial retail lease can never be unconscionable. Similarly***, there is no categorical rule holding cotenancy provisions are unreasonable per se and therefore unenforceable penalties***. Instead, the ***validity of a***

> ***cotenancy provision depends upon the facts and circumstances proven in a particular case***."

(*Ibid.*, emphasis added.)

This fact-specific analysis is exactly what the trial court and Court of Appeal in *JJD-HOV* conducted here, and in great detail. Specifically, the trial court and the Court of Appeal analyzed the unique facts and circumstances of this case and determined that the co-tenancy provision in the parties' 2003 Lease is valid and enforceable, finding that at the time the Lease was negotiated and agreed-to, the amount of the reduced rent was "expressly premised on Jo-Ann's sales" and occupancy percentages. (AA at 1029; *JJD-HOV, supra,* 80 Cal.App.5th at 426.)

Throughout its opening brief, Landlord JJD attempts to shift the focus away from trial court and the Court of Appeal's analysis of the parties' negotiation and agreement on the co-tenancy provision in the 2003 Lease with pure argument about Jo-Ann's actual harm from vacancies that occurred years later, by repeatedly alleging that Jo-Ann suffered no actual damages traceable to vacancies in the shopping mall.[4] But that is not what

[4] Landlord JJD also misleadingly suggests that Jo-Ann was "tasked" with providing a basis for the rent reduction amount, and refused. (Opening brief at p. 43.) Not only do the record citations Landlord JJD provides fail to support this point, they reflect the opposite. The evidence shows that the parties in 2003 discussed "what is substitute rent?" with express reference to percentages of Jo-Ann's sales, indicating (as the trial court found) that the parties ***were*** considering the range of anticipated harms that could flow from future vacancies in the shopping mall. (AA at 466 [SSUMF 35], AA at 468 [SSUMF 40].) No authorities provided by Landlord JJD suggest that

the court in *Grand Prospect,* or in *JJD-HOV, or* any other unenforceable penalty case cited by Landlord JJD, requires—a commercial tenant is not required to prove that the co-tenancy term is reasonably related to its actual, eventual damages from vacancies in order to avoid a landlord's refusal to abide by the parties' lease agreement. Such a requirement would turn both the burden of proof for relief from forfeitures and contract law on their heads.

Moreover, as the trial court and the Court of Appeal in *JJD-HOV* explained in great detail, both the co-tenancy provision itself as well as the parties' course of dealing distinguish the 2003 Lease from the facts in *Grand Prospect*. In *Grand Prospect,* the co-tenancy provision at issue conditioned tenant Ross Dress for Less' obligation to ***open*** a store and pay ***rent*** upon Mervyn's (a department store chain) operating a store in the shopping center on the commencement date of the lease. (*Grand Prospect, supra,* 232 Cal.App.4th at 1337.) The landlord (Grand Prospect) did ***not*** own the Mervyn's parcel, the co-tenancy provision did ***not*** have ***any end date*** for the ***complete*** rent abatement, and tenant Ross was not required to pay ***any*** rent regardless of whether it was open and operating or not. (*Id.* at 1340, fn. 2.) The co-tenancy provision also granted tenant Ross the option to terminate the lease if Mervyn's ceased operations and was not replaced

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the range of anticipated harms at the time of the contract need correspond to eventual actual harm. Such a rule would be unworkable.

at that location by an acceptable retailer within 12 months. (*Id.* at 1337.) This opening co-tenancy condition was not satisfied because Mervyn's filed for bankruptcy and did not open its store. (*Id.* at 1340.) Tenant Ross took possession of its space, but ***never*** opened for business, ***never*** paid rent, and ***terminated*** the lease after the 12-month cure period expired. (*Id.* at 1341.) The landlord—who paid over $2.3 million in tenant improvements before tenant Ross took possession of the premises—claimed that Ross had to pay rent for the full term because the provisions authorizing full rent abatement and termination were unconscionable or, alternatively, an unenforceable penalty. (*Id.* at 1340, fn. 3, and 1342.)

A significant factor in the *Grand Prospect* case was thus that tenant Ross' "opening" co-tenancy provision was virtually ***incurable*** because it did not provide the landlord (Grand Prospect) with the opportunity to cure the "opening" co-tenancy condition (so that rent would be paid)—as at the time the lease was made, landlord did ***not*** own the Mervyn's parcel (unlike Landlord JJD who owns the entire shopping center), and thus would have to purchase the Mervyn's property and locate new tenants that would be acceptable substitutes to Ross.

The 2003 Lease at issue here is completely different—Section 15(a), as amended at Landlord's request in 2004, provides that Tenant (notwithstanding any dispute about comparable substitute Anchor Tenants) may ***not*** pay only Substitute Rent in the event that "sixty percent (60%) or

more of the gross leaseable area of the Shopping Center" is leased by Landlord. (AA at 0947 [SSUMF, No. 11].) Indeed, in Recital H of the parties' "Settlement and Mutual Release Agreement" dated August 21, 2007, as regarding its position under Section 15(a) as to ***when*** and under ***what circumstances*** Tenant would only pay "Substitute Rent," Landlord acknowledged in writing this exact "sixty percent (60%) or more of the gross leaseable area of the Shopping Center" argument. (AA at 0954.) In and of itself, this alternative language in Section 15(a) distinguishes the 2003 Lease from the Court's ruling in *Grand Prospect*.

Landlord JJD attempted to address this distinction by impermissibly inserting an entirely new fact-based argument before the Court of Appeal, *i.e.* that it could not comply with the 60% occupancy condition either. (Appellant's brief at pp. 14-15.) The basis for this assertion remains unclear, as it is not the case that any tenant's bankruptcy removed the premises from being relet, but in any event, Landlord made no such assertions in the trial court. (AA at 1030 [as stated by the trial court, "However, as discussed above, under the Lease JJD could also comply with Section 15 by ensuring a 60% occupancy rate. JJD makes no argument that it could not comply with that."].) As such, this new argument is not properly considered on appeal. (*Peart, supra,* 119 Cal.App.4th at 70 ["[U]nless they were factually presented, fully developed and argued to the trial court, potential theories which could theoretically create 'triable issues

of material fact' may not be raised or considered on appeal."].) And in any event, as explained above, Landlord JJD knowingly accepted the co-tenancy term and its obligations under that term when it purchased the property in 2007. It cannot now be heard to argue that the term it acknowledged, and must have priced into its purchase, is not achievable. (Appellant's brief at pp. 14-15.)

Indeed, the undisputed nature of the reasons for the original "Substitute Rent" provision here was memorialized by the First Amendment to the 2003 Lease. Again, at Landlord's specific request (and to accommodate Landlord's desire to evade increased development fees due to the City of Elk Grove), tenant Jo-Ann agreed to enter into a "First Amendment to Lease" with Landlord dated September 8, 2003. The impact of this Amendment was to ***decrease*** the total square feet of space required to be leased by Landlord under co-tenancy Section 15(a), and thus make it less likely that Jo-Ann could ever exercise its contractual right to "pay only Substitute Rent for so long as such vacancy or cessation continues" under this Section. (AA at 0947-49.)

Another significant factor in the *Grand Prospect* case was tenant Ross' remedies under the "opening" co-tenancy provision (i.e., ***zero*** rent, or full rent abatement, and the right to terminate the lease without ***ever*** paying rent), and, particularly after the landlord had provided tenant Ross with $2.3 million in tenant improvements, the right to possession of the space for

over a year ***without any payment of rent for that entire one-year period***. Again, the 2003 Lease at issue here is completely different—Section 15(a) does not provide for the potential payment of zero rent to Landlord, and instead requires the monthly payment of the negotiated "***greater***" amount between two "Substitute Rent" options. (AA at 0949.) Moreover, commencing in 2004, tenant Jo-Ann has paid Landlord over ***$9,000,000*** in rent and other charges under the terms of the Lease through January 15, 2021 (AA at 0960), and now paid over $10,490,000 in rent and other charges through January 1, 2023. As such, and as the trial court found, the parties' negotiated determination in 2003 of the "greater" Substitute Rent amount was reasonably related to Tenant's potential lost sales or lost profits that Tenant anticipated that it might suffer should Section 15 not be satisfied by Landlord. (AA at 1029-30.)

There is no reported case in California that has extended the *Grand Prospect* decision to a factual scenario and/or the express 2003 Lease provisions in this case, nor anything even close. Applied here, an alternative "Substitute Rent" provision which requires tenant Jo-Ann to pay ***reduced***, or tiered or alterative, rent (as opposed to no rent at all as in *Grand Prospect*), and the amount that would potentially be due as rent—percentage of gross sales—reflects the parties' contractual intent as expressly tied to how well Jo-Ann does financially.

Accordingly, the trial court and the Court of Appeal in *JJD-HOV* thus correctly held that the specific co-tenancy provisions in the 2003 Lease are valid and enforceable as consistent with the parties' mutual intent, as shown by the plain terms of the parties' contractual bargain in 2003 and the subsequent fifteen (15) years of dealings under the Lease. Unlike in *Grand Prospect*, Landlord JJD had a reasonable cure right and the ability to remedy the failed condition to resume the payment of full rent—which has occurred ***repeatedly*** during the now 19-year tenancy of Jo-Ann under the 2003 Lease. (AA at 0949, 0951-52, 0956-57, 0960.)

3. Recent Court of Appeal's decisions show that the co-tenancy term in the parties' 2003 Lease is not a forfeiture or unenforceable penalty, as the trial court and the Court of Appeal in *JJD-HOV* held.

The trial court and the Court of Appeal in *JJD-HOV* also properly applied guidance from the recent *Constellation-F, LLC v. World Trading 23, Inc.* (2020) 45 Cal.App.5th 22 decision, in which the parties disputed the enforceability of a holdover rent provision in a commercial lease providing for a 150% increase in base rent if the tenant failed to vacate the premises following lease termination. The tenant in *Constellation-F, LLC* successfully challenged the provision at trial, arguing it was an unenforceable penalty barred by Civil Code section 1671 regarding liquidated damages.

On appeal, the Court of Appeal in *Constellation-F, LLC* reversed the lower court's decision, finding that the holdover rent provision ***was*** enforceable and ***not*** an unlawful penalty. (*Constellation-F, supra,* 45 Cal.App.5th at 26.) In so holding, the Court cited extensively to *Vucinich, supra,* 51 Cal.App.2d 434 for its finding that holdover rents, or "graduated rents," are ***not*** "damages" governed by Civil Code section 1671 (i.e., arising from a "breach") but simply reflect additional rents negotiated by the parties in arms-length dealings. (*Id.* at 27.) The commercial tenant's burden, according to the Court, was to prove that the landlord had "market power," which the Court broadly analogized to the power exerted by monopolists oppressing consumers, and that tenant therefore had no competitive alternative to signing the lease at issue. (*Id.* at 27-28.) Based on the absence of any evidence that the landlord had such monopolistic power, the Court determined that the holdover rent provision was valid and enforceable. (*Id.* at 27-29.)

Similarly, and even more recently, the court in *Southern California School of Theology* concluded that a right of first offer clause in a 1957 grant deed transferring land between two universities did not constitute an unenforceable forfeiture despite costing the proponent of the doctrine's application as much as $36 million. (*Southern California School of Theology, supra,* 60 Cal.App.5th at 8.) The court observed that "[t]he question in each [forfeiture] case is as to what is the contract between the

parties," and "[c]ontracts are, by their very nature, allocations of risk and responsibility as between the parties." (*Id*. at 9-10.) Because enforcing the right of first offer clause as written would result in each party getting "that for which they bargained, and that to which they agreed," the court held that it was not a forfeiture and reversed the trial court's judgment to the contrary. (*Id*. at 10.)

Instead of recognizing the commercial contract principles underlying *Constellation-F* and *Southern California School of Theology*, as applied by the trial court and Court of Appeal, Landlord JJD spends multiple pages of its opening brief discussing the ratio of losses that should result in a court voiding a contract term as an unenforceable penalty. (Opening brief, pp. 42-47.) But as reflected in *Southern California School of Theology* where a loss of around $36 million was alleged, and as further explained below, the ratio of alleged loss is not determinative. Rather, the party seeking to void a contract term in a commercial lease (here, Landlord JJD) bears the burden of showing that the term is an unenforceable penalty based on the facts in the record about the parties' understandings at the time of contracting. As the trial court and the Court of Appeal properly held here, the parties negotiated and determined in 2003 the amount of the substitute rent by explicitly referencing Jo-Ann's gross sales and occupancy percentage, showing the parties' agreed-upon allocation of risks at the time of the 2003 Lease. (AA at 1029.) Landlord JJD's argument risks requiring every

commercial lease co-tenancy term to be subject to judicial oversight as to the exact scope of the parties' negotiations regarding that term.

In sum, both the *Constellation-F* and *Southern California School of Theology* analyses and conclusions are applicable to the reduced "Substitute Rent" provision in the parties' 2003 Lease. Like the right of first offer in *Southern California School of Theology* and the holdover rent in *Constellation-F*, the co-tenancy provision in the 2003 Lease regarding the alternative payment of reduced "Substitute Rent" does not constitute an unenforceable penalty or a forfeiture to Landlord JJD, but rather a negotiated, agreed-upon "tiered" rental rate (i.e., alternative performance) for the leasing of retail property—just as the trial court and Court of Appeal found.

C. The Trial Court and Court of Appeal Properly Distinguished the Other Case Decisions and Legal Arguments Cited by Landlord JJD as Inapposite and Inapplicable to this Declaratory Relief Dispute Over the Enforceability of the Co-tenancy Provision of the Parties' 2003 Lease.

The trial court and Court of Appeal in *JJD-HOV* easily recognized that the other case decisions and legal arguments cited by Landlord JJD (i.e., other than *Grand Prospect*) are inapposite and inapplicable to this dispute over the enforceability of the specific co-tenancy provisions in the parties' 2003 Lease. Each case evaluates a contractual penalty/liquidated

damages provision triggered by a ***breach*** of the contract at issue, ***not*** a commercial lease with a negotiated, tiered rental rate structure.

As in the trial court and Court of Appeal, Landlord JJD's opening brief again cites to *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 495, to argue that the fact "Jo-Ann has received a windfall, paying less than one-third of the rent it owed in compensation for zero loss caused by the failure of the co-tenant to open," alone makes the co-tenancy term here unenforceable. (Opening brief, pp. 42, 45-46.) Not only does this argument improperly require a comparison of the substitute rent to ***actual*** damages (a determination that was correctly not before the trial court) as opposed to ***anticipated harm at the time of contracting*** as instructed by *Grand Prospect*, it also relies on inapplicable caselaw.

In *Greentree Financial*, the issue was not the negotiated, agreed-upon amount of rent owed under a commercial lease (as here), but instead a "***stipulated judgment***" amount that would arise from a "***breach***" of a settlement agreement to resolve a lawsuit seeking payment of financial advisory fees. (*Greentree*, *supra*, 163 Cal.App.4th 495.) The court thus analyzed whether the liquidated damages *amount* was reasonably related to the alleged ***breach*** of the settlement agreement. (*Ibid*.) This analysis has no application here, as the trial court and Court of Appeal recognized. Any triggering of the co-tenancy provisions in the parties' 2003 Lease did not constitute any "breach" of the Lease by Landlord, as opposed to the agreed-

upon, reduced amount of rent due by tenant Jo-Ann for a certain period. Again, like the holdover rent in the *Constellation-F* case, the co-tenancy provision in the 2003 Lease regarding the ***alternative*** payment of reduced "Substitute Rent" does not constitute an "amount of damages" (or liquidated damages) to Landlord JJD, but rather a negotiated, agreed-upon tiered rental rate for the leasing of commercial property. This distinction also accounts for Landlord JJD's misunderstanding of the trial court and Court of Appeal's explanation of the applicability of the guidance in *Constellation-F*. (AA at 1032.) The trial court and the Court of Appeal simply noted that the co-tenancy term issue here is not about "damages" arising from any "breach" of the parties' 2003 Lease.

Again, and as properly explained by the trial court and the Court of Appeal, and like the holdover rent in *Constellation-F*, the co-tenancy provision of parties' 2003 Lease regarding the ***alternative*** payment of reduced "Substitute Rent" do not constitute an "amount of damages" upon any "breach" of, or "default" under, the commercial lease at issue, but rather a negotiated, agreed-upon tiered rental rate for the leasing of commercial property.

D. Landlord JJD is Estopped from Now Claiming that the Co-tenancy Provision of the Parties' 2003 Lease is Unenforceable as a Matter of Law and Judicial Estoppel.

Because the trial court and the Court of Appeal in *JJD-HOV* held that the co-tenancy provision in the parties' 2003 Lease is enforceable and

does not constitute a forfeiture under *Grand Prospect*, Civil Code section 1671 or Civil Code section 3275, it did not reach tenant Jo-Ann's compelling estoppel argument. But where the facts are undisputed, and there is only one inference to be drawn, whether estoppel applies is a question of law that provides an independent basis for affirming the trial court's Order and thus bears mention here. (*West Washington Properties, LLC v. California Dept. of Transportation* (2012) 210 Cal.App.4th 1136, 1143; *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305 ["When the evidence [of estoppel] is not in conflict and is susceptible of only one reasonable inference, the existence of an estoppel is a question \of law."]; see also *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th at 1201 ["If the decision itself is correct, there can be no prejudicial error from incorrect logic or reasoning."].)

Landlord JJD's actions over the course of the first fifteen (15) years under the 2003 Lease consistently affirmed the validity and enforceability of the co-tenancy provision in the 2003 Lease, estopping it from suddenly disavowing its negotiated obligations under that provision. As Evidence Code section 623 states: "Whenever a party has, ***by his own statement or conduct***, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is ***not***, in ***any litigation arising out of such statement or conduct***, permitted to ***contradict*** it." (Emphasis added.) Further, within estoppel, there is also a subset of estoppel

considered judicial. The elements pertinent to a finding of judicial estoppel include: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.)

Applied here, Landlord JJD is estopped from denying the enforceability of the co-tenancy provision of the 2003 Lease against tenant Jo-Ann. Specifically, as a matter of law, Landlord has for over 15 years confirmed the validity and enforceability of its co-tenancy provisions regarding Jo-Ann's proper payment of "Substitute Rent" when permitted under the 2003 Lease. (AA at 0946-49, 0951-57 [SSUMF, Nos. 7-11, 16-18, 20-24, 27-29].)

Further, as a matter of judicial estoppel, Landlord is also bound by its August 3, 2007 Complaint for declaratory relief regarding whether the "Substitute Rent" provision ***was*** triggered and/or satisfied under Section 15(a) of the 2003 Lease—which quoted within that Complaint the express controlling "Substitute Rent" provisions of Sections 15 and 2(u) of the Lease. (AA at 095 [SSUMF, No. 22].) More specifically, Landlord's 2007 Complaint admitted that the "Lease provides that if Plaintiff ***fails to meet its Co-Tenancy Obligations, then Defendant [tenant Jo-Ann] is <u>entitled</u> to***

pay 'Substitute Rent*.'"** (*Id*., emphasis added.) Thereafter, Landlord reached a settlement with tenant Jo-Ann on whether the "Substitute Rent" provision was satisfied. The 2007 Settlement Agreement also expressly stated in Recital I that "it is the intent of the Parties in entering this Agreement that neither of them is waiving their respective contentions regarding how the Co-Tenancy requirements of Section 15(a) are ***defined and ***satisfied*** under the terms of the Lease and the Amendment." (AA at 0954-55 [SSUMF, Nos. 23-24], emphasis added.) As such, by filing the Complaint at issue here, Landlord JJD has taken inconsistent judicial positions regarding the validity and enforceability of the co-tenancy provision of the 2003 Lease—and should be judicially estopped from now claiming that such co-tenancy provision is invalid.

Even if this Court finds that the trial court and the Court of Appeal in *JJD-HOV* did not apply the proper legal framework in this case (which it clearly did), the trial court and Court of Appeal's ultimate rulings should be affirmed under the doctrine of estoppel.

VI. CONCLUSION

For the foregoing reasons, the trial court's well-reasoned judgment and the Court of Appeal's well-reasoned, unanimous decision in *JJD-HOV* should be affirmed, granting tenant Jo-Ann's motion for summary judgment and denying landlord JJD's motion for summary judgment in this case.

Dated: January 12, 2023 DLA PIPER LLP (US)

By _____
MARK E. MCKEEN
Attorney for Defendant and Respondent
JO-ANN STORES LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, counsel hereby certifies that the enclosed response brief contains 13,969 words. Counsel relies on the word count of the computer program used to prepare this response brief.

Dated: January 12, 2023

s/ *Mark E. McKeen*

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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is DLA Piper LLP (US), 555 Mission Street, Suite 2400, San Francisco, CA 94105. On January 12, 2023, I served the within documents:

RESPONDENT JO-ANN STORES, LLC'S RESPONSE BRIEF ON THE MERITS

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Marshall C. Whitney Jacob Sarkis Sarabian Whitney Thompson & Jeffcoach, LLP 970 W. Alluvial Avenue Fresno, CA 93711	**Attorneys for Plaintiff and Appellant JJD-HOV Elk Grove, LLC**
Clerk of Court Supreme Court of California 350 McAllister Street San Francisco, CA 94102	**(electronic service via True Filing)** **(Additional paper copy via overnight UPS)**
Clerk of the Court Court of Appeal Third Appellate District, 914 Capitol Mall, Sacramento, CA 95814	

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Honorable Shama Hakim Mesiwala
Judge of the Sacramento Superior Court
720 9th Street
Sacramento, CA 95814

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 12, 2023, at San Francisco, California.

/s/ Mark E. McKeen
MARK E. MCKEEN

STATE OF CALIFORNIA
Supreme Court of California

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Case Name: **JJD-HOV ELK GROVE v. JO-ANN STORES**
Case Number: **S275843**
Lower Court Case Number: **C094190**

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