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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

IDEX GLOBAL SERVICES, INC.,

Plaintiff and Appellant,

v.

J.K. MERZ CONSTRUCTION, INC.,

et al.,

Defendants and Appellants.

A134287

(Marin County

Super. Ct. No. CIV 090865)

J.K. Merz Construction, Inc. (Merz Construction) was the general contractor on a public works project for the City of Antioch (City). Appellant IDEX Global Services, Inc. (IDEX) was the electrical subcontractor on the project. IDEX sued Merz Construction for amounts still due on the job. IDEX also sued the owners of Merz Construction on an alter ego theory, sought recovery against the contractor's license bond, and asked the court to award statutory prompt payment penalties and attorney fees and costs against all of the defendants. The trial court entered judgment for most of the claimed debt against the contractor and judgment for a lesser amount against the bond surety. IDEX appeals the trial court's denial of alter ego liability, prompt payment penalties, and attorney fees and costs.<sup>1</sup> We affirm.

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<sup>1</sup> John and Sally Merz cross-appeal, challenging only the amount of the judgment against Merz Construction. Because we affirm the trial court's alter ego ruling, their challenge to the judgment against the corporation is moot.

## I. BACKGROUND

Merz Construction was the general contractor and IDEX was the electrical subcontractor on the 2002–2004 Lone Tree Golf Course clubhouse project (Project) for the City. John K. Merz (Merz) and Sally P. Merz (Sally Merz), the individual defendants—and the only respondents participating in this appeal—are the sole owners and officers of Merz Construction. This action arises from Merz Construction’s failure to fully pay IDEX for its work on the Project, which, in the words of the trial court, was “[b]y all accounts . . . a miserable project with difficult owners, strained communications, haphazard funding or payment procedures, and painful delays.”

To obtain payment for work on the Project, subcontractors submitted progress payment applications to Merz Construction, which were based on the percentage of work completed on their subcontracts as modified by approved change orders. Merz Construction added a markup to these payment applications and submitted its own progress payment applications to the City. The City approved or disapproved the amounts requested and, of the amounts approved, withheld a 10 percent retention payment, which was deposited in an escrow account for distribution after the Project was completed. Approved progress payments (minus the 10 percent retention) were then made by the City to Merz Construction, which in turn made progress payments to the subcontractors. After Project completion, the subcontractors applied to Merz Construction for their retention payments and Merz Construction in turn applied for a retention payment from the City. The retention funds would be released from the escrow account once the City determined that Merz Construction had fulfilled its obligations on the Project.

The original contract price for IDEX’s subcontracting work was \$292,004 and 53 change orders were issued to IDEX. It was undisputed that the total amount Merz Construction paid IDEX was \$308,337.75. Craig Morris, president and chief executive officer of IDEX, testified that Merz Construction owed IDEX approximately an additional \$42,000. Merz testified that IDEX had been paid in full and might even have been overpaid by Merz Construction. Merz acknowledged that Merz Construction had

received \$315,357.38 from the City for work performed by IDEX, \$7,019.63 more than it paid to IDEX. However, he claimed Merz Construction was entitled to offsets because: (1) Merz Construction performed about \$8,000 in work that was within the scope of the IDEX subcontract (“back charges”); (2) IDEX did not follow proper procedures in obtaining change orders from the City; and (3) IDEX was responsible for delays on the Project and thus liable in part for delay penalties the City imposed on Merz Construction.

Merz testified that the City made its final progress payment to Merz Construction in November 2004. This final payment was substantially reduced by delay penalties imposed by the City on Merz Construction. Merz Construction then made reduced final progress payments to each of its subcontractors, having concluded that they should all share in the penalties.

Sometime before March 7, 2005, First Republic Bank, which held the escrow account containing the Project retention funds, mistakenly released the funds to Merz Construction’s account at the same bank. Merz transferred the funds on March 7 to a personal account held by John and Sally Merz at Mechanics Bank. Merz said that he used a personal rather than a corporate account because Mechanics Bank would not allow him to open a corporate account, as the corporation was then suspended for nonpayment of taxes. Merz paid Merz Construction’s subcontractors from the transferred funds, including payments to IDEX as explained further *post*.

On December 23, 2004, IDEX faxed Merz Construction a request to expedite payment of an outstanding amount due of \$25,787.24. Attached to the fax were copies of several checks written by Merz Construction to IDEX with notations showing that IDEX had received only partial payment on some of its prior progress payment applications. In January 2005, IDEX sent Merz Construction closing contract documents, a final progress payment application for about \$10,000, and an invoice for \$35,000 in retentions. Morris testified that additional amounts totaling about \$30,000 in still-outstanding bills were not covered by these January 2005 documents. On March 14, 2005, IDEX demanded “final payment” but did not state the total amount still claimed to be due. Merz Construction responded: “This office intends to pay IDEX under the terms and conditions of our sub

contract [*sic*] agreement. The owner has stopped paying on this job . . . . They have left us absolutely no choice but to pursue our own claim against them which I can assure you will be substantial. As part of this claim against them will be all unpaid contract amounts and change orders. [¶] . . . I would like to meet with you at your convenience . . . . [¶] It may be possible that we can reach an agreement over this situation and forgo a prolonged wait for IDEX.”

On about March 29, 2005, Merz gave IDEX two checks written on the Mechanics Bank personal account, which held the transferred retention funds: a check for about \$15,000 payable to IDEX alone and a check for about \$15,000 payable to both IDEX and Independent Electric, an IDEX materials provider. Independent Electric provided a “conditional waiver and release upon *final* payment” (italics added) of \$15,467.71, and IDEX provided a “conditional waiver and release upon *progress* payment” (italics added), which stated about \$39,000 was still owed to IDEX. The check written to Independent Electric had “final” written in the memo line and the check written to IDEX did not. Merz testified that he believed these March 2005 payments satisfied all of IDEX’s outstanding claims. On April 1, 2005, IDEX demanded payment of another \$41,513.99. Merz testified that he believed this letter referred to money *the City* owed to IDEX, either for work completed after the Project ended or for change orders that had been approved without Merz Construction’s involvement. After sending the April 2005 payment demand, IDEX took no further action to collect the debt from Merz Construction until it filed this action in February 2009.

Throughout the Project, Merz Construction maintained a \$3.849 million payment bond (Payment Bond) that required the surety, Travelers Casualty and Surety Company of America (Travelers), to pay subcontractors on the Project if Merz Construction failed to pay them. (See Civ. Code, former §§ 3181, 3248, subd. (b); current Civ. Code, §§ 9100, 9554, subd. (b).) The contract between Merz Construction and the City, which was incorporated by reference into IDEX’s subcontract with Merz Construction,

referenced “two bonds, bearing even date with these presents,”<sup>2</sup> and the IDEX subcontract discussed IDEX’s right “to make a claim against a payment bond (if applicable).” All of the subcontractors who were still owed money on the Project after December 2004—except IDEX—made claims against the Payment Bond and were compensated.<sup>3</sup> Morris testified that IDEX did not make a claim against the Payment Bond because he was not aware that it existed. He acknowledged that the Payment Bond would have provided him a remedy had he pursued it.

In October 2005, Merz Construction sued the City and various other entities involved in the Project for amounts still due on the Project. (*JK Merz Construction, Inc. v. First Republic Bank* (Super. Ct. S.F. City and County, 2006, No. CGC 06-454761).) Travelers sued Merz Construction and John and Sally Merz (as well as a Merz family trust) for indemnification on the subcontractors’ claims on the Payment Bond. (*Travelers Cas. & Surety Co. v. J.K. Merz Construction, Inc.* (N.D.Cal. 2008, No. C 07-00770 WHA).) In early 2008, the parties to these two lawsuits reached a global settlement that resulted in a \$205,000 payment to Merz Construction. Merz Construction used \$165,000 of the settlement funds to pay an underground contractor on the Project and the remaining \$40,000 to pay its attorneys. IDEX argued in the current trial that Merz Construction was required to pay IDEX’s outstanding bills from these settlement funds. At the time it received the settlement funds, Merz Construction maintained a \$7,500 license bond issued by Western Surety. IDEX argued that Western Surety was liable under the terms of the bond for the amounts Merz Construction should have paid IDEX from the litigation settlement in 2008.

In February 2009, IDEX sued Merz Construction and John and Sally Merz for breach of contract, and Western Surety for recovery on the license bond. Merz

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<sup>2</sup> In addition to the Payment Bond, Merz Construction obtained a \$3.849 million performance bond on the Project, which required Travelers to indemnify the City if Merz Construction failed to fulfill its contractual obligations.

<sup>3</sup> Those subcontractors sued Merz Construction and the litigation was resolved by Travelers.

Construction's corporate powers were suspended for nonpayment of taxes, and it never appeared in the action. The claims were tried to the court, which issued the following statement of decision: "The evidence is uncontroverted that the original contract was for \$292,004, that [IDEX] performed additional work pursuant to fifty-three change orders, and that it was paid from [Merz Construction] the sum of \$308,337.75. . . . [¶] . . . [¶] The Court finds that [IDEX] has proven by a preponderance of the evidence that it is owed an additional \$35,148, plus interest at the rate of 10% from December 1, 2004[,] from [Merz Construction] . . . . The Court also finds that, of this amount, plaintiff is entitled to recover \$7,108 from Western Surety Company, as for the amounts wrongfully with held [sic] by [Merz Construction]. ([Merz Construction] received \$315,445 [sic] from [City] due to [IDEX's] work and passed this on to [IDEX] except for \$7108 [sic].)" The court rejected IDEX's alter ego argument and ruled that John and Sally Merz were not personally liable to IDEX for Merz Construction's outstanding debt. The court also rejected IDEX's argument that Merz Construction or Western Surety was liable for statutory penalties and attorney fees and costs under two prompt payment statutes. "[T]he court declines to impose the [penalties]. The court finds that [Merz Construction] made reasonably prompt payments to [IDEX]. The billing was confusing. [Merz Construction] was entitled to some credits for work it performed for [IDEX]."

IDEX appealed from the judgment and John and Sally Merz filed a cross-appeal.

## II. DISCUSSION

### A. *Alter Ego Liability*

IDEX contends that the trial court erred in holding that Merz Construction was not the alter ego of John and Sally Merz and that they were thus not personally liable for Merz Construction's debts to IDEX.

"Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.]" (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 (*Sonora Diamond*)). " 'Alter ego is a limited doctrine, invoked only where recognition of the corporate form would work an injustice to a third person.' "

[Citation.] ‘The essence of the alter ego doctrine is that justice be done. . . . Thus the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require.’ [Citation.]” (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 810 (*Zoran*)). “Alter ego is an extreme remedy, sparingly used. [Citation.]” (*Sonora Diamond*, at p. 539.) “ ‘Because society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that imposition of alter ego liability be approached with caution.’ ” (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 512 (*Greenspan*)).

“ ‘The law as to whether courts will pierce the corporate veil is easy to state but difficult to apply.’ . . . Because it is founded on equitable principles, application of the alter ego [doctrine] “is not made to depend upon prior decisions involving factual situations which appear to be similar.” ’ ” (*Greenspan, supra*, 191 Cal.App.4th at p. 512.) “ ‘[T]he conditions under which the corporate entity may be disregarded vary according to the circumstances in each case and the matter is particularly within the province of the trial court. [Citations.] This is because the determination of whether a corporation is an alter ego of an individual is ordinarily a question of fact.’ [Citation.] There are two requirements for disregarding the corporate entity: first, that there is a sufficient unity of interest and ownership between the corporation and the individual or organization controlling it that the separate personalities of the individual and the corporation no longer exist; and second, that treating the acts as those of the corporation alone will sanction a fraud, promote injustice, or cause an inequitable result. [Citation.] ‘Both of these requirements must be found to exist before the corporate existence will be disregarded, and since this determination is primarily one for the trial court and is not a question of law, the conclusion of the trier of fact will not be disturbed if it is supported by substantial evidence.’ [Citations.]” (*Misik v. D’Arco* (2011) 197 Cal.App.4th 1065, 1071–1072 (*Misik*); see also *Zoran, supra*, 185 Cal.App.4th at p. 811 [“ ‘conditions under which the corporate entity may be disregarded, or the corporation be regarded as the *alter ego* of the stockholders, necessarily vary according to the circumstances in each case

inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court’ ”].)

The first requirement for disregarding the corporate entity under the alter ego doctrine—whether there is sufficient unity of interest and ownership that the separate personalities of the individual and the corporation no longer exist—encompasses a series of factors. Among the many factors to be considered in applying the doctrine are one individual’s ownership of all stock in a corporation; use of the same office or business location; commingling of funds and other assets of the individual and the corporation; an individual holding out that he is personally liable for debts of the corporation; failure to maintain minutes or adequate corporate records; disregard of corporate formalities; absence of corporate assets and inadequate capitalization; and the use of a corporation as a mere shell, instrumentality or conduit for the business of an individual. (*Zoran, supra*, 185 Cal.App.4th at pp. 811–812.) “ ‘No single factor is determinative, and instead a court must examine all the circumstances to determine whether to apply the doctrine. [Citation.]’ ” (*Id.* at p. 812.) “The second requirement for application of the alter ego doctrine is a finding that the facts are such that adherence to the fiction of the separate existence of the corporation would sanction a fraud or promote injustice. [Citation.] The test for this requirement is that if the acts are treated as those of the corporation alone, it will produce an unjust or inequitable result.” (*Misik, supra*, 197 Cal.App.4th at p. 1073.)

#### 1. *Trial Evidence*

Merz Construction was an “S corporation.” (26 U.S.C. §§ 1361–1379; Rev. & Tax. Code, § 23801, subd. (a).) Merz was the president and Sally Merz was the secretary/treasurer of Merz Construction. Sally Merz was not involved in the daily management of the business, but she helped with secretarial tasks and attended mandatory pre-bid meetings on public works jobs. Merz testified that he and Sally Merz held annual director and shareholder meetings and kept notes. IDEX’s counsel, however, asserted that Merz Construction had produced no documents in response to a discovery demand for the minutes of corporate meetings.

Merz Construction had a corporate bank account at First Republic Bank. As noted *ante*, a \$220,000 check was written on the account, from the mistakenly released retention amounts, to John Merz and deposited in John and Sally Merz's personal account at Mechanics Bank in March 2005. Merz used these funds to pay Merz Construction's subcontractors. During the pendency of the Project (from 2002 to 2005), the corporate account was also used to pay personal expenses of John and Sally Merz: 24 checks totaling \$50,357.57 to Downey Savings and Loan as payments on their personal mortgage; 50 checks totaling \$78,634.50 to Indymac Bank as mortgage payments on noncorporate property; eight checks totaling \$7,292.72 for personal educational expenses or donations; six checks totaling \$11,458.94 to tax collectors (five of these had John Merz's personal social security number on the memo line and the sixth referenced a residence); three checks totaling \$900 to Macy's; and six checks totaling \$11,895.23 to PG&E, two realtors, a law office, a life insurance company, and a \$5,000 cashier's check made out to Sally Merz.

An S corporation is taxed as a partnership. (See *Valentino v. Franchise Tax Bd.* (2001) 87 Cal.App.4th 1284, 1287–1288.) Owner withdrawals from the corporate account of an S corporation are credited against that owner's capital account. IDEX acknowledged that such withdrawals are appropriate as long as the capital account had a sufficient balance to cover the withdrawal. When asked whether Merz Construction had bookkeeping procedures to keep track of payments to third parties as draws from the owners' capital accounts, Merz replied that the bank account records "would have been the record. And then my CPA would have taken them and done whatever he did with them." John Dupar, C.P.A., Merz Construction's tax accountant, testified he did not personally track payments for personal expenses as draws from the owners' accounts. "That would have been the bookkeeper." In preparing the corporation's taxes, Dupar relied on the bookkeeper's general ledger and the corporation's profit and loss statements and balance sheets that were provided to him. He did not know whether any corporate checks were written for John and Sally Merz's personal expenses. The bookkeeper did

not testify at trial. IDEX's counsel represented at trial that Merz Construction produced no documents in response to a discovery demand for relevant accounting records.

Merz Construction bounced some checks while the Project was underway. Also, its corporate powers were suspended in March 2005 for nonpayment of taxes. The suspension was cured and Merz Construction stayed in business through 2005, but the corporation was thereafter suspended again for nonpayment of taxes and Merz "let the corporation slide because [he] was no longer in business." When asked if the corporation was financially solvent during the course of the Project, Merz testified, "We had our ups and downs. I put a lot of personal money into that company. . . . [T]he corporation took a big hit but we moved on and I would say yes, we were solvent through that job. We had some real rough patches but the solvency that I was able to continue, yes." Merz testified that IDEX never asked for any financial statements from Merz Construction when they negotiated their subcontract on the Project, and IDEX presented no evidence that it relied on any representations as to the financial condition of Merz Construction in entering into the subcontract.

## 2. *Statement of Decision*

The trial court addressed the alter ego issue as follows: "The contracts were all in the name of [Merz Construction]. All progress payments were made to the corporate entity and from the corporate entity to the subcontractors. When [Merz Construction] closed its account with First Republic Bank and opened an account with Mechanics Bank, it was not intermingling personal and business funds; rather, it was preserving the funds for the subcontractors by protecting the funds from a bank lien by First Republic. There is no evidence that [Merz Construction] failed to comply with the corporate formalities; in fact, Mr. Merz testified that he and his wife had annual meetings on January 1 of each year. There is insufficient evidence that [Merz Construction] was undercapitalized. Significantly, the corporation carried a performance and payment bond, which would have covered [IDEX's] claim. [IDEX] did prove that John Merz paid some of his personal expenses from his business account. That alone is not enough to set aside the corporate identity and 'pierce the corporate veil.' It was shown that this was [an

S] corporation and these payments were taken and shown as draws or debits against the owner's capital account. [Merz Construction] was a valid corporation, and, as such, the owners are entitled to the protections of maintaining a corporate entity. The evidence was that [IDEX] did not rely on the financial ability or strength of [Merz Construction] when it entered the contract and [IDEX] could have requested further assurances or guarantees if it had wished.”

### 3. *Analysis*

IDEX argues the trial court ignored or gave insufficient weight to the following evidence that tended to support an alter ego finding: John and Sally Merz's commingling of their personal funds with corporate funds and their use of corporate funds to pay personal expenses; the corporation's undercapitalization as shown by the corporation's suspension for failure to pay taxes, bounced corporate checks, and deposits of personal funds in the corporate account; and John and Sally Merz's identity as the sole owners of the corporation, their use of the same attorney to represent them and the corporation, and their disregard of corporate formalities as manifested in the absence of minutes from corporate meetings. But the issue is not whether there was substantial evidence that would have supported findings in favor of IDEX. The question instead is whether there is substantial evidence supporting the trial court's finding that John and Sally Merz sufficiently maintained the separate corporate identity of Merz Construction, and its implicit determination that recognition of that separate identity would not create an unjust or inequitable result—matters “particularly within the province of the trial court.” We find that there is.

On the issue of corporate formalities, the trial court was entitled to credit Merz's testimony about corporate practices even in the absence of supporting documentary evidence. The mere fact that John and Sally Merz were the sole owners of Merz Construction and used the same attorney as the corporation carries little weight on the alter ego issue: the same is likely true for most if not all S corporations.

On the issue of commingling corporate and personal funds, the trial court reasonably found that the corporation's practices did not stray far from the appropriate

use of capital distributions from an S corporation. The payment of subcontractors with Merz's personal funds was explained by testimony about the mistaken release of retention funds and Merz's inability to open a new corporate account. These payments could not have misled IDEX about John and Sally Merz's personal responsibility for IDEX's bills on the Project, as IDEX suggests on appeal, because the payments were made long after IDEX signed the subcontract and performed its work on the Project. As to the withdrawals that were used for personal expenses, IDEX did not meet its burden to show that the withdrawals exceeded John and Sally Merz's capital accounts.

On the issue of undercapitalization, IDEX also failed to meet its burden of proof. The court found that IDEX did not rely on the financial ability or strength of Merz Construction when entering into the contract, and that IDEX could have requested further assurances or guarantees if it had wished. Although the evidence clearly established Merz Construction had financial difficulties while the Project was underway, the mere fact of financial troubles cannot alone justify piercing the corporate veil or no one would enjoy corporate protection: the law specifically permits owners to incorporate a business for the very purpose of shielding them from its liabilities. Significantly, IDEX did not show that Merz Construction was structured or financed in such a way that it *foreseeably* was unable to pay its debts when it entered into the Project. Indeed, substantial evidence established that the Project unforeseeably went awry, causing Merz Construction to never receive its full contract price and explaining its financial problems during the time period in question.

In any event, error in the trial court's findings on the corporation's separate identity would not be sufficient to reverse the court's alter ego finding. A finding of inequity or fraud is also required. Here, the trial court could reasonably find no inequity in respecting the corporate form. The court noted that Merz Construction had protected its subcontractors throughout the Project by maintaining a Payment Bond sufficient to guarantee them payment. All of the subcontractors who took advantage of that remedy were compensated. IDEX's failure to avail itself of that remedy apparently resulted from

its own negligence—Morris testified that he was simply unaware of the Payment Bond—and cannot be attributed to Merz Construction or John and Sally Merz.

“The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard. [Citations.]” (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 539.) In sum, the trial court’s alter ego finding was supported by substantial evidence, and the court did not abuse its equitable discretion in denying alter ego liability.

B. *Prompt Payment Penalties*

IDEX argues the trial court erred in failing to impose statutory penalties on Merz Construction or award IDEX attorney fees and costs pursuant to two prompt payment statutes, Business and Professions Code section 7108.5 and Public Contract Code section 7107.

Business and Professions Code section 7108.5 provides in relevant part: “(a) A prime contractor . . . shall pay to any subcontractor, not later than seven days after receipt of each *progress payment*, unless otherwise agreed to in writing, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor’s interest therein. In the event that there is a *good faith dispute* over all or any portion of the amount due on a progress payment from the prime contractor . . . to a subcontractor, the prime contractor . . . may withhold no more than 150 percent of the disputed amount. [¶] (b) Any violation of this section . . . shall subject the licensee to a penalty, payable to the subcontractor, of 2 percent of the amount due per month for every month that payment is not made. [¶] (c) In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney’s fees and costs.” (Italics added.)

Public Contract Code section 7107, which applies to public works construction projects, similarly provides: “(d) Subject to subdivision (e), within seven days from the time that all or any portion of the *retention proceeds* are received by the original

contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. . . .

[¶] (e) The original contractor may withhold from a subcontractor its portion of the retention proceeds if *a bona fide dispute* exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount. [¶] (f) In the event that retention payments are not made within the time periods required by this section, the . . . original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs." (Italics added.)

Substantial evidence supports the trial court's implied finding that there was a good faith (*bona fide*) dispute about a substantial portion of the amount Merz Construction owed IDEX, precluding imposition of prompt payment penalties.<sup>4</sup> Significantly, the trial court found "[Merz Construction] was entitled to some credits for work it performed for [IDEX]." Although the trial court apparently resolved other disputes over the debt (i.e., the validity of IDEX's change orders and IDEX's liability for delay penalties) in IDEX's favor, nothing in the record suggests a finding that Merz raised those disputes in bad faith.

Indeed, the court specifically found that "[t]he billing was confusing" and this finding is supported by the record. IDEX's December 2004 billing for \$25,787.24 did not clearly explain that this figure represented only the amounts outstanding from previously-submitted payment applications. Its January 2005 final progress payment application also did not reflect the amounts still due from prior progress payment applications, even though the progress payment applications were designed to be cumulative. IDEX's March 14, 2005 demand for final payment did not specify the total

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<sup>4</sup> Merz Construction was entitled to withhold 150 percent of any amount disputed in good faith. (Bus. & Prof. Code, § 7108.5, subd. (a); Pub. Contract Code, § 7107, subd. (e).)

amount outstanding. Merz Construction responded with a promise to pay what was owed and an offer to review IDEX's claims in an attempt to reach a quick resolution, and on March 29, 2005, Merz paid IDEX about \$30,000. Merz testified that he believed that this was a "final payment" to IDEX, and the IDEX employee who accepted the payment did not dispute this at the time. Although IDEX demanded an additional \$41,513.99 on April 1, 2005, Merz testified that he understood this letter to refer to City debts to IDEX for which Merz Construction had no liability. Given Merz's testimony about the irregular manner in which IDEX obtained some change orders, Merz's alleged understanding of the April 2005 letter was not patently unreasonable. Moreover, the fact that IDEX made no demand on the payment bond, and took no other action to collect the debt until filing suit in February 2009 was not inconsistent with Merz's professed belief that IDEX had been paid in full. This confused billing record supports the trial court's implicit finding of a good faith dispute.

IDEX argues the trial court's award of a \$7,108 judgment against Western Surety necessarily implies that the court found Merz Construction had willfully and deliberately violated its obligations under the Business and Professions Code. IDEX relies on Business and Professions Code section 7071.5, which requires a contractor to obtain a bond for the benefit of a "person damaged as a result of a willful and deliberate violation of this chapter by the licensee . . . ." (Bus. & Prof. Code, § 7071.5, subd. (c).) However, the Western Surety bond, which was identified as "Plaintiff's [Exhibit] 21" at trial and was the subject of judicial notice, is not included in the appellate record. We thus cannot determine whether the bond provided the minimum coverage required by this statute or broader coverage. Consequently, we cannot determine whether the trial court's award of a judgment against the bond surety necessarily implied a finding of a "willful and deliberate violation" of the prompt payment statutes (or some other statutory provision) or might have reflected a finding of lesser misconduct by Merz Construction. In any event, even if we assume the trial court found there was no good faith dispute regarding \$7,108 of Merz Construction's debt to IDEX, the prompt payment statutes still would not be triggered. A good faith dispute about the remainder of the debt (\$28,040) more than

justified Merz Construction's withholding of the full \$35,148 (150 percent of \$28,040 is \$42,060).

We find no error in the trial court's denial of IDEX's claims for prompt payment penalties and attorney fees and costs from Merz Construction.<sup>5</sup>

### III. DISPOSITION

The judgments are affirmed. John and Sally Merz's cross-appeal is dismissed as moot. IDEX shall pay John and Sally Merz's costs on appeal.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.

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<sup>5</sup> IDEX argues the trial court erred in failing to include prompt payment penalties and attorney fees and costs against Western Surety. Because Western Surety's purported liability for these amounts is wholly derivative of Merz Construction's liability, we necessarily reject this argument as well.