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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

RICHARD C. SINCLAIR et al.,

Plaintiffs and Appellants,

v.

ANDREW KATAKIS et al.,

Defendants and Appellants.

F058822

(Super. Ct. No. 332233)

**OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Richard C. Sinclair, in pro. per., and for Plaintiffs and Appellants Lairtrust, LLC, Brandon Sinclair, Capstone, LLC, and Gregory Mauchley.

Downey Brand, Janlynn R. Fleener, Ramaah Sadasivam and Katie Konz for Plaintiff and Appellant Stanley Flake and Capstone Trust.

McCormick, Barstow, Sheppard, Wayte & Carruth, D. Greg Durbin, Todd W. Baxter, John M. Dunn and Scott M. Reddie for Defendants and Appellants.

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This case includes three appeals from the judgment and the postjudgment orders following litigation over the ownership of eight lots in the Fox Hollow subdivision in Turlock, California.

The plaintiffs are Richard C. Sinclair, who serves as counsel for some of the plaintiffs on appeal; his company Lairtrust, LLC;<sup>1</sup> Sinclair's son, Brandon Sinclair (Brandon); Brandon's company, Capstone, LLC; Stanley Flake, as an individual and as trustee of Capstone Trust; and Gregory Mauchley (collectively, plaintiffs).<sup>2</sup> Each plaintiff has had an ownership interest in the Fox Hollow property.

The defendants are Andrew Katakis, his company California Equity Management Group, Inc. (CEMG), and the Fox Hollow of Turlock Owners Association (FHOA) (collectively, defendants).

Katakis and CEMG acquired the properties that plaintiffs lost through foreclosures. The FHOA foreclosed on two of plaintiffs' properties for delinquent dues and special assessments.

At trial, plaintiffs claimed they were deprived of their property by wrongful foreclosures and defendants' tortious acts. Defendants denied the allegations and asserted that plaintiffs' unclean hands precluded recovery. Defendants also cross-complained for abuse of process. The trial court found against plaintiffs on their complaint and concluded plaintiffs' unclean hands barred their recovery as well. The trial court found against defendants on their cross-complaint.

In this appeal: (1) plaintiffs challenge essentially all of the trial court's rulings against them, (2) Stanley Flake, as an individual and as trustee of Capstone Trust, challenges the unclean hands findings and the denial of a motion to enforce a settlement agreement, and (3) defendants cross-appeal and challenge the trial court's ruling that

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<sup>1</sup>Defendants filed a motion to dismiss Lairtrust, LLC, on the ground of legal incapacity because the company's powers, rights, and privileges were suspended pursuant to the California Revenue and Tax Code. While the motion appears to be well taken, the opinion renders it moot. On that ground, the motion is denied.

<sup>2</sup>Mauctrst, LLC (Mauctrst), a company owned by Mauchley and managed by Sinclair, filed a certificate of cancellation in 2011. Subsequently, the court granted defendants' motion to dismiss Mauctrst from the appeal.

some of plaintiffs' claims were not barred by the doctrine of res judicata. We will address each appeal and the related motions in turn.

## **PLAINTIFFS' APPEAL**

### **FACTUAL SUMMARY**

#### **Sinclair Develops Fox Hollow, 1988—1994**

Sinclair is an attorney whose practice includes business, tax, real estate, and corporate matters. In the 1980's, he became involved in real estate syndication and constructed and owned apartment complexes and office buildings. In 1988, he and his wife purchased land at 152 20th Century Boulevard in Turlock, California, and built a 35-unit townhome apartment complex known as Fox Hollow. In July 1992, Sinclair defaulted on the Fox Hollow construction loan with Stockton Savings and Loan Association. Several months later, despite the pending default, he transferred Fox Hollow to Sinclair Enterprises, Inc. (also referred to as SE), which he and his wife owned.

In February 1993, Sinclair applied to the City of Turlock to subdivide Fox Hollow into 19 lots and a common area and to convert it into a planned unit development (PUD) to enhance its value. The resulting 19 lots could be sold or financed individually. Sinclair signed the application as the owner despite the property's transfer to Sinclair Enterprises, Inc.

The City of Turlock Planning Commission approved the application subject to conditions that had to be met before the final subdivision map was recorded. The conditions included separate utility service for each unit, erection of firewalls between the units and, upon subdivision of the site, formation of a homeowners association to maintain the common areas.

In January 1994, Sinclair, through Sinclair Enterprises, Inc., asked to modify the condition requiring all building code revisions to be completed before the final map could be recorded. The City of Turlock denied the request a month later. Sinclair wrote the City, stating “[t]here are sufficient funds within the homeowners association” to

perform some of the modifications. At the time, however, there was no homeowners association.

Meanwhile, in August 1993, Stockton Savings and Loan Association recorded a notice of default stating \$154,615.50 was due on the Fox Hollow loan and no loan payments had been made since July 1992. Stockton Savings and Loan Association recorded a notice of sale and scheduled a non-judicial foreclosure sale. One week before the sale, Sinclair Enterprises, Inc., transferred Fox Hollow back to Sinclair and his wife. About an hour after the deed was recorded, Sinclair and his wife filed a chapter 11 bankruptcy proceeding. Eventually, the bankruptcy court granted Stockton Savings and Loan Association relief from the automatic stay, and the bank foreclosed on Fox Hollow.

#### **Flake's Ownership, October 1995—February 1997**

Flake operated a car dealership before he retired, and Sinclair's family had purchased cars from that dealership over the years. Sinclair had known Flake since at least 1985 from the car dealership and because they attended the same church. As of the early 1990's, Flake had invested in at least one of Sinclair's real estate syndications.

In 1993, as part of Sinclair's "Benbright" bankruptcy, Flake signed a letter of intent to exchange properties his car dealership owned with properties Sinclair's corporation owned. Sinclair used the letter in an unsuccessful attempt to convince lenders to allow Flake to assume the Sinclair corporation loans and properties. Subsequently, the court dismissed the bankruptcy after concluding Sinclair had filed it in "bad faith." Sinclair's "egregious conduct in making the unauthorized postpetition transfers of the properties out of the Benbright estate to his individual bankruptcy after the meritorious motions for relief from stay were filed has caused further delay, harassment, and increased costs to the secured creditors." Flake filed objections to the court's order as did Sinclair and Sinclair's wife. The objections are essentially identically worded, but Sinclair could not recall if he prepared Flake's objections. Flake was not questioned about the Benbright bankruptcy.

Flake did not recall how he learned of Fox Hollow but he knew a number of real estate brokers who might have brought the property to his attention. He did not recall Sinclair's connection to the property when he purchased it. Sinclair, on the other hand, testified he "spoke to" Flake, and Flake arranged to buy Fox Hollow.

In October 1995, Flake, as trustee of the Julie Insurance Trust, purchased Fox Hollow from Stockton Savings and Loan Association for approximately \$1,266,000. Flake did not recall subdividing Fox Hollow while he owned it. Documentary evidence, however, disclosed that within 10 days of purchasing the property, Flake signed a subdivision map—which was prepared by the same engineer Sinclair had used—that subdivided a portion of Fox Hollow and created lots 1, 11, 18, and 19 and a designated remainder. Flake also worked with architect Vernon Fergel, who had begun the PUD conversion with Sinclair. Flake paid an invoice for work Fergel had done for Sinclair while Sinclair owned Fox Hollow. During the 16 months Flake owned Fox Hollow, Sinclair helped Flake process the subdivision application and obtain the first partial subdivision map that was recorded in 1996. Sinclair also filed unlawful detainer actions against Fox Hollow tenants, listing Flake, as trustee, and himself as owners of the property.

Flake signed CC&R's (covenants, conditions, and restrictions) for Fox Hollow, which were recorded in September 1996. The CC&R's defined the "Declarant" as "SE, a California corporation," Sinclair's corporation. In addition, the CC&R's state that, when recorded, they were to be mailed to "Mauctrst" at Sinclair's address, not to Flake. Flake did not recall who prepared the CC&R's or why. The Fox Hollow property did not change physically in any significant way during the months Flake owned it.

### **Mauchley's Ownership, February 1997—July 1998**

Mauchley owned a sheet metal fabrication shop and a Utah cattle ranch. He was a friend and client of Sinclair's, and he wanted to buy property to offset his taxes. Sinclair knew Flake wanted to sell Fox Hollow, so Sinclair arranged the sale to Mauchley.

Mauchley did no due diligence before purchasing the property; he relied on Sinclair for that.

In February 1997, Flake's Julie Insurance Trust sold Fox Hollow to Mauchley through separate grant deeds, one each for lots 1, 11, 18, and 19, and a fifth deed for the remainder of the property that had not been subdivided. At the time of the sale, Flake anticipated it would take 12 months to complete the subdivision work and record a final map. Mauchley agreed to pay Flake approximately \$1.9 million for Fox Hollow in the form of cash plus a note and deed of trust for \$444,888. The sale Sinclair arranged yielded Flake a sizeable profit. The beneficiary under the \$444,888 deed of trust was Flake, as trustee of Capstone Trust, which Flake formed for the purpose of holding the Mauchley note and deed of trust.

Mauchley obtained five loans from GMAC Mortgage Corporation (GMAC) to purchase Fox Hollow. Sinclair assisted Mauchley to obtain the financing but, at trial, did not recall what assistance he provided. Mauchley borrowed \$119,000 for four lots for a total of \$476,000. Each loan was secured by a deed of trust on the specified lot. Mauchley borrowed an additional \$1 million, secured by a deed of trust, against the remainder of Fox Hollow, which was to be subdivided into 15 additional lots. Flake retained a security interest in the garages not attached to specific units, the "garage lots."

While Mauchley owned Fox Hollow, he was not involved in the day-to-day operations. Sinclair managed the property by collecting rents, paying the lenders, and maintaining the property. Sinclair also was responsible for completing the work needed to subdivide the remaining lots. Mauchley was aware the required modifications were not completed while he owned the property.

### **Final Subdivision Map**

Nevertheless, on February 20, 1998, Sinclair filed a "Notice of Completion" of the subdivision project. The notice states that Sinclair is the "developer of said work" and the owner of the subdivision. A week later, Mauchley signed the "Fox Hollow NO. 2" subdivision map as owner of the property. The map, which created lots 2, 3, 4, 5, 6, 7, 8,

9, 10, 12, 13, 14, 15, 16 and 17, and a common area, was recorded on July 21, 1998. Sinclair did not recall whether he disclosed to City of Turlock employees that the conditions imposed for approval of the subdivision had not been completed. He testified it was common to complete the requirements after the map was recorded.

### **Refinancing of the New Lots**

Several days after the final subdivision map was recorded, Sinclair, with Mauchley's authorization, obtained financing on the 15 newly created lots. Sinclair testified Mauchley set up his own financing. But Mauchley testified he did not communicate with the refinance lenders, Sinclair did. Documentary evidence supported Mauchley's testimony. Mauchley borrowed approximately \$1.8 million from four lenders secured by deeds of trust on each of the 15 lots. Fifteen escrows were opened and a portion of the proceeds of each was used to pay off the \$1 million GMAC loan. In addition, a portion of the proceeds was used to pay Flake the principal and interest on his \$444,888 note.

Granite Bay Funding, which made loans on lots 3, 7, 9 and 14, was not aware the subdivision work had not been completed. Had it been aware, it would not have made the loans until the work was complete. The trial court concluded the July 1998 loans were obtained "on a false premise."

### **Mauctrst's Ownership, July 1998—Foreclosures**

In 1995, Sinclair formed Mauctrst for Mauchley as part of a tax plan. Mauchley was the owner and member manager. Sinclair was comanager. Sinclair was not able to produce a signed operating agreement for Mauctrst.

Once the loans on the 15 newly created lots were funded in July 1998, Mauchley transferred Fox Hollow to Mauctrst. Mauctrst agreed to pay Sinclair a monthly salary of \$10,600 for managing Fox Hollow.

Mauchley did not recall if the lenders were told of the transfer. He did not ask the lenders for consent to transfer the property, as required by the terms of the notes and

deeds of trust. The owner of Granite Bay Funding testified the loans had an acceleration clause, and he was not aware Mauchley planned to transfer Fox Hollow to Mautrst.

In July 1998, Mautrst executed a note for \$271,000 secured by a deed of trust with assignment of rents on all 19 lots to Flake's Capstone Trust. The record is not clear regarding the purpose of that transaction.

In March 1999, Mautrst recorded another deed of trust for \$300,000 secured by the Fox Hollow property. In addition, at some point, Mauchley provided Mautrst \$300,000 to meet an operating deficit.

Mautrst made only a few payments on the 15 July 1998 loans, and the lenders began recording notices of default in April 1999.

### **Mautrst's Bankruptcy**

Sinclair filed a chapter 11 bankruptcy petition for Mautrst on July 1, 1999. The court appointed a chapter 11 trustee, whose status reports are critical of Sinclair's management of Mautrst. Sinclair failed to timely file the required bankruptcy disclosure statements; he had not provided Mautrst with an accounting of his services and compensation for over a year; and, since January 1998, he had been paid \$150,000, including \$20,000 in the 90 days before Mautrst filed the bankruptcy petition. In addition, Sinclair failed to account for the proceeds of two fire insurance claims, and over 50 cancelled checks and two bank statements were missing. Finally, he failed to account to the trustee for \$135,000 he had received from Mautrst between August 1998 and June 1999.

In January 2000, the bankruptcy court granted the trustee's motion to abandon the Fox Hollow property back to Mautrst because it was "severely over encumbered [*sic*]." The bankruptcy eventually was converted to a chapter 7 and closed by final decree in September 2002.

### **Sinclair's Further Involvement**

After Fox Hollow reverted to Mautrst in January 2000, Sinclair attempted to purchase the notes from the foreclosing lenders for his "clients." At trial, he could not

remember which clients. He offered a reduced price because many of the units securing the notes could not be resold individually since the subdivision work was not complete. For example, in January 2000, just 18 months after Mauchley borrowed \$130,000 against lot 3, Sinclair offered to pay the lender \$80,000 for the note because the lot was not individually saleable.

### **Tactics to Delay Foreclosure**

#### **Lots 3, 7, 9, and 14**

Granite Bay Funding held the notes on lots 3, 7, 9, and 14 for about two weeks before assigning them to Allied American Funding, Inc. At least one of the assignments was not recorded. Eventually, the notes and deeds on the four lots were transferred to ContiMortgage Corporation (ContiMortgage). Sinclair had not disputed the validity of the ContiMortgage security interests in the Mauctrst bankruptcy proceeding. After the bankruptcy trustee abandoned the property, however, Sinclair refused to make payments for Mauctrst to ContiMortgage, claiming he was dissatisfied with ContiMortgage's documentation establishing that it held the notes and deeds of trust.

After the property reverted to Mauctrst, the lenders again pursued foreclosures. Sinclair, on behalf of Mauchley and Mauctrst, filed 15 actions against the lenders to delay foreclosure. In an action against ContiMortgage and Lonestar Mortgagee Services, LLC (Lonestar), Stanislaus Superior Court, No. 254996, Mauchley and Mauctrst sought a restraining order and preliminary injunction barring foreclosures on lots 9 and 14. The pleading Sinclair prepared pertained to lots 9 and 14 only. The order Sinclair prepared for the judge's signature after the hearing, however, states that defendants were enjoined from conducting a foreclosure sale on lots 9 and 14 "or any Lots in the Fox Hollow subdivision ...." At trial, Mauctrst and Sinclair contended the preliminary injunction also applied to lots 3 and 7.

The preliminary injunction ordered Mauchley and Mauctrst to make regular monthly payments on the promissory notes. From June 2000 through June 2003, when the injunction was dissolved and the case dismissed, Mauctrst had possession of the lots

and collected rents but made no mortgage payments. Despite the court order to make monthly payments, Sinclair refused to pay on the ground he did not believe ContiMortgage owned the notes and deeds of trust.

### **Lots 1, 11, 18, and 19**

In a suit against GMAC, Sinclair sought a temporary restraining order barring foreclosure sales set for lots 1, 11, 18, and 19. While Sinclair successfully obtained a temporary restraining order, two months later the trial court denied a preliminary injunction and dissolved the earlier order because Mauchley and Mautrst did not comply with its terms to make regular payments on the notes. GMAC completed the foreclosures on September 29, 2000. The GMAC foreclosures eliminated the property securing Flake's \$271,000 note.

### **Homeowners Association**

Despite the City of Turlock's subdivision approval condition in 1996 that required the formation of a homeowners association and similar language in the CC&R's, Sinclair testified that the FHOA had to be formed only upon the sale of the first lot to a second owner. Therefore, when the first foreclosure by a lender was imminent, Sinclair held the first meeting of the FHOA on June 1, 2000, and prepared the minutes. The minutes state that Sinclair, Brandon, and Mauchley were present, and each was elected to the board of directors. In one area the minutes state the directors elected Brandon president, Mauchley treasurer, and Sinclair secretary, but the last page states Brandon was elected president and Sinclair elected secretary-treasurer.

The directors agreed to waive Sinclair's conflict of interest as a manager of Mautrst and employed him as the association's legal counsel at \$225 per hour or approximately \$50,000 for his services that year to assist with the FHOA formation. At the second FHOA meeting on August 1, 2000, the board approved a motion to begin collecting dues of \$150 per unit or \$300 per duplex lot for the next six months, commencing that day, and authorized payments to Sinclair for his legal work. The

minutes state Mauchley was present at both meetings but Mauchley testified he never attended an FHOA board meeting.

### **Court Appoints a Receiver**

In February 2001, Ocwen Federal Bank, F.S.B. (Ocwen), a lender on four of the foreclosed lots, applied to have a receiver appointed for the FHOA because of deterioration of the buildings and common area. The court-appointed investigator reported that Fox Hollow was in very poor condition. The property was littered with garbage, discarded furniture, disabled vehicles, and abandoned shopping carts. The landscaping and pool were not maintained, and the pool had a strong sewage odor. In addition, the FHOA had shoddy bookkeeping practices and had grossly misused its funds. That misuse included paying Sinclair \$15,266 for attorney fees while spending only \$9,419 on property-related matters. Over Sinclair's opposition, the court appointed a receiver. The receiver was discharged in September 2002.

### **GMAC Settlement Agreement**

After GMAC foreclosed on lots 1, 11, 18, and 19, the Mauchley/Mauctrst lawsuit against GMAC for damages remained. In May 2001, GMAC, Mauchley, Mauctrst, and Flake for Capstone Trust entered into a settlement agreement. GMAC agreed to sell lots 1, 11, 18, and 19 to Flake, as trustee of Capstone Trust, for \$114,000 per lot. Capstone Trust participated in the agreement because Flake hoped to get his \$271,000 note paid off by purchasing the lots and then immediately reselling them at a profit to Sinclair.

Sinclair set up double escrows for the purchase of lots 1 and 19. He testified that Mauchley and Mauctrst owed him substantial attorney fees and wanted those fees to be paid. As payment for those fees, Sinclair agreed to take the lots and give one lot to his son Brandon because he had worked "on the project." Accordingly, Flake would resell the lots to Sinclair and Brandon for \$190,000 each, crediting Sinclair's fees and reducing the amount owed on the \$271,000 note by about \$15,000. Sinclair testified that GMAC was aware of the double escrows and it did not matter to them. GMAC's attorney, who had approved the settlement agreement for GMAC, testified she never would have agreed

to the double escrows had she been aware of them. Her goal for GMAC was “to get rid of the Sinclair, Mauchley, et cetera, people for all time.” Further, she believed double escrows “[are] akin to fraud” and lead to litigation.

Escrow closed on lot 1 on August 1, 2001, and on lot 19 in December 2001. On the same days that the GMAC-Capstone Trust escrows closed, Flake, as trustee, conveyed lot 1 to Brandon and lot 19 to Sinclair. In February 2002, Sinclair transferred lot 19 to his company, Lairtrust, LLC, and Brandon transferred lot 1 to his company, Capstone, LLC (no relation to Flake’s Capstone Trust).

The GMAC settlement agreement, dated May 14, 2001, in its title, recites that escrow would close on the four lots within 60 days of execution of the agreement. In July 2001, GMAC became concerned and impatient with Sinclair’s repeated assurances that the transactions were progressing followed by failure to follow through, including not placing the funds in escrow to purchase the lots. Sinclair repeatedly assured GMAC the escrows would close soon and then failed to meet every projected date of completion. On August 7, 2001, GMAC’s attorney wrote Sinclair, “The agreement is canceled.” Sinclair did not respond to the letter or dispute that the agreement was cancelled.

The settlement agreement had provided that GMAC would deliver possession of the lots to Capstone Trust at the close of escrow. Because the escrows on lots 11 and 18 did not close before GMAC cancelled the settlement agreement, GMAC continued to own lots 11 and 18. Despite this, Brandon entered into at least four written leases for the units on those lots and collected rents. Brandon testified he did so for Sinclair. He could not explain why he leased property he did not own. GMAC was unaware that Brandon leased the units and did not give Brandon permission to lease the units or collect rents.

### **Katakis’s Ownership, May 2002**

Katakis is a real estate broker. He owns and is president of CEMG, a real estate investment company. He learned of Fox Hollow when a real estate agent brought the property to his attention. He had experience renovating rundown properties. In May 2002, he acquired lots 2, 4, 5, 13, and 15, which were then owned by the lender Ocwen.

On June 25, 2002, CEMG acquired lots 11 and 18 from GMAC. When Sinclair learned of this, he faxed Katakis a copy of the GMAC-Capstone Trust settlement agreement and accused him of interfering with the agreement. At trial, Sinclair testified he notified Katakis of the settlement agreement before CEMG acquired the lots, and he presented an undated fax to substantiate his testimony. Katakis produced the actual fax he received, however, which had a date stamp of July 17, 2002, weeks after CEMG acquired the lots.

When CEMG purchased its first lots, the receiver was operating the FHOA. On September 30, 2002, the receiver notified the Fox Hollow property owners that he was discharged and they must elect a board of directors immediately to continue operating the association. The receiver's letter included a notice of special meeting set for October 15, 2002, at 6:00 p.m., and a three-page agenda of business to be transacted. The meeting notice was signed by Katakis, as owner of 5 percent of the total voting power of the FHOA.

On October 4, 2002, Sinclair wrote Katakis asking to have the meeting rescheduled because he would be in trial in Fresno. He stated he represented Mauctrst, himself, Brandon, Mauchley, Capstone, LLC, Lairtrust, LLC, and Flake collectively, who owned more than 5 percent of Fox Hollow. He did not assert that he, Brandon, and Mauchley were the current board of directors. And, three months earlier in July 2002, Sinclair wrote in a statement filed with the court that the FHOA board members had resigned when the receiver was appointed, and it was logical to hold elections for a board of directors to carry out the work of the FHOA.

The FHOA meeting was held as scheduled. The minutes of the meeting reflect that those in attendance elected Katakis president, Gary Alldrin vice president and Dave Konecny secretary-treasurer. Among other things, the new board discussed the need for a reserve study, hiring an accountant and a property manager, and hiring a project manager to address deferred maintenance issues. The next meeting was set for noon on October 24, 2002.

Sinclair notified the board of directors he would be out of town and unable to attend the October 24 meeting. He objected to the board's actions, which he claimed were outside the scope of board authority under the CC&R's and bylaws.

At the October 24 meeting, the board hired a management company for Fox Hollow and agreed to request that Sinclair deed the common area to the FHOA. Sinclair returned a deed to the common area but, according to Katakis, the deed did not contain a proper legal description and was not valid.

On December 16, 2002, Sinclair sent a letter to Katakis and the FHOA claiming that the former board—himself, Mauchley and Brandon—had not resigned, and he had not been given credit for attorney fees that the FHOA owed to him while the receiver was in place.

Despite Sinclair's protests, the FHOA board of directors began to repair Fox Hollow and to complete the work the City of Turlock required to convert Fox Hollow to a PUD. The work required to meet Turlock's building code was completed in 2004 at a cost of approximately \$312,000 to the FHOA and \$1,007,000 to CEMG.

Sinclair believed that Katakis and the FHOA were treating him and his lot unfairly. His lot was not included in the improvements and his reports of a leaking roof were ignored. The chief executive officer of the management company for the FHOA testified that the amended CC&R's permitted the association to decline to maintain or repair items for lots that were delinquent in paying dues or special assessments. For those units, the owner was obligated to maintain and repair the unit. Sinclair admitted he received a letter from the attorney for the association notifying him that because he had not paid dues, the association would not repair his units.

### **FHOA Dues and Special Assessments Accounting**

In January 2003, the board of directors, through Katakis, hired an accounting firm to prepare an accurate set of books for the FHOA. As president of the association, Katakis gathered documents for the accountants and met with them regarding the reports. The accountants did not believe that Katakis was withholding information or was

requesting special accounting for the lots he owned. Katakis, however, sent an e-mail that was misinterpreted, resulting in an accounting error.

The accountant prepared a report that tracked dues and special assessment payments made in relation to each lot from August 1, 2000, through December 31, 2002. In March 2003, Katakis sent the accountant an e-mail regarding the lots owned by Mauchley, Sinclair, and their companies stating, “please make the assumption that payments have not been make [sic] to April 1, 200[3].... This will give the attorney final numbers to start the lien process with.” Katakis intended the accountant to update the reports to show the Sinclair entities had made no payments in January, February, and March 2003. The accountant, however, struck all payments made on behalf of those lots, which resulted in an overstatement of the delinquencies. Although the accountant knew the revised calculations were not consistent with source documents Katakis had provided, he did not recall why he had interpreted the e-mail as he had.

In April 2003, FHOA’s attorney notified Capstone, LLC, Brandon’s company, the owner of lot 1, and Lairtrust, LLC, Sinclair’s company, the owner of lot 19, that the association would institute collection procedures if the outstanding dues and special assessments were not paid within 30 days. Sinclair responded that the delinquency figures cited were incorrect but did not provide the amount he opined was correct nor did he offer to pay anything.

### **FHOA Foreclosures on Lots 1 and 19**

In June 2003, the FHOA recorded a notice of delinquent assessment with respect to both lots. At trial, Sinclair continued to dispute the amount owed, but acknowledged that neither Brandon nor he had paid any dues or special assessments to the FHOA from May 2002 through March 2004. Sinclair contended he had a credit for legal fees the FHOA owed him, and the special assessments had been improperly enacted and imposed. He also stopped paying dues because Katakis had told him that Katakis would own his lots no matter what he did. In March 2004, the FHOA foreclosed on lots 1 and 19.

Subsequently, CEMG purchased the note and deed of trust on lot 19, foreclosed, and became record title owner in 2008.

### **PROCEDURAL SUMMARY**

In April 2003, Mautrst;<sup>3</sup> Lairtrust, LLC; Capstone Trust; Flake, as trustee; Sinclair, Mauchley, and Brandon filed this action. The fifth amended complaint is the operative pleading and alleges 12 causes of action against Katakis, CEMG, and the FHOA.<sup>4,5</sup> Flake authorized Sinclair to file the lawsuit on behalf of himself and as trustee of Capstone Trust as a way to recover the amount he was owed on the \$271,000 note that had been secured by the Fox Hollow property. At the time of trial in December 2008, Katakis's CEMG owned 18 of the lots and Sinclair's Lairtrust, LLC owned one lot. Eight of Fox Hollow's 19 residential lots are at issue in the lawsuit: lots 1, 3, 7, 9, 11, 14, 18, and 19.

Regarding lots 1 and 19, plaintiffs claimed Katakis, through the FHOA, instituted wrongful foreclosure proceedings using overstated dues and assessment amounts and defective notices. In addition, Katakis improperly reconstructed the FHOA board of directors to oust Sinclair and Brandon and to foreclose wrongfully on the lots. Defendants claimed plaintiffs' unclean hands in relation to the lots was sufficient to deny their claims for wrongful foreclosure. Further, that plaintiffs had failed to meet their burden of proof to show a loss of net equity and/or any loss of net rental income.

Regarding lots 3, 7, 9, and 14, plaintiffs asserted: (1) the lots were foreclosed upon in violation of the automatic stay in the Mautrst bankruptcy; (2) the foreclosure of lot 3 violated the preliminary injunction issued by the Stanislaus Superior Court; (3)

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<sup>3</sup>The appeal was dismissed as to Mautrst for lack of standing after the company filed a certificate of cancellation with the Secretary of State and its powers, rights, and privileges ceased. (Corp. Code, § 17350.5, subd. (c).)

<sup>4</sup>The FHOA is now known as New Century Townhomes of Turlock Owners Association but will be referred to as FHOA as it was known during most of the litigation.

<sup>5</sup>Defendants' answer has not been included in the appellate record.

CEMG never acquired the notes and deeds of trust and therefore never had the right to foreclose; (4) the notices of foreclosure contained numerous defects rendering the foreclosures wrongful; and (5) Lonestar had no authority to conduct the foreclosure sales because “Loanstar” executed the trustee’s deed for lots 9 and 14. Plaintiffs sought to set aside the foreclosures and asked for monetary damages for lost gross rental income. Defendants countered that plaintiffs’ failure “to do equity” precluded relief. In addition, plaintiffs had failed to establish they were not in default, failed to show any procedural irregularities were prejudicial, failed to prove CEMG did not hold title, and failed to show any lost net rental income, the proper measure of damages.

Regarding lots 11 and 18, plaintiffs contended that Katakis and CEMG intentionally or negligently interfered with contract or economic advantage by interfering with the settlement agreement between GMAC, Mauchley, and Flake whereby GMAC was to sell the lots to plaintiffs. Plaintiffs sought monetary damages. Defendants claimed plaintiffs failed to show the agreement had not been cancelled long before Katakis and CEMG purchased the lots.

Brandon claimed Katakis violated his right to privacy and the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) by obtaining Brandon’s loan application and threatening to disclose its contents to third parties. Defendants claimed plaintiffs introduced no evidence that Katakis or CEMG violated any credit statute or that Brandon suffered any damage.

Defendants Katakis and CEMG cross-complained for abuse of process against Sinclair, Mauchley, and Mauctrst, who generally denied the allegations.

After a 36-day court trial and posttrial briefing, the trial court issued a detailed statement of decision and entered judgment for defendants on the fifth amended complaint and judgment for cross-defendants on the cross-complaint.<sup>6</sup>

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<sup>6</sup>Posttrial orders are the subject of separate appeals.

Sinclair, on behalf of “Plaintiffs,” filed a timely notice of appeal. Defendants filed a timely cross-appeal. Flake filed a separate appeal, which defendants moved to dismiss as untimely. Defendants also requested sanctions against Flake for pursuing a frivolous and dilatory appeal. We will address each appeal in turn.

## **DISCUSSION**

### **Preliminary Matters**

Plaintiffs’ briefing disregards (1) which party bore the burden of proof at trial to prove a specific claim or affirmative defense, (2) which party bears the burden on appeal to show trial court error, and (3) the applicable standard of review under which this court must analyze an appellant’s claims. We set forth those standards and will refer to them where appropriate throughout the opinion as we consider the various claims.

#### **Burden of Proof at Trial**

At trial, a party has the burden of proof as to each fact that is essential to the claim for relief or the defense being asserted. (Evid. Code, § 500.) Plaintiffs bore the burden of proving the elements of each cause of action for which they sought relief. They bore the burden of persuading the trial court of the truth of the facts they asserted to support each cause of action. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24.) Defendants bore no burden with respect to plaintiffs’ causes of action. Defendants, however, bore the burden of proof and persuasion on their unclean hands affirmative defense, which they alleged to defeat plaintiffs’ claims. (*Gularte v. Martins* (1944) 65 Cal.App.2d 817, 820.)

#### **Burden to Demonstrate Error on Appeal**

On appeal, the reviewing court presumes the trial court’s judgment is correct and the record contains evidence to support the trial court’s findings. An appellant bears the burden to overcome that presumption and must provide an adequate appellate record demonstrating the alleged error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) Equally important, especially when the record is voluminous as it is in this case, an appellant must provide page citations to the record to support the

arguments. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) The appellate court is not required to search the record to determine whether it supports the appellant's claim of error. (*Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819, 835.) If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived. (*Duarte v. Chino Community Hospital, supra*, at p. 856.)

### **Burden When Challenging Trial Court Findings**

When the trial court makes findings against the plaintiffs because they failed to meet their burden of persuasion, either because of a lack of evidence or a lack of credible evidence, arguing on appeal that the trial court erred because it did not credit the plaintiffs' evidence is pointless. Whether the plaintiffs proved their claims is a question to be determined by the trial court. The appellate court does not decide the question anew, but only examines the record to determine whether there is any substantial evidence to sustain the trial court's conclusion. (*Gularte v. Martins, supra*, 65 Cal.App.2d at pp. 820-821.) In other words, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law. That is, whether the appellant's evidence was "uncontradicted and unimpeached" and "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

### **Procedural Defects in Plaintiffs' Briefs**

Defendants contend that substantial procedural defects in plaintiffs' opening brief should result in a waiver of all arguments made. Specifically, plaintiffs failed (1) to cite adequately to the appellate record and (2) to identify the applicable standards of review.

Plaintiffs filed a 141-page opening brief with few record citations. Of the citations provided, many could not be correlated with the record plaintiffs had provided. The court ordered plaintiffs to correct the opening brief and provide proper citations to the record.

Plaintiffs provided a 152-page corrected opening brief that contains additional citations to the record. Some of the added citations fail to comply with the rule that a party's brief must support any reference to a matter in the record by a specific page citation to the record (Cal. Rules of Court, rule 8.204 (a)(1)(c)). For example, after the statement "Within 23 months, Katakis owned all the lots committing numerous torts against Plaintiffs to get there," plaintiffs provided the following record citation: "(*App V. 7 BS 1958-1964*) (*RT V. 15 P. 3704 L. 15-24*), (*RT V. 4 P. 927 L. 19-22*; *RT V. 4 P. 932 L. 20-27*; *RT V. 4 P. 929 L. 20-22*; *RT V. 4 P. 933 L. 20-24*; *RT V. 4 P. 934 L. 14-28*; *RT V. 4 P. 930 L. 1-4 and RT V. 4 P. 932 L. 1-18*), (*RT V. 13 P. 3277 L. 17-23*), (*RT V. 15 P. 3695 L. 18-25*) (*RT V. 15 P. 3720 L. 7-10*), *RT V. 6 P. 1517 L. 11-15*) *RT V. 6 P. 1513-1518*), (*App V. 8 BS 2294-2295*), ... [151 additional citations to the record]." Plaintiffs inserted the same 66-line sequence of citations on page 1 and page 66 of the corrected brief.

To the extent plaintiffs have provided useable citations when discussing an issue, defendants' argument is moot. To the extent plaintiffs failed to cite to the record or provided citations that do not comply with the rules of court when discussing an issue, the court will deem the issue waived.

Regarding the failure to cite to the applicable standard of review, plaintiffs raised a number of substantial evidence issues but cited only evidence favorable to them. Defendants urge this court to presume the record contains evidence to sustain every finding of fact and to consider all the arguments waived.

A party who challenges the sufficiency of the evidence to support a finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.) With several issues, plaintiffs have failed to do so. Their opening brief sets forth only their version of the evidence and omits the conflicting evidence presented by defendants. Where the plaintiffs present only facts and inferences favorable to their position, the court may deem their substantial evidence challenges waived. (*Doe v. Roman Catholic*

*Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.) Accordingly, where this court finds that plaintiffs have failed to meet their obligations concerning the discussion and analysis of a substantial evidence issue, we will deem the issue waived.

### **I. Motion to Enforce Settlement Agreement**

Plaintiffs contend the trial court erred by denying their motion to enforce the 2007 settlement agreement. Defendants claim the trial court's order denying the motion is supported by substantial evidence and should be affirmed. We find no error and affirm the order.

#### ***Procedural Summary***

In July 2007, at the onset of trial, the parties discussed settlement and entered into a "Preliminary Settlement" agreement. The agreement provided the terms were "skeletal, with the final details to be provided by the parties through mutual constructive engagement." Over the next five months, however, the parties were unable to complete a formal settlement agreement because they disagreed about the interpretation of certain terms of the agreement. In December 2007, plaintiffs filed an application to enforce five specified terms of the agreement. Defendants opposed the application, arguing that plaintiffs had not performed as required by the agreement, they were attempting to enforce only certain terms of the agreement, and they were asking the trial court to order defendants to perform acts beyond the terms of the agreement. The trial court heard and denied the motion without prejudice, for the reasons "articulated by the opposition."

In January 2008, plaintiffs filed a motion to enforce the settlement agreement pursuant to Code of Civil Procedure section 664.6.<sup>7</sup> They contended the agreement contained all the material terms and, to the extent there were disagreements regarding the terms, the agreement provided a procedure for the trial court to resolve the disputes. Further, all parties had executed the agreement, the parties had acknowledged the suit was settled in a related action in federal court, and there had been partial performance.

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<sup>7</sup>Further statutory references are to the Code of Civil Procedure unless otherwise stated.

Defendants, with new counsel, again opposed the motion. They asserted the agreement was not enforceable because it was not signed by all the parties, and the parties had failed to agree on several material terms.

At the hearing on the motion, the trial court acknowledged it “fell down on the job” when it accepted the settlement agreement as drafted. It should “have ensured that there was more detail that was presented to the Court.” Further, despite the statement in the agreement that the trial court would reserve jurisdiction and resolve disputes regarding the agreement, if the parties had reached a settlement, there would be no reason to have the judge further settle issues because, “either you have a settlement agreement or you don’t.” The trial court concluded, contrary to its statement in the tentative ruling, which it vacated,<sup>8</sup> that the agreement was not enforceable pursuant to section 664.6 because there was no meeting of the minds for the reasons set forth in the opposition to the motion.

### *Analysis*

#### **A. Standard of Review**

The court of appeal reviews the trial court’s determination whether to enforce the settlement agreement under the substantial evidence standard. (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.)

#### **B. Procedural Flaws**

In briefing the issue on appeal, Sinclair sets forth specific actions plaintiffs took to perform under the agreement, but only refers generally to Katakis’s lack of cooperation. As such, plaintiffs failed to include the evidence favorable to the prevailing parties as they must to raise a substantial evidence challenge to the trial court’s ruling.

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<sup>8</sup>Plaintiffs cited the tentative ruling statement in their ARB at page 32 that the trial court found the agreement enforceable under section 664.6. They did not add that the trial court “vacate[d]” that statement and its tentative ruling at the conclusion of the hearing and ruled to the contrary.

As a reviewing court, we presume the record contains evidence to support the trial court's findings. The burden is on the appellant to overcome that presumption and to show reversible error. (*State Farm Fire & Casualty Co. v. Pietak, supra*, 90 Cal.App.4th at p. 610.) A party who challenges the sufficiency of the evidence to support a finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient. (*Schmidlin v. City of Palo Alto, supra*, 157 Cal.App.4th at p. 738.) Where the appellant presents only facts and inferences favorable to its position, the court may deem the substantial evidence challenges waived. (*Doe v. Roman Catholic Archbishop of Cashel & Emly, supra*, 177 Cal.App.4th at p. 218.) Under these fundamental principles of appellate procedure, we presume the trial court's order denying the motion to enforce the settlement agreement was supported by the evidence and deem plaintiffs' arguments to the contrary to be waived.

### **C. Merits**

Ignoring the brief's procedural failings, plaintiffs contend the trial court abused its discretion in denying the motion because (1) the settlement agreement authorized the trial court to resolve all disputes about the terms of the settlement; (2) the parties had reported in state and federal courts, pursuant to California Rules of Court, rule 3.1385, that the matter had settled; (3) all necessary parties signed the agreement and Katakis is estopped to deny that he signed the agreement for the FHOA, of which he was the sole officer and member of the board of directors; (4) the record does not support the finding there was mutual mistake and, because the parties were all real estate experts, that argument is unavailing; and (5) as a matter of law, the settlement agreement was enforceable under section 664.6.

In ruling on a section 664.6 motion for entry of judgment enforcing a settlement agreement—and in determining whether the parties entered into a binding settlement of the case—a trial court considers whether (1) the material terms of the settlement were explicitly defined, (2) the supervising judicial officer questioned the parties regarding their understanding of those terms, and (3) the parties expressly acknowledged their

understanding of and agreement to be bound by those terms. (*In re Marriage of Assemi, supra*, 7 Cal.4th at p. 911.)

A settlement agreement is a contract, therefore the legal principles that apply to contracts generally apply to settlement agreements. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810.) An enforceable settlement agreement must be sufficiently definite that the promised performance is reasonably certain. (*Id.* at p. 811.) All material terms must be well-defined and clearly expressed. (*Id.* at p. 817.) And the parties' outward manifestations must show that they agreed on the same thing. (*Id.* at p. 811.) In contrast, when material details are left to future agreement, the contract is uncertain and unenforceable. (*Id.* at p. 817.) We apply those principles to plaintiffs' claims.

First, the agreement was not enforceable simply because it provided: "Any disagreement in the meaning, effect, purpose, terms or execution of this Settlement Agreement shall be decided before the [trial judge]." Section 664.6 does not authorize a judge to create the material terms of an agreement. (*Weddington Productions, Inc. v. Flick, supra*, 60 Cal.App.4th at p. 797.) The judge may enter judgment only in conformity with the agreement the parties have reached. (*Jones v. World Life Research Institute* (1976) 60 Cal.App.3d 836, 840.) If the parties disagree on the material terms of the agreement, there is no meeting of the minds and no settlement agreement to enforce. (*Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1459.) As the trial court acknowledged, it could not "settle issues" the parties had failed to agree upon.

Second, the parties' reporting in state and federal courts pursuant to California Rules of Court, rule 3.1385 that the matter had settled did not preclude a finding months later that the settlement agreement was unenforceable. Nothing in the language of the rule of court, which obligates the parties to notify the court promptly when a case settles, supports plaintiffs' claim.

Third, plaintiffs also argue judicial estoppel requires a reversal. This argument fails on procedural grounds. Plaintiffs did not raise the issue in the trial court and first

addressed the issue in their reply brief. The court need not consider issues raised for the first time in the reply brief (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766), and will not consider points not raised in the trial court (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486).

Finally, we reject plaintiffs' claim that the agreement was enforceable as a matter of law because substantial evidence supports the trial court's finding that there was no meeting of the minds. The parties agreed to the goals of the settlement, but failed to agree on all the specific means that were material to the settlement. As a result, several of the material terms were too uncertain to constitute an enforceable contract.

The agreement begins, "Preliminary Settlement Terms .... [¶] These terms are skeletal, with the final details to be provided by the parties through mutual constructive engagement." And the parties never agreed on those "final details." The record contains pages and pages of e-mails between Sinclair and Katakis and their counsel that illustrate disagreements regarding the meaning of the terms of the settlement.

For example, the second paragraph of the settlement agreement provides, "This Agreement intends to allow the parties to liquidate their holdings as set forth herein, and intends to ensure that the parties to this settlement agreement need not conduct any business with each other, with regard to Fox Hollow." The agreement did not specify how this was to occur, and Sinclair and Katakis both believed the other had agreed to sell his Fox Hollow properties. Katakis believed the agreement called for Sinclair to sell his units; Sinclair believed the agreement required Katakis to liquidate his Fox Hollow lots.

Further, when the parties agreed to settle, Katakis believed Sinclair had the ability to pay cash for the Fox Hollow property that Sinclair agreed to purchase. Subsequently, it became clear that Sinclair intended to finance his purchases and had to enter and improve the units, which then belonged to defendants, before he could get a loan to complete the purchases. Defendants did not intend to permit Sinclair to take possession of the property until he paid for it and title had transferred.

Thus, the record demonstrates there was no meeting of the minds on several material terms, most notably whether either party would maintain an interest in Fox Hollow and the plaintiffs' rights and obligations regarding lot 1. The trial court properly found no enforceable agreement existed and correctly denied the motion to enforce the settlement agreement.

We need not consider plaintiffs' additional contentions. Regardless of whether all necessary parties signed the agreement and whether the parties were experts, they failed to set forth all the material terms of the agreement with sufficient certainty to make it enforceable under section 664.6.

## **II. Motion to Disqualify Defense Counsel**

Plaintiffs contend the trial court abused its discretion by (1) denying their motion to disqualify defendants' former counsel, Timothy Ryan, in March 2005, and (2) denying their request to reconsider several posttrial rulings because defendants' trial counsel had a disqualifying conflict of interest. Defendants reply that plaintiffs fail to cite to the record in briefing this issue and, in any event, any potential conflict was waived. We affirm the trial court's rulings.

### ***Procedural Summary***

In 2005, the trial court denied without prejudice plaintiffs' motion to disqualify defendants' former attorney of record, Timothy Ryan. The trial court concluded that plaintiffs' moving papers did not establish that Mr. Ryan had a disqualifying conflict of interest or that he had represented plaintiffs in the past, as either current or former members of the FHOA. Further, even if Mr. Ryan was a potential witness, the law did not require that he be disqualified summarily. Finally, plaintiffs had been aware of Mr. Ryan's purportedly "conflicting" representation for years and had not taken steps to end it prior to this motion. As such, it may be too late to challenge Mr. Ryan's representation.

Plaintiffs also contend the trial court abused its discretion when it permitted defendants' trial counsel, John M. Dunn, D. Greg Durbin and the McCormick Barstow

law firm, to remain on the case. Plaintiffs assert they are clients of McCormick Barstow as members of the FHOA. Therefore, the trial court must “dismiss McCormick Barstow and reconsider all evidence excluding that evidence submitted by McCormick Barstow and Mr. Ryan or reverse its decision.” Defendants reply that plaintiffs never moved to disqualify their counsel and, had they done so, defendants would have rebutted plaintiffs’ “baseless claims,” including by establishing that McCormick Barstow obtained appropriate consents to its representation.

### ***Analysis***

Plaintiffs have shown no abuse of discretion regarding the denial of their motion to disqualify Mr. Ryan. Plaintiffs did not include the pleadings for the motion in the appellate record. There is a reporter’s transcript of the trial court’s brief oral ruling, and defendants provided a copy of the corresponding minute order denying the motion. The rulings demonstrate the trial court denied plaintiffs’ motion without prejudice, finding their showing inadequate to establish that Mr. Ryan had a disqualifying conflict of interest. Because the pleadings are not before us, we must presume plaintiffs’ showing was inadequate, as the trial court found, and affirm the order. (*State Farm Fire & Casualty Co. v. Pietak, supra*, 90 Cal.App.4th at p. 610.)

Plaintiffs’ claim is untimely as well as inadequately supported by the record. Plaintiffs did not object when McCormick Barstow substituted into the case on behalf of defendants in February 2008, months before trial. Rather, plaintiffs first raised the issue in their motion for reconsideration of the trial court’s rulings on posttrial motions for costs, attorney fees, and to add a judgment debtor. They claimed McCormick Barstow had a conflict of interest in representing the homeowners association because plaintiffs, as owners of property at Fox Hollow, have been members of the homeowners association and, therefore, clients of McCormick Barstow.

Plaintiffs have not referred this court to the pleadings,<sup>9</sup> the trial court's ruling, or the reporter's transcript of the hearing on the motion for reconsideration where this issue was raised. Plaintiffs, as the party challenging the ruling, have the burden of providing an adequate record for this court to assess their claims of error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) Because there is nothing in the record for us to review, this claim is forfeited. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1296.)

### **III. Unclean Hands Defense**

Plaintiffs contend the trial court abused its discretion in applying the unclean hands doctrine as a defense against all of their claims. We conclude there was no abuse of discretion because the findings are supported by substantial evidence.

#### ***Procedural Summary***

The trial court found against plaintiffs on their causes of action but also found their unclean hands in relation to Fox Hollow barred recovery on every claim. The trial court found 28 wrongful acts constituting a pattern of misconduct and deception on the part of all plaintiffs regarding Fox Hollow.

“1. In April 1994, Mr. Sinclair wrote to the City of Turlock to advise them that there were sufficient funds in the HOA. [Citations.] Mr. Sinclair testified that he never told the City that there was an HOA before 1998 [citation] and that there was no HOA before 2000. [Citations.] Mr. Sinclair's 1994 letter to the City of Turlock that there was an HOA was false.

“2. From November 1995 through February 1997, Mr. Sinclair and Mr. Flake worked closely together to develop Fox Hollow. [Citations.] Yet, Mr. Flake testified he had no involvement with Mr. Sinclair during this time. Clearly, this was not true.

“3. In March 1996, Plaintiffs subdivided Fox Hollow by recording Map No. 1. [Citation.] The City required as a condition that a homeowner's association be formed. [Citation.] In September 1996, Plaintiffs recorded the CC&Rs. [Citation.] The CC&Rs required formation of an HOA. The Plaintiffs did not do this.

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<sup>9</sup>Defendants provided the pleadings in their appendix.

“4. In February 1997, Mr. Flake sold Fox Hollow to Mr. Mauchley by selling four separate lots through four separate deeds. [Citations.] Although the CC&Rs required him to convey the common area to the HOA before doing this, he did not do it.

“5. In 1998, Mr. Sinclair worked to secure financing at Fox Hollow. Mr. Mauchley testified that Mr. Sinclair handled this work and that he, Mr. Mauchley, ‘didn’t talk to any lenders.’ Mr. Sinclair testified that Mr. Mauchley was ‘arranging for the most part the financing.’

“6. On or about July 21, 1998, Plaintiffs caused Subdivision Map No. 2 to be recorded creating an additional 15 lots. [Citation.] Plaintiffs knew that they had failed to complete the conditions imposed by the City for recording such a map. [Citations.] Plaintiffs also knew that the City had previously rejected their request to complete the required work after the map was recorded. [Citations.]

“7. In July 1998, immediately upon recording Map No. 2, Plaintiffs caused 15 loans to be placed against the 15 new lots. Mr. Mauchley signed fifteen deeds of trust [citations] that contained Planned Unit Development riders representing that there was a HOA. Yet, ‘there was no intention to start it then.’ [Citation.]

“8. In July 1998, Plaintiffs obtained these 15 new loans based on values that were ‘subject to final completion of subdivision firewalls and underground relocation of utilities to accommodate individual ownership ....’ [Citations.] This material information was not disclosed to the lenders. Plaintiffs’ [sic] secured these loans [] on a false premise.

“9. In late 1998 and early 1999, Plaintiffs began defaulting on the loans and were further encumbering the property with a \$300,000 loan. [Citation.] Mr. Mauchley testified he knew that Plaintiffs were late on a more than a couple of payments, but Mr. Sinclair insisted that he had made wire transfers or other sorts of direct payments, but later recanted this testimony.

“10. In April, May and June of 1999, lenders began to record notices of default on the July 1998 loans. [Citations.] On July 1, 1999, Mautrst LLC filed bankruptcy. Plaintiffs claimed that the bankruptcy filing had nothing to do with the pending non-judicial foreclosures and ‘that wasn’t the consideration at all.’ [Citations.]

“11. In July 1999, Mr. Sinclair filed bankruptcy for Mautrst LLC representing that it was owned 50% by Mr. Mauchley and 50% by Mrs. Mauchley. Mr. Mauchley testified at trial these statements were false. Richard Sinclair and Gregory Mauchley then had recently filed unlawful

detainer actions verifying under oath that they owned the property. Since July 1999, Plaintiffs have asserted that the automatic stay of the Mautrst LLC bankruptcy should prevent Fox Hollow lenders from pursuing collection efforts even though (1) Richard Sinclair and Gregory Mauchley, not Mautrst LLC, owned the property, (2) Mr. Mauchley, not Mautrst LLC, was the obligor on the notes and deeds of trust.

“12. Mr. Sinclair has testified in deposition, at trial and in letters that he sent that he is a member/manager of Mautrst LLC and that member/manager means owner. Mr. Sinclair has divulged that he directly benefited in the amount of \$160,000 from the Fox Hollow endeavor in the year before the July 1, 1999 [bankruptcy]. Yet, he continues to claim he has no ownership interest in it.

“13. In January 2000, Plaintiffs began to attempt to negotiate significant discounts on their loans by drawing the lenders attention—18 months after they obtained the loans—to the fact that their collateral was impaired for reasons solely attributable to Plaintiffs’ misconduct. [Citations.]

“14. In February 2000, lenders filed additional notices of default regarding Fox Hollow. [Citations.] In March 2000, Plaintiffs began suing lenders and seeking restraining orders to delay those foreclosures. [Citations.] In total, they filed seven lawsuits and lost nearly all of them.

“15. On June 6, 2000, Plaintiffs obtained a preliminary injunction which listed Lots 9 and 14 at Fox Hollow, but which they have claimed also pertained to Lots 3 and 7. [Citation.] The injunction was conditioned on Plaintiffs making ‘the required monthly payments on the promissory note as it comes due.’ Plaintiffs failed to make a single payment and enjoyed the benefit of the injunction until 2003.

“16. Although Plaintiffs prepared HOA minutes indicating that Mr. Mauchley was present at the first two HOA meetings [citation], Mr. Mauchley testified that he did not attend meetings. Plaintiffs’ minutes indicate work was being done on and Mr. Sinclair billed Fox Hollow for doing work on Articles of Incorporation [citation] during the time period of August 2000 to December 2000. Yet, the Articles of Incorporation were signed and completed in July 2000, but simply not filed with the Secretary of State until December 2000. [Citation.]

“17. In October 2000, Plaintiffs provided the outstanding dues to escrow and volunteered to escrow that ‘title to the lots cannot be transferred at the present time.’ [Citation.] Mr. Sinclair provided a declaration under penalty of perjury to the Court that this letter was sent ‘[o]ut of courtesy to

the new owners and to elicit their cooperation.’ [Citation.] This is not credible. A month later, Plaintiffs sent out a HOA dues statement with a note at the bottom that there were potential purchasers interested in purchasing the lots at their ‘as is where is’ price. [Citation.]

“18. In February 2001, a receiver was appointed over Plaintiffs’ objection. [Citations.] The receiver appointment hearing reflects Plaintiffs’ misleading conduct. [Citation.]

“19. In May 2001, Plaintiffs entered a settlement agreement with GMAC that they secretly set up as a double escrow without disclosing to GMAC that the Sinclairs were the actual purchasers. In July 2001, Plaintiffs failed to close with GMAC. Mr. Sinclair informed Mr. Mauchley that they missed the deadline. Mr. Sinclair even wrote correspondence acknowledging that the escrow ‘must close’ within a time certain. [Citation.] However, Plaintiffs still claim that the date for the close of escrow was not a condition of their agreement with GMAC. [Citation.]

“20. In December 2001, Brandon Sinclair took out a loan against Lot 1 at Fox Hollow [citation] and then transferred the property to an LLC [citation] that he and his father formed to protect him from credit damage (Testimony of Brandon Sinclair) when they defaulted.

“21. In May 2002, Plaintiffs stopped making dues payments to the HOA.

“22. In June 2002, over 10 months after the Plaintiffs were to close escrow on Lots 11 and 18 and after GMAC had canceled the Settlement Agreement with Plaintiffs [citation], CEMG entered into a contract with GMAC to purchase those two lots. During trial, Plaintiffs deleted information from an exhibit showing that Mr. Sinclair had not sent a copy of the GMAC settlement agreement until July 17, 2002. [Citations.] This was done in an attempt to create the impression that Plaintiffs had claimed they had a contract to purchase the properties before GMAC and CEMG completed their sale. Richard Sinclair’s testimony regarding what he told Mr. Katakis before CEMG closed escrow was false.

“23. On July 31, 2002, Plaintiffs advised the Court in writing that: (a) after the Court appointed a receiver, ‘the Board resigned’; (b) there was ‘no board of directors to represent’ the HOA; (c) ‘no direction has been provided’; and (d) elections should be held. [Citation.] Plaintiffs failed to advise the HOA for two months after the new Board was elected that they believed they were the Board and only did so when it was apparent that the new Board was going to begin collecting dues and gather estimates for the repair work at Fox Hollow. [Citation.]

“Mr. Sinclair explained why he told the Court this: ‘What I must have ineloquently represented to the Court was Mr. Katakis was buying us out. He had made us an offer of about \$1 million. We were waiting to finalize that. And everybody wanted to get rid of this case because it had no other purpose. And so we weren’t going to go to trial. We weren’t going to go forward with it. And so I was telling the Court, you know, this is kind of done with.’ [Citations.] Thus, rather than admit that he had lied to the Court, Mr. Sinclair made up this story. First, the document he stated to the Court suggests nothing remotely like Mr. Sinclair’s testimony. Second, the evidence is unequivocally clear that Mr. Katakis never offered them \$1 million as Mr. Sinclair claims.

“24. In October 2002, when the new Board and officers were elected at Fox Hollow, Fox Hollow was in a very poor condition. [Citation.] It had been in the same condition when the Court was required to appoint a receiver for the homeowner’s association. [Citations.] It had been in a deteriorating condition since as early as 1993. [Citation.] Mr. Sinclair even admitted the deferred maintenance. [Citations.] Yet, Plaintiffs continue to claim that they had no role in the condition of Fox Hollow.

“25. In December 2002, Plaintiffs threatened the new Board with a number of baseless charges while claiming that the prior Board had in fact not resigned.

“26. In March 2003, Plaintiffs doctored a Summons [citation] and prepared an Amended Complaint [citation] and served both documents on CEMG and Mr. Katakis without Court approval, without them being filed and then allowed the litigation to proceed for months.

“27. In May 2003, Plaintiffs complained about Fox Hollow being in a state of disrepair. [Citation.] Yet, Plaintiffs still refused to pay dues. In July 2003, as the HOA attempted to move forward with a rehabilitation project, Plaintiffs wrote to the HOA and advised that the HOA’s actions were done to damage Plaintiffs. [Citation.] Plaintiffs’ claims that the HOA and other defendants were harming them by the rehabilitation project were false.

“28. In November 2003, Plaintiffs tendered \$0 to the HOA when clearly Plaintiffs knew that they had not paid dues since May 2002. [Citations.]”

The trial court concluded:

“[E]ach of the Plaintiffs, particularly Richard Sinclair, are deserving of the application of the unclean hands doctrine ... even if this court had not otherwise found in favor of Defendants ....

“The pattern of ‘unclean hands’ conduct ... of Plaintiffs was pervasive as well as endemic to the entire Fox Hollow project over the entire period of time involved in this case, including, but not limited to: (1) the manner of securing the subject promissory notes and deeds of trust; (2) refusing to make payments and misrepresentation of making payments required under the subject promissory notes and deeds of trust; (3) misusing the bankruptcy court to improperly delay and try to defeat the claims of the holders of the subject promissory notes and deeds of trust; (4) misusing a preliminary injunction to delay foreclosures without making monthly payments; (5) failing to timely form and fund an HOA and failing to properly conduct the affairs of the HOA; (6) dealings and interacting with the HOA and defendants, after October 2002, related to the lots in issue; (7) dealings with GMAC and defendants Katakis and CEMG with respect to lots 11 and 18; and (8) the other conduct [described in relation to each cause of action].

“Given the nature and duration of the conduct, this court finds that the ‘unclean hands’ of Plaintiffs is proximately related to Plaintiffs’ claims and the relief they seek, such that the court finds for Defendants on their unclean hands defense against Plaintiffs on all causes of action and for this separate and independent reason finds in favor of Defendants on each of the causes of action in Plaintiffs’ Fifth Amended Complaint.”

## ***Analysis***

### **A. Doctrine of Unclean Hands**

The doctrine of unclean hands arises from the maxim that one who comes into equity must come with clean hands. (*Blain v. Doctor’s Co.* (1990) 222 Cal.App.3d 1048, 1059.) The doctrine requires that the plaintiff act fairly in the matter for which the plaintiff seeks a remedy or the plaintiff will be denied relief, regardless of the merits of the claim. The defense is available in legal and equitable actions. Whether the doctrine of unclean hands applies is a question of fact that defendants bore the burden of proving. (Evid. Code, § 500; *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978 (*Kendall-Jackson*).

The unclean hands doctrine protects judicial integrity because allowing a plaintiff with unclean hands to recover creates doubt regarding the justice provided by the judicial system. Thus, precluding recovery to the plaintiff with unclean hands protects the court's, rather than the defendant's, interests. (*Kendall-Jackson, supra*, 76 Cal.App.4th at p. 978.) The doctrine promotes justice by making a plaintiff answer for his or her own misconduct in the action. It prevents a wrongdoer from enjoying the fruits of the wrongful acts. (*Ibid.*)

Not every wrongful act falls within the unclean hands doctrine. But the misconduct need not be a crime or an actionable tort. Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient to invoke the doctrine. (*Kendall-Jackson, supra*, 76 Cal.App.4th at p. 979.) The wrongful conduct must relate directly to the plaintiff's claims. Past misconduct that only indirectly affects the claims does not suffice. The misconduct must affect the equitable relations between the litigants. There must be a direct relationship between the misconduct and the causes of action alleged such that it would be inequitable to grant the requested relief. (*Ibid.*)

Whether the plaintiff's particular misconduct is a bar to the claim for relief depends on: (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries. (*Kendall-Jackson, supra*, 76 Cal.App.4th at p. 979, citing *Blain v. Doctor's Co., supra*, 222 Cal.App.3d at p. 1060.)

## **B. Plaintiffs' Challenges**

Plaintiffs contend the trial court abused its discretion in finding their unclean hands barred all their claims regarding the Fox Hollow property. They support this contention with five arguments. They are: (1) the first 20 instances of unclean hands the trial court found are "untrue or a misrepresentation or a partial truth," and the bad acts that occurred before 2002, when Katakis became an owner of Fox Hollow property, are prior misconduct that only indirectly affects their claims, plus, the final eight acts did not prejudice Katakis so that it would be inequitable to grant plaintiffs relief; (2) Katakis's bad acts were worse than plaintiffs', and Katakis took advantage of plaintiffs'

misconduct—he was not injured by the bad acts; (3) The trial court failed to examine analogous case law, which supports a contrary finding; (4) plaintiffs’ misconduct does not rise to the level of unclean hands; and, (5) plaintiffs’ misconduct did not excuse Katakis’s intentional and fraudulent conduct.

We analyze plaintiffs’ contentions under the three *Kendall-Jackson/Blain* factors: analogous case law (contention No. 3), nature of the misconduct (contentions Nos. 2 and 4), and relation of misconduct to claims for relief (contentions Nos. 1 and 5).

*1. Analogous case law*

Plaintiffs cite *Bardis v. Oates* (2004) 119 Cal.App.4th 1 (*Bardis*) as analogous case law that compels reversal. We disagree. In *Bardis*, the plaintiff partners sued the managing partner of a real estate partnership for fraud, and breach of contract and tort duties based on allegations of self-dealing, secret markups, and clandestine commissions. The jury awarded the plaintiffs compensatory and punitive damages. The defendant challenged the judgment, claiming the plaintiffs failed to show they were damaged and the punitive damages were excessive under recent case law. (*Id.* at p. 5.) The appellate court affirmed the compensatory damage award and modified the punitive damage award to comply with the single digit guidepost set by recent case law. (*Id.* at pp. 16, 25-26.)

Plaintiffs assert *Bardis* is analogous because the predatory behavior at issue is similar to Katakis’s behavior that resulted in his acquiring the Fox Hollow lots and “taking over” the FHOA. Plaintiffs are mistaken. *Bardis* is not analogous simply because it involved business practices that plaintiffs argue were similar to Katakis’s practices. Katakis’s business practices were not in issue; rather, the issue was plaintiffs’ behavior regarding the lots they sought to recover. *Bardis* is irrelevant to plaintiffs’ challenge to the unclean hands findings here because *Bardis* does not address the doctrine of unclean hands or otherwise demonstrate the trial court abused its discretion in finding the plaintiffs’ misconduct constituted unclean hands, which precluded recovery.

*Wilson v. S.L. Rey, Inc.* (1993) 17 Cal.App.4th 234, which defendants cite, is analogous and supports the trial court’s conclusion. In *Wilson*, three individuals, as

cotenants, purchased real property subject to trust deed encumbrances. The defendants obtained the interest of one of the cotenants following a foreclosure sale and then purchased one of the deeds of trust and foreclosed on the property. The plaintiff, one of the original cotenants, challenged the foreclosure sale. (*Id.* at pp. 238-239, 244.) The court rejected her claims, concluding that substantial evidence supported the trial court's finding that she had unclean hands. "The record reflects a continuing course of refusal to make note payments, to pay taxes, to account for royalties, rents and profits, and misuse of the bankruptcy court to delay and defeat the legitimate claims of lienholders, including [the defendant]." (*Id.* at pp. 244-245.) This is analogous case law and it supports the trial court's ruling.

## **2. *Nature of the misconduct***

Plaintiffs contend the nature of their misconduct should not have precluded recovery on their claims because Katakis's bad acts were worse, and their misconduct did not rise to the level of unclean hands.

We note that plaintiffs' arguments regarding the nature of their misconduct in their opening brief are general. In contrast, defendants cite 39 examples of plaintiffs' misconduct, which include: fraud in obtaining loans on the property, misrepresentations of or failure to disclose material facts to the City of Turlock, violation of the conditions set forth in the City of Turlock resolution permitting the Fox Hollow subdivision, misuse of LLC's, false statements in bankruptcy filings involving Fox Hollow, misuse of the courts to delay foreclosures while failing to make court-ordered monthly payments to the lenders, collecting rents on property they did not own, falsifying FHOA minutes, failing to deed the common area to the FHOA as required by the CC&R's, failing to disclose double escrows to the lender, altering documents to support their version of the facts, repeatedly failing to make payments to the lenders and to the FHOA, and false testimony at trial.

Plaintiffs' contention that their unclean hands should not have precluded recovery because Katakis's misconduct was worse disregards the parties' burdens of proof at trial

and the standard under which we review this issue. Defendants pled the affirmative defense of unclean hands and produced evidence to establish plaintiffs' unclean hands misconduct in relation to the eight lots for which plaintiffs sought relief. The trial court found defendants' evidence persuasive and concluded that plaintiffs' unclean hands precluded recovery on every cause of action they asserted. On appeal, the only issue before this court under the applicable standard of review is whether the trial court's findings are supported by substantial evidence. (*Gularte v. Martins, supra*, 65 Cal.App.2d at pp. 820-821.) As such, Katakis's behavior is irrelevant to plaintiffs' challenge to the unclean hands findings. Plaintiffs' argument improperly shifts the burden of proof to defendants to prove Katakis's lack of unclean hands. Defendants did not have that burden in the trial court and do not have it here.

Plaintiffs contend, in effect, their evidence<sup>10</sup>—that Katakis interfered with the GMAC contract, assessed the FHOA to pay litigation attorney fees, violated the bankruptcy automatic stay and temporary restraining orders, bought notes he knew were void, engaged in extortion, falsified amounts plaintiffs owed the FHOA, formed a new FHOA board without considering the existing board, mistreated and interfered with Sinclair's tenants, refused to repair or maintain Sinclair's lots, wasted FHOA money, and levied improper special assessments—compelled a finding that Katakis's behavior negated the effect of their unclean hands behavior as a matter of law. This contention fails because the evidence was not “uncontradicted and unimpeached” nor was it “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” (*In re I.W., supra*, 180 Cal.App.4th at p. 1528.) Further, Katakis's behavior was not at issue in the trial court other than to the extent it was relevant to establish an element of plaintiffs' causes of action.

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<sup>10</sup>In their ARB, plaintiffs list “70+” acts of defendants—many of them repetitive and some unsupported by citations to the record—that they contend were worse than their acts. The trial court generally ruled against plaintiffs on these claims, finding them either unsupported or immaterial or not prejudicial.

Plaintiffs' second claim that their misconduct did not rise to the level of unclean hands is belied by the record and the findings of the trial court as set forth above. (E.g., *Wilson v. S.L. Rey, Inc.*, *supra*, 17 Cal.App.4th at pp. 244-245.) Plaintiffs reargue the facts and reasonable inferences and urge this court to reach a result different from the trial court's. The arguments are unavailing. The appellate court does not reweigh the evidence. It upholds the judgment of the trial court if it is supported by substantial evidence, even though substantial evidence to the contrary exists and the trial court might have reached a different result had it believed other witnesses. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

### **3. *Relation of misconduct to claims for relief***

The misconduct that brings the unclean hands doctrine into play must infect the causes of action involved and the equitable relations between the litigants. (*Kendall-Jackson*, *supra*, 76 Cal.App.4th at p. 984.) Plaintiffs assert that the first 20 instances of unclean hands the trial court found are "untrue or a misrepresentation or a partial truth." Because they fail to cite to evidence in the record to support that assertion, it is waived. (*Schmidlin v. City of Palo Alto*, *supra*, 157 Cal.App.4th at p. 738.) Plaintiffs next claim that, even if true, the bad acts that occurred before 2002, when Katakis became an owner of Fox Hollow property, do not relate directly to the transactions before the trial court. Plaintiffs' argument is neither logical nor supported by the facts.

The pre-2002 misconduct included plaintiffs' failure to complete the subdivision work for Fox Hollow to create a PUD and the misrepresentation of, or failure to disclose, the noncompliance to the City of Turlock and to lenders, which permitted plaintiffs to encumber Fox Hollow in excess of its true value. It also included failure to form and operate the FHOA once the subdivision map was filed, to maintain the property while it was overencumbered, and to make payments to the lenders. Further, it included filing a petition in bankruptcy to delay foreclosure, filing state court actions to further delay foreclosure and, finally, making misrepresentations in various court proceedings.

Plaintiffs' pre-2002 misconduct led to the foreclosures that resulted in Katakis acquiring lots 3, 7, 9, and 14 and related directly to plaintiffs' claims that those foreclosures were wrongful and must be set aside.

Plaintiffs also claim the final eight acts did not prejudicially affect Katakis's rights rendering it inequitable to grant plaintiffs' relief. Plaintiffs misconstrue the unclean hands bar. Under the unclean hands doctrine, it was inequitable to grant plaintiffs the relief they sought—monetary damages and to reacquire the lots they lost through foreclosure—because of their misconduct in relation to those lots. The doctrine did not require proof that their misconduct harmed the parties who acquired those lots. Further, whether Katakis's behavior was above reproach was irrelevant. Neither Katakis nor the other defendants bore any burden to establish a lack of misconduct on their part. Finally, plaintiffs assert that Katakis was not injured by any misconduct and profited from it. Neither assertion has any relevance to whether plaintiffs' claims for relief are barred by the unclean hands doctrine.

Moreover, the nature of plaintiffs' misconduct directly related to the transactions for which they requested relief. Plaintiffs sought to set aside the "wrongful" foreclosures of lots 1, 3, 7, 9, 14, and 19, and to recoup income resulting from their inability to reacquire lots 11 and 18. The trial court found that plaintiffs' claims regarding the lots were barred by misconduct that included fraud in securing the underlying notes and deeds of trust, refusal to make mortgage payments and misrepresentations regarding those payments, refusal to pay dues and special assessments to the FHOA, and misuse of the courts to delay the foreclosures. Under the unclean hands doctrine, plaintiffs were not entitled to recover the lots or any lost rents because of their wrongful acts in relation to those lots.

For all of the reasons set forth above, plaintiffs have failed to show the trial court abused its discretion in concluding all of their claims were barred by the doctrine of unclean hands. The trial court's findings are amply supported by substantial evidence.

#### **IV. Challenges to Rulings on Underlying Causes of Action**

The trial court's findings that all of plaintiffs' claims are barred by the unclean hands affirmative defense are supported by substantial evidence. As a result, it is immaterial whether the trial court erred in failing to find for plaintiffs on the merits of the claims. Moreover, plaintiffs, in arguing these issues, ignore that they bore the burden of proof at trial and now bear the burden to show error on appeal under the applicable standard of review.

Plaintiffs contend the trial court erred in failing to find: (1) the FHOA foreclosures of lots 1 and 19 were invalid due to procedural and substantive defects in the delinquency notices and Katakis's breaches of fiduciary duty as the sole member of the FHOA board of directors; (2) the foreclosures of lots 3, 7, 9, and 14 should be set aside because of procedural and substantive defects in the foreclosure processes; (3) plaintiffs were entitled to relief for the wrongful foreclosures and conversion of rents; (4) Katakis and CEMG interfered with plaintiffs' rights as to lots 11 and 18; and, (5) defendants were liable for slander of title, intentional or negligent interference with contract, misrepresentation, invasion of privacy, violation of the credit statute, and conversion. Plaintiffs set forth a plethora of evidence, which they argue supports their claims and compels judgment in their favor.

Where the issue on appeal turns on a failure of proof at trial, the question for the appellate court is whether the evidence compels a finding in favor of the appellant as a matter of law. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) Evidence compels a finding as a matter of law when it is "uncontradicted and unimpeached" and is of a character and weight that leaves no room for the trial judge to determine it was insufficient to support a finding of entitlement to relief. (*Ibid.*)

Over the 36 days of trial, this case posed numerous evidentiary conflicts. The case obligated the trial court to evaluate competing and conflicting evidence. As reflected in the trial court's detailed statement of decision, the trial court considered the competing and conflicting evidence and essentially discounted plaintiffs' evidence in concluding

they had failed to carry their burden of proof. It is not our function to retry the case. We therefore decline plaintiffs' implicit invitation to reevaluate the evidence and revisit the trial court's failure-of-proof conclusions. (*In re I.W.*, *supra*, 180 Cal.App.4th at pp. 1528-1529.) This is simply not a case where undisputed facts lead to only one conclusion.

Moreover, the fact finder is not obligated to accept direct evidence of a fact. (*Blank v. Coffin* (1942) 20 Cal.2d 457, 461.) Regardless of how overwhelming and persuasive plaintiffs believe their proof was, the trier of fact was within its power to reject that evidence and make findings consistent with that rejection, even if defendants did not introduce contrary evidence. (*Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370.) As an appellate court, we have no authority to interfere with this sort of decision because the nonacceptance of proffered evidence by a trier of fact is a factual determination—that a fact does not exist—no less than is the acceptance by the trier of fact of proffered evidence—that a fact does exist. Applied to plaintiffs' case, this means the trial court, as fact finder, could have been unpersuaded that defendants' acts or omissions made them liable for plaintiffs' claims. This court plays a different role in the judicial process than does the trial court, and we are obliged to respect that difference. (*Bennett v. City of Los Angeles* (1970) 12 Cal.App.3d 116, 120.)

Accordingly, we need not and will not consider plaintiffs' additional challenges to the underlying evidence and resulting trial court findings.

## **V. Alter Ego Liability**

The trial court concluded in its statement of decision that "Plaintiffs are indistinguishable from one another" for the purposes of the doctrine of unclean hands as Sinclair was acting for all of them, and Mauctrst was a "sham and alter ego" of Sinclair and Mauchley. Sinclair, Mauchley and Mauctrst operated as "an indistinguishable enterprise," with Sinclair having the authority to act on behalf of Mauchley and Mauctrst. Mauctrst was "a fiction designed to allow the misuse of the bankruptcy court and to

attempt to avoid Plaintiffs' obligations under various deeds of trust ... and other obligations of plaintiffs."

Plaintiffs contend the trial court erred in finding Sinclair was an alter ego of Mauctrst because (1) LLC's are treated differently than corporations for purposes of alter ego liability, (2) there is an insufficient showing of fraud to invoke alter ego liability, and (3) the statement of decision provides no basis for naming Sinclair an alter ego because he never acted outside the scope of a manager or legal representative of the LLC. Defendants counter that LLC's are treated like corporations for purposes of alter ego liability, and substantial evidence supports the trial court's findings. We affirm the trial court's alter ego rulings.

#### **A. LLC's and Alter Ego Liability**

Plaintiffs' contention that there are inherent differences between corporations and LLC's with respect to alter ego liability is refuted by statutory and case law. A limited liability company (LLC) is a hybrid business entity that combines aspects of both a partnership and a corporation. LLC's are formed under the Corporations Code and consist of "members" who own membership interests. An LLC has a legal existence separate from its members. It provides members with limited liability to the same extent enjoyed by corporate shareholders, yet allows members to participate actively in management and control. (9 Witkin, Summary of Cal. Law (10th ed. 2005) Partnership, § 136, p. 697.)

Members are not personally liable for the judgments of an LLC, solely by reason of being a member, but are liable under the same circumstances and to the same extent as corporate shareholders under common law principles of alter ego liability. (Corp. Code, § 17101, subd. (b); *People v. Pacific Landmark, LLC* (2005) 129 Cal.App.4th 1203, 1212.) Similarly, managers are not liable for the wrongful conduct of the LLC solely by reason of being a manager, but may be held accountable for personal participation in tortious or criminal conduct, even when performing duties as manager. (Corp. Code, § 17158, subd. (a); *People v. Pacific Landmark, LLC, supra*, at pp. 1212-1213.)

Accordingly, we will analyze the trial court's findings under common law principles of alter ego liability as applied to corporations.

**B. Sufficiency of Showing of Fraud**

Plaintiffs next contend there was an insufficient showing of fraud, or fraud directed at defendants, to impose alter ego liability. Not so. Whether a corporation or LLC is the alter ego of an individual is a question of fact. (*Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1072.) There are two requirements for finding alter ego liability: (1) a sufficient unity of interest and ownership between the corporation and the individual controlling it that the separate personalities of the individual and the corporation no longer exist and (2) treating the acts as those of the corporation alone will sanction a fraud, promote injustice, or cause an inequitable result. (*Ibid.*)

Under the second requirement, the trial court need not find a fraud. It is sufficient if the trial court determines that treating the acts as those of the company alone would promote injustice or create an unjust result. (*Misik v. D'Arco, supra*, 197 Cal.App.4th at p. 1074.) Thus, plaintiffs' claim that there is no finding of fraud or fraud toward defendants is irrelevant. In addition, as set forth below, the trial court's findings of fraudulent conduct are well supported by the evidence.

**C. Sufficiency of Evidence Supporting Alter Ego Liability Finding**

In determining whether there is sufficient unity of interest to impose alter ego liability, the court may consider a number of factors, including: the 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 or she is personally liable for debts of the corporation; identical directors and officers; failure to maintain adequate corporate records; disregard of corporate formalities; absence of corporate assets and inadequate capitalization; the use of a corporation as a mere shell, instrumentality, or conduit for the business of an individual; and whether treating the acts as those of the corporation alone promotes injustice or causes an unjust result. (*Misik v. D'Arco, supra*, 197 Cal.App.4th at p. 1073.)

Applying the pertinent factors to this case shows the trial court's alter ego findings are amply supported by the record. First, there was sufficient unity of interest between Mautrst and Sinclair. Sinclair set up Mautrst as a revocable trust for Mauchley in 1995. From its inception, Sinclair was the manager and ran its day-to-day affairs. In 1996, the Fox Hollow CC&R's, which Flake recorded while he owned Fox Hollow, stated they were to be returned to Mautrst at Sinclair's address when recorded. Mautrst did not own Fox Hollow property until July 1998.

Sinclair kept the Mautrst books and accounts at his law office. He or someone from his office were the only ones to pick up mail at the Mautrst post office box. Sinclair paid Mautrst's bills out of a "management account" that he used to pay bills for the properties of other clients. Sinclair could not recall if he deposited Fox Hollow rents for Mautrst in an account in his name. He deposited the \$300,000 College Guardian Loan funds that encumbered Fox Hollow into an account entitled "Richard C. Sinclair Rentals" and used more than half of that money to cure a default on another property. He was unable to produce original bank statements for a Mautrst checking account or other bank accounts for the period between April 1998 and July 1999.

Second, Mautrst lacked assets. Sinclair testified in the Mautrst bankruptcy proceeding that his agreement with Mautrst provided that the rents and funds generated by refinances did not become Mautrst's property until after operating expenses and fees due him were paid. And because Mautrst had operated at a deficit since its inception, none of the funds Sinclair had received were ever the property of Mautrst. Mautrst was overdrawn by \$7,300 when the bankruptcy schedule was prepared. According to Sinclair, the operating deficit was due to capital improvements but the record did not disclose what capital improvements, if any, were funded. Documents filed in the Mautrst bankruptcy indicated the building permits, firewalls, utility relocations, and remodeling required for the PUD conversion remained to be completed.

Further, Mautrst executed a note in favor of Flake and Capstone Trust for \$271,000. Flake testified that, despite the Mautrst bankruptcy, Mauchley and Sinclair

continued to recognize the obligation, and Flake believed they intended to pay.

Mauchley testified he believed he was indebted to Flake individually and pursuant to Mautrst.

Third, Sinclair used Mautrst as a conduit for his own business interests. In the bankruptcy petition, Sinclair claimed Mautrst owed him \$400,000 but had no documents to support his claim. In schedule F of the petition, he asserted an unsecured, nonpriority claim of \$272,500. At trial, he could not recall the basis for either claim or whether the \$272,500 debt was included within or in addition to the \$400,000 debt.

In addition, Sinclair took various positions regarding Mautrst's ownership depending on the circumstances. Sinclair prepared the Mautrst bankruptcy petition that Mauchley signed as the member-manager and Sinclair signed as the attorney of the debtor. The petition stated that Mauchley and his wife each owned 50 percent of Mautrst. The bankruptcy trustee reported Sinclair testified at the meeting of creditors that Mauchley owned 25 percent and his wife owned 75 percent of Mautrst. Mauchley testified at trial that he is and has been the only owner of Mautrst. In 2008, Sinclair sent a letter to Fox Hollow tenants notifying them to deliver up possession of the common area, which he signed, "RICHARD C. SINCLAIR, ESQ. [¶] Member/Manager for Mautrst, LLC." He testified at his deposition that he was a managing member of Mautrst. And, while he contradicted those statements at trial and testified he was only a manager, he referred to Mautrst as "us." Finally, while Mautrst owned Fox Hollow, Sinclair filed verified unlawful detainer actions against Fox Hollow tenants that stated Sinclair and Mauchley owned the property.

On appeal, plaintiffs set forth "facts" to counter the trial court's findings. Many, however, are not followed by a citation to the record. Because those arguments are not supported by the necessary citations to the record, they are deemed to have been waived. (*Duarte v. Chino Community Hospital, supra*, 72 Cal.App.4th at p. 856.)

Plaintiffs also assert the bankruptcy court "investigated" Sinclair and "clearly found that Sinclair was a manager, but not a member." The only relevant evidence we

have found is the bankruptcy trustee's statement: "[Mauctrst] is an LLC wholly owned and controlled by Gregory Mauchley and Richard Sinclair."

Finally, plaintiffs assert that Sinclair testified, without contradiction, that oral modifications to the signed operating agreement permitted Mauchley and Sinclair to file suit in their own names while doing so for Mauctrst. However, while the record includes an unsigned operating agreement that was filed with the Mauctrst bankruptcy, plaintiffs failed to produce at trial a signed operating agreement that delineated the responsibilities of Sinclair and Mauchley, and Sinclair's testimony lacked credibility.

In summary, substantial evidence supports the trial court's findings that Mauctrst was "a sham and alter ego for" Mauchley and Sinclair, and "a fiction designed to allow the misuse of the bankruptcy court and to attempt to avoid Plaintiffs' obligations under various deeds of trust ... and other obligations of plaintiffs."

Sinclair used Mauctrst to make money for himself, Flake, and Mauchley. As such, treating Sinclair's acts as those of Mauctrst alone would promote injustice and cause an inequitable result.

## **STANLEY FLAKE'S APPEAL**

### **I. Motion to Dismiss Based on the Sinclair Notice of Appeal**

#### ***Procedural Summary***

Sinclair filed a timely notice of appeal from the judgment for "Plaintiffs." At the time, this court's docket showed Daniel S. Truax of the law firm of Neumiller & Beardslee, who had been plaintiffs' trial counsel, as Flake and Capstone Trust's counsel. In February 2010, Mr. Truax notified the court that his firm had been relieved as counsel for plaintiffs. Nevertheless, for a number of months after that, the court's docket continued to indicate that Mr. Truax was Flake's and/or Capstone Trust's appellate counsel.

In February 2010, attorney Michael Abbott filed in superior court a substitution of attorney form for Flake and Capstone Trust for posttrial matters pending in the trial court. The form, however, states that Flake's former legal representative was Sinclair. On

March 31, 2010, in correspondence to defendants' counsel regarding briefing for the appeal, Mr. Abbott wrote that he was not Flake's attorney for the appeal; Mr. Truax was the attorney of record according to the Court of Appeal docket and would continue to be until Truax permitted Abbott to replace him on the appeal. Mr. Abbott added that Flake, both individually and as trustee, had "NEVER" consented to appointing Sinclair as his appellate counsel. Defendants then moved to dismiss the appeal as to Flake, individually and as trustee of Capstone Trust, on the ground that the only notice of appeal was filed by Sinclair, who was not authorized to represent Flake or Capstone Trust on appeal.

Flake did not file opposition to the motion, and on June 21, 2010, this court dismissed Flake's and Capstone Trust's appeal.

In July 2010, Flake, through Mr. Abbott, moved to vacate the dismissal and reinstate the appeal. He explained that neither he nor Capstone Trust had any interest in the merits of the Sinclair plaintiffs' appeal. In a posttrial order of June 3, 2010, however, the trial court amended the judgment and awarded defendants \$750,000 in attorney fees imposed jointly and severally against all plaintiffs, including Flake as an individual and as trustee of Capstone Trust. Flake, as an individual and as trustee, appealed those orders on July 1, 2010, with Mr. Abbott as appellate counsel.<sup>11</sup> Flake declared that, based on the court's Web site, he believed he was still represented by Mr. Truax and that his law firm was handling the appeal. He did not think Sinclair was his attorney. Because Mr. Truax did not file a notice of appeal for Flake, however, and Sinclair's notice of appeal was on behalf of "plaintiffs," Sinclair had acted on his behalf in filing the timely appeal, albeit without his express consent. We vacated the dismissal and reinstated the appeal.

Defendants filed a motion to reconsider the order reinstating the appeal. Defendants pointed out that Flake knew or should have known that Mr. Truax was not his

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<sup>11</sup>*Flake v. Katakis*, F060574 is the third appeal in this litigation. Flake replaced Mr. Abbott with the Downey Brand law firm before the briefs were filed.

appellate counsel. Mr. Truax, in a letter of September 24, 2009, which apparently covered a number of topics, stated that his office would not handle any appeal of the matter. The letter was sent to Flake “c/o” the car dealership he owned before he retired. Flake was also served with Sinclair’s motions for extensions of time to designate the record on appeal, which stated that the law firm of Neumiller & Beardslee was not involved in the appeal. These, too, were sent to the car dealership address.

Flake and Capstone Trust opposed the motion to reconsider. Flake declared he was told Mr. Truax would handle the appeal. He was not aware that Sinclair filed the notice of appeal rather than Mr. Truax and, given the misinformation on this court’s Web site, which continued to list Mr. Truax and the Neumiller & Beardslee law firm as counsel for Flake and or Capstone Trust through at least June 2010, he was unaware that Truax and his law firm had been released as his attorney before this court. He adopted the actions of Sinclair in filing the appeal. Further, the Sonora address for the car dealership is not where he resides or goes to since his retirement; he lives in Jamestown.

In August 2010, this court deemed the motion to reconsider to be a new motion to dismiss the appeal and ordered Flake and Capstone Trust to respond. Subsequently, we deferred ruling on the motion until the appeal was decided on the merits. That order incorporated the original motion to dismiss in the renewed motion to dismiss and directed the parties to discuss the issue in their briefs.

### ***Current Motion***

Defendants moved to dismiss Flake and Capstone Trust’s appeal on the ground that Sinclair filed the only notice of appeal and he was not authorized to act for Flake and Capstone Trust. California Rules of Court, rule 8.100(a)(1) provides that the notice of appeal must be signed by the appellant, the appellant’s attorney or another person authorized to sign on the appellant’s behalf. As such, a notice of appeal signed by an unauthorized attorney or person is ineffective to preserve the right to appeal. (*Edlund v. Los Altos Builders* (1951) 106 Cal.App.2d 350, 357.)

Flake, individually and as trustee for Capstone Trust (Flake plaintiffs), responded that the court must construe liberally a technically noncomplying notice of appeal to protect the right to appeal when an appeal, like theirs, is taken in good faith. (*In re Malcolm D.* (1996) 42 Cal.App.4th 904, 910.)

Here, Sinclair timely filed a notice of appeal for all “plaintiffs,” which this court reasonably construed to include the Flake plaintiffs. After the time to file a notice of appeal had passed, however, new trial counsel, who was not then retained as appellate counsel for the Flake plaintiffs, told defendants’ counsel that Flake had “never ... consented to appointing ... Sinclair to be his appellate counsel.” (Some capitalization omitted.) When Flake realized the implications of that statement, Flake “adopted” Sinclair’s filing of the notice of appeal on his and Capstone Trust’s behalf.

### ***Analysis***

The issue presented is the legal effect of the Flake plaintiffs’ adoption of the notice of appeal filed by Sinclair. A client must consent to the appeal. Therefore, a notice of appeal is ineffective when signed by an attorney or anyone else who did not have the appellant’s authority to file the appeal. (*Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 192, fn. 3.) A few cases address unauthorized notices of appeal. In *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, the court held that a joint venturer’s notice of appeal was ineffective. The notice was signed by the codefendants’ counsel, but the joint venturer was represented by separate counsel and did not authorize the codefendants’ attorney to file a notice of appeal on his behalf. (*Id.* at p. 1048, fn. 9; see also *Edlund v. Los Altos Builders, supra*, 106 Cal.App.2d at p. 357 [notice of appeal signed by discharged attorney was ineffective where substitution of new attorney was on file].)

Likewise, in *In re Alma B.* (1994) 21 Cal.App.4th 1037, the notice of appeal was ineffective where circumstances indicated an attorney signed the notice of appeal for his client without her consent. The appellant mother did not attend the hearing that resulted in the appealed order. Counsel, who signed the notice of appeal on her behalf, did not

know her whereabouts. But he knew from past contacts that she objected to the termination of her parental rights and he believed she would want to appeal. (*Id.* at p. 1043.) Counsel’s belief the mother objected to the order did not give him authority to appeal the order entered after her disappearance. (*Ibid.*)

On the other hand, the signature requirement on a notice of appeal is liberally construed in favor of its sufficiency. A signing attorney need not be the appellant’s attorney of record. (*Estate of Hultin* (1947) 29 Cal.2d 825, 832.) Any person authorized by the appellant may sign the notice of appeal on the appellant’s behalf. (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1216-1217.) And the court will conclude the signing party was authorized to act on behalf of the nonsigning party in the absence of a clear and satisfactory showing that such authority was lacking. (*Ibid.* [notice of appeal signed by one party that did not identify the appealing party, but identified a judgment against two parties, construed as appeal by both parties]; *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 853 [notice of appeal was sufficient though respondent claimed appellant’s signature was forged, absent evidence person who signed notice was not authorized to act on appellant’s behalf].)

In *Ehret v. Ichioka* (1967) 247 Cal.App.2d 637, the notice of appeal filed on behalf of the “plaintiffs” was signed by a nonattorney coplaintiff. The defendant unsuccessfully moved to dismiss the appeal on the ground the signing plaintiff was not an attorney. (*Id.* at p. 640.) The notice of appeal was valid. The California Rules of Court permitted the notice of appeal to be signed by a party regardless whether the party or his or her coplaintiffs were still represented by trial counsel. Because such notices were liberally construed, the court concluded the plaintiff, as agent, could sign the notice on behalf of the other plaintiffs. Further, in opposition to the motion to dismiss, the plaintiff filed a document executed by her coplaintiffs, which the court regarded “as adequate proof either of her original authority or of ratification.” (*Ehret*, at p. 641, fn. 2.)

*Ehret v. Ichioka*, *supra*, 247 Cal.App.2d 637 is not factually identical to this case because there was no indication the coplaintiffs had not authorized the plaintiff to sign

the notice of appeal on their behalf when she did so. With a silent record, the court assumes authorization. (*In re Malcolm D.*, *supra*, 42 Cal.App.4th at p. 910.) In contrast, the record here includes the statement that Flake did not consent to appointing Sinclair to be his appellate counsel. It, however, also includes Flake's belated adoption of Sinclair's filing of the notice of appeal on his behalf. To the extent Flake's adoption amounted to ratification, under *Ehret*, Sinclair's notice of appeal was effective for Flake, individually and as trustee for Capstone Trust.

Accordingly, the notice of appeal was effective for the Flake plaintiffs and the motion to dismiss is denied.

## **II. The Flake Plaintiffs' Challenge to the Unclean Hands Affirmative Defense**

### ***Procedural Summary***

The Flake plaintiffs, in their opening brief,<sup>12</sup> challenge only the trial court's unclean hands findings as to them. Defendants submit that because plaintiffs do not challenge the trial court's rulings against them under section 631.8, even if the trial court erred in applying the unclean hands defense to them, the judgment must be affirmed, because plaintiffs did not prevail on the merits of their monetary claims. Thus, any error in the unclean hands affirmative defense finding is not prejudicial because it does not impact the judgment entered against the Flake plaintiffs on their claims for relief.

The Flake plaintiffs respond that plaintiffs' claims were not for monetary relief alone. And the trial court decided the issues relating to the foreclosures of some lots and the interference claims relating to other lots separately from the section 631.8 motion rulings. Thus, the section 631.8 findings pertaining to damages do not affect our ability to reverse the judgment as to those causes of action. Further, if this court concludes that the unclean hands defense is not applicable to the Flake plaintiffs as to even some causes of action, that conclusion will impact the judgment and the finding that defendants were the prevailing parties for purposes of attorney fees.

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<sup>12</sup>They raise an additional issue in their reply brief.

In the accompanying motion for sanctions, filed after briefing was complete, defendants note that the trial court found the Flake plaintiffs failed to prove any of their claims—monetary, injunctive, and declaratory—on the merits. Thus, even if the trial court erred in applying the unclean hands affirmative defense, the Flake plaintiffs failed to prove any of their claims, so defendants remain the prevailing parties.

In opposition to the motion, the Flake plaintiffs assert their appeal is not indisputably meritless because the trial court denied recovery of certain claims on the basis of the unclean hands defense. Specifically, regarding the foreclosures of lots 1 and 19, the trial court denied recovery for wrongful accounting and noncompliance with the Davis-Stirling Common Interest Development Act (Davis-Stirling Act; Civ. Code, § 1350 et seq.) on the basis of unclean hands. Further, regarding the foreclosures of lots 3, 7, 9, and 14, the trial court denied the claim that the foreclosures violated the automatic stay in the Mauctrst bankruptcy and the preliminary injunction based on the unclean hands defense. Thus, this court’s determination that the trial court erred in finding unclean hands would require reversal of these claims and a reconsideration of the prevailing party determination.

### *Analysis*

#### **A. The Record**

The Flake plaintiffs’ position is not supported by the statement of decision. Regarding lots 1 and 19, plaintiffs’ claimed in their posttrial brief that the FHOA foreclosures of those lots were invalid because: (1) the amounts purportedly due were incorrect, (2) the special assessments were not valid under the governing documents, (3) there were material defects in the prelien notices in violation of the Davis-Stirling Act, and (4) the foreclosures were not authorized by an appropriately constituted board of directors.

The trial court ruled on these claims as follows: (1) The error in the deficiency notice was neither material nor prejudicial as plaintiffs went 22 months without paying assessments or dues before foreclosure. Plaintiffs were not misled nor prejudiced by the

mistake in the accountings, and Sinclair's claim of an attorney fee offset was not credible nor supported by the law; (2) the Davis-Stirling Act did not require strict compliance and plaintiffs had failed to show that any failure to comply resulted in prejudice. Further, plaintiffs' unclean hands "is a basis to deny Plaintiffs' requested relief"; and, (3) plaintiffs' challenges to the authority of the FHOA board of directors were not supported by the evidence and were barred under equitable principles.

Regarding lots 3, 7, 9, and 14, plaintiffs claimed the foreclosures of those lots should be set aside because: (1) the foreclosures of lots 7, 9, and 14 violated the Mautrst bankruptcy automatic stay, (2) the foreclosure of lot 3 violated the preliminary injunction, (3) plaintiffs were not credited with payments on those lots, (4) neither ContiMortgage nor CEMG acquired the right to foreclose, (5) ContiMortgage had no interest to transfer to CEMG, and, (6) Lonestar had no authority to conduct the foreclosure sale and no preforeclosure notice was provided.

The trial court ruled that the foreclosure sales did not violate the automatic stay because the sales occurred after the bankruptcy trustee abandoned the property back to the debtor. Also, plaintiffs failed to persuade the trial court that they could raise the automatic stay claim in state court or that recording a notice of default during the automatic stay rendered void a foreclosure sale that occurred after the bankruptcy trustee abandoned the property. And plaintiffs' failure to tender the mortgage payments on the lots required that they be denied relief. Further, the trial court declined to award plaintiffs any relief because of their unclean hands in the Mautrst bankruptcy.

As to the foreclosure in violation of the preliminary injunction, the trial court ruled that plaintiffs' failure to make monthly payments for almost three years while continuing to collect rents constituted unclean hands that barred relief on that claim.

The trial court found plaintiffs' remaining arguments neither persuasive nor supported by the law. The lenders did not have to accept partial payments. Plaintiffs' challenge to ContiMortgage's ownership was refuted by the evidence, and plaintiffs' ownership claims were barred by the doctrine of unclean hands. There was no evidence

to support the claim that the wrong trustee conducted the sale, and no prejudice resulted from the claimed inadequate preforeclosure notice. The evidence showed the required notice period was exceeded.

Regarding lots 11 and 18, plaintiffs claimed defendants interfered with their rights to those lots. The trial court found no convincing evidence that defendants interfered with any contract or economic advantage relative to the settlement agreement with GMAC.

The trial court in its statement of decision denied every claim—except that related to lot 3 and the preliminary injunction—on the merits. On most of these claims, the trial court also found that plaintiffs could not recover because of their unclean hands. As such, even if Flake’s claim that the unclean hands findings as to him were not supported had merit, defendants would remain the prevailing party because they prevailed on the merits of virtually every claim against Flake.

## **B. The Law**

An error in the trial court’s findings of fact is not grounds for reversal, unless a correction of the error will lead to a different result. (§ 475.) If there are findings of fact that necessarily control the judgment, the presence or absence of findings on other issues is inconsequential. (*Alpine Ins. Co. v. Planchon* (1999) 72 Cal.App.4th 1316, 1320; *Chapman v. Sky L’Onda etc. Water Co.* (1945) 69 Cal.App.2d 667, 680-681 [if judgment is supported by unchallenged findings, it is not ground for reversal that the other findings are unsupported by evidence].)

Here, the Flake plaintiffs do not challenge the trial court’s findings against them on the merits of each of their claims for relief. They limit their challenge to the findings on the affirmative defense. Even if the affirmative defense findings were unsupported, however, that would not change the judgment because it would still be affirmed based on the findings on the underlying claims for relief. Accordingly, we will not consider whether the unclean hands findings as to the Flake plaintiffs is supported because, even if they are not, we would still affirm the judgment.

### III. Motion for Sanctions

After briefing was complete, defendants filed a motion for sanctions against the Flake plaintiffs for pursuing a frivolous and dilatory appeal. Defendants requested \$62,949.18, for the attorney fees they incurred in responding to the Flake plaintiffs' brief and preparing the motion for sanctions. The Flake plaintiffs filed opposition to the motion. They assert their appeal is not indisputably meritless, and they challenge the monetary amount defendants requested. We conclude that while the Flake plaintiffs' challenge to the unclean hands findings was futile, it was not frivolous.

Section 907 permits courts to impose sanctions when an appeal is frivolous or taken solely for delay. (See also Cal. Rules of Court, rule 8.276(a)(1).) An appeal is deemed frivolous under only two circumstances: when it is prosecuted for an improper motive or when it is indisputably without merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Here, there is no evidence the Flake plaintiffs pursued their appeal for an improper motive—to harass defendants or delay the effect of the adverse judgment. Hence, the only ground for finding the appeal frivolous is lack of merit—that any reasonable attorney would agree the appeal is completely without merit. (*Ibid.*)

In determining whether an appeal is frivolous, courts recognize that appellate counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely they will prevail. Further, sanctions pose a serious chilling effect on the assertion of a litigant's rights. Thus, an appeal that is simply without merit is not by definition frivolous and should not incur sanctions. And courts should impose sanctions sparingly to deter only the most egregious conduct. (*In re Marriage of Flaherty, supra*, 31 Cal.3d at pp. 650-651.)

Weighing the chilling effect of sanctions against the factually complex issues present here, we conclude that a reasonable attorney may well have believed in their merit. Accordingly, this appeal does not justify the imposition of sanctions against the Flake plaintiffs. (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1296 [although litigant

attempted to appeal a nonappealable order, the appeal was not frivolous].) The motion for sanctions is denied.

#### **IV. Judicial Estoppel and the Enforceability of the 2007 Settlement Agreement**

The Flake plaintiffs raise this issue in their reply brief. Concurrently, they requested judicial notice of a declaration of Sinclair filed in a related federal action, which they state is relevant to the issue. They urge us to permit them to raise this new theory on appeal because it presents a pure issue of law based solely on the facts in the record.

Plaintiffs concede they did not argue judicial estoppel in the trial court but, instead, sought to enforce the settlement agreement under section 664.6. They further concede that judicial estoppel is not a novel legal concept but argue that *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39 (*Blix Street Records*) created new law when it applied the doctrine to an otherwise unenforceable settlement agreement. Further, plaintiffs did not raise the issue in their opening brief because, at the time, they did not have all the relevant facts and evidence concerning the settlement agreement because they had difficulty obtaining a complete record from trial counsel. We decline to consider the issue.

An appellant cannot assert a different legal theory to support a motion whose ruling he or she challenges on appeal. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 110-111 [appellant, who unsuccessfully moved to vacate judgment under one code section, could not challenge the judgment on appeal under another code section].) A party is not permitted to adopt a different theory on appeal because it is unfair to the trial court and manifestly unjust to the opposing party. (*Ibid.*) An appellant, however, may raise a new theory pertaining only to questions of law on undisputed facts. This is because there is no unfairness to the opposing party, who has not been deprived of the opportunity to litigate disputed factual issues. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.)

Appellate courts are more inclined to permit a new theory where, after trial, there has been a change in decisional law that would have validated the new theory urged on appeal. (*Palmer v. Shawback* (1993) 17 Cal.App.4th 296, 300.) This only applies, however, where the new theory does not involve a question of fact that was not put in issue in the trial court. (*McDonald's Corp. v. Board of Supervisors* (1998) 63 Cal.App.4th 612, 618.)

The Flake plaintiffs submit that the issue of whether defendants were judicially estopped from denying the enforceability of the settlement agreement presents a pure question of law that can be decided on the facts developed in the record. We disagree.

Judicial estoppel applies when (1) a party has taken two positions, (2) in a judicial proceeding, (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. (*Blix Street Records, supra*, 191 Cal.App.4th at p. 47.) Judicial estoppel presents issues of fact, to be decided according to the particular evidence and circumstances of each case. (*Id.* at p. 46.)

Here, because the issue was not raised in the trial court, there is no evidence as to whether the first position taken—that there was an enforceable settlement agreement—was the result of ignorance, mistake, or fraud. The limited evidence in the record detailing the parties' continuing disagreements regarding what was required of each under the settlement agreement supports an inference that the parties were mistaken or ignorant in their initial belief they had settled the complicated matter. As such, this is not a proper case to consider on appeal.

The Flake plaintiffs submit we can decide whether judicial estoppel applies to the facts developed in the record as a question of law. (*Blix Street Records, supra*, 191 Cal.App.4th at p. 46.) Their argument ignores the unfairness that flows to the trial court and the opposing party when the appellate court decides an issue when the facts relevant to the issue were not developed in the trial court. (*In re Marriage of Eben-King & King, supra*, 80 Cal.App.4th at pp. 110-111.)

Accordingly, we decline to consider whether defendants are judicially estopped from denying the enforceability of the settlement agreement because this issue of fact was not raised in the trial court. Because we decline to consider the issue, the Flake plaintiffs' companion request that we take judicial notice is irrelevant. Both requests are denied.

### **DEFENDANTS' CROSS-APPEAL**

The sole issue defendants raise on their appeal is whether the trial court erred in rejecting their defense that the doctrine of res judicata barred plaintiffs' claims in relation to lots 3, 7, 9, and 14.

#### ***Procedural Summary***

##### **A. Prior Action**

In May 2000, in Stanislaus Superior Court, No. 254996, Mauchley and Mautrst sued Lonestar and ContiMortgage to enjoin pending foreclosure sales on lots 9 and 14. Among other things, Mauchley and Mautrst sought declaratory relief as to whether the amounts in the notices of default were correct, whether ContiMortgage owned the notes, whether the trustee was authorized to act on behalf of the note owner, whether the notices of default filed during the Mautrst bankruptcy were valid and whether the notice of sale procedures were proper. Although the complaint referred only to lots 9 and 14, the preliminary injunction, which Sinclair prepared and presented in court to the judge for signature at the conclusion of the hearing, enjoined foreclosure sales for "any Lots," including lots 3 and 7 in the Fox Hollow subdivision.

In September 2003, the trial court dissolved the preliminary injunction and dismissed the complaint with prejudice because Mauchley and Mautrst had failed to make monthly mortgage payments to ContiMortgage's successor in interest, Fairbanks Capital Corp., as ordered by the trial court. Judgment was entered in favor of the defendants and against Mauchley and Mautrst in June 2004.

## **B. Current Action**

Defendants contend the primary right at issue in the prior action was whether ContiMortgage and Lonestar had the right to complete the foreclosures of lots 3, 7, 9, and 14. Thus, the dismissal of that complaint with prejudice was a determination on the merits adverse to Mauchley and Mauctrst that entitled CEMG, as successor of ContiMortgage, to assert a res judicata bar to plaintiffs' wrongful foreclosure claims regarding lots 3, 7, 9, and 14.

The trial court ruled against defendants. It was not persuaded the issue decided in the prior action was identical to the issue in this action because the prior case did not specifically include lots 3 and 7.

### ***Analysis***

The doctrine of res judicata has two aspects. In its narrowest form, known as "claim preclusion," res judicata precludes parties or their privies from relitigating a cause of action that has been finally resolved in a prior action. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828.) Res judicata also includes the broader doctrine of collateral estoppel, known as "issue preclusion." Under collateral estoppel, a party is precluded from relitigating an issue necessarily decided in the prior proceeding in a subsequent lawsuit on a different cause of action. (*Ibid.*)

While res judicata bars relitigation of identical claims or causes of action, collateral estoppel precludes a party from redisputing issues decided against the party in an earlier action, even when those issues bear on different claims raised in a later case. Further, because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve identical parties or their privies. Only the party against whom the doctrine is invoked must be bound by the prior proceeding. (*Vandenberg v. Superior Court, supra*, 21 Cal.4th at p. 828.)

At trial, defendants argued plaintiffs' claim for wrongful foreclosure was precluded. They did not argue that specific issues were barred by collateral estoppel. Thus, defendants invoked the claim preclusion aspect of res judicata.

The required elements for applying the doctrine to a claim or cause of action are: (1) the claim raised in the present action is identical to a claim litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) We review de novo whether the doctrine of res judicata barred plaintiffs' claims regarding lots 3, 7, 9, and 14. (*Krell v. Gray* (2005) 126 Cal.App.4th 1208, 1217.)

We need not decide whether defendants met the latter two requirements. We agree with the trial court that defendants failed to establish that the claims were identical. We look to the "primary rights" theory to determine whether the claims are identical for purposes of claim preclusion. Under this theory, the cause of action is the right to obtain redress for a harm suffered, not the particular theory asserted by the litigant. Even if a plaintiff asserts multiple legal theories to support the claim, if the plaintiff alleges a single injury, he or she has only one claim for relief. Thus, a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though the plaintiff presented a different legal ground for relief in the second action. (*Boeken v. Philip Morris USA, Inc.*, *supra*, 48 Cal.4th at pp. 797-798.)

Plaintiffs' wrongful foreclosure claims as to lots 3, 7, 9, and 14 in the present action are not identical to Mauctrst and Mauchley's claims in the prior action. The claims in the prior action were aimed at stopping the lender and mortgage servicer from completing the pending foreclosures on lots 9 and 14. In this action, plaintiffs sought to set aside the foreclosures on lots 3, 7, 9, and 14 and for damages from Katakis and CEMG, who ultimately purchased those lots.

Defendants submit the failure to include lots 3 and 7 in the prior action is immaterial. The same claims made in relation to lots 9 and 14 could have been made with respect to the foreclosures on lots 3 and 7. Defendants are correct on the law: A prior judgment is res judicata on matters that were raised or could have been raised in the prior proceeding. (*Warga v. Cooper* (1996) 44 Cal.App.4th 371, 378.) The record does

not show, however, that the same claims could have been raised regarding lots 3 and 7. The various documents comprising the record of the prior action address lots 9 and 14 only. They do not disclose whether the same claims could have been made as to lots 3 and 7. As such, defendants failed to show that the claims in the two actions were identical.

**DISPOSITION**

The judgment is affirmed. The defendants’ motion for reconsideration, deemed a renewed motion to dismiss the appeal, is denied. The defendants’ motion for sanctions is denied. The defendants’ motion to dismiss Lairtrust, LLC, is denied as moot. The Flake plaintiffs’ request that we take judicial notice is denied. The defendants are awarded their costs on appeal. The trial court is directed to determine the amount of attorney fees to be awarded to defendants for legal services on appeal. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1112.)

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CORNELL, J

WE CONCUR:

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WISEMAN, Acting P.J

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LEVY, J.