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Attorneys for Plaintiffs and Cross-Defendants
VILLAS ON OSWEGO, LLC, a California limited
liability company; CHRISTOPH TRIBULL, an
individual; and SHIU-MING ELLIS, an individual

FILED
Superior Court of California
County of Los Angeles
09/08/2025

David W. Slayton, Executive Officer / Clerk of Court

By: M. Jones Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

VILLAS ON OSWEGO, LLC, a California
limited liability company; CHRISTOPH
TRIBULL, an individual; and SHIU-MING
ELLIS, an individual,

Plaintiff,

v.

ANDREW NOWACZEK, an individual;
and MARTA LITWIN, an individual,
and DOES 1-10, inclusive,

Defendants.

ANDREW NOWACZEK, an individual; and
MARTA LITWIN, an individual; VILLA
NOVA DEVELOPING, INC., a California
corporation;

Cross-Complainants,

v.

VILLAS ON OSWEGO, LLC, a California
limited liability company; CHRISTOPH
TRIBULL, an individual; and SHIU-MING
ELLIS, an individual; ROES 1 through 10,

Cross-Defendants.

Case No. 20GDCV01045

[Assigned for all purposes to Judge Jared D.
Moses, Department P]

~~[PROPOSED]~~ JUDGMENT

Complaint Filed: June 29, 2021
Trial Date: June 24, 2024

1 This matter came on regularly for trial before the Honorable Jared D. Moses, Judge
2 of the Superior Court, in Department O of the Los Angeles County Superior Court. The
3 trial commenced on June 24, 2024 and concluded with the matter deemed submitted on
4 April 7, 2025. Pursuant to California Code of Civil Procedure section 632 and California
5 Rules of Court, Rule 3.1590, the Court issued its Final Statement of Decision on June 26,
6 2025, which is attached hereto as **Exhibit A** and incorporated herein by reference.

7 Having considered the evidence presented at trial, the testimony of witnesses, the
8 arguments of counsel, the proposed statements of decision, responsive pleadings, and
9 additional evidence submitted pursuant to the Court's orders, the Court enters judgment as
10 follows, consistent with the Final Statement of Decision:

11
12 **JUDGMENT**

13 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

14 1. On Plaintiffs' Complaint against Defendants Andrew Nowaczek and Marta Litwin:

15 a. On the First Cause of Action (Dissociation of a Member), Defendant Andrew
16 Nowaczek is dissociated as a member of Villas on Oswego, LLC, effective immediately.

17 b. On the Second Cause of Action (Fraud), Third Cause of Action (Conspiracy to
18 Commit Fraud), and Sixth Cause of Action (Elder Abuse), Plaintiffs Christoph Tribull and
19 Shiu-Ming Ellis take nothing, and judgment is entered in favor of Defendants Andrew
20 Nowaczek and Marta Litwin.

21 c. On the Fourth Cause of Action (Conversion), Plaintiffs Villas on Oswego, LLC,
22 Christoph Tribull, and Shiu-Ming Ellis are awarded \$2,038,678 against Defendants Andrew
23 Nowaczek and Marta Litwin, jointly and severally, apportioned as follows:

- 24 o Christoph Tribull: \$1,834,810.20 (90%)
25 o Shiu-Ming Ellis: \$203,867.80 (10%)

26 d. On the Fifth Cause of Action (Breach of the Implied Covenant of Good Faith and
27 Fair Dealing), Plaintiffs are awarded \$2,290,176 against Defendant Andrew Nowaczek,
28 apportioned as follows:

1 ○ Christoph Tribull: \$2,061,158.40 (90%)

2 ○ Shiu-Ming Ellis: \$229,017.60 (10%)

3 e. As to the damages awarded to Plaintiffs on the Fourth and Fifth Causes of
4 Action, such damages are cumulative, such that the total damages awarded to Plaintiffs
5 against Defendants Andrew Nowaczek and Marta Litwin, jointly and severally is
6 \$2,038,678, and the additional amount awarded to Plaintiffs solely against Nowaczek is
7 \$251,498.

8 f. On the Declaratory Relief Cause of Action, the Court declares that Plaintiffs'
9 right to monthly compound interest cuts off as of January 2017.

10 2. On Cross-Complainants' Cross-Complaint Against Cross-Defendants Villas on
11 Oswego, LLC, Christoph Tribull, and Shiu-Ming Ellis:

12 a. On the First Causes of Action (Breach of Fiduciary Duty) and Third Cause of
13 Action (Breach of the Implied Covenant of Good Faith and Fair Dealing), against Cross-
14 Defendant Christoph Tribull, judgment is entered in favor of Cross-Complainant Andrew
15 Nowaczek but no damages are awarded due to the application of the unclean hands doctrine,
16 as set forth in the Statement of Decision.

17 b. On the Second Cause of Action (Quantum Meruit), Cross-Complainant Villa Nova
18 Developing, Inc. takes nothing, and judgment is entered in favor of Cross-Defendant Villas
19 on Oswego, LLC.

20 c. On the Third Cause of Action (Breach of the Implied Covenant of Good Faith and
21 Fair Dealing), against Cross-Defendants Christoph Tribull and Shiu-Ming Ellis, judgment is
22 entered in favor of Cross-complainant Andrew Nowaczek against Cross-Defendant
23 Christoph Tribull, but no damages are awarded due to Cross-complainant Andrew
24 Nowaczek's unclean hands. As to Shiu-Ming Ellis, Cross-Complainant Andrew Nowaczek
25 takes nothing, and judgment is entered in favor of Cross-Defendant Shiu-Ming Ellis.

26 d. On the Declaratory Relief Cause of Action, the Court declares that Plaintiffs' right
27 to monthly compound interest cuts off as of January 2017.

28 3. Costs and Attorney's Fees:

1 a. Plaintiffs Villas on Oswego, LLC, Christoph Tribull, and Shiu-Ming Ellis are the
2 prevailing parties on the Complaint and are entitled to recover costs pursuant to California
3 Code of Civil Procedure section 1032. Plaintiffs shall file a memorandum of costs in
4 accordance with California Rules of Court, Rule 3.1700.

5 b. Cross-Defendants Villas on Oswego, LLC and Shiu-Ming Ellis are the prevailing
6 parties on the causes of action asserted against them in the Cross-Complaint and are entitled
7 to recover costs pursuant to California Code of Civil Procedure section 1032. Cross-
8 Defendants Villas on Oswego, LLC and Shiu-Ming Ellis shall file a memorandum of costs
9 in accordance with California Rules of Court, Rule 3.1700

10 c. Cross-Complainants and Christoph Tribull dispute who is the prevailing party on
11 the causes of action asserted against him in the Cross-Complaint. As such, the Court hereby
12 reserves jurisdiction to determine the prevailing party on the causes of action asserted by
13 Cross-Complainants against Christoph Tribull for purposes of awarding costs and attorney's
14 fees, if any, pursuant to Code of Civil Procedure sections 1032, 1033.5, and 1717, and
15 California Rule of Court 3.1702, following the entry of judgment.

16 d. The issue of attorney's fees, if any, shall be determined by post-judgment motion
17 pursuant to California Code of Civil Procedure section 1033.5(c) and California Rules of
18 Court, Rule 3.1702.

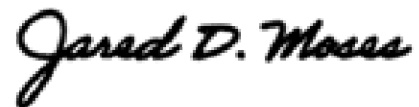
19 4. Interest:

20 a. The monetary awards in favor of Plaintiffs shall bear post-judgment interest at the
21 legal rate of 10% per annum from the date of entry of this Judgment until paid, pursuant to
22 California Code of Civil Procedure section 685.010.

23 5. This Judgment is final and appealable pursuant to California Code of Civil Procedure
24 section 904.1.

25 **IT IS SO ORDERED.**

26 Dated: 09/08/2025



JARED D. MOSES
Judge of the Superior Court

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Northeast District, Pasadena Courthouse, Department P

20GDCV01045

June 26, 2025

**VILLAS ON OSWEGO, LLC, A CALIFORNIA LIMITED
LIABILITY COMPANY, et al. vs ANDREW NOWACZEK, et
al.**

2:30 PM

Judge: Honorable Jared D. Moses
Judicial Assistant: Matthew Jones
Courtroom Assistant: Christina Ruiz

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Court Order

The matter is not called this date.

The Court's Tentative ruling subject to a party's objection under California Rule of Court 3.1590(g).

The Courts Finale Statement of Decision is attached to this minute order and filed this date. A copy of the statement of decisions is mailed to counsel and the original will be scanned and filed in electronic file of the court.

Plaintiff shall prepare a judgement consistent with this statement of decision.

The clerk is ordered to give notice.

Certificate of Mailing is attached.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

VILLAS ON OSWEGO, LLC, a California
limited liability company; CHRISTOPH
TRIBULL, an individual; and SHIU-MING
ELLIS, an individual,

Plaintiffs,

v.

ANDREW NOWACZEK, an individual;
and MARTA LITWIN, an individual,
and DOES 1-10, inclusive,

Defendants

ANDREW NOWACZEK, an individual; and
MARTA LITWIN, an individual, VILLA
NOVE DEVELOPING, INC., a California
Corporation

Cross-Complainants,

v.

VILLAS ON OSWEGO, LLC, a California
limited liability company; CHRISTOPH
TRIBULL, an individual; and SHIU-MING
ELLIS, an individual,, and ROES 1 through
10,
Cross-Defendants.

Case No.: 20GDCV01045

STATEMENT OF DECISION

FILED
Superior Court of California
County of Los Angeles
JUN 26 2025
David W. Slayton, Executive Officer/Clerk of Court
By: M. Jones, Deputy

Court's Tentative Ruling Subject to a Party's Objection under California Rule of Court Rule
3.1590(g)

This matter came on for court trial on June 25 through June 28, 2024, July 1 through July
3, 2024, and July 24, 2024. Todd E. Whitman represented Plaintiffs. Stephen D. Weisskopf
represented Defendants.

1 At the conclusion of testimony and closing arguments, the Court set a briefing schedule
2 as follows: counsel to file their proposed statements of decision by September 16, 2024,
3 followed by responsive/rebuttal pleadings from each side by September 30, 2024. All filings
4 were received by the Court and the matter was deemed submitted on September 30, 2024.
5 However, on October 14, 2024, while working on the tentative statement of decision, the Court
6 became aware that Plaintiff/Cross-Defendants had never answered the cross-complaint, which
7 was filed in 2021. Nor had Cross-Complainants ever requested that default be entered. The
8 Court contacted counsel, who agreed to enter into stipulations resulting in the parties filing an
9 amended complaint and amended cross-complaint, each adding a new cause of action for
10 declaratory relief. In addition, Plaintiffs/Cross-Defendants intended to file their answer to the
11 cross-complaint. The Court ordered the parties to file all new documents within 30 days.

12 As a result, the Court deemed the matter no longer under submission, effective October
13 15, 2024. The Court indicated that once the parties filed the new documents, the Court would
14 again deem the matter under submission. However, after further review, the Court determined
15 that it required additional information in order to issue a statement of decision. This required
16 that the evidentiary portion of the trial reopen. On October 22, 2024, the Court issued the
17 following minute order:

18
19 “The Court requires additional information before it can complete the proposed statement
20 of decision. Therefore, the evidentiary portion of the trial must reopen before the Court can
21 proceed further. The Court requests that the parties provide the following information:

22 1. The Court requires information on custom and practice in the residential construction
23 industry. Specifically, looking at the Villas on Oswego project in January of 2013, what would a
24 qualified construction industry expert expect to be the length of time necessary to complete the
25 project, accounting for any potential delays. The answer to this question turns not on what
26 actually happened in this case but one would expect at the inception of the project. The Court
27 invites the parties to retain their own experts, who will testify at trial, or answer the question by
28 stipulation.

2. The Court requires the present-day value of the project to be determined by a qualified
real estate appraiser. The parties may agree on one appraiser, or each engage the services of their
own appraiser, who would generate reports and testify at trial.

3. The Court requires an up-to-date accounting of net profits received by Plaintiffs for
renting the Villas on Oswego apartments, i.e. rent minus expenses. The time period for this

1 accounting will be from the date the first unit was rented to the present. The parties may handle
2 this in any manner they see fit and are encouraged to arrive at a stipulation."

3 In response to this minute order, the parties presented additional evidence and documents
4 to the Court as follows:

5 1. On March 20, 2025, the Court heard additional testimony from appraisers Bradley
6 Lofgren (for Plaintiffs) and Rod Hefington (for Defendants) regarding their opinions of the
7 present-day value of the project. The parties also submitted the reports by these witnesses.

8 2. On April 4, 2025, Plaintiffs submitted the following documents:

- 9 a. Plaintiffs/Cross-Defendants' answer to the cross-complaint.
- 10 b. Declarations of Christoph Tribull and Shuh-Ming Ellis.
- 11 c. Memorandum regarding net profits on Villas on Oswego.
- 12 d. Objection to Court's 10/22/24 order.

13 3. On April 7, 2025, Defendants submitted the following documents:

- 14 a. Defendants/Cross-Complainants brief regarding net operating income.
- 15 b. Declaration of Jeffrey Weinstein.

16 4. On April 7, 2025, the parties also submitted a joint stipulation which added claims for
17 declaratory relief and filed Cross-Defendants' answer.

18 The Court deemed the matter submitted on April 7, 2025, and now issues its tentative
19 statement of decision.

20 BACKGROUND AND THE PARTIES' CONTENTIONS

21
22 This case involves a troubled construction project in Pasadena to build a 33-unit
23 condominium complex. The project became known as Villas on Oswego. The parties involved
24 in this project were Plaintiffs Christoph Tribull and Shiuh-Ming Ellis and Defendants Andrew
25 Nowaczek and Marta Litwin. Cross-Complainant Villa Nova Developing, Inc. is Nowaczek's
26 construction company. Tribull and Ellis are retired aerospace executives with little construction
27 or real estate experience who wanted to invest in a real estate development project. The evidence
28 established that they had significant liquid assets on hand to put into the project. Nowaczek is a

1 licensed general contractor and real estate developer with many years' experience in the
2 construction and real estate development business. Litwin was his long-time associate who
3 served as project manager for Villas on Oswego.

4 Tribull and Nowaczek first met in the 1990s when Nowaczek did some remodeling work
5 on Tribull's home. In 2012, Tribull and Nowaczek resumed communication. Nowaczek invited
6 Tribull to invest in the Villas on Oswego project. Tribull, along with Ellis, ultimately accepted.
7 In late 2012, Nowaczek executed a limited liability company agreement for Villas on Oswego,
8 LLC. He was the sole signatory. In January 2013, Nowaczek, Tribull and Ellis executed the first
9 amendment to the Villas on Oswego, LLC agreement (FAA). In May 2015, Tribull, Ellis and
10 Nowaczek executed the second amendment (SAA) to the Villas on Oswego, LLC agreement
11 (SAA).

12 The Amended LLC agreement set forth the structure of the deal to develop, build and
13 market a 33-unit condominium complex. Under "Recitals," FAA Paragraph B stated that the
14 company has been formed "for the development and construction...of a 33-unit condominium
15 project and the sale of such units...." SAA Paragraph A reiterated this, using slightly different
16 language. The agreement contained numerous terms, including capital contributions by Tribull
17 and Ellis, distributions upon sale, management of the LLC, which was vested in Tribull, and an
18 integration clause, which was set forth in section 11.3 of the initial LLC agreement and
19 reiterated in both the FAA and SAA.

20 Tribull and Ellis were responsible for all capital contributions, which they agreed to
21 apportion. Tribull would provide 90% of capital contributions and Ellis would provide 10%.
22 (6/25/24 RT, p. 22:27-28, p. 23: 1-9). In a glaring omission, not one of these documents
23 expressly described Nowaczek's role. However, this term can be implied from the relationship
24 between the parties and their subsequent conduct (see generally *Moen v. Regents of University*
25 *of California* (2018) 25 Cal. App. 5th 845, 855). Nowaczek's role was to build the project. FAA
26 Paragraph 3 (and SAA Paragraph 3) contained the project's compensation terms. Once the
27 project was sold, the parties would be compensated as follows:
28

1 “[d]istributions shall be made to the Members in the following order of priority: (a) first,
2 to Tribull to the extent necessary to cause Tribull to receive an amount equal to his
3 unreturned capital contributions; (b) second, to Ellis to the extent necessary to cause Ellis
4 to receive an amount equal to her unreturned capital contributions; (c) third, to Tribull to
5 the extent necessary to cause Tribull to receive his preferred return; (d) fourth, to Ellis to
6 the extent necessary to cause Ellis to receive her preferred return ; and (e) thereafter, (i)
7 50% to Ellis and Tribull in proportion to their respective capital contributions, and (ii)
8 50% to Nowaczek. For purposes hereof, the term “**Preferred Return**” means, with
9 respect to Ellis and Tribull, a cumulative amount calculated like interest and accrued on
10 the balance standing from time to time of their respective unreturned Capital
11 Contributions at a rate of ten percent (10%) per annum, compounded monthly.”

12 For numerous reasons, the project ran into delays. The City of Pasadena issued the
13 building permit in August 2016. As work progressed, in April 2018 Tribull decided to change
14 the project from condominiums to apartments. His plan was to sell the entire building at some
15 unspecified point in the future. Plaintiffs continued making capital contributions toward
16 construction costs, ultimately contributing \$10,382,596.50. The parties agreed on this figure. At
17 trial, Plaintiffs argued that Defendants spent \$7,292,755 to build the project and, therefore,
18 committed fraud and converted \$3,089,841.50 of Plaintiffs’ capital contributions for unknown
19 purposes. Defendants disputed that amount, arguing that the testimony of Defendants’ expert,
20 Mike Zollman, established that Defendants spent \$8,343,918 on the project. Alternatively,
21 Defendants argued that Plaintiffs’ expert, Kim Onisko, opined that Defendants spent \$8,094,164
22 on the project. All these calculations were disputed at trial. Defendants argued that the disputed
23 funds over and above the construction costs were used to fund Defendants’ overhead costs on
24 the project. Defendants argued that this is standard practice in the construction business.
25 Plaintiffs argued that there was no provision in the deal, express or implied, that provided for
26 overhead.

27 The parties generally agreed that the project encountered significant turbulence en route
28 to completion. In 2018 and 2019, it became clear that Defendants had failed to pay numerous
subcontractors and suppliers. Between October 2018 and February 2019, at least eight
mechanic’s liens were recorded against the Project. Litwin testified that there were
approximately 15 liens in total (6/28/24 RT, 66: 15-16). Multiple lawsuits to foreclose on these

1 liens followed. It was undisputed that Defendants did not inform Plaintiffs of these liens or
2 lawsuits. In fact, the evidence indicated that Defendants intentionally kept Plaintiffs in the dark
3 about the liens and lawsuits. In 2020, Ellis learned through her own research that the property
4 was subject to multiple liens and lawsuits, some of which had resulted in default judgments.
5 Defendants had disclosed none of this to Plaintiffs.

6 In addition, the property taxes on the project had gone unpaid for years. The evidence
7 established that the property tax bills had been mailed to Defendants' business address, but
8 Defendants neither paid them nor forwarded them to Plaintiffs. In 2020, Ellis learned that the
9 project was scheduled for a tax auction. Defendants had failed to disclose this information as
10 well.

11 Nowaczek argued that in April 2018, Tribull, unilaterally and without his agreement,
12 changed the goal of the project from condominiums to apartments. In October 2019, Nowaczek
13 received a third amended LLC agreement, already signed by Tribull and Ellis, that expressly
14 changed the goal of the project from condominiums to apartments. Nowaczek declined to sign.
15 Nowaczek argued that this proposed amendment reflected Tribull's awareness that his unilateral
16 change to apartments violated the LLC agreement.

17 LEGAL ANALYSIS AND FINDINGS OF FACT

18 Plaintiff's Causes of Action

19 Plaintiffs brought six causes of action against Defendants:

- 20 1) Dissociation of a Member under Corporations Code § 17706.02(c) (as to Nowaczek)
- 21 2) Fraud (as to both Defendants)
- 22 3) Conspiracy to Commit Fraud (as to both Defendants)
- 23 4) Conversion (as to both Defendants)
- 24 5) Breach of the Covenant of Good Faith and Fair Dealing (as to Nowaczek)
- 25 6) Elder Abuse (as to both Defendants)

26 Overhead

1 The central issues at trial were (1) whether Defendants were entitled to use Plaintiffs'
2 capital contributions for overhead; and, if so, (2) whether Defendants actually used Plaintiffs'
3 capital contributions for overhead. Resolution of these questions turns on interpreting the LLC
4 agreement and determining the credibility of witnesses.

5 Nothing in the LLC Agreement Expressly or Impliedly Authorized Defendants to Put Plaintiffs'
6 Capital Contributions Toward Villa Nova Developing's Overhead.

7 The FAA contained the terms of the deal, which, as discussed above, included capital
8 contributions by Tribull and Ellis, distributions upon sale, management of the LLC, and an
9 integration clause which, if one were explaining to a first-year law student, means "if it's not in
10 here, it's not part of the deal." The agreement could only be modified in a writing signed by the
11 parties. In May 2015, Tribull, Ellis and Nowaczek executed the SAA, which also contained an
12 integration clause in section 4(e).

13 Paragraph 3 of the FAA contained the compensation arrangement (cited above). In
14 layman's terms, this was a back-end deal. Once the project was sold, the parties would be
15 compensated according to the terms of Paragraph 3. There is no provision in the agreement for
16 any other form of compensation or reimbursement. There is no provision, express or implied,
17 authorizing payments to any party other than as set forth in Paragraph 3. This necessarily
18 includes overhead. This deal allocated risk among the parties. Tribull and Ellis were to put up all
19 capital contributions. The deal calls for no capital contributions from Novaczek. Were the
20 project to fail, Plaintiffs stood to lose their sizeable investment. Novaczek was to perform all
21 work necessary to complete the project. There was no provision allowing him to be reimbursed
22 for his overhead. Were the project to fail, he stood to lose the time and effort and money he put
23 into completing the job, including his overhead.

24 Witness Testimony and Credibility

25 Counsel questioned all four percipient witnesses (Tribull, Ellis, Nowaczek and Litwin) at
26 length about overhead. Tribull testified that the parties had no discussions about Villas on
27 Oswego paying Villa Nova Development's overhead (6/25/24 RT, p. 34: 9-13). He was never
28 asked about it verbally or in writing (*Id.* p. 34: 14-18). He testified "we did not agree to

1 overhead or any contractor's fees" (*Id.* p. 90: 6-7). Ellis testified that Defendants were entitled to
2 50% of net profits. "There was no mention of overhead anywhere" (6/26/24 RT, p. 128: 4-8).
3 This testimony is consistent with the language of the agreement.

4 Nowaczek testified that he never had a project where the general contractor's overhead
5 costs were not included in the project costs (7/1/24 RT, p. 10: 18-21). He also testified that he
6 never used the word "overhead" with Tribull but told him "I would build it by cost" (*Id.* p. 15:
7 1-3). He later added "I think they misunderstood how the business works with hard costs, soft
8 costs, and overhead" (*Id.* p. 89: 15-17). This conclusion is reasonable, given Tribull and Ellis's
9 lack of experience in real estate development and construction. The evidence established that
10 there was no meeting of the minds about overhead. Litwin also testified about overhead. In her
11 experience, a general contractor's overhead expenses are always part of the cost of a project
12 (6/28/24 RT, p. 46: 9-28).

13 All witnesses are human and, thus, imperfect. During his testimony, Tribull had some
14 memory lapses which, given his age (83), were unremarkable. Ellis, also an elderly person,
15 occasionally gave answers that were non-responsive or lengthy narratives. Given that the events
16 went back as far as 2013, it is understandable that memory lapses occurred. The Court
17 nonetheless found these witnesses generally credible.

18 The same cannot be said for Defendants. On direct examination, Litwin had good recall
19 and was able to testify clearly and cogently. But on cross-examination, this changed. Her
20 demeanor changed and she had multiple memory lapses. By this Court's count, on direct
21 examination, which numbered 84 transcript pages, Litwin testified "I don't (or can't) remember"
22 6 times. On cross-examination, which numbered 61 pages, Litwin testified "I don't (or can't)
23 remember" 25 times. Litwin admitted to being untruthful with Ellis and to withholding
24 information from her. For example, Litwin never told Ellis about the many liens on the project,
25 the pending lawsuits or the unpaid property taxes. The following occurred during Litwin's direct
26 examination:

27
28 Q: DID YOU EVER VOLUNTARILY NOTIFY MS. ELLIS OF THOSE LIENS?

1 A: NO.

2 Q: SHE AT ONE POINT ASKED YOU IF THERE WERE LIENS, CORRECT?

3 A: CORRECT.

4 Q: AND WHAT DID YOU TELL HER?

5 A: THAT I'M NOT AWARE OF THAT.

6 Q: SO TELL US WHY YOU SAID THAT TO HER?

7 A: I GUESS, I DIDN'T WANT TO UPSET HER.

8 (6/28/24 RT, p. 66: 21-28, p. 67: 1-2.)

9
10 The Court observed Litwin's manner and demeanor while testifying and found the last
11 response not credible. Litwin had worked with Nowaczek in the construction business since
12 2002 (6/28/24 RT, p. 6: 1-2). She had been involved in numerous construction projects. She
13 testified as follows:

14 A: I WAS ASSISTANT TO A SUPERINTENDENT AND LATER I WAS A
15 SUPERINTENDENT AND THEN I WAS A PROJECT MANAGER. THEN, I GAINED
16 EXPERIENCE INTO PROCESSING PERMITS AND WORKING WITH ARCHITECTS
17 AND ENGINEERS, AND, YEAH.

18 Q: WHAT TYPE OF EXPERIENCE HAVE YOU HAD OVER THE YEARS IN WHAT I'LL
19 CALL MULTIFAMILY PROJECTS LIKE THIS PASADENA PROJECT?

20 A: WE HAVE DONE MAINLY MULTIFAMILY PROJECT FROM SINGLE FAMILY
21 HOMES, LIKE, 10 TO 15 TO, LIKE, APARTMENT BUILDINGS AND CONDOMINIUM
22 PROJECTS, TOWNHOMES.

23 Q: ABOUT HOW MANY OF THE BIG MULTIFAMILY PROJECTS HAVE YOU BEEN
24 INVOLVED IN?

25 A: MAYBE 15, 10 TO 15.

26 (*Id.* p. 6: 10-24).

27 Litwin was a seasoned construction industry professional. It is implausible that she would
28 withhold crucial project information from Ellis (and by extension Tribull) because she didn't

1 want to upset her. There was no legitimate or justifiable business or personal reason to fail to
2 disclose the existence of these liens to one of the parties funding the project. As project
3 manager, it was her obligation to keep Tribull and Ellis advised of these matters so they could
4 take remedial steps.

5 It was undisputed that Nowaczek had multiple construction projects going on while
6 Villas on Oswego was being built and that he was having financial problems. On cross-
7 examination, Litwin testified about an email (Exh. 90) that she sent to someone named "Pari"
8 with the city of Pasadena. Plaintiff's counsel read Litwin a passage from the email.

9
10 Q: "GOOD MORNING, PARI, P-A-R-I, I HOPE THIS EMAIL FINDS YOU HEALTHY AND
11 WELL. I AM REACHING OUT TO YOU REGARDING THE PROJECT LOCATED AT
12 2476 OSWEGO STREET. THE OWNERS HAVE BEEN EXPERIENCING SOME
13 FINANCIAL HARDSHIP AND WERE NOT ABLE TO FINISH THE PROJECT BEFORE
14 THE PERMIT EXPIRATION DATE."

15 THE OWNERS NEVER TOLD YOU THEY WERE EXPERIENCING FINANCIAL
16 HARDSHIP, DID THEY?

17 A: ONE OF THEM DID.

18 Q.: WHEN? AROUND THIS TIME?

19 A: YEAH.

20 Q: THEY FUNDED EVER PENNY, PRETTY MUCH, THAT YOU HAD ASKED FOR ON
21 THIS PROJECT; DIDN'T THEY?

22 A: YOU ASKED ME IF THE OWNERS, RIGHT, AND THE OWNERS WAS ALSO
23 ANDREW. THE OWNER OF THE PROJECT WAS VILLAS ON OSWEGO, LLC.

24 Q: THAT'S WHO YOU'RE REFERRING TO IN THIS EMAIL, THAT MR. NOWACZEK
25 WAS EXPERIENCING FINANCIAL HARDSHIP?

26 A: WELL, TRUTHFULLY I DIDN'T REALLY THINK OF IT LIKE THIS.

27 (6/28/24 RT, p. 141: 22-28, p. 142: 1-15).

1 The Court found the contents of Exhibit 90 to be deceptive, given that Tribull and Ellis
2 continued to fully fund the project. Litwin tried to explain this away during her testimony by
3 indicating that "owners" referred to Nowaczek. The Court found this explanation unconvincing,
4 given that she wrote "owners" in the plural. Furthermore, as Nowaczek was Litwin's employer
5 and long-time business associate, the Court finds it unlikely that she would lay out her own
6 employer to the City as having financial troubles. The passage above was another example of
7 testimony that undermined Litwin's credibility and Defendants' case.

8 During direct examination, Ellis testified about communications with Litwin in
9 December of 2019 regarding the certificate of occupancy (6/26/24 RT, pp. 117-119). During
10 these communications, Litwin told her "It's ready" and that they needed to meet with "Kevin" at
11 the city to get it (*Id.*). They met at city hall where Litwin told her there would be no meeting with
12 "Kevin" because she had already met with "Kevin" and the certificate was ready and "they will
13 send that to us in a few weeks or a few months" (6/26/24 RT, p. 119: 10-11). The evidence
14 established without question that the certificate was not ready. According to Ellis's testimony:
15 "we got the certificate of occupancy in 2022" (6/26/24 RT, p. 47: 4-5). The certificate was
16 admitted at trial as Exhibit 175 and was issued by the city on December 2, 2021. This evidence
17 further undermined Litwin's credibility.

18 During direct examination, Litwin testified that her meeting with Ellis to get the
19 certificate of occupancy from "Kevin" never happened.

20
21 Q: MS. ELLIS TESTIFIED THAT, I BELIEVE I'M CORRECT, THAT SHE MET YOU
22 SOMEWHERE, MAYBE IN THE CITY PLANNING OFFICE, AND THEN YOU GUYS
23 MAYBE MET OUTSIDE. YOU TOLD HER, "WE GOT IT, IT'S JUST GOING TO TAKE A
24 FEW WEEKS TO GET IT." DID THAT EVER HAPPEN?

25 A: NO.

26 (6/28/24 RT, p. 89: 10-15).

1 The Court found this testimony utterly lacking in credibility. To accept Litwin's version
2 of events, one must accept the premise that Ellis either lied outright about the meeting or
3 imagined a meeting with Litwin that never occurred. The Court finds both explanations
4 unlikely. The more reasonable explanation is that Litwin lied under oath.

5 Turning to Nowaczek, the Court found numerous problems with his testimony as well.
6 As with Litwin, on direct examination he was cooperative and answered questions with little
7 difficulty. However, his demeanor changed on cross-examination. His memory suddenly failed
8 on numerous details. He was less cooperative with counsel. His voice dropped and became
9 quiet. Numerous responses were monosyllabic in nature. There were also long pauses and
10 mumbling. However, on points he wanted to make, his memory suddenly improved, and he was
11 able to testify in detail.

12 On direct examination, Nowaczek set forth his extensive (35 year) experience in
13 construction and real estate development.
14

15 Q: HOW LONG YOU'VE BEEN INVOLVED IN THE REAL ESTATE INDUSTRY?

16 A: I AM GENERAL CONTRACTOR, PRESIDENT OF VILLA NOVA DEVELOPING, INC.,
17 AND I'VE BEEN DOING IT 35 YEARS.

18 Q: CAN YOU GIVE US AN IDEA OF DURING THAT 35 YEARS OF WHAT TYPE OF
19 PROJECTS YOU'VE BEEN WORKING ON?

20 A: I WORKED ON SINGLE FAMILY DWELLINGS AND I WORKED ON MULTIFAMILY
21 DWELLINGS, SMALL SUBDIVISION, APARTMENT BUILDINGS, CONDOMINIUMS. I
22 BUILD GAS STATIONS. I USED TO BUILD RESTAURANTS.

23 Q: IS IT FAIR THAT IN SOME OF THOSE CASES, YOU'RE HIRED JUST AS A
24 GENERAL CONTRACTOR?

25 A: YES. OCCASIONALLY, YES.

26 Q: BUT IS IT IN MOST CASES AND MOST RECENTLY, ARE YOU ALSO A PARTNER
27 OR AN INVESTOR, OR I SHOULD SAY A PARTNER IN THE PROJECTS THAT YOU
28 DEVELOP?

1 A: THAT'S CORRECT.

2 (6/28/24 RT, p. 158: 1-17).

3
4 On cross-examination, many of Nowaczek's answers appeared evasive as he disclaimed
5 knowledge of the many negative developments on the Villas on Oswego project. He testified
6 that he was not involved in paying any of the bills associated with the project, that he was
7 unaware of the numerous mechanic's liens recorded against the project in 2018 and 2019 and
8 that he was unaware of a \$300,000 lawsuit filed against the project and his own company, Villa
9 Nova Developing, in December 2018. He further testified that he didn't know if he was the
10 agent for service of process for Villa Nova Developing and Villas on Oswego, although all mail
11 for those entities came to his business address on Foothill Blvd. He also testified that he didn't
12 usually pick up the mail, leaving that task to people who worked for him. (See 7/1/24 RT, pp.
13 56-58.)

14 Regarding mechanic's liens, Nowaczek testified:

15 Q: I MEAN, YOU'RE VERY FAMILIAR WITH MECHANIC'S LIENS; CORRECT?

16 A: I WILL NOT SAY I'M VERY FAMILIAR.

17 (7/1/24 RT, p. 58: 11-13).

18 Nowaczek also testified that he was unaware of the 10 lawsuits filed against the project to
19 foreclose on the mechanic's liens.

20
21 Q: AND YET YOU LET 10 DIFFERENT COMPLAINTS GET FILED AGAINST THIS
22 PROJECT THAT YOU DIDN'T EVEN RESPOND TO. ISN'T THAT CORRECT?

23 A: I DIDN'T KNOW ABOUT.

24 Q: YOU DIDN'T KNOW ABOUT. YOU WERE THE AGENT FOR SERVICE OF
25 PROCESS, THOUGH; CORRECT?

26 A: IF YOU SAYING SO, YES.

27 (7/1/24 RT, p. 54:12-18).

1 The Court found this testimony evasive and unconvincing. It is hard to accept that
2 someone with Nowaczek's experience and apparent expertise in construction and real estate
3 development, would be so completely in the dark about the many existential threats to the
4 project.

5 Based on the LLC agreement as well as the testimony of these witnesses, this Court
6 concludes that payment of Villa Nova Development's overhead on the project was never part of
7 the deal. Defendants diverted money from the project that they were not entitled to. During
8 redirect, Nowaczek made a comment that caught this Court's attention: "We were very excited
9 that we have somebody behind us with such a deep wallet like Mr. Tribull" (7/2/24 RT, p. 19:
10 22-24). Plaintiffs' theory of the case was that Plaintiffs had significant financial resources yet
11 were inexperienced in real estate and construction and that Defendants took advantage of them
12 by bilking them out of millions of dollars, diverting that money to unknown destinations, then
13 seeking to explain it away after the fact by calling it overhead. This is not an unreasonable
14 conclusion.

15 Even if the Court assumes that the deal authorized Defendants to use Plaintiffs' capital
16 contributions for overhead, Defendants provided no documentary evidence showing where the
17 missing two-plus million dollars went. The only evidence that this money went toward overhead
18 came from the testimony of Litwin and Nowaczek. Given the credibility problems with these
19 witnesses, the Court puts no stock in that testimony. One can only speculate where the money
20 went, but it would not be unreasonable to infer that it lined Defendants' pockets, was diverted to
21 other projects, or both. One thing is certain, the two-plus million dollars did not go to the many
22 subcontractors and suppliers who had to resort to mechanics' liens and lawsuits to get paid.

23 PLAINTIFFS' FIRST CAUSE OF ACTION AGAINST NOWACZEK FOR DISSOCIATION
24 OF AN LLC MEMBER UNDER CORPORATIONS CODE SECTION 17706.02(e).

25
26 On application by a limited liability company, a person may be expelled as a member by
27 judicial order if the person has done any of the following:
28

1 (1) Engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or
2 will adversely and materially affect, the limited liability company's activities.

3 (2) Willfully or persistently committed, or is willfully and persistently committing, a material
4 breach of the operating agreement or the person's duties or obligations under Section 17704.09.

5 (3) Engaged, or is engaging, in conduct relating to the limited liability company's activities that
6 makes it not reasonably practicable to carry on the activities with the person as a member.

7 The Court finds that Nowaczek engaged in wrongful conduct that adversely and
8 materially affected Villas on Oswego's activities. The waste and mismanagement on this project
9 were extensive and costly. The evidence at trial established that Nowaczek:

- 10 1) Diverted millions of dollars of Plaintiffs' capital contributions away from hard
11 construction costs, later claiming this was for overhead, to which he was not entitled.
- 12 2) Failed to account for funds paid by Plaintiffs to Nowaczek for constructing the Project.
- 13 3) Failed to inform Plaintiffs of multiple mechanic's liens and lawsuits against the Project.
- 14 4) Failed to respond to lawsuits filed against Villas on Oswego, LLC despite being served as
15 the agent for service of process for Villas on Oswego, LLC.
- 16 5) Failed to inform Plaintiffs of an impending tax sale of the Project despite receiving the
17 notice of the tax sale.
- 18 6) Failed to forward property tax bills to Plaintiffs for payment.
- 19 7) Signed settlement agreements on behalf of Villas on Oswego, LLC without proper
20 authority.

21 Therefore, there is sufficient basis to dissociate Nowaczek as a Member of Villas on Oswego
22 LLC under each of Corporations Code sections 17706.02(e)(1), (e)(2) and (e)(3). The parties
23 were at odds as to whether the Court can award damages on this cause of action. Given the
24 rulings on the other causes of action, The Court finds it unnecessary to resolve this question.

25 PLAINTIFFS' SECOND AND THIRD CAUSES OF ACTION FOR FRAUD AND
26 CONSPIRACY TO COMMIT FRAUD AGAINST NOWACZEK AND LITWIN.

27 Plaintiffs argued that Defendants Nowaczek and Litwin conspired to and did
28 commit fraud. As stated in Plaintiffs' proposed statement of decision:

“[T]he elements of an action for fraud and deceit based on a concealment are: (1) the
defendant must have concealed or suppressed a material fact, (2) the defendant must have

1 been under a duty to disclose the fact to the plaintiff, (3) the defendant must have
2 intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4)
3 the plaintiff must have been unaware of the fact and would not have acted as he did if he
4 had known of the concealed or suppressed fact, and (5) as a result of the concealment or
suppression of the fact, the plaintiff must have sustained damage."

5 Boschma v. Home Loan Center, Inc., 198 Cal.App.4th 230, 248 (2011).

6 The essence of these causes of action, as argued by Plaintiffs, is that Defendants failed to
7 disclose that moneys Plaintiff were paying to Villa Nova Developing were being diverted from
8 paying subcontractors and vendors working on the Project and were being withheld by
9 Nowaczek and Villa Nova Developing.

10 In opposition, Defendants argued "Plaintiffs [sic] entire fraud claim appears to be based
11 on the fact that overhead costs were being paid from construction costs and Plaintiffs claim they
12 were ignorant of this and Defendants somehow intentionally hid this fact from them."

13 Defendants further argued "[w]ith respect to the overhead issue, again, if there was a
14 misunderstanding that is not fraud. Overhead is a part of every construction project. Every
15 general contractor, even one with an ownership interest, pays overhead from the construction
16 loan (or in this case the capital contributions that acted as loans). Nowaczek has always done
17 business this way. (Defense witness) Zollman testified this is how business is done on every
18 construction contract for decades. There was no ill intent by Nowaczek and Litwin. They ran
this project like every other."

19 The Court finds that, as to the second and third causes of action, Plaintiffs have failed to
20 meet their burden of proof. There is no question that Defendants wrongfully deprived Plaintiffs
21 of over \$2,000,000. One interpretation of the evidence (argued by Defendants) is that
22 Defendants took that money to fund Villa Nova's overhead costs, believing that they were
23 entitled to do so. A competing interpretation (argued by Plaintiffs) is that Defendants deceived
24 Plaintiffs and intentionally and illegally diverted funds from Plaintiffs' capital contributions for
25 their own purposes. Plaintiff bears the burden of proof on this question. This Court cannot find
26 that the fraud claims are more likely to be true than not true. Therefore, Plaintiffs have failed to
27 carry their burden of proof and the Court finds for Defendants on the second and third causes of
28 action.

1 PLAINTIFFS' FOURTH CAUSE OF ACTION FOR CONVERSION AS TO NOWACZEK
2 AND LITWIN.

3 As stated by the California Supreme Court in Voris v. Lampert, 7 Cal. 5th 1141 (2019):

4 "the tort (of conversion) comprises three elements: "(a) plaintiff's ownership or right to
5 possession of personal property, (b) defendant's disposition of property in a manner
6 inconsistent with plaintiff's property rights, and (c) resulting damages." (Citations
7 omitted.) Notably absent from this formula is any element of wrongful intent or motive;
in California, conversion is a "strict liability tort."

8 Voris at 1150.

9
10 Plaintiffs argued that Defendants converted \$3,089,841.50 of Plaintiffs' money.
11 Plaintiffs provided Defendants with \$10,382,596.50 to construct the Project. Defendants'
12 financial records indicate they only spent \$7,292,755 on construction costs. Defendants disputed
13 the \$3,089,841.50 figure. Defendants further argued that Plaintiffs have not been damaged
14 because they suffered no financial harm or, in the alternative, that there is no specific,
15 identifiable sum of money involved. Alternatively, Defendants argued that if there are damages
16 for conversion, the amount should be \$2,288,432. This was based on defense expert Mike
17 Zollman's testimony that Defendants spent \$8.3 million to build the project. According to
18 Defendants, the reason that Plaintiffs suffered no damages is that, under Paragraph 3 of the LLC
19 agreement, Plaintiffs will recoup all their capital contributions once the property is sold. To this
20 Court's ear, this sounds like a "no harm, no foul" argument. However, contrary to Defendants'
assertions, there was both a foul and harm.

21 As stated by the Court in Voris, "the tort of conversion is understood more generally as
22 'the wrongful exercise of dominion over personal property of another.'" Voris at 1150 (citation
23 omitted). The damage flows from the loss of the use and enjoyment of that property.
24 Defendants systematically deprived Plaintiffs of millions of dollars, money that could have been
25 used and enjoyed by Plaintiffs for other purposes. Defendants' argument that Plaintiffs would
26 ultimately recoup their capital contributions once the project was sold defies logic and common
27 sense. Whatever the project ultimately sold for, the money Defendants converted was long gone
28 and permanently memorialized in red ink on Plaintiffs' balance sheet.

1 Both Defendants played a role in the conversion of these funds. According to Ellis's
2 testimony, all funding requests came from Litwin (6/26/24 RT, p. 69: 17-20; p. 72: 7-19; p.
3 77:12-20). In 2016, the parties set up bank accounts to continue funding the project (*Id.* p. 70: 3-
4 6). Plaintiffs opened a Villas on Oswego, LLC account with Wells Fargo while Defendants
5 opened a Villas on Oswego, LLC account with Bank of America (*Id.* p. 70: 12-26). Ellis
6 testified that Plaintiffs would write checks on their Villas on Oswego account for deposit into
7 Defendants' Villas on Oswego account, which would then be used to pay vendors (*Id.* p. 71: 4-
8 7). However, Ellis later learned that Defendants were transferring Plaintiffs' contributions from
9 Defendants' Villas on Oswego account to Nowaczek's Villa Nova¹ account (*Id.* p. 71: 12-23).
10 Although Defendants claimed that the missing construction funds went to overhead, Defendants
11 offered no documentary evidence at trial showing where the missing money went.

12 The Court finds that Plaintiffs have met their burden of proof on this cause of action. The
13 Court will address damages later in this decision.

14 PLAINTIFFS' FIFTH CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT
15 OF GOOD FAITH AND FAIR DEALING AGAINST NOWACZEK.

16 The elements of breach of implied covenant of good faith and fair dealing are:
17 (1) existence of a contractual relationship; (2) implied duty; (3) breach; and (4) causation of
18 damages. Smith v. San Francisco, 225 Cal.App.3d 38, 49 (1990). "Every contract imposes on
19 each party an implied duty of good faith and fair dealing." Egan v. Mutual of Omaha Ins. Co.,
20 24 Cal.3d 809, 818 (1979). Breach of the covenant of good faith and fair dealing is a form of
21 breach of contract action. The same elements apply, but the breach is not of an express term of
22 the contract but rather an implied term necessary to protect the reasonable expectations and
23 purposes of the contracting parties as to the express terms of the contract. Carma Developers,
24 Inc. v. Marathon Development California, Inc., 2 Cal.4th 342, 373 (1992).

25 As discussed above, the evidence at trial established that Nowaczek

- 26 1) Diverted millions of dollars of Plaintiffs' capital contributions away from hard
27 construction costs, later claiming this was for overhead, to which he was not entitled.

28 ¹ Ellis mistakenly referred to the entity as "Nova Villa."

- 2) Failed to account for funds paid by Plaintiffs to Nowaczek for constructing the Project.
- 3) Failed to inform Plaintiffs of multiple mechanic's liens and lawsuits against the Project.
- 4) Failed to respond to lawsuits filed against Villas on Oswego, LLC despite being served as the agent for service of process for Villas on Oswego, LLC.
- 5) Failed to forward property tax bills to Plaintiffs for payment.
- 6) Failed to inform Plaintiffs of an impending tax sale of the Project despite receiving the notice of the tax sale.
- 7) Signed settlement agreements on behalf of Villas on Oswego, LLC without proper authority.

Based on the Court's previous findings, the Court finds for Plaintiffs on this cause of action. Nowaczek breached the implied covenant of good faith and fair dealing by his actions, or inactions, set forth in 1-7 above. The damages for this cause of action will be discussed below.

PLAINTIFFS' SIXTH CAUSE OF ACTION FOR ELDER ABUSE AGAINST NOWACZEK AND LITWIN.

Plaintiffs declined to address this cause of action in their proposed statement of decision. Civil liability for financial abuse of an elder may be established by proof that a person "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder ... for a wrongful use or with intent to defraud, or both." Kerley v. Weber, 27 Cal. App. 5th 1187 (2018). As with the fraud causes of action, the Court finds the evidence insufficient to establish intent to defraud. The Court likewise finds that evidence of "wrongful use" or "intent to defraud" are insufficient. There was no evidence at trial regarding the disposition of the converted funds. The Court finds that Plaintiffs have not met their burden of proof as to this cause of action.

DAMAGES

Plaintiffs argued that their damages were as follows:

- 1) \$3,089,841.50, which Plaintiffs claim is the difference between their capital contributions of \$10,382,596 for constructing the project and \$7,292,755 that Villa Nova allegedly spent in construction costs;
- 2) \$172,092 in tax penalties incurred for Defendants' failure to forward property tax bills received by them for the Project to Plaintiffs for payment; and

1
2 3) \$79,406 in premium payments Plaintiffs were required to pay Browning Fire
3 Protection, S&D Drywall and Quality Vinyl, to resolve their claims against Villas on
4 Oswego, LLC (Exhibits 94, 181.)

5 The Court agrees that Nowaczek must pay Plaintiffs the amounts in items 2 and 3 on the
6 5th cause of action for breach of the implied covenant of good faith and fair dealing. As to the
7 amount in item 1, further analysis is required. Defendants argued that Plaintiffs' figure of
8 \$7,292,755 is inaccurate. According to Plaintiffs, that figure is based on Villa Nova's financial
9 records and is set forth in Exhibit 534-089, defense expert Mike Zollman's report. Defendants
10 argued Zollman's testimony established that Villa Nova's construction costs were \$8.3 million.
11 Alternatively, Defendants argued that Plaintiffs' expert, Kim Onisko, concluded in his report
12 that Villa Nova's construction costs were \$8,094,164.

13 To resolve this quandary, the Court must review the evidence in detail. As an initial
14 matter, the Court finds Plaintiffs' argument that Villa Nova spent \$7,292,755 to build the project
15 unsupported by the evidence. While that number is suggested by Exhibit 534-089, both experts
16 appeared not to accept it and instead testified to numbers in the low to mid \$8 million range.
17 On direct examination, Zollman testified "So Villas on Oswego, the construction cost paid by
18 Villa Nova for the direct site costs, 8.3 million." (7/2/24 RT, p. 91: 21-23.) This figure was
19 drawn from Villa Nova's job cost journal. (*Id.* p. 105: 18-23.)

20 Plaintiffs' expert, Kim Onisko, initially testified that his review of Villa Nova's financial
21 records showed the unaccounted-for capital contributions to be \$2,038,678: "The difference
22 between the deposits and the expenses were \$2,038,678." (6/27/24 RT, p. 88: 28, p. 89: 1.)
23 Later, he modified this to account for some missing checks, arriving at a figure of \$2,288,423 in
24 missing money.

25 Q: AND ARE YOU ABLE TO, OR DID YOU FORM AN OPINION AS TO WHICH
26 NUMBER YOU BELIEVED TO BE A MORE ACCURATE REPRESENTATION OF THE
27 MONEY THAT IS MISSING, THE 2,038,000 OR THE 2,288,000?

28 A: UNLESS I WAS GIVEN THE CHECKS THAT ARE MISSING, I WOULD GO WITH
THE 2,288,432 NUMBER.

1 (Id. p. 91: 9-14.)
2

3 Subtracting \$2,288,432 from \$10,382,596, which both sides agreed was Plaintiffs' capital
4 contribution, yields \$8,343,918 in Villa Nova's construction costs. In a case where there was
5 almost no agreement on any of the numbers bandied about, Onisko's conclusion is remarkably
6 close to Zollman's conclusion of \$8.3 million in construction costs. Given the proximity of the
7 numbers by these two qualified, although very differently trained experts, the Court finds that
8 Villa Nova's construction costs on this project were \$8,343,918. Therefore, Plaintiffs' damages
9 as to the conversion cause of action are \$2,038,678, for which Defendants Nowaczek and Litwin
10 are jointly and severally liable. Plaintiffs' damages as to the breach of the implied covenant are
11 \$2,038,678 plus \$251,498, as to Nowaczek only.

12 Defendants have raised the affirmative defense of unclean hands to Plaintiffs' causes of
13 action. The Court will address this infra.

14 CONCLUSION

15 BASED UPON THE FOREGOING, THE COURT RULES AS FOLLOWS:
16

17 1. Judgment is entered as follows:

- 18 a. First cause of action: Judgment in favor of Plaintiffs and against Defendant
19 Nowaczek. Defendant Nowaczek is ordered dissociated from Villas on
20 Oswego, LLC under Corporations Code section 17706.02(e).
21 b. Second, third and sixth causes of action: judgment for Defendants and against
22 Plaintiffs.
23 c. Fourth cause of action: judgment for Plaintiffs and against Defendants
24 Nowaczek and Litwin in the amount of \$2,038,678, jointly and severally.
25 d. Fifth cause of action: judgment for Plaintiffs and against Defendant Nowaczek
26 in the amount of \$251,498 plus \$2,038,678 for a total of \$2,290,176.
27 e. Damages awarded Plaintiffs shall be apportioned to Tribull and Ellis according
28 to their percentage of capital contributions (90% Tribull, 10% Ellis).

2. Plaintiff shall prepare a judgment consistent with this statement of decision.

1
2 NOWACZEK AND VILLA NOVA DEVELOPING'S CAUSES OF ACTION AGAINST
3 PLAINTIFFS.

4 Defendants/Cross-Complainants alleged three causes of action² against Plaintiffs/Cross-
5 Defendants:

- 6 1) Breach of Fiduciary Duty by Nowaczek against Tribull.
7 2) Quantum Meruit by Villa Nova Developing against Villas on Oswego, LLC.
8 3) Breach of the Implied Covenant of Good Faith and Fair Dealing by Nowaczek against
9 Tribull and Ellis.

10 CROSS-COMPLAINANT NOWACZEK'S FIRST CAUSE OF ACTION FOR BREACH OF
11 FIDUCIARY DUTY.

12 "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a
13 fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the
14 breach." (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.) Nowaczek argued that
15 Tribull breached his fiduciary duty to Nowaczek by:

- 16 1) Unilaterally making the self-serving decision to convert the Project from condos to
17 apartments and deciding not to sell the units, contrary to the FAA, thereby depriving
18 Nowaczek of his expected profits.
19 2) Continuing to charge interest beyond April 2018 and then stating to Nowaczek that his
20 (Tribull's) capital contributions and interest exceeded the value of the Project and,
21 therefore, Nowaczek would get nothing.
22 3) Failing to notify Nowaczek of a \$28.8 million cash offer and refusing to accept the offer.
23 4) Continuing to rent out the apartments rather than sell the Project. The only way for
24 Nowaczek to make money on the Project is for the Project to be sold.

25 In response, Plaintiffs advanced several arguments, including:
26
27

28 ² Cross-Defendants dismissed their fourth cause of action for defamation during trial.

- 1
- 2 1) The Project was for investment purposes, with a goal of maximizing profit.
- 3 2) As the Managing Member, Tribull had broad authority to act.
- 4 3) Tribull was entitled to rely upon people with professional or expert competence, which he
- 5 did in taking CBRE's recommendation to sell the Project as stabilized apartments; and
- 6 4) Tribull explained his rationale to Litwin and Nowaczek, and they agreed to the change.

7
8 Evaluating these arguments requires, once again, an examination of the language of the
9 LLC agreement and Tribull's testimony. Cross-Defendant's arguments ignore the plain language
10 of the LLC agreement. "Recitals" Paragraph B states that the company has been formed "for the
11 development and construction...of a 33-unit condominium project and the sale of such units...."
12 There is nothing ambiguous about this. By unilaterally changing the goal of the project from
13 condominiums to apartments and then declining to sell the property, Tribull breached the
14 express language of the LLC agreement, thereby depriving Nowaczek of his back-end
15 compensation while Tribull collected rent. Plaintiffs' argument that Nowaczek subsequently
16 agreed to the change fails in the face of the integration clause, which reads as follows:

17 "Entire Agreement. This Second Amendment and the LLC Agreement (as hereby amended)
18 contain and constitute the entire agreement between the parties hereto with respect to the
19 subject matter hereof, and the LLC Agreement (as hereby amended) may not be modified,
20 amended, or otherwise changes in any manner, except as provided in the LLC Agreement (as
21 hereby amended)."

22
23 Section 11.3 of the original LLC agreement states, in part, that the LLC agreement "cannot be
24 changed or terminated orally or in any manner other than by a written agreement executed by all
25 of the Members."

26 This language makes clear that any claimed subsequent oral modification has no binding
27 effect. The Court agrees with Nowaczek that the proposed third amended LLC agreement
28 supports an inference that Tribull knew his change from condominiums to apartments violated
the existing LLC agreement, so he sought to remedy that by submitting a proposed third

1 amended LLC agreement, already signed by himself and Ellis. Nowaczek, however, declined to
2 sign. As such, condominiums remained the goal and the unilateral change to apartments and the
3 decision not to sell but to collect rent violated the existing agreement.

4 Tribull testified at length about the change from condominiums to apartments. The
5 following occurred on cross-examination:

6
7 Q: NOW YOU'RE AWARE -- ARE YOU AWARE THAT THE FIRST AMENDMENT TO
8 THE LIMITED LIABILITY AGREEMENT THAT YOU SIGNED SPECIFICALLY STATES
9 AND I QUOTE, THE PROJECT WAS FOR, QUOTE, "THE DEVELOPMENT AND
10 CONSTRUCTION THEREON OF A 33-UNIT CONDOMINIUM PROJECT AND THE SALE
11 OF SUCH 18 UNITS." YOU ARE AWARE OF THAT LANGUAGE?

12 A: CORRECT.

13 Q: YOU UNDERSTOOD AT THE TIME IN APRIL OF 2018, WHEN YOU MADE YOUR
14 DECISION, THAT YOU WERE CHANGING THE TERMS OF THE FIRST AMENDMENT
15 TO THE LIMITED LIABILITY AGREEMENT, CORRECT?

16 A: I DIDN'T CHANGE THE TERMS. I CHANGED THE APARTMENT -- THAT THE
17 BUILDING WOULD CHANGE FROM CONDOS TO APARTMENT. THAT IS WHAT IT
18 WAS.

19 Q: YOU WERE CHANGING THE SCOPE --

20 A: NO.

21 Q: -- OF WHAT PARTIES HAD AGREED TO?

22 A: NO, NOT AT ALL. I JUST CHANGED THE BUILDING, INSTEAD OF -- ON ADVICE
23 FROM CBRE TO UNDERSTAND THE REAL ESTATE MARKET THAT IT IS BETTER TO
24 HAVE A BUILDING FOR LEASE, PARTICULARLY IN OUR CASE AND THEN HAVE
25 THIS BUILDING STABILIZED AND PUT IT ON THE MARKET. IT IS MORE COST
26 EFFECTIVE AND MORE PROFITABLE INSTEAD OF SELLING APARTMENTS,
27 PARTICULARLY IN OUR CASE BECAUSE THESE APARTMENTS, HALF OF THEM IN
28 THE BACK WERE NOT ATTRACTIVE AND THE OTHER HALF WERE GOOD
APARTMENTS.

1 Q: SO, IS IT YOUR TESTIMONY HERE TODAY THAT YOU DID NOT BELIEVE THAT
2 YOU WERE IN VIOLATION OF THE FIRST AMENDMENT TO THE LIMITED
3 LIABILITY AGREEMENT FROM SWITCHING FROM CONDOS TO APARTMENTS?

4 A: CORRECT.

5
6 The Court previously noted that Tribull's testimony was generally credible. However,
7 this portion gave the Court pause. Tribull was a former aerospace industry executive. It is hard
8 to fathom that someone with his education (MBA) and professional experience could conclude
9 that the change from condominiums to apartments did not violate the express terms of the LLC
10 agreement. The Court found this testimony unconvincing. Furthermore, the Court agrees with
11 Cross-Complainant's argument regarding the significance of the proposed Third Amended LLC
12 Agreement. This document reflects an implicit acknowledgement by Tribull that his unilateral
13 change to apartments violated the LLC agreement.

14 There is no question that Tribull, as manager of Villas on Oswego, LLC, owed a
15 fiduciary duty to LLC member Nowaczek. The Court agrees that Tribull breached this duty by
16 changing the project to condominiums, refusing to sell the project or even counteroffer after the
17 \$28.8 million cash offer, and continuing to hold onto the property and collecting rent into 2025.
18 The Court will discuss damages below.

19 CROSS-COMPLAINANT VILLA NOVA DEVELOPMENT'S SECOND CAUSE OF
20 ACTION FOR QUANTUM MERUIT AGAINST VILLAS ON OSWEGO.

21 To recover on a claim for the reasonable value of services under a quantum meruit
22 theory, a plaintiff must establish that: (1) defendant requested plaintiff perform services for the
23 benefit of defendant, (2) that plaintiff performed the services as requested, (3) that defendant has
24 not paid for the services and (4) the reasonable value of the services that were provided. (CACI
25 No. 371.) Cross-Complainant argues that it is entitled to recoup its overhead costs of
26 \$2,144,737. It is well-settled that a breach of contract cause of action and a quantum meruit
27 cause of action are inconsistent. *Newport Harbor Ventures, LLC v. Morris Cerullo World*
28 *Evangelism* (2016) 6 Cal.App.5th 1207, 1223 (citing *Hedging Concepts, Inc. v. First Alliance*
Mortgage Co. (1996) 41 Cal.App.4th 1410, 1419) ("A quantum meruit or quasi-contractual

1 recovery rests upon the equitable theory that a contract to pay for services rendered is implied by
2 law for reasons of justice. [Citation omitted.] However, it is well settled that there is no
3 equitable basis for an implied-in-law promise to pay reasonable value when the parties have an
4 actual agreement covering compensation.”)

5 As discussed above, the agreement between the parties is governed by a written contract.
6 This agreement does not provide for Villa Nova, Nowaczek or anyone else to recoup money
7 spent on overhead. That was not part of the deal. A party may not do an end run around a written
8 contract by asserting a quantum meruit cause of action for a payment that is impermissible under
9 the terms of the contract. The Court finds for Cross-Defendant on this cause of action.

10 CROSS-COMPLAINANT NOWACZEK’S THIRD CAUSE OF ACTION FOR BREACH OF
11 THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AGAINST TRIBULL
12 AND ELLIS.

13 As noted above, the elements of breach of implied covenant of good faith and fair dealing
14 are: (1) existence of a contractual relationship; (2) implied duty; (3) breach; and (4) causation of
15 damages. In support of this cause of action, Cross-Complainants argue:

16
17 “Nowaczek’s benefit from the First Amendment was that he would be entitled to 50% of
18 any profit after Tribull and Ellis recouped their capital contribution plus interest. Tribull
19 and Ellis completely frustrated this when they decided to switch from condos to
20 apartments and rent out the apartments rather than selling the Project, as specifically
21 provided for in the First Amendment. This and the reasons discussed above regarding the
22 breach of fiduciary duty support the fact that Tribull and Ellis also breached the
23 covenant.”

24 The Court agrees that Tribull breached the implied covenant of good faith and fair
25 dealing by undertaking these actions. However, the Court declines to find Ellis liable on this
26 cause of action. The evidence at trial established that Tribull made the decision to switch to
27 apartments based on his claimed authority as managing director of the LLC. Ellis was not
28 authorized to make that decision. While she did sign the proposed third amendment to the LLC
agreement, that document had no legally binding effect. The Court finds for Cross-Complainant
and against Tribull on this cause of action. As to Ellis, the Court finds that Cross-Complainant
has not met his burden of proof.

1 ALL PARTIES' ACTION FOR DECLARATORY RELIEF

2
3 At trial, Plaintiffs and Defendants/Cross-Complainants asked the Court to allow the
4 parties to amend their respective pleadings to add an additional cause of action for declaratory
5 relief. The reason for this request was to allow the Court to determine when Plaintiffs' right to
6 monthly compound interest cut off. The Court granted this request and the parties stipulated to a
7 cause of action for declaratory relief in their April 7, 2025, filing. Plaintiffs argued that it should
8 cut off in December 2021, when the City issued the certificate of occupancy. Cross-
9 Complainants argued that it should cut off in April 2018, because that is when Tribull breached
10 his fiduciary duty by changing the project to apartments. In response, Plaintiffs argue 1) this
11 was not a breach; and 2) if it was, it was at most an anticipatory breach for which damages are
12 not available given Nowaczek's subsequent conduct.

13 The cutoff date for Plaintiffs' compound interest is a matter of contract interpretation.
14 Turning to the LLC agreement, the Court finds another glaring omission: The document is silent
15 on when compound interest cuts off. Therefore, the Court must attempt to glean the parties'
16 intent.

17 "A contract includes not only the promises set forth in express words, but, in addition, all
18 such implied provisions as are indispensable to effectuate the intention of the parties and
19 as arise from the language of the contract and the circumstances under which it was made
20 (citation omitted). This rule is codified in California. Section 1656 of the Civil Code
21 provides: 'All things that in law or usage are considered as incidental to a contract, or as
22 necessary to carry it into effect, are implied therefrom, unless some of them are expressly
23 mentioned therein, when all other things of the same class are deemed to be excluded.'"

24 (*Frankel v. Board of Dental Examiners* (1996) 46 Cal. App. 4th 534, 544.)

25 In determining the intention of the parties, a court must be guided by principles of
26 reasonableness and may rely on "external facts" in reaching its determination.

27 "The modern trend of the law is to favor the enforcement of contracts and, if feasible, to
28 carry out the intentions of the parties. Neither law nor equity requires that every term and
condition be set forth in a contract. The usual and reasonable terms found in similar
contracts may be considered, unexpressed provisions of the contract may be inferred
from the writing, external facts may be relied upon, and custom and usage may be

1 resorted to in an effort to supply a deficiency if it does not alter or vary the terms of the
2 agreement The court should accord an interpretation which is reasonable”

3 *Id.* at 545.

4 “The stipulation (i.e. contract) must be ‘interpreted as to give effect to the mutual
5 intention of the parties as it existed at the time of contracting, so far as the same is
6 ascertainable and lawful.’ . . . The intention of the parties must be first determined from
7 the language of the contract itself. . . . However, where the language of the contract is
8 ambiguous, it is the duty of the court to resolve the ambiguity by taking into account all
9 the facts, circumstances and conditions surrounding the execution of the contract. . . .”

10 *Id.* at 544.

11 The Court now turns to the evidence to determine the parties’ intent. The parties executed
12 the FAA in January 2013. No witness testified to the exact date and the FAA is undated. Tribull
13 testified that the meeting to execute the FAA occurred in “early January” 2013. (6/25/24 RT,
14 p.18:27-27, p. 19: 1-8.) The City of Pasadena issued the certificate of completion in December
15 2021, almost 8 years later. The Court rejects Plaintiffs’ contention that compound interest cuts
16 off in December 2021.

17 The evidence at trial established that the parties anticipated a two-year completion date
18 for this project. Exhibit 5 set forth a timeline for the project. Tribull testified as follows:

19 A: NOWACZEK EXPLAINED THAT THE WAY HE WORKED WITH HIS INVESTORS
20 WAS THAT THE INVESTOR WOULD PUT UP THE FUNDS, THE MONEY TO BUY THE
21 LAND, AND THE MONEY FOR THE CONSTRUCTION AND WOULD ALSO GET A
22 COMPOUND INTEREST OF 10 PERCENT FROM THE START OF THE PURCHASE OF
23 THE LAND UNTIL THE END OF THE PROJECT. AT THE END OF THE PROJECT,
24 THE PROJECT WOULD BE SOLD AND THE PROFITS WOULD BE SPLIT
25 (6/25/24 RT, p. 15:14-21)

26 He later testified:

27 Q: YOUR TESTIMONY WAS THIS WAS ABOUT A TWO-YEAR PROJECT, FROM
28 BEGINNING TO END?

1 A: YES.

2 (6/25/24 RT, p. 17:17-19.)

3
4 In his declaration filed April 4, 2025, Tribull conceded that the initial timeline for the
5 project was two years. However, he repeatedly emphasized his lack of experience in real estate
6 and construction. He "assumed" the project could take "many years." He stated that he believed
7 his preferred return would continue to accrue until all the units were sold, which would have
8 been long after the certificate of occupancy had issued. This testimony differed significantly
9 from the position taken by Plaintiffs at trial that the preferred return would cut off in December
10 2021 when the certificate of occupancy was issued.

11 Litwin also testified about the two-year timeline.

12 Q: AND I THINK YOUR TESTIMONY JUST -- I JUST WANT TO MAKE SURE IT WAS
13 CLEAR. YOUR TESTIMONY WAS THAT THE TWO-YEAR TIMELINE SET FORTH IN
14 EXHIBIT 4 -- OR EXHIBIT 5 WAS PREDICATED ON THE INFORMATION THAT YOU
15 RECEIVED FROM THE CITY?

16 A: I RECEIVED THAT INFORMATION FROM A PERSON THAT WAS HIRED BY THE
17 PREVIOUS PARTNER, KATHERINE, WHO HAD TIES TO THE CITY AND ALSO BY
18 THE ARCHITECT.

19 (6/28/24 RT, p. 138: 24-28, p. 139: 1-3.)

20
21 However, the parties also contemplated that the project could run into delays, as is so common
22 in projects of this nature. Nowczek testified:

23
24 Q: SO IS IT COMMON OR UNCOMMON ON A PROJECT OF THIS NATURE FOR
25 THERE TO BE DISRUPTION TO THE CRITICAL PATH THAT CAUSES INCREASES IN
26 THE BUDGET AND DELAYS IN THE PROJECT?

27 A: YES.

28 Q: DID THAT HAPPEN ON THIS PROJECT?

1 A: YES.
2 (6/28/25 RT, p. 58:22-28.)
3

4 In his declaration filed April 7, 2025, defense expert Jeffrey Weinstein testified to his
5 many years 'experience in the real estate and construction businesses. The Court found his
6 credentials impressive. He opined that the project would have taken a minimum of three years to
7 obtain the certificate of occupancy and more likely closer to five years. The Court found this
8 testimony reasonable and credible.

9 The evidence supports the conclusion that the missing contract term regarding the cutoff
10 of preferred interest is four years, or January 2017. The Court finds that this is a fair and
11 reasonable interpretation of the LLC agreement, given all the surrounding circumstances. In
12 reaching this conclusion, the Court is guided by the following passage from *Frankel, supra*:
13 "[t]he usual and reasonable terms found in similar contracts may be considered, unexpressed
14 provisions of the contract may be inferred from the writing, **external facts may be relied upon,**
15 **and custom and usage may be resorted to in an effort to supply a deficiency if it does not**
16 **alter or vary the terms of the agreement** (emphasis added). . . . The court should accord an
17 interpretation which is reasonable...." *Id.* at 545. Therefore, this Court finds that Plaintiffs'
18 compound interest cuts off four years from the execution of the FAA, or January 2017.
19

20 CROSS-COMPLAINANTS' DAMAGES.

21 At the conclusion of their proposed Statement of Decision, filed September 16, 2024,
22 Cross-Complainants argued that they are entitled to damages of \$4,534,971. To reach that
23 number, Cross-Complainants proposed the following analysis:
24

25 "To determine damages requires the Court to resolve four issues, which Nowaczek raised
26 in his opening brief and during oral closing arguments: (1) when does interest cut off; (2)
27 are overhead costs allowed or not; (3) what is the "magic number," i.e., Tribull and Ellis'
28 capital contribution plus interest minus their net operating income (or profits) from
renting the units; and (4) the present day value of the Project."

1 The Court has already resolved two of these issues, determining that interest cuts off in January
2 2017 and that overhead costs are not allowed. The Court agrees that the proper measure of
3 Cross-Complainants' damages, if any, is (1) Tribull and Ellis' capital contributions plus interest
4 minus their net operating expenses (or profits); and (2) the present-day value of the project. In
5 other words, calculating Nowaczek's damages must begin with a number that establishes the
6 present-day value of the project. From that number, one must deduct Tribull and Ellis' capital
7 contributions and preferred interest, recalculated with a cutoff date of January 2017. After that
8 deduction, Nowaczek would be entitled to 50% of the final number, plus one half of Tribull and
9 Ellis' profits on the project (i.e. rental income).

10 To that end, as noted in the October 22, 2024, minute order, the Court requested
11 additional information from the parties. In response, the parties offered the testimony of
12 appraisers, Mr. Lofgren and Mr. Hefington, and their respective reports, Exhibits 190 and 543.
13 The appraisers reached dramatically different conclusions. Mr. Lofgren concluded that the
14 "current project value (bulk sale)" as of January 13, 2025, was \$24,320,000, while Mr.
15 Hefington, in a report dated January 8, 2025, concluded that the "aggregate retail value" was
16 \$37,675,000. The parties also submitted briefs regarding net profits/net operating income and,
17 again, arrived at widely divergent numbers. Cross-Defendants calculated their net profits
18 through March 31, 2025, to be \$712,841.00. Cross-Complainants do not dispute the underlying
19 numbers but disagree with the inclusion of three expenses, namely (1) depreciation; (2)
20 amortization; and (3) contract labor. If those three expenses are removed, Cross-Complainants
21 calculate Cross-Defendants' net profits to be \$2,952,679.00.

22 Given the divergence of these numbers, the Court finds it difficult to arrive at a hard
23 number for Cross-Complainants' damages. Were the Court inclined to award damages to Cross-
24 Complainants, the Court would request supplemental briefing from the parties on damages,
25 which would include a recalculation of Plaintiffs' preferred return based on the January 2017
26 cutoff. However, supplemental briefing is not necessary because Cross-Defendants have pled
27 unclean hand as the twelfth affirmative defense of their newly filed (April 4, 2025) answer and
28 the Court finds that this is dispositive. After an in-depth review of the evidence and the law, the

1 Court concludes that, notwithstanding Cross-Defendant Tribull's self-serving breaches of
2 fiduciary duty and implied covenant of good faith and fair dealing, the law disallows awarding
3 damages to Cross-Complainants.

4 UNCLEAN HANDS

6 Raised by Cross-Defendants as to the Cross-Complaint

7
8 Cross-Defendants raise the defense of unclean hands to the cross-complaint.

9 "The defense of unclean hands arises from the maxim, '[h]e who comes into Equity must
10 come with clean hands.' The doctrine demands that a plaintiff act fairly in the matter for
11 which he seeks a remedy. He must come into court with clean hands, and keep them
12 clean, or he will be denied relief, regardless of the merits of his claim.

13 "The defense is available in legal as well as equitable actions. However, 'the unclean
14 hands doctrine is not a legal or technical defense to be used as a shield against a
15 particular element of a cause of action. Rather, it is an equitable rationale for refusing a
16 plaintiff relief where principles of fairness dictate that the plaintiff should not recover,
17 regardless of the merits of his claim. It is available to protect the court from having its
18 powers used to bring about an inequitable result in the litigation before it 'The doctrine
19 promotes justice by making a plaintiff answer for his own misconduct in the action. It
20 prevents 'a wrongdoer from enjoying the fruits of his transgression.'"

21 *Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 685 (internal quotations
22 and citations omitted).

23 *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, set forth a three-part test to determine
24 if the doctrine applies. The *Blain* Court determined that "whether there is a bar (to recovery)
25 depends upon the analogous case law, the nature of the misconduct, and the relationship of the
26 misconduct to the claimed injuries." *Id.* at 1060. "From *Blain*, we can glean that the first prong
27 of the unclean-hands defense does not require "analogous case law" to be controlling or on all
28 fours to the case at hand to find the defense applicable. Rather, 'analogous case law' means
similar case types to set and frame the context for determining whether the unclean-hands
defense is available at all in that general circumstance." *Padideh v. Moradi* (2023) 89 Cal. App.
5th 418, 441.

While this Court could not find published cases addressing the application of the doctrine

1 to cases involving breach of the covenant of good faith and fair dealing, it is well-settled that the
2 doctrine applies in breach of contract cases. As stated in *Cohen v. TNP 2008 Participating Notes*
3 *Program, LLC* (2019) 31 Cal.App.5th 840, 872-873 "the unclean hands doctrine ... is a
4 recognized defense to a claim for breach of contract under California law." (citing *Jade Fashion*
5 *& Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 653-654.) In addition,
6 *Health Maint. Network v. Blue Cross of So. Cal.* (1988) 202 Cal. App. 3d 1043 and *Schrage v.*
7 *Schrage* (2021) 69 Cal. App. 5th 126 indicate that the doctrine is available in cases involving
8 breach of fiduciary duty. Therefore, the Court finds that the first prong of *Blain* is satisfied and
9 that the unclean hands doctrine applies to the present case.

10 The second *Blain* prong involves an analysis of Cross-Complainants' misconduct. "'Not
11 every wrongful act constitutes unclean hands. The misconduct need not be a crime or an
12 actionable tort. Any conduct that violates good conscience, or good faith, or other equitable
13 standards of conduct is sufficient to invoke the doctrine.'" *Padideh, supra* at 444. As discussed
14 above, there is no question that Cross-Complainants' misconduct violated good conscience and
15 good faith and was, in fact, actionably tortious. The misconduct included (1) diverting millions
16 of dollars of Plaintiffs' capital contributions away from hard construction costs to destinations
17 unknown, (2) failing to account for funds paid by Plaintiffs for constructing the Project, (3)
18 failing to inform Plaintiffs of multiple mechanic's liens and lawsuits against the Project, (4)
19 failing to respond to lawsuits filed against Villas on Oswego, LLC despite being served as the
20 agent for service of process for Villas on Oswego, LLC, (5) failing to inform Plaintiffs of an
21 impending tax sale of the Project despite receiving the notice of the tax sale, (6) failing to
22 forward property tax bills to Plaintiffs for payment. The Court finds that the second *Blain* prong
is satisfied.

23 As to the third prong, the relationship of the misconduct to the claimed injuries, the
24 *Padideh* Court noted that "'[t]he misconduct that brings the unclean hands doctrine into play
25 must relate directly to the transaction concerning which the complaint is made. It must infect the
26 cause of action involved and affect the equitable relations between the litigants.'" *Id.* at 447.
27 There is no question that this prong is also satisfied. Nowaczek's misconduct relates directly to
28 the transaction at issue, i.e. the agreement between the parties to construct the Villas on Oswego
project. Nowaczek's misconduct infects the causes of action in the cross-complaint and has

1 affected the equitable relationship between the litigants. Put simply, a party cannot be allowed to
2 convert over \$2,000,000 of their business partner's money in connection with a real
3 estate/construction deal, then turn around and recover damages from that same business partner
4 for breaches associated with the very same deal.

5 Raised by Defendants as to the Complaint
6

7 In their objections to the Court's tentative statement of decision, Defendants point out
8 that the Court failed to address Defendants' unclean hands defense to Plaintiffs' causes of
9 action. This assertion is correct and the Court will now address this issue. Although unclean
10 hands applies in legal and equitable actions, it's origins are in equity. Evaluating Defendants'
11 unclean hands defense requires an examination of the respective deeds or misdeeds of the parties
12 in light of equitable principles.

13 As noted above, "Not every wrongful act constitutes unclean hands." *Padideh, supra* at
14 444. Cross-Defendant Tribull's decision to change the goal of the project from condos to
15 apartments, while actionable, was a misguided business decision designed to maximize revenue.
16 Defendants' misdeeds, on the other hand, seemed intentionally designed to run the project into
17 the ground while converting as much of Plaintiffs' money as possible.

18 The timeline of events led this Court to draw certain inferences. In April 2018, Tribull
19 changed the project from condominiums to apartments. The evidence at trial established that the
20 majority of troubles with the project, e.g. unpaid subcontractors, suppliers and tax bills, liens,
21 lawsuits, a default judgment, a scheduled tax auction, and the like, occurred well after April
22 2018. It is reasonable to infer that these events, and the conversion of over \$2 million of
23 Plaintiffs' money, were Defendants' response to Tribull's announced change of plan. It is
24 reasonable to infer that Nowaczek, assisted by Litwin, believing he was going to be deprived of
25 his back-end profit, decided to sabotage the project while wrongfully looting as much of
26 Plaintiff's money as possible. One could argue that while Tribull's hands may appear a little
27 dusty, Nowaczek and Litwin's hands are pitch black. Should such individuals be allowed to
28 invoke the doctrine of unclean hands?

1 As previously discussed, unclean hands “is an equitable rationale for refusing a plaintiff
2 relief where principles of fairness dictate that the plaintiff should not recover, regardless of the
3 merits of his claim. It is available to protect the court from having its powers used to bring about
4 an inequitable result in the litigation before it. ‘The doctrine promotes justice by making a
5 plaintiff answer for his own misconduct in the action. It prevents ‘a wrongdoer from enjoying
6 the fruits of his transgression.’” *Meridian Financial Services, Inc. v. Phan* (2021) 67
7 Cal.App.5th 657, 685 (internal quotations and citations omitted).

8 This Court concludes that it would be inequitable and unjust to allow Defendants to
9 invoke the doctrine of unclean hands. The Court concludes that Plaintiffs’ award of damages
10 should not be reduced or eliminated. As such, the Court need not address Defendants’ argument
11 regarding their 8th affirmative defense of offset/setoff.

12 CONCLUSION
13

14 The Court finds that relief is barred because Cross-Complainants have unclean hands.
15 The Court awards no damages on the cross-complaint.

16 Plaintiff shall prepare a judgment consistent with this statement of decision.
17

18 IT IS SO ORDERED

19 Dated: June 26, 2025
20

21
22 JARED D. MOSES
23 JUDGE OF THE SUPERIOR COURT
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PROOF OF SERVICE

Villas on Oswego LLC. v. Nowaczek et al.
LASC Case No. 20GDCV01045

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 1800 Century Park East, Suite 200, Los Angeles, California 90067.

On September 4, 2025 I served the document(s) described as

[PROPOSED] JUDGMENT
on the interested parties in this action as stated
below:

Stephen D. Weisskopf
LevatoLaw
2029 Century Park East, Suite 400
Los Angeles, CA 90067

Attorneys for Defendants and Cross-complainants

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on and in accordance with a court order or agreement of the parties to accept service by e-mail or electronic transmission, I caused a true copy of the document to be sent to the persons at the corresponding electronic address as indicated above on the above-mentioned date. My electronic notification address is twhitman@kkslawyers.com. I am readily familiar with this firm's Microsoft Outlook electronic mail system and did not receive any electronic message or other indication that the transmission was unsuccessful.

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

Executed on September 4, 2025, at Los Angeles, California.



Todd Whitman