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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JIU ZHOU GROUP (HK) HOLDING LIMITED,

Plaintiff, Cross-defendant and Appellant,

v.

M. BROTHERS, INC., et al.,

Defendants, Cross-complainants and Respondents.

B269861 c/w B272470
(Los Angeles County Super. Ct. No. BC490181)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephanie Bowick, Judge. Affirmed in part, reversed in part with directions.

Law Office of Gerald Philip Peters and Gerald P. Peters for Plaintiff, Cross-defendant and Appellant.

Sandra J. Applebaum and Salvatore Coco for Defendants, Cross-complainants and Respondents.

Jiu Zhou Group (HK) Holding Limited (JZHK) asserted claims against respondents M. Brothers, Inc. (MB) and Rodney Lo for breach of contract and unjust enrichment, and appellants cross-complained against JZHK for breach of contract. Following a bench trial, the court ruled against JZHK on its claims and in favor of respondents on their breach of contract cross-claim, concluding that although MB and Lo failed to establish actual damages, they were entitled to $1,000,000 in liquidated damages.

JZHK contends the trial court erred in finding that JZHK breached the contract, erred in rejecting JZHK's "alter ego" theory regarding Lo, erred in dismissing JZHK's claim for unjust enrichment, and erred in awarding liquidated damages. We reject JZHK's first three contentions, but conclude the award of liquidated damages must be reversed. We therefore affirm the judgment in favor of respondents on JZHK's complaint, reverse the judgment in respondents' favor on their cross-complaint, and remand with directions to enter a new judgment on respondents' cross-complaint in JZHK's favor.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

A. *Background*

The key issues concern two contracts executed by related businesses.[1] JZHK is registered in Hong Kong, and belongs to a family of legally separate businesses. Other members include Shenzhen Jiuzhou Electronics Co. (Electronics), a company based in China, and its subsidiary, Jiu Zhou Jena (Jena), which has an office in Texas. Lo is the chief executive officer and sole shareholder of MB; in addition, during the pertinent events, Lo and Silver Cheung acted as representatives of Infinite Digital, Inc. (Infinite).[2]

B. *2011 Agreement*

On February 25, 2011, Electronics, Jena, and Infinite entered into a contract entitled "A Framework Agreement on Market Cooperation by Three Parties," which set forth an "agreed cooperation plan" for the marketing of LCD and LED televisions. The agreement was to be valid for a one-year period commencing on February 25, 2011, during which the plan was to be performed. Cheung executed the agreement as Infinite's representative.

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[1] The pertinent contracts were originally written in Chinese. At trial, translations of the contracts were admitted into evidence.

[2] Throughout the record, Cheung is variously denominated "Sylvan Chang," "Sylvan Steven Cheung," and "Silver Cheung."

The agreement described Electronics as having "access to the products," Infinite as having a customer base and sales experience in the North American market, and Jena as having "the sales outlet in the target market." Under the agreement, Electronics authorized Infinite to represent it in the target market and engage in marketing promotion in order to secure orders. Upon Infinite's submission of "reasonable requests" from customers to Electronics and Jena, they were obliged to evaluate the requests, identify a potential product supplier, and work with Infinite regarding product delivery. Before signing any customer order, Infinite was required to consult with Electronics and Jena about the order, including methods of payment collection and delivery of shipments. If Electronics and Jena determined that a customer order was acceptable, Electronics was to export the products after insurance was obtained from Sinosure. Infinite was responsible for filling the order, ensuring delivery, collecting payment, and providing after-sale service, including resolving customer disputes.

On May 29, 2011, the parties executed an appendix to the agreement setting forth procedures and goals relating to the agreed cooperation plan. Lo signed the appendix as Infinite's representative.

C. *2012 Agreement*

On February 10, 2012, JZHK and MB entered into a "Market Cooperation Agreement." Under the agreement,

MB was obliged to engage in selling LCD and LED television products provided by JZHK to customers in North America. The agreement was to be valid for a three-year period commencing on the date of its execution. Lo signed the agreement as MB's representative.

The agreement provided: "100% of the ownership right of [MB] will be entrusted to [JZHK] during the validity period of the agreement. During the validity period . . . [specified] accounts of [MB] will be authorized and operated by personnel designated by [JZHK]. To ensure the management right of [JZHK] to the funds of [MB] in the aforesaid period, [JZHK] will appoint a director to serve on the board of [MB] . . . ." In addition, the agreement stated that "[t]he entire ownership of the merchandise purchased by [MB] through [JZHK] will belong to [JZHK]."

The agreement required JZHK and MB to cooperate regarding orders, stating: "After the agreement is entered into, [MB] will make efforts in the electronic product market in North America for the procurement of orders. But [JZHK] will need to conduct risk and profit evaluation before an order for a customer is signed. No order may be executed before the two parties have reached agreement on the specific mechanism of how to fill the order. No contract or order can go into effect before the designated representatives from the two parties have jointly confirmed it."

Regarding the parties' duties, the agreement provided that "[a]fter insurance from SINOSURE is obtained, [JZHK] will be responsible for the export of the merchandise . . . .

[MB] will serve as the importer in North America to handle issues relating to importation shipping, payment collection so that the execution of a[n] order can be carried out smoothly." The agreement further stated: "In the process of the delivery of the order, [MB] is obligated for the execution and shipping of the order, payment collection and . . . after-sale services. It is also responsible for handling . . . possible disputes with customers."

The agreement contained terms regarding the distribution of profits from sales and the manner in which MB was to pay for products obtained from JZHK. In this regard, the agreement stated: "[MB] will set up an account for payments for goods in HSBC or Bank of China in Los Angeles. The accounts will be turned over to the financial personnel designated by [JZHK] for management. The account will only be used for collection of payments and settlement of the profits of the parties. [MB] is not allowed to utilize funds in the account for any purpose outside the scope of this agreement. [JZHK] will reserve the right to check and monitor the activities in the account."

Under the agreement, JZHK was obliged to lend MB $150,000 each year as a cash flow reserve. The loans were to be repaid from MB's share of the agreement-related profits. Within 15 working days of the agreement's

execution, JZHK was required to make a $150,000 deposit in a bank account designated by MB.[3]

Under the agreement, JZHK and MB were also jointly responsible for the expenses of a call center providing after-sale service. The agreement stated that expenses for the call center and after-sale service were to be "reserved in [MB's] expense account [because MB] will directly deal with the market." The agreement further stated that in order "[t]o avoid a scenario in which the after-sale service operated by [MB] runs into difficulties, [JZHK] agrees that an amount of [$150,000] may be withheld permanently in [MB's] account . . . ." JZHK represented that the "Juzhou companies" (*sic*) held $528,062.40 to satisfy potential after-service expenses.

The agreement also contained the following provision: "A six month advance notification to the other party is required if one party wishes to terminate this agreement before the expiration date. If one of the parties unilaterally terminates this agreement, it needs to pay the other party $1,000,000 . . . as penalty."

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[3] As executed, the agreement incorrectly stated: "[MB] will deposit the said amount [of $150,000] in an account designated by [JZHK] within 15 working days upon the signing of this agreement." Later, during the underlying action, MB and Lo asserted a contract reformation cross-claim against JZHK to correct the error. The error was resolved by a stipulation of the parties prior to trial.

D. *Underlying Action*

1. *Initial Proceedings*

In August 2012, JZHK initiated the underlying action against Lo, Cheung, MB, and M. Brothers Digital, Inc. The original complaint contained claims for breach of contract, negligent misrepresentation, fraud, conversion, unjust enrichment, and rescission. The complaint alleged that under the 2012 agreement, the defendants were obliged to place proceeds from product sales in an HSBC account. According to the complaint, in April and May 2012, the defendants shipped goods provided by JZHK to Sears, but did not pay JZHK for the goods, and diverted the funds from the goods into accounts other than the HSBC account.

In September 2012, MB filed a cross-complaint against JZHK, asserting claims for breach of contract, reformation, and interference with prospective economic advantage. The cross-complaint alleged, inter alia, that JZHK never provided the initial sum of $150,000 necessary for MB's operational costs, refused to provide televisions to satisfy new purchase orders from Sears, and "repeated[ly] sabotaged" MB's relationship with Sears. MB requested damages exceeding $30 million.

In October 2013, JZHK filed its second amended complaint (SAC).[4] In April 2015, pursuant to a stipulation of the parties, JZHK dismissed Cheung and M. Brothers

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[4] The record provided by JZHK does not include the SAC.

Digital, Inc., from the action, and dismissed with prejudice the SAC's claims against Lo and MB, with the exception of JZHK's claims for breach of contract and unjust enrichment. Under the stipulation, MB dismissed its cross-claims with prejudice, save for its cross-claim for breach of contract.

JZHK's pre-trial brief asserted that Lo and MB had breached the 2012 agreement by failing to transfer to JZHK's account funds they received from Sears for JZHK's televisions. Lo and MB's pre-trial brief maintained that JZHK, in negotiating and executing the 2012 agreement, implemented a "hidden agenda" to obtain proceeds attributable to television sales under the 2011 agreement. According to Lo and MB, after Jena and Electronics decided to leave the television business, they "brought in" JZHK, which attempted to use the 2012 agreement -- though limited to "'new' television business" -- to "clean up and finish left-over 'old' television inventory business related to Jena," including securing the proceeds from "Jena's 'old' television sales to Sears . . . ." Lo and MB further stated that although they performed their obligations under the 2012 agreement, JZHK did not do so.

2. *Trial*

In August 2015, the court conducted a five-day bench trial on the parties' claims. At trial, it was undisputed that from April 2011 to February 2012, Jena provided televisions valued at approximately $15 million to EZ Corporation (EZ). All those televisions were manufactured no later than

January 2012. In or after 2011, EZ refused to make full payment for the televisions, alleging, inter alia, that many televisions had been returned by customers. In March 2012, Lo suggested that available televisions involved in the EZ transaction be marketed to other parties. Later, some of those televisions were sold to Sears. When Sears requested more televisions, JZHK declined to fill the order.

The key issues at trial concerned whether the televisions sold to Sears in 2012 fell within the scope of the 2012 agreement, whether the parties to that agreement satisfied their obligations regarding Sears's television orders and other matters, and whether Lo was personally liable for any breach of the 2012 agreement.

a. *JZHK's Case-in-Chief*

i. *Wei Huang*

Wei Huang testified that he is JZHK's vice general manager, as well as a director of Jena and Electronic's vice general manager for global sales and marketing. According to Huang, Electronics, Jena, and JZHK, though separate and independently registered entities, are "subsidiaries" of the Jiu Zhou Group. In testifying, Huang generally applied the term "Jiu Zhou" to Electronics, Jena, JZHK, and the Jiu Zhou Group itself. When asked how a purchase order identifying Jena as a supplier differed from one identifying JZHK as a supplier, Huang stated: "This is how I view the situation: To me, Jena and [JZHK] are both subsidiar[ies] of

Jiu Zhou. So it's operated by the same people. So it is considered internal transactions."

Huang testified that the 2011 and 2012 agreements, though formally involving different parties, regulated the same business relationship. While acknowledging that Jena was a distinct business from Electronics, Huang stated: "They were all Jiu Zhou subsidiaries, all Jiu Zhou people. So based on different times we used different names. [¶] . . . [¶] Jiu Zhou used a different company to sign the [2012] contract. It was arranged by the company Jiu Zhou. But what we were looking for was that we gave the business to [Lo] and his team and it was in the same line of business. The people from both sides who entered this [the 2012] contract did not change." Huang also acknowledged that Lo was not formally a party to the 2012 agreement, but stated, "To us . . . Lo is equivalent to [MB]."

Huang testified that he first met Lo in 2008, and later became acquainted with Cheung, Lo's business partner. Huang's business relationship with Lo began in February 2011, when the 2011 agreement was executed. In early 2012, Jiu Zhou and Lo each made some business adjustments. Jiu Zhou decided to change the scope of Jena's operations. At the same time, Lo wished to establish a new company, and proposed to "pledge it" to Jiu Zhou in order to continue his business relationship. As the result of Lo's proposal, the 2012 agreement was executed.

Huang testified that from April 2011 to February 2012, EZ bought televisions through Jena. Huang characterized

that transaction as involving the "business venture with the defendants." The purchase orders relating to the transaction showed that Jena obtained the televisions provided to EZ from JZHK. EZ received televisions valued at approximately $15 million, but refused to pay approximately $6.2 million owing for them, claiming, inter alia, that many televisions had been returned by customers. According to Huang, at the time of trial, Jiu Zhou was preparing a lawsuit against EZ regarding the unpaid funds.

Huang further testified that in an e-mail dated March 11, 2012, Lo suggested to Huang that they collect as many televisions as possible involved in the EZ transaction and sell them to other parties. In April and May 2012, MB sold some of those televisions to Sears and P.C. Richard. Pursuant to those sales, Sears owed $3.2 million.

According to Huang, in late June 2012, when Sears's payment for the televisions was due, JZHK and Jena lost contact with Lo. At Huang's direction, David Xia, acting on behalf of Jena, communicated with Sears directly regarding the payment. In a July 2, 2012 e-mail to Sears, Xia stated that MB had been representing Jena and that Jena was "the real owner" of the televisions sold to Sears. Xia requested that Sears deposit the funds in an HSBC account held by MB.

Huang acknowledged that he had approved the language of the e-mail, but maintained that JZHK consigned the televisions to MB for sale to Sears. Huang stated: "Jena is a subsidiary of Jiu Zhou. What we're trying to say is Jiu

Zhou has the rights to this batch of goods. [¶] So when I say [JZHK] or [Electronics] or Jena, internally we're all referring to Jiu Zhou." He further stated that Jena had bought the televisions in question from JZHK, and that "[t]he rights to the goods belonged to [JZHK] because Jena ha[d] not paid [JZHK]."

Huang testified that although Sears paid MB approximately $2.3 million in July 2012, those funds were not placed in the HSBC account.[5] Later, when Sears requested more televisions, Jiu Zhou declined to fill the order because it appeared to be unprofitable, Sinosure refused to provide insurance, Sears had an excessively generous return policy, and Jiu Zhou was unable to obtain credit to fund the transaction.

Huang maintained that the 2012 sale of televisions to Sears fell within the scope of the 2012 agreement, stating: "Our contract regulates our relationship . . . between Jiu Zhou and [Lo's] company. It is not targeted at a particular purchase order or merchandise. [¶] . . . [I]n February 2012, we signed a new contract which replaced the old contract. So any sales behavior after that date should be guided by the new contract."

Huang acknowledged that after the execution of the 2012 agreement, Jiu Zhou never loaned MB the initial sum of $150,000 for operational costs, but attributed that conduct

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[5] Huang also testified that MB did not pay for televisions sold to certain parties other than Sears.

to MB's failure to establish an appropriate bank account and pay for televisions provided to it. He also stated that in March 2012, Lo orally agreed not to request the loan until EZ paid the funds it owed.

Huang also acknowledged that contrary to the representations in the 2012 agreement, JZHK did not possess $528,062.40 for potential after-service expenses. According to Huang, the 2012 agreement contained a grammatical error, and should have stated that JZHK anticipated that it would possess that amount for potential after-service expenses. JZHK actually had approximately $180,000 available for those expenses.

ii. *Lo (As Adverse Witness)*

Testifying as an adverse witness (Evid. Code, § 776), Lo stated that he was MB's chief executive officer and sole stockholder. According to Lo, Infinite sold televisions belonging to Jena to EZ, which failed to pay approximately $6 million owed for the televisions. Later, pursuant to the 2012 agreement with JZHK, MB opened an HSBC account. At JZHK's request, for no compensation, MB also agreed to "clean up . . . odds and ends" regarding the televisions returned from EZ. MB sold some of the televisions to Sears, and sought further sales from Sears and other parties.[6] In

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[6] When called as an adverse witness, Lo stated at one point that MB sold the televisions to Sears for "plaintiff."
(Fn. continued on the next page.)

May 2012, in an effort to assist Jena's recovery of the funds that EZ owed, Lo wrote a letter to EZ on letterhead bearing MB's name. Lo testified that Sears's payment for the sale of the returned televisions "should" have been deposited in the HSBC account, but was ultimately placed in an MB account.

b. *Rulings on JZHK's Claims for Unjust Enrichment Against Respondents and Breach of Contract Against Lo*

Prior to the presentation of respondents' case-in-chief, following motions by respondents, the trial court concluded that JZHK's claim for unjust enrichment against respondents and claim for breach of contract against Lo failed in light of the parties' pre-trial stipulation and the trial evidence. The trial court determined that the unjust enrichment claim, as alleged in the SAC, was not independent of the conversion claim dismissed pursuant to the parties' pre-trial stipulation. The court further determined that there was insufficient evidence to support JZHK's theory of alter ego liability, for purposes of the breach of contract claim against Lo.

c. *Respondents' Case-in-Chief*

Lo testified that after graduating from college, he worked as an electrical engineer specializing in television

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Later, in testifying on behalf of respondents, Lo maintained that MB sold the televisions to Sears on behalf of Jena.

products. In 2008, in the course of a business transaction between Lo's employer and Electronics, Lo met Huang. In 2010, Huang suggested that Lo create his own business.

According to Lo, the only parties to the 2011 agreement were Electronics, Jena, and Infinite. From the date of the agreement's execution to February 2012, Infinite assisted in the sale of televisions to only one customer, namely, EZ. When EZ placed an order, Infinite passed the order to Jena, which communicated it to Electronics. After Electronics located a supplier, invoices for the shipment were processed in the reverse order. Infinite assisted Jena in storing and delivering the shipment.

Lo testified that in early 2012, Huang told Lo that he wanted to replace the 2011 agreement. Huang wished to have entirely different parties involved in the new agreement. The 2012 agreement applied only to MB's sales of televisions provided by JZHK.

According to Lo, although MB began assisting in the sale of the Jena-supplied EZ televisions in February 2012, MB never entered into any express agreement regarding that assistance. After mid-March 2012, MB sold Jena-supplied EZ televisions to Sears and P.C. Richards. In May 2012, after some negotiations, MB proposed an agreement regarding such sales to JZHK. In an e-mail to Lo dated May 25, 2012, Huang directed Lo to place payments from EZ relating to the televisions in Jena's account, and suggested that "we" might sign the proposed agreement. The agreement submitted by Lo was never executed.

Lo further testified that he followed directions from David Xia -- who was acting on behalf of Jena -- regarding payment arrangements relating to the Jena-supplied EZ televisions. After MB collected funds from EZ, Xia asked Lo to place the funds in a Jena account rather than the HSBC account established under the 2012 agreement. When P. C. Richards paid for the televisions it bought, Xia directed Lo to give him the payment check. Lo complied with that request because Xia "was Jena." Xia deposited the payment check in the HSBC account.

After Sears bought some of the Jena-supplied EZ televisions, Xia asked Lo to deposit Sears's payment in the HSBC account. According to Lo, Xia's request was the sole reason for directing the deposit to that account, as the 2012 agreement was inapplicable to the transaction. Sears twice tried to make an electronic deposit of approximately $2.3 million into the HSBC account, but each time the transaction failed. Lo then asked Sears to place the funds in an MB bank account.

With respect to the cross-complaint, Lo testified that JZHK breached the 2012 agreement by failing to make the initial $150,000 loan for operational expenses, rejecting all proposed orders, and failing to reserve $524,396.40 for after-sale service costs. Regarding the loan, Lo stated that although JZHK was obliged to provide MB with a $150,000 loan within 15 days of the 2012 agreement's execution, JZHK failed to do so. After the execution of the 2012 agreement, David Xia became a member of MB's board as

JZHK's representative. On May 17, 2012, Lo forwarded to Huang a modified set of minutes of the March 2012 MB board meeting at which Xia was elected to the board. The modified minutes reflected the passage of a resolution calling for JZHK to transfer the $150,000 loan to MB.[7] JZHK never provided those funds.

Regarding the proposed orders, Lo testified that without consultation, JZHK rejected orders that appeared to be profitable and insurable. MB submitted proposed orders to JZHK from Sears, P.C. Richard, and Mason. Although Sinosure declined to insure the proposed Sears order, MB informed JZHK that it had identified an alternative insurer. JZHK accepted none of the orders.

Regarding the funds for after-sale service costs, Lo testified that JZHK never transferred any money to MB's accounts. When Lo requested the funds, JZHK replied, "Later. Let's take care of the merchandise first."

Lo acknowledged that JZHK never formally terminated the agreement, but maintained that JZHK's conduct effectively did so. In July 2012, Lo informed JZHK by letter that he viewed its conduct as terminating the agreement.

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[7] Huang acknowledged reading the modified minutes Lo sent to him.

3. *Rebuttal Evidence*

Both sides offered rebuttal evidence. Testifying on behalf of JZHK, Huang testified that JZHK gave the televisions to MB in order to sell them. According to Huang, the decision to place JZHK in charge of the Jena-supplied EZ televisions was the result of "an internal meeting" involving Electronics, JZHK, and Jena.

Huang also testified that MB's proposed orders were unprofitable, that JZHK was entitled to reject any order not insurable by Sinosure, and that MB lost no profits due to JZHK's rejection of the orders because MB was free to rely on other product suppliers. In response, Lo testified that MB could not have found alternative suppliers in time to fill the proposed orders.

4. *Statement of Decision and Judgments*

Following trial, JZHK sought a statement of decision, and requested findings on 96 issues. On December 9, 2015, the trial court filed its statement of decision, and entered judgments in favor of MB and against JZHK on JZHK's complaint and on MB's cross-complaint, awarding MB $1,000,000 in damages. In the detailed statement of decision, the court determined that the 2011 and 2012 agreements involved distinct parties, and that the contract at issue was the 2012 agreement. The court concluded that only JZHK breached the 2012 agreement, and awarded MB $1,000,000 in liquidated damages due to JZHK's "unilateral termination" of the agreement. Later, on April 26, 2016, the

trial court entered a judgment dismissing JZHK's claims against Lo with prejudice. JZHK noticed timely appeals from the judgments.

DISCUSSION

JZHK's overarching contention is that the trial court erred in concluding that JZHK -- rather than respondents -- breached the 2012 agreement. In this regard, JZHK maintains that respondents violated the 2012 agreement by failing to deposit Sears's $2.3 million payment in the HSBC account, and that JZHK did not breach the contract in any manner. JZHK further contends the court improperly awarded $1,000,000 in liquidated damages to respondents, and erred in rejecting its claim for unjust enrichment against respondents and its claim for breach of contract against Lo. As explained below, we agree with JZHK's challenge to the award of liquidated damages, but reject its other contentions.

A. *Standards of Review*

In assessing JZHK's contentions, we will affirm the trial court's factual findings to the extent they are supported by substantial evidence. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561.) Upon review for substantial evidence, we "consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving conflicts in support of the judgment. [Citation.]" (*Ibid.*) In

contrast, we independently review the trial court's resolution of questions of law. (*Home Depot, U.S.A., Inc. v. Contractors' State License Bd.* (1996) 41 Cal.App.4th 1592, 1599.)

Here, JZHK requested a statement of decision, seeking findings on 96 issues. Generally, "[i]n issuing its statement of decision, the trial court need not address each question listed in appellants' request. All that is required is an explanation of the factual and legal basis for the court's decision regarding such principal controverted issues at trial as are listed in the request." (*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1130.) Thus, "a statement of decision is adequate if it fairly discloses the determinations as to the ultimate facts and material issues in the case. [Citation.] When this rule is applied, the term 'ultimate fact' generally refers to a core fact, such as an essential element of a claim. [Citations.] Ultimate facts are distinguished from evidentiary facts and from legal conclusions. [Citations.]" (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513 (*Central Valley General Hosp.*).)

To the extent JZHK challenges the trial court's interpretation of the pertinent agreements, our inquiry follows established principles. "The paramount rule governing the interpretation of contracts is to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as it is ascertainable and lawful [citation]. The [in]tention of the parties must, in the first

instance, be derived from the language of the entire contract." (*Leo F. Piazza Paving Co. v. Foundation Constructors, Inc.* (1981) 128 Cal.App.3d 583, 591, italics deleted.) The circumstances surrounding the negotiation of a contract may be relevant to its interpretation (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 748, pp. 836-838), but not the private and unexpressed views of participants in the negotiations (*Edwards v. Comstock Insurance Co.* (1988) 205 Cal.App.3d 1164, 1169 (*Edwards*)).

B. *No Breach of the 2012 Agreement By MB*

We begin with JZHK's challenge to the trial court's determinations regarding JZHK's breach of contract claim, which relied on the allegation that MB contravened the 2012 agreement by failing to deposit Sears's $2.3 million payment in the HSBC account. In rejecting JZHK's claim, the trial court stated: "[T]he 2012 agreement applies only to sales by [MB] on behalf of JZHK. . . . [T]here is nothing in writing . . . that [MB] 'succeeded' Infinite . . . and Jena to sell and import televisions, or that [JZHK] 'succeeded' [Electronics]. Rather, [MB] represented Jena separately to sell Jena televisions. . . . [T]he 2011 Jena television transaction was not added to the 2012 contract by way of written modification or amendment. In addition, there was no written contract between [MB] and [JZHK] governing the Jena television transaction. . . . [¶] The transactions that were occurring in accordance with the 2011 agreement . . . , including the sales of televisions to [EZ] stood on their own

and separate from the 2012 agreement . . . . Therefore, the Sears television payment from the EZ-Jena televisions did not fall under the 2012 contract."

The record discloses ample evidence to support these determinations. The trial court reasonably found that the 2011 and 2012 agreements involved distinct parties. Although Huang characterized them as reflecting an ongoing business relationship, he acknowledged that Jena, Electronics, and JZHK are separate businesses, and Lo described Infinite and MB as different entities. Furthermore, the record shows that the televisions underlying Sears's $2.3 million payment were initially ordered from Jena by EZ before the execution of the 2012 agreement. For that reason, the trial court reasonably characterized that sale as "the 2011 Jena television transaction."

The crucial issue presented to the trial court was whether the resale of some of the Jena-supplied EZ televisions to Sears -- for which Sears made the $2.3 million payment -- fell within the scope of the 2012 agreement. Regarding that issue, the record discloses that in a March 11, 2012 e-mail to Huang and Xia, Lo suggested that the available Jena-supplied EZ televisions be resold to other parties. That e-mail, however, does not formally identify Huang or Xia as principals of Jena or JZHK. Lo testified that because no existing express agreement encompassed the sale of the televisions to Sears, he proposed an agreement to JZHK, which was never executed. He also

testified that Sears's $2.3 million payment should have been deposited in the HSBC account because Xia, acting on behalf of Jena, ordered that method of payment. Although Huang maintained that the sale to Sears fell within the scope of the 2012 agreement, he acknowledged that in July 2012, with his approval, Xia -- acting on behalf of Jena -- told Sears that the televisions belonged to Jena, and requested that payment be deposited in an HSBC account held by MB.

In view of this evidence, the trial court reasonably found that the resale of the Jena-supplied EZ televisions to Sears -- and thus the issue regarding Sears's $2.3 million payment -- fell outside the scope of the 2012 agreement. The record shows that Jena -- which was not party to the 2012 agreement -- claimed ownership of the televisions and the sales proceeds. Although MB participated in the sale to Sears, Huang acknowledged that 2012 agreement was not "exclusive," that is, with JZHK's permission, MB was free to arrange sales involving suppliers other than JZHK. As the court also observed, the parties never expressly modified or amended the 2012 agreement to encompass the transaction. Nor was the court compelled to conclude that the 2012 agreement was amended as the result of any conduct by JZHK and MB (*Garrison v. Edward Brown & Sons* (1944) 25 Cal.2d 473, 479 [parties to a written contract may modify it

through their conduct]), as the evidence showed that Jena -- not JZHK -- asserted control over the sale to Sears and MB.[8]

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[8] In challenging the trial court's findings, JZHK notes that Lo, when called as an adverse witness (Evid. Code, § 776), testified at one point that MB sold the televisions to Sears for "plaintiff." That response, however, does not conclusively discredit Lo's remaining testimony. As our Supreme Court explained in *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878, overruled on another ground in *Ryan v. Rosenfeld* (2017) __ Cal.5th __, __ [2017 Cal. LEXIS 4208 at p. *17], even internally inconsistent testimony from a single witness may support a judgment. "It is for the trier of fact to consider internal inconsistencies in testimony, to resolve them if this is possible, and to determine what weight should be given to such testimony." (*Clemmer v. Hartford Insurance Co., supra,* at p. 878.)

During oral argument, JZHK's counsel also maintained that the deposition testimony of Steven Shen admitted at trial established that MB sold the Jena-supplied EZ televisions to Sears for JZHK. Shen stated that he worked with Lo, that he was responsible for orders processed in China, and that the 2012 contract governed the sale of the Jena-supplied EZ televisions to Sears. However, as there is no evidence that Shen participated in the negotiation of the 2012 agreement or in subsequent discussions between the parties regarding its meaning, and the trial court was not required to credit his subjective understanding of that agreement.

JZHK contends the trial court improperly disregarded a provision of the 2012 agreement establishing that it encompassed all transactions after its execution. We disagree. The provision upon which JZHK relies states: "From the date when this agreement is signed, *customers* procured and with whom transactions are consummated by [MB] will be *protected* by this agreement. [JZHK] *is not allowed to skip* [MB] *to directly transact any contract deals with the said customer*." (Italics added.) The provision thus states only that JZHK must do business with customers secured by MB only through MB. Nothing in the provision suggests that it brought the sale of the Jena-supplied EZ televisions to Sears within the scope of the 2012 agreement.[9]

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[9] During oral argument, JZHK's counsel maintained that other provisions of the 2012 agreement showed that it encompassed the sale of the Jena-supplied EZ televisions to Sears. As explained below, we reject those contentions.

Counsel placed special emphasis on the following provision: "The entire ownership of merchandise purchased by [MB] *through* [JZHK] during the validity period of the agreement will belong to [JZHK]. . . . " (Italics added.) However, as there is sufficient evidence to support the trial court's finding that the sale of the Jena-supplied EZ televisions to Sears was "between Jena and [MB]," that provision was not relevant to the sale.

Counsel further contended the 2011 agreement merged fully into the 2012 agreement, arguing that under the 2012 agreement, MB agreed to provide an after-sale services call center for televisions sold under the 2011 agreement, and

(Fn. continued on the next page.)

JZHK committed itself to pay for a share of those services from funds derived from the 2011 agreement. In our view, the 2012 agreement's terms regarding the provision of after-sale services for sales consummated under the 2011 agreement did not require the trial court to conclude that the 2012 agreement necessarily encompassed another matter, namely, the sale of the EZ televisions to Sears.

Counsel also argued that Lo admitted the funds from that sale should have been deposited in the HSBC account, which the 2012 agreement expressly restricted to payments related to that agreement. Regarding this contention, the record contains evidence that after the execution of the 2012 agreement, David Xia became a member of MB's board as JZHK's representative. Later, acting on behalf of Jena, Xia asked Sears to place the funds in the HSBC account. In view of this evidence, the trial court reasonably concluded that JZHK waived the restriction in the 2012 agreement restricting the use of the HSBC account.

In a related contention, JZHK suggests that the sale of the Jena-supplied EZ televisions to Sears necessarily fell under the 2012 agreement because the 2011 agreement terminated in February 2011. However, the trial court concluded that the sale fell under *no* written contract to which Jena and MB were jointly parties. In our view, Lo's testimony that the sale occurred outside the scope of both written agreements is sufficient to support that determination.

JZHK also contends the trial court incorrectly interpreted the 2012 agreement to apply only to "'newly manufactured television sales.'" Any error here is harmless,

(Fn. continued on the next page.)

JZHK also maintains that MB breached the 2012 agreement, pointing to Huang's testimony that in 2012, JZHK acquired ownership of the televisions sold to Sears though "internal bookkeeping" involving JZHK and Jena.[10] JZHK's contention fails for two reasons. First, as the trial court noted, JZHK offered no written instrument by which Electronics and Jena authorized JZHK to sell the Jena-supplied EZ televisions or act as their successors-in-interest. Moreover, the record discloses evidence -- including testimony from Huang -- that with Huang's approval, Xia told Sears that the televisions belonged to Jena, and that Xia, acting on behalf of Jena, controlled the payments from the sale of the televisions. That evidence is sufficient to support the trial court's express finding that "the Jena television issue is between Jena and [MB]." Second, JZHK

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however, as that determination is inessential to the court's conclusion that MB did not breach the 2012 agreement.

[10] JZHK states: "[T]he undisputed evidence is that . . . in 2012, [JZHK] and Jena, both members of the Jiu Zhou family of companies, through internal bookkeeping, . . . restore[d] [JZHK's] ownership of the televisions [¶] When customers issued purchase orders to Jena for televisions, it . . . issued purchase orders to [JZHK]. The orders were fulfilled by [JZHK] . . . . In 2012, the [Jiu Zhou] family's directors and officers decided [JZHK] would be responsible for selling the remaining EZ inventory. Therefore, Jena's and [JZHK's] accounts receivable and accounts payable for the televisions were internally canceled."

could not unilaterally modify the 2012 agreement to encompass the Sears sale through "internal" transactions with Jena not communicated to MB. (See *Edwards*, *supra*, 205 Cal.App.3d at p. 1169.) In sum, there is sufficient evidence to support the trial court's findings rejecting JZHK's breach of contract claim.[11]

C. *JZHK's Breach of the 2012 Agreement*

We turn to JZHK's challenge to the trial court's determinations regarding MB's breach of contract cross-claim. The trial court concluded that JZHK did not perform as required under the 2012 agreement, finding that JZHK failed to provide the initial $150,000 loan for operational expenses within 15 days of the agreement's execution, failed to provide funds for after-sale services and call center

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[11] JZHK's reply brief contends that respondents' conduct regarding the $2.3 million Sears payment breached the 2012 agreement, pointing to evidence favorable to that conclusion. In so arguing, however, JZHK "'misapprehends our role as an appellate court. Review for substantial evidence is not trial de novo. [Citation]' [Citation.] When there is substantial evidence to support the [factfinder's] actual conclusion, 'it is of no consequence that the [factfinder], believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' [Citation.]" (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1301.) As explained above, there is sufficient evidence to support the trial court's determination that the Sears payment fell outside the 2012 agreement.

expenses, and rejected all proposed orders. The court further found that MB fully complied with its contractual obligations by placing JZHK-nominated directors on its board and opening the HSBC account.

Of these determinations, JZHK contests only the finding relating to the rejected proposed orders. Generally, when a contract conditions a party's performance on its satisfaction, and the requisite satisfaction involves "factors of commercial value or financial concern," the party's decision is subject to an objective "reasonable person" standard, rather than a subjective "good faith" test, unless the contract specifies otherwise. (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 59-60.)

Here, the 2012 agreement stated after MB tendered a proposed order, JZHK "will need to conduct risk and profit evaluation before an order from a customer is signed. No order may be executed before the two parties have reached agreement on the specific mechanism of how to fill the order. No contract or order can go into effect before the designated representatives from the two parties have jointly confirmed it." The agreement further provided that "[a]fter insurance from SINOSURE is obtained, [JZHK] will be responsible for the export of the merchandise . . . ."

Relying on these provisions, JZHK contends the trial court erred in finding that JZHK improperly rejected the proposed order, arguing that Huang's testimony established that all the orders were unprofitable. We disagree. As the 2012 agreement does not specify that JZHK's decisions were

consigned to its "good faith" discretion, the agreement subjected those decisions to a "reasonable person" standard. Prior to trial, the parties stipulated that "in the course of [MB's] efforts to sell televisions under [the 2012 agreement], [MB] received genuine orders from Sears/K-Mart, P[.] C[.] Richard and Mason . . . ." At trial, Lo provided evidence that the proposed orders were profitable, and that JZHK rejected them without adequately consulting MB. On review for substantial evidence, Lo's testimony is sufficient to establish that JZHK's rejection of the orders was not grounded on a reasonable determination regarding their unprofitability.[12]

In a related contention, JZHK maintains that under the 2012 agreement, JZHK was entitled to reject the proposed Sears order because Sinosure insurance was unavailable for the order. Regarding this contention, Lo testified that he found an alternative insurer for the order. In view of the evidence that JZHK rejected all the proposed

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[12] JZHK contends that the stipulation is erroneous -- and thus not binding -- with respect to the proposed Mason order. However, in civil proceedings, parties to a stipulation of facts may not dispute the facts it establishes. (*Steele v. Steele* (1955) 132 Cal.App.2d 301, 303.) *In re Neal* (1980) 114 Cal.App.3d 141, upon which JZHK relies, is distinguishable, as that case involved a stipulation regarding a legal issue in a criminal proceeding (*id.* at p. 143, fn. 2). Ordinarily, such stipulations are not binding in criminal actions. (*Leonard v. City of Los Angeles* (1973) 31 Cal.App.3d 473, 476.)

orders without a cost analysis, the trial court reasonably could have inferred that the lack of Sinosure insurance was not JZHK's reason for rejecting the Sears order.

Furthermore, even if the trial court's findings were incorrect with respect to the proposed Sears order, that error would be harmless. As noted above, JZHK does not challenge the findings relating to the $150,000 loan and funds for the after-sale services call center, and there is adequate evidence that JZHK improperly rejected the proposed P. C. Richard and Mason orders. In our view, that conduct constituted breaches of the 2012 agreement sufficient to establish its termination.

D. *Liquidated Damages*

JZHK challenges the award of liquidated damages to MB under the following provision of the 2012 agreement: "A six month advance notification to the other party is required if one party wishes to terminate this agreement before the expiration date. If one of the parties unilaterally terminates this agreement, it needs to pay to the other party $1,000,000 . . . as penalty." The trial court found that although MB failed to establish actual damages, it was entitled to an award of $1,000,000 in liquidated damages under that provision. JZHK contends first that the provision is unenforceable. Additionally, JZHK contends it engaged in no "unilateral terminat[ion]" of the 2012 agreement. For the reasons discussed below, we reject JZHK's first contention, but agree with its second contention.

1. *Enforceable Provision*

JZHK maintains that the liquidated damages provision is invalid, arguing there is no evidence that MB, in negotiating the 2012 agreement, engaged in an assessment of potential damages sufficient to support the amount specified in the provision. As explained below, we disagree.

Subdivision (b) of Civil Code section 1671 provides that absent circumstances not present here, "a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." Generally, a liquidated damages clause is unenforceable "'if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. . . . In the absence of such a relationship, a contractual clause purporting to predetermine damages 'must be construed as a penalty.' [Citation.] [¶] . . . [¶] In short, '[a]n amount disproportionate to the anticipated damages is termed a "penalty." A contractual provision imposing a "penalty" is ineffective, and the wronged party can collect only the actual damages sustained.' [Citations.]" (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977 (*Ridgley*).)

At the outset, we observe that the occurrence of the term "penalty" in the liquidated damages provision does not establish that the provision is unenforceable. "A liquidated damages provision is not invalid merely because it is

intended to encourage a party to perform, so long as it represents a reasonable attempt to anticipate the losses to be suffered. [Citation.] A court will interpret a liquidated damages clause according to its substance, and if it is otherwise valid, will uphold it even if the parties have referred to it as a penalty." (*Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 656.) We therefore examine the substance of the provision.

The validity of a liquidated damages provision is assessed by reference to a two-part test. (*Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern Cal., Inc.* (2006) 135 Cal.App.4th 1023, 1029 (*Utility Consumers' Action Network*).) Under the test, it must be the case that "fixing the amount of actual damages" was "'impracticable or extremely difficult,'" and "the amount selected must 'represent a reasonable endeavor by the parties to estimate fair compensation for the loss sustained.'" (*Ibid.*, quoting *Rice v. Schmid* (1941) 18 Cal.2d 382, 385-386.)

In order to satisfy the "reasonable endeavor" requirement, it is not necessary to show that the parties engaged in express negotiations regarding the amount selected. (*Utility Consumers' Action Network, supra*, 135 Cal.App.4th at pp. 1035-1039.) Rather, that aspect of the two-part test "looks primarily to the intent of the parties, as determined by the purposes behind a liquidated damages clause and the relationship between the amount of liquidated damages and a fair estimate of the actual damages from a breach of the contract." (*Id.* at p. 1038.)

The party seeking to impose liquidated damages must demonstrate that it "'actually engaged in some form of analysis to determine what losses it would sustain from breach, and that it made a genuine and non-pretextual effort to estimate a fair average compensation for the losses to be sustained.'" (*Hitz v. First Interstate Bank* (1995) 38 Cal.App.4th 274, 291.)

Here, the trial court stated: "The [c]ourt does not find awarding liquidated damages to be a 'penalty' . . . because damages due to a breach were sufficiently uncertain at the time the contract was entered into and the amount was roughly approximate." In support of those determinations, the court pointed to an analysis prepared by Sears and KMart in April 2012, which forecast $250,000,000 in potential television sales.

We conclude there is sufficient evidence to support the trial court's determinations, even though -- as JZHK notes -- the Sears-Kmart analysis is insufficient to do so because it post-dates the 2012 agreement. The record unequivocally shows that the 2012 agreement was intended to implement a business relationship similar to that created under the 2011 agreement. Although the agreements involved distinct parties, the same individuals -- primarily, Huang and Lo -- were involved in the negotiation of the agreements. For that reason, in negotiating the 2012 agreement, Huang and Lo necessarily were aware of the financial aspects of Infinite's relationship with Jena and Electronics under the 2011 agreement.

In our view, that knowledge constitutes the requisite analysis of potential losses and reasonable compensation for those losses. Certain undisputed features of the 2012 agreement -- namely, the provision of an annual $150,000 loan to MB for operational costs and JZHK's avowed retention of $524,064.40 for after-sale service costs -- must be regarded as manifesting Huang's and Lo's judgment that MB was likely to incur significant expenses in discharging its duties under the 2012 agreement. Furthermore, it is undisputed that by early January 2012, when Huang and Lo were discussing the 2012 agreement, Jena had sold -- in less than one year -- televisions valued at approximately $15 million to EZ, which had failed to pay as much as $6.2 million of that sum. As the 2012 agreement was to be valid for three years, Jena's sales experience under the 2011 agreement necessarily supported an expectation of considerable -- if uncertain-- sales under the 2012 agreement. Accordingly, the trial court did not err in concluding that the liquidated damages provision in the 2012 agreement was valid.

2. *No Unilateral Termination of the 2012 Agreement*

JZHK contends the trial court erred in finding that JZHK "unilaterally terminate[d]" the 2012 agreement within the meaning of the liquidated damages provision. As noted above (see pt. C. of the Discussion, *ante*), the court found that JZHK breached the 2012 agreement by failing to

provide the initial $150,000 loan for operational expenses within 15 days of the agreement's execution, by failing to reserve funds for after-sale services and call center expenses, and by rejecting all proposed orders. Relying on those findings, the court determined that JZHK unilaterally terminated the 2012 agreement, stating, "While JZHK never gave official notice of its decision to terminate the agreement, its inactions are deemed to constitute such."

We conclude that the term "unilateral terminat[ion]," as found in the liquidated damages provision, is intended to refer to a repudiation of the contract. Under California law, a repudiation occurs only when a party expressly refuses to perform or engages in an act rendering performance impossible. As JZHK neither expressly refused to perform nor made its own performance impossible, the record shows no unilateral termination sufficient to support an award of liquidated damages.

Generally, liquidated damages are available only for conduct supporting an award of damages. (*Ridgley*, *supra*, 17 Cal.4th at pp. 976-977.) Under California law, damages may be awarded only for a breach of a contractual promise when performance is due, a repudiation, or some combination of the two. (*Central Valley General Hosp.*, *supra*, 162 Cal.App.4th at p. 514.)

Respondents suggest that under the liquidated damages provision, a material breach alone constitutes a unilateral termination. However, it is well established that a party's material breach of contract when performance is

due does not terminate the agreement, but merely affords the other party the option to terminate the agreement and seek damages. (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051; *Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 Cal.App.2d 594, 602-603.) Here, the nonbreaching party's option to terminate is not reasonably regarded as the "unilateral terminat[ion]" specified in the liquidated damages provision, as it obliges the *terminating* party to pay liquidated damages.

Accordingly, the only candidate for conduct constituting a unilateral termination is repudiation. California recognizes only two forms of repudiation, namely, express and implied. (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 (*Taylor*).) "An express repudiation is a clear, positive, unequivocal refusal to perform [citations]; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible [citations]."[13] (*Ibid.*)

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[13] Repudiation is governed by Civil Code section 1440, which states: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

Repudiation may effectuate a total breach of the contract in two distinct ways. One is by anticipatory breach, that is, "repudiation by the promisor . . . before his performance is due under the contract." (*Gold Min. & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29.) The other is by a partial breach of the contract, followed by a repudiation. (*Ibid.*)

In our view, the evident intent of the liquidated damages provision is to authorize an award of liquidated damages upon a repudiation of the contract. The provision authorizes an award of liquidated damage regardless of whether the terminating party has otherwise breached the agreement. The provision is thus reasonably understood as reflecting the doctrines of repudiation and anticipatory breach.

The remaining question is whether JZHK engaged in a unilateral termination, so understood. We find dispositive guidance regarding the question from *Taylor*. There, the owner of two mares entered into contracts with a horse services provider to breed the mares with his thoroughbred stallion. After executing the contracts, the provider sold the stallion. (*Taylor*, *supra*, 15 Cal.3d at pp. 132-135.) The mare owner demanded that the provider arrange for stud services with the stallion through its new owners. (*Id.* at p. 133.) Although the provider made those arrangements, the provider thereafter significantly impeded the mare owner's ability to secure the stud services. (*Ibid.*) Prior to the end of the contract's term of validity, the mare owner

sued the provider for breach of contract on a theory of anticipatory breach. (*Id*. at pp. 135-137.) The trial court found that the provider's "whole course of conduct" amounted to repudiation of the contracts. (*Id*. at p. 138.)

Reversing, our Supreme Court concluded that the provider's sale of the stallion constituted an implied repudiation that was waived by the mare owner. (*Taylor*, *supra*, 15 Cal.3d at pp. 138-139, 142.) The court further concluded that the provider's obstructive conduct after arranging for stud services with the stallion's new owners was not a repudiation, as it neither rendered the stud services impossible nor involved an express refusal to perform those services. (*Id*. at pp. 139-142.) Following *Taylor*, appellate courts have applied its stringent rule regarding repudiation. (E.g., *De Anza Enterprises v. Johnson* (2002) 104 Cal.App.4th 1307, 1318 [party's assertion that he had not breached contract and current nonperformance of contract did not constitute anticipatory repudiation]; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 49, fn. 43 [dispute regarding contract terms was not anticipatory repudiation].)

In view of *Taylor*'s stringent construction of repudiation, the record discloses no conduct by JZHK constituting a repudiation of the 2012 agreement. We do not disagree with the trial court that JZHK's "inaction" -- that is, its comprehensive failure to satisfy its contractual obligations -- manifested an intent not to honor the agreement. However, because JZHK neither expressly

stated that it would not do so nor acted to render its performance impossible, *Taylor* dictates that no repudiation -- and thus no unilateral termination -- occurred.[14]

In so concluding, we recognize that section 251 of the Restatement Second of Contracts identifies a third form of repudiation potentially capable of supporting the trial court's determination. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 865, p. 953.) Under that section, a repudiation may occur when a party, acting on the reasonable belief that the other party intends to breach the contract, requests a reassurance of performance and

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[14] Respondents' reliance upon *Guerrieri v. Severini* (1958) 51 Cal.2d 12 is misplaced. There, a wine merchant agreed to buy wine from a supplier. (*Id.* at pp. 14-15.) Shortly after the sales contract was executed, the supplier told the merchant that due to an injunction imposed in the supplier's divorce proceeding, he could not deliver the wine. (*Id.* at p. 16-17.) When the merchant demanded the wine, the supplier replied, "Well, if that's the case, . . . [w]e'll have to go through with it." Later, the supplier's lawyer informed the merchant by letter that the supplier's "offer" to provide the wine had been withdrawn. (*Id.* at p. 17.) Noting that an anticipatory breach required "'acts or statements'" reflecting "'the clearest terms of repudiation,'" our Supreme Court concluded that the lawyer's letter -- but not the supplier's initial announcement that he could not deliver the wine -- constituted an anticipatory breach. (*Id.* at pp. 18-19 & fn 5.) As explained above, JZHK engaged in no conduct equivalent to that letter.

receives none within a reasonable time. That section extends the scope of a rule stated in Uniform Commercial Code section 2-609, which is also codified in section 2609 of the California Commercial Code. However, no California court has accepted section 251 of the Restatement Second of Contracts.

Here, the record shows that respondents unsuccessfully sought reassurance from JZHK regarding the required $150,000 loan to MB, as it undisputedly shows that in May 2012, Lo sent Huang minutes from an MB board meeting reflecting a resolution demanding the loan. However, under existing California law, that failed request for reassurance did not establish a repudiation. The reassurance rule codified in Commercial Code section 2609 is inapplicable because the 2012 agreement is not within the scope of that code. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1186-1187 [contract establishing business relationship aimed primarily at promoting the sale of one party's goods falls outside Commercial Code].) Furthermore, although we recognize the merits of the rule stated in the Restatement Second of Contracts, *Taylor* is binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In sum, the award of $1,000,000 in liquidated damages to MB and Lo must be reversed.[15]

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[15] During oral argument, respondents' counsel suggested that JZHK engaged in an anticipatory repudiation when it
(Fn. continued on the next page.)

E. *Rulings Regarding JZHK's Claims for Unjust Enrichment and Breach of Contract*

JZHK challenges the trial court's mid-trial rulings regarding JZHK's claim for unjust enrichment against respondent and its claim for breach of contract against Lo. As explained below, JZHK has shown no prejudicial error.

1. *Governing Principles*

JZHK's contentions implicate issues related to relief under the equitable principle of unjust enrichment. There is a division of opinion among the appellate courts regarding the existence of a distinct and independent cause of action for unjust enrichment.

In *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370, the court stated: "'[T]here is no cause of action in California for unjust enrichment.' [Citations.] Unjust enrichment is synonymous with restitution. [Citation.] [¶] 'There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. [Citations.] Alternatively, restitution may be awarded

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failed to offer an assurance of performance after receiving Lo's July 2012 letter, which asserted that JZHK's conduct manifested its termination of the agreement. That contention fails for the reasons discussed above.

where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory . . . . [Citations.] In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment.' [Citation.]" Other courts agree. (E.g., *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1138 [same]; *Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911 [unjust enrichment is not a cause of action but "a general principle underlying various doctrines and remedies"]; *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231 [same]; *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 792 [same] (*Melchior*); *Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1307 ["Unjust enrichment is not a cause of action, just a restitution claim"].)

In contrast, some courts have set forth elements for a cause of action for unjust enrichment. In *Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 726, the appellate court identified those elements as "receipt of a benefit and unjust retention of the benefit at the expense of another." (See also *First Nationwide Savings v. Perry* (1992) 11

Cal.App.4th 1657, 1662 [concluding that complaint stated claim for unjust enrichment by pleading those elements]).[16]

JZHK's contentions also implicate the doctrine of alter ego liability. "Under the alter ego doctrine, . . . when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons . . . actually controlling the corporation, in most instances the equitable owners. [Citations.]" (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) Generally, "two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the

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16 Regarding this division, we note that in *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 45-46, the defendant asserted a cross-complaint relating to an unpaid promissory note relating to a purchase of real property, asserting a claim for recovery of a "'[d]eficiency [b]alance,'" a common count for payment of money, a cause of action to establish a resulting trust, and other unspecified claims. In examining those claims, our Supreme Court remarked that the defendant was "entitled to seek relief under traditional equitable principles of unjust enrichment" and noted that some appellate courts had recognized "a cause of action for unjust enrichment," but did not address or decide whether there is a distinct cause of action for unjust enrichment. (*Id.* at pp. 50, 52, 53-55.)

corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.]" (*Ibid*.)

2. *Underlying Proceedings*

In October 2013, JZHK filed the (SAC), which is the operative complaint. The record on appeal supplied by JZHK does not contain the SAC. In April 2015, the parties filed a stipulation and request to dismiss various claims and parties (Code Civ. Proc., § 581). The parties sought, inter alia, the dismissal of the SAC's claims against respondents -- including a claim for conversion -- with the exception of the claims for breach of contract and unjust enrichment, which sought recovery of the $2.3 million Sears payment for the Jena-supplied EZ televisions. The parties' stipulation stated that only those two causes of action "shall remain against" respondents. The trial court granted the requested dismissal in its entirety.

Prior to trial, respondents filed a motion in limine, seeking to exclude all evidence relating to respondents' potential alter ego liability for each other. The motion argued that the stipulation and dismissal of JZHK's conversion claim undermined its alter ego theory; in addition, the motion asserted that the unjust enrichment claim "is not actually recognized as a cause of action in California." Respondent's trial brief also contended that

unjust enrichment, as alleged in the SAC, was not an independent cause of action.

At the commencement of trial, the court denied respondents' motion in limine, concluding that nothing in the parties' stipulation barred JZHK from "moving forward" with its claims for breach of contract and unjust enrichment. As JZHK neared the completion of its case-in-chief, the trial court and the parties revisited the issues raised in respondents' motion in limine and trial brief, namely, Lo's potential liability under an alter ego theory and unjust enrichment as a distinct cause of action. The court announced that it intended to revise its prior rulings and concluded that the SAC's unjust enrichment claim did not constitute a "valid cause of action" due to the dismissal of the SAC's conversion claim.

After JZHK initially completed its case-in-chief, respondents' counsel asserted two motions regarding the SAC's unjust enrichment claim against respondents. He stated: "I'm going to make a motion -- actually I'm going to make two motions. [¶] One for nonsuit under CCP [section] 581 [*sic*] as it's not a cognizable cause of action. [¶] And two, [a] motion for judgment under CCP [section] 631.8 because the elements of unjust enrichment have not been established."[17] Respondents' counsel clarified that the latter

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[17] Motions for nonsuit are governed by Code of Civil Procedure section 581c. Generally, a motion for nonsuit "'is the modern equivalent of a demurrer to the evidence: it
(Fn. continued on the next page.)

motion also included the breach of contract claim against Lo, which was predicated on alter ego liability. The crux of respondents' first motion was that the SAC's claim for unjust enrichment against respondents was not an independent cause of action, but relied on the SAC's dismissed conversion claim. In support of the second motion, respondents' counsel argued, inter alia, that there was no evidence that Lo had been unjustly enriched or that he was the alter ego of MB.

The trial court granted the first motion, which it described as a motion under Code of Civil Procedure

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concedes the truth of the facts proved, but denies that they, as a matter of law, sustain the plaintiff's case. [Citations.]' [Citation.] 'A nonsuit may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. [Citation.]' [Citation.]" (*Gray v. Kircher* (1987) 193 Cal.App.3d 1069, 1071-1072, italics omitted.)

Motions for judgment are governed by Code of Civil Procedure section 631.8, which provides that "[a]fter a party has completed his presentation of evidence in a trial by the court, the other party . . . may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party . . . ." (*Id.,* at subd. (a).)

"[section] 581."[18] Pointing to decisions stating that unjust enrichment is not a separate cause of action, the court stated that the SAC's unjust enrichment claim "was not an appropriate cause of action for this case." The court placed special emphasis on *Melchior*, *supra*, 106 Cal.App.4th at pages 791-793, in which the appellate court affirmed summary adjudication on a conversion claim as preempted by federal law, and also affirmed summary adjudication on an unjust enrichment claim because it rested on the same basis as the preempted conversion claim.

As the motion for judgment required the trial court to weigh the available evidence before ruling, the court permitted JZHK to reopen its case-in-chief to submit additional evidence regarding alter ego liability. Following the presentation of that evidence, the court granted the motion for judgment, concluding that JZHK failed to support its theory of alter ego liability regarding Lo.

3. *Ruling on Unjust Enrichment Claim*

JZHK contends the trial court erred in concluding that the unjust enrichment claim was not viable. However, because JZHK has not included the SAC in the record on

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[18] Section 581 of the Code of Civil Procedure sets forth conditions under which complaints and claims may be properly dismissed during a civil action. (See 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 280, pp. 733-734.)

appeal, that contention has been forfeited. "A fundamental rule of appellate review is that "'[a] judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" [Citations.]" (*Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841, italics omitted.) To overcome this presumption, appellants must provide an adequate record that demonstrates error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Because the record lacks the SAC, we must presume that its allegations establish that the unjust enrichment claim is not independent of the dismissed conversion claim. JZHK has thus shown no error in the trial court's ruling that the unjust enrichment claim was untenable.

JZHK also challenges the procedural correctness of the trial court's ruling, contending that it constituted an improper mid-trial "dismissal" under Code of Civil Procedure section 581. That contention fails in light of the record. Although respondents' counsel and the court referred to that section, the record establishes that respondent characterized his motion as one "for nonsuit," which is governed by Code of Civil Procedure section 581c. Furthermore, in the course of ruling, the trial court stated that it was revising its denial of respondents' motion in limine, insofar as the motion contended that the unjust enrichment claim was not tenable. To the extent that motion objected to the introduction of evidence to support

the unjust enrichment claim, it amounted to a demurrer or motion for judgment on the pleadings. (*Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451.) Because JZHK does not challenge the propriety of the trial court's ruling on these alternative procedural grounds, it has forfeited any such contention of error.

In a related challenge, JZHK contends the pretrial stipulation barred respondents from asserting their challenge to the unjust enrichment claim. We disagree. In construing that stipulation and the order implementing it, we apply the rules generally governing the interpretation of writings, looking first to the language in the stipulation and order. (*In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 47; *In re Marriage of Richardson* (2002) 102 Cal.App.4th 941, 948-949.) Regarding the unjust enrichment claim, the stipulation states: "It is stipulated that only the first cause of action for breach of contract and the fifth cause of action for unjust enrichment from the Second Amended Complaint shall remain against [respondents]." The related order provides: "The [SAC] will and hereby does consist solely of two causes of action -- the first cause of action for breach of contract and the fifth cause of action for unjust enrichment both solely against [respondents]." (Capitalizations omitted.) Nothing in the stipulation or order bars respondents from asserting defenses and challenges to the SAC's unjust enrichment claim, including that it failed as a

matter of law in view of the dismissal of the conversion claim.[19]

Even had JZHK shown error in the ruling, we would find no prejudice, as the trial court's findings establish that JZHK lacks standing to assert an unjust enrichment claim against respondents. "Standing is a jurisdictional issue that . . . must be established in some appropriate manner." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232, disapproved on another ground in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 169-170.)

Broadly put, the focus of an inquiry into standing is on whether the plaintiff is asserting a claim that "belongs to somebody else." (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004.) Only real parties in interest

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[19] The decisions upon which JZHK relies are distinguishable, as in each a party to a stipulation attempted to engage in conduct clearly contravening the stipulation. (*Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 Cal.App.4th 672, 677-679 [lawyer estopped from challenging order compelling arbitration on ground it reflected oral stipulation for arbitration, as he orally agreed in open court that no written stipulation was necessary]; *Smith v. Whittier* (1892) 95 Cal. 279, 286 [lawyer improperly tried to bar submission of absent witness's recorded testimony after orally agreeing to its admission]; *Continental Bldg. v. Wolf* (1910) 12 Cal.App. 725, 729 [after enjoying benefits of stipulation for entry of judgment, parties improperly attempted to set it aside].)

have standing to prosecute actions. (*Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American Dist. of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445.) "'Generally, "the person possessing the right sued upon by reason of the substantive law is the real party in interest." [Citations.]' [Citation.] To have standing, a party must be beneficially interested in the controversy, and have 'some special interest to be served or some particular right to be preserved or protected.' [Citation.]" (*Ibid.*) Lack of standing is a jurisdictional defect that mandates dismissal of an action, and thus can be raised for the first time at any stage in the action. (*Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 501.)

Following trial and on appeal, respondents have maintained that JZHK lacks standing to recover the $2.3 million Sears payment for the Jena-supplied EZ televisions. In ruling on JZHK's breach of contract claim, the trial court rejected JZHK's request for an offset against the award of liquidated damages to respondents, expressly finding that "the Jena television issue is between Jena and [MB]." That finding establishes that Jena -- rather than JZHK -- is entitled to seek recovery of the Sears payment. As explained below, JZHK has shown no prejudicial error in the ruling regarding its unjust enrichment claim.

4. *Ruling on Breach of Contract Claim Against Lo*

JZHK contends the trial court erred in granting judgment on the breach of contract claim against Lo, which was predicated on an alter ego theory of liability. That contention necessarily fails, as the trial court correctly determined that MB did not breach the 2012 agreement (see pt. B. of the Discussion, *ante*).[20]

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[20] Because JZHK has shown no reversible error relating to the claims against Lo for unjust enrichment and breach of contract, it is unnecessary to address JZHK's contention that the court improperly limited the presentation of evidence regarding Lo's potential misappropriation of Sears's $2.3 million payment for the Jena-supplied EZ televisions.

DISPOSITION

The judgment on JZHK's complaint in favor of respondents and against JZHK is affirmed. The judgment on respondents' cross-complaint is reversed, and the matter is remanded to the trial court to vacate that judgment and enter a new judgment on respondents' cross-complaint awarding respondents no damages. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.