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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MICHAEL MORRISON, Plaintiff and Appellant, v. MINDEY MORRISON, Defendant and Respondent.	B269435 (Los Angeles County Super. Ct. No. BC458005)

APPEAL from an order of the Superior Court for Los Angeles County, Barbara M. Scheper, Judge. Affirmed in part, reversed in part.

Randall A. Spencer for Plaintiff and Appellant.

Stanley Denis for Defendant and Respondent.

This case is before us for the second time. In the first appeal, from a judgment in favor of defendants following a bench trial, we affirmed the trial court's rulings as to certain causes of action (which rulings were on the merits or on standing grounds) and reversed as to causes of action on which the trial court ruled based upon the unclean hands doctrine. (*Tradewind Consulting, LLC, et al. v. Wildcat Distributors, Inc., et al.* (case No. B250835) (hereafter, *Tradewind Consulting*).) We remanded those causes of action with directions to the trial court to decide the remanded claims on the merits based upon the record of the trial. The trial court did so, finding in favor of defendants and against plaintiffs on all but a single claim by one plaintiff, Michael Morrison against one defendant, Wildcat Asset Management, LLC (WAM). The court then awarded attorney fees to defendant Mindey Morrison.[1]

Michael appeals from the award of attorney fees to Mindey, contending that the trial court (1) erred by determining the amount of attorney fees based upon evidence of the amount Mindey paid to her attorneys, rather than on the attorneys' billing records; (2) abused its discretion by failing to apportion the fees between those incurred in defending against Michael's contractual claims and those incurred in defending against his tort claims; and (3) abused its discretion by awarding Mindey fees incurred in establishing her affirmative defense that Michael lacked standing to assert certain claims. Based upon a recent California Supreme Court case, we conclude the trial court

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[1] We will refer to the Morrisons (and their nephew, who also is a defendant) by their first names for ease of reference.

abused its discretion by awarding fees that were incurred before the complaint was amended to add a claim for breach of a promissory note, because that award was made under an agreement that plaintiffs did not seek to enforce or interpret in their lawsuit. Instead, the agreement in this case was asserted as an affirmative defense. Accordingly, we reverse the award of fees incurred before the amendment of the complaint, and affirm the remainder of the fee award.

BACKGROUND

To provide the context necessary to understand the issues in this case, we will quote extensively from our decision in *Tradewind Consulting*, *supra*. The parties in the case are: plaintiffs Michael and Tradewind Consulting, LLC (Tradewind), and defendants Mindey, Steven Goverman (Mindey and Michael's nephew), Wildcat Distributors, Inc. (WDI), and WAM.

"A. *Michael, Mindey, and Steven Inherit WDI and the Land it Occupies*

"WDI is an adult entertainment business, a bookstore, located in Lennox, California. WDI originally was owned by Allan Morrison (Michael and Mindey's father, and Steven's grandfather), who also owned other adult bookstores. When Michael and Mindey's parents divorced, their mother, Geri Morrison Steingold, was awarded ownership of WDI and the land it occupies.

"Geri died in July 1997, leaving behind her spouse, Joseph Steingold, her three children (Michael, Mindey, and Tracey Goverman), and her grandson, Steven, who was twelve years old. Geri's will

provided that on the death of her husband, her estate would be divided equally among Michael, Mindey, and Steven.[2] Joseph died in 2000.

"Michael was the executor of Geri's estate, the primary assets of which were WDI and the land it occupied. At the time, Michael lived in Atlanta and owned a chain of adult bookstores in the southeast United States. While the will was in probate, he came to Los Angeles every month or two to check on WDI; a long-time employee ran the day-to-day operations. . . . [¶] . . . When probate closed in December 2002, Mindey took over the management of WDI. [Footnote omitted.]

"B. *WAM is Created*

"Tax attorney Cris Wenthur, who was asked by the probate attorneys for Geri's estate to help clean up the corporation's records and provide a business structure for the estate assets, helped form an entity, WAM, to hold the real property that Michael, Mindey, and Steven inherited from Geri. . . . Wenthur was told that the intent in forming WAM was to have WDI transfer profits, in the form of rental payments, to WAM for distribution to its three members. He understood that WDI would pay WAM 'fair market rent beefed up' -- in other words, fair market rent plus 10 to 20 percent, because it was a family business -- which would save the family money in taxes. . . .

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[2] Steven's share was to be placed in a trust until he reached the age of 21.

"C. *Michael Sells His Shares in WDI*

"At the same time that WAM was formed, Michael was a defendant in a tax evasion prosecution. Michael and his attorney in that prosecution directed Wenthur to draft a stock repurchase agreement [SRA] in which Michael agreed to sell his shares in WDI back to WDI in exchange for forgiveness of a $124,000 debt. Although the agreement was drafted in August 2004, Michael and his attorney asked Wenthur to backdate the agreement to December 31, 2003 for reasons having to do with sentencing in his tax evasion case.

"WDI began paying rent to WAM in late 2004 or early 2005. Mindey, who was president of WDI and principal managing member of WAM, determined how much rent to pay each month, based upon what WDI's revenues were; the amount varied from month to month. WAM then distributed that money to Mindey, Michael and Steven (or his trustee, before he turned 21 in June 2006).

"D. *Michael Agrees to Sell His Interest in WAM*

"Michael was convicted of tax evasion in 2005 for underreporting his income from his adult bookstore companies by $1.4 million; he reported to prison in June 2005 and was released in February 2008. While Michael was incarcerated, he (through an intermediary, Eric Claybough) and Mindey discussed having Mindey buy his interest in WAM. In April 2007, they entered into a written agreement, drafted by Wenthur, entitled 'Membership Interest Purchase Agreement' (MIPA). Under the MIPA, which Claybough signed as 'POA' (power of attorney), on behalf of Michael, Mindey agreed to purchase Michael's interest in

WAM for $333,333. The MIPA specified a closing date of April 24, 2007, although Mindey did not sign the document until April 25, 2007, the same date she signed a promissory note to Michael for the amount of $333,333 (which had a due date of August 1, 2007). The promissory note included a 'Method of Payment' provision, which provided that payment may be satisfied in one of two ways: payment of the principal and interest, or return to Michael of his membership interest in WAM.

"At the time Mindey entered into the agreement, she intended to get the funds to purchase Michael's interest by refinancing the property held by WAM, but the refinancing fell through. According to Mindey, she and Michael then entered into a oral agreement for Michael to sell his interest in WAM back to WAM in exchange for payments over time. Thereafter, Mindey and Steven believed that all distributions made to Michael (or his assignees) from WAM or WDI constituted payments under the oral agreement.

"E. *The Agreements Between Michael and Tradewind*

"[Beginning in December 2007, Michael entered into a series of questionable agreements with Tradewind that purported to transfer his interests in WDI (which he no longer owned in light of the SRA) and WAM (which he may or may not have owned in light of the MIPA or the subsequent oral agreement). Those agreements, which the trial court found were used by Michael to hide his interest in WAM and disguise the payments he received from WAM, are not at issue in this appeal.]

"F. *Steven Discovers Mindey's Improper Charges on WDI's Credit Card*

"In July 2008, Steven did not receive a distribution check from WAM. He went to the bookstore and, for the first time, examined WDI's financial records. He found questionable charges that Mindey had made on WDI's American Express card that appeared to be for personal items, beginning in 2003 or 2004.[3] He discussed the charges with Mindey and Michael, and determined the improper charges totaled $237,500.[4] Following negotiations, Mindey and Steven entered into a written agreement, which Mindey drafted, providing that Mindey would transfer her interest in WAM to Steven to satisfy her $237,500 note to Steven, and Steven would assume the roles of president of WDI and managing member of WAM and oversee the day-to-day operations. . . .

"G. *The Monthly Distributions to Michael and/or Tradewind Decrease*

"After Steven took over the day-to-day operations of WDI and WAM in 2009, the amount of the monthly distributions to Michael (or Tradewind) decreased. Steven explained that the economy was suffering at that time, and WDI's gross revenues and profits were decreasing. Nevertheless, Michael received significantly more than Steven in distributions because, as Steven explained, he was trying to pay down the amount owed to Michael for his interest in WAM. . . .

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[3] There is some discrepancy regarding when the improper charges began; they may not have begun until 2005.

[4] Michael testified that Mindey told him the amount of improper charges was $475,000. One-half of that amount is $237,500.

"H. *Michael and Tradewind File Two Lawsuits*

"Michael and Tradewind filed a lawsuit against Mindey, Steven, WDI, and WAM (the direct action) on June 1, 2011, and filed a derivative action on behalf of WDI and WAM the following day. The operative first amended complaint in the direct action allege[d] that (1) Mindey formed WAM without Michael's knowledge or consent; (2) there was a failure of consideration with regard to the MIPA (to purchase Michael's interest in WAM), so Michael and Mindey agreed to treat it as a nullity, or in the alternative, the distributions he received after execution of the MIPA did not constitute payments under the agreement or were not sufficient payment of the amount owed; (3) Michael sold his interests in WDI and WAM to Tradewind; and (4) Mindey and Steven conspired to deprive Tradewind of its rightful ownership interest and share of distributions. The complaint allege[d] causes of action for declaratory relief, breach of fiduciary duty, conversion, fraud by concealment, breach of oral agreement, money had and received, accounting, and breach of written contract.

"The first cause of action for declaratory relief [sought] a declaration that, among other things, Michael and Mindey agreed to treat the MIPA as a nullity (or, if the MIPA is found to be enforceable, that the distributions he received were not payments for his interest and that WAM is estopped to deny that he is a one-third owner), that Michael validly transferred his ownership interests in both WDI and WAM to Tradewind, and that Tradewind (or Michael, if his transfer is

found to be invalid) is entitled to receive distributions from both entities equal to the distributions received by Mindey and Steven.

"The second cause of action contain[ed] four counts of breach of fiduciary duty. The first count allege[d] that Mindey and Steven breached their fiduciary duty by causing WDI and WAM to make distributions to themselves but not to Michael or Tradewind. The second count [was] based upon allegations that Mindey skimmed or stole approximately $500,000 from WDI, which deprived WDI and WAM of funds that would have been distributed to the shareholders of WDI and WAM. The third count [was] based upon the agreement between Mindey and Steven to transfer Mindey's share of WAM to Steven, which the complaint alleges deprived WDI and WAM of funds that would have been distributed to Tradewind. The fourth count allege[d] that Mindey and Steven used funds belonging to WDI and/or WAM to pay the expenses of their relatives unrelated to the companies' business, depriving the companies of funds that would have been distributed to Tradewind.

"The third cause of action allege[d] two counts of conversion. The first count allege[d] that Mindey and Steven caused WDI and WAM to issue distributions to themselves while causing the companies to issue decreasing distributions to Tradewind. The second count [was] based upon Mindey and Steven's refusal to recognize Tradewind's ownership interests in WDI and WAM.

"The fourth cause of action for fraud by concealment allege[d] that Mindey skimmed and stole approximately $500,000 from WDI and/or WAM and that Mindey and Steven tried to conceal their agreement to

allow Mindey to keep $237,500 and allow Steven to receive $237,500 rather than return the stolen funds to WDI.

"The fifth cause of action for breach of oral agreement allege[d] that Michael, Mindey, and Steven entered into an oral agreement for the purpose of closing probate, whereby Mindey would take over the day-to-day operations of WDI and would operate the business so as to maximize profits and distributions for the three shareholders. The complaint allege[d] that Mindey and Steven breached the agreement by failing to operate WDI and WAM in a manner reasonably calculated to maximize the distributions, and failing to issue equal distributions to Michael and Tradewind.

"The sixth cause of action for money had and received allege[d] that Mindey and Steven caused WDI and WAM to fail to pay equal distributions to Michael and/or Tradewind while they caused the entities to pay distributions to themselves.

"The seventh cause of action [sought] an accounting of the receipts, expenses, books, and records of WDI and WAM for the years 2005 to the present.

"The eighth cause of action for breach of written agreement against Mindey [was] based upon the promissory note Mindey signed in connection with the MIPA.

"The derivative complaint [was] based upon the same allegations as the direct action. It allege[d] causes of action for conversion (two counts), breach of fiduciary duty (four counts), fraud by concealment, constructive fraud, money had and received, and accounting. The two counts of conversion [were] based upon allegations that Mindey

skimmed and stole money from WDI, and allegations that Mindey and Steven used money from WDI and WAM for the personal benefit of their relatives. The breach of fiduciary duty counts [were] based upon (1) Mindey's alleged stealing, (2) the agreement between Mindey and Steven transferring Mindey's interest in WAM to Steven, (3) Mindey and Steven using funds from WDI and/or WAM to pay their relatives' personal expenses, and (4) allegations that Mindey and Steven have been paying employees in cash and under-reporting net revenues for the purpose of tax evasion, thus placing the entities in danger of legal penalties. The fraud by concealment, constructive fraud, and money had and received causes of action [were] based upon the agreement between Mindey and Steven to transfer Mindey's interest. The accounting cause of action [sought] an accounting of the personal financial books and records of Mindey and Steven.

"[¶] . . . [¶]

"J. *Steven Files a Cross-Complaint*

"Steven filed a cross-complaint on April 11, 2012. In the operative second amended cross-complaint, he alleges 13 causes of action against Michael, Mindey, and Tradewind. [We need not discuss the allegations in detail, except to note that, as the cross-complaint itself stated, '[t]he factual allegations offered to support Plaintiffs' claims for damages as set forth in their operative complaints revolve around virtually the same parties and events, however albeit with differing versions, addressed in this pleading.']

"K. *Trial*

"On the first day of trial, counsel for plaintiffs announced that plaintiffs were withdrawing the derivative claims brought on behalf of WDI, and would not be challenging the authenticity of the [SRA] (by which Michael transferred his shares back to WDI). Until trial, Michael had maintained the position that he never knew of or signed that agreement; but based upon documents that were produced during discovery indicating that he did sign the agreement, he . . . concede[d] the authenticity of the [SRA]. . . .

"The primary issues contested at trial related to (1) the distribution of profits from WDI; (2) Michael's alleged sale of his interest in WAM; (3) if there was such a sale, how much is still owed as payment for that interest; and (4) if there was no sale, what is the fair market rent WDI should have been paying to WAM.

"[¶] . . . [¶]

"L. *Statement of Decision*

"Following the close of evidence and argument of counsel, the trial court issued a statement of decision. The court found that Michael and Tradewind failed to meet their burden on, or lacked standing to assert, the causes of action for breach of fiduciary duty, fraud by concealment, breach of oral agreement, and money had and received. With regard to the remaining claims for declaratory relief, accounting, conversion, and breach of promissory note, the court found 'that the evidence overwhelmingly supports the conclusion that Michael comes before this court with unclean hands,' and therefore the court 'will not relieve

plaintiffs from the consequences of their fraudulent scheme to hide their ownership interest in WDI and WAM as well as their receipt of income from these entities in order to defraud the government or other creditors.'" (*Tradewind Consulting*, *supra*, at pp. 3-16.)

M. *Prior Appeal and Remand*

Michael and Tradewind appealed from the judgment. In an unpublished opinion, we affirmed the judgment on the breach of fiduciary duty, fraud by concealment, breach of oral argument, and money had and received causes of action in plaintiffs' direct action, and affirmed the judgment as to the entire derivative action. (*Tradewind Consulting*, *supra*, at p. 30.) We reversed the judgment on the declaratory relief, accounting, conversion, and breach of promissory note causes of action in the direct action and remanded the matter with directions to the trial court to decide those causes of action on the merits. We also directed the trial court to determine the amount, if any, still owed to Michael and/or Tradewind for the one-third interest in WAM that Michael sold back to WAM. (*Ibid.*)

On remand, the trial court found on the declaratory relief claim that neither Michael nor Tradewind had an ownership interest in WAM, and found in favor of defendants on the accounting, conversion, and breach of promissory note causes of action. It granted Michael's request to amend the complaint to allege a breach of the oral agreement between Michael and WAM with regard to his selling his interest back to WAM. The court found that WAM breached the agreement by significantly reducing and then stopping its monthly payments to

Michael, and found that WAM owed Michael $129,833 to complete payment for Michael's interest, plus prejudgment interest in the amount of $57,980.22. An amended judgment was entered reflecting the court's ruling.

N. *Mindey's Attorney Fee Motion*

Mindey filed a motion for her attorney fees under Civil Code section 1717 (section 1717) and Code of Civil Procedure section1021. She sought to recover all of the fees she incurred on the ground that she prevailed on all causes of action, and all of those causes of action either arose from or were deemed barred by operation of written agreements containing attorney fee provisions. She requested a total of $96,273.83 in fees, which included one-third of the amount paid by WDI to attorney Ernest Franceschi, who represented all of the defendants from June 2011 through February 2012, as well as the amounts she paid to several different attorneys who represented her during the remainder of the litigation. The motion was supported by Mindey's declaration, in which she stated the amounts she paid her various attorneys, copies of cancelled checks and other bank documents reflecting those payments, and some billing statements from two of the attorneys.

In his opposition, Michael argued that Mindey could recover fees only under the promissory note, because she was not a party to the SRA and there was no claim to enforce or interpret the MIPA. He also argued that Mindey failed to submit sufficient evidence to support most of her claimed fees, and failed to apportion the fees between work related to the breach of promissory note claim and the other claims.

Finally, Michael challenged certain portions of the fees requested for the attorney who represented Mindey following the remand and was representing her on her attorney fee motion.

The trial court issued a detailed ruling.

First, it noted that Michael conceded that Mindey was entitled to some amount of fees based upon the attorney fee provision in the promissory note, and he contended those fees should be limited to fees incurred in defense of the claim for breach of that note, from June 1, 2012 (when the claim was added to the complaint) to present. The court found that the fees Mindey incurred during this period amounted to $54,402, and that apportionment was not possible because the court was required to address all of the agreements between the various parties in order to determine the enforceability of the promissory note.

Second, the court found that the fees incurred were reasonable and necessary. It overruled Michael's objection to Mindey's evidence, finding that Mindey laid a sufficient foundation as to the amount she paid her attorneys, and the court was capable of determining the reasonableness of the fees without detailed billing records, given that it had handled the two cases (the direct action and the derivative action) from their inception. Therefore, based upon its familiarity with the case, the court concluded that $54,402 in attorney fees "is more than reasonable for the period June 2012 to the present."

Finally, the court found that Mindey was entitled to recover her attorney fees for the period before June 2012 under the attorney fee provision in the SRA, which she signed as president of WDI, because she "was forced to defend herself against the claims made against her

personally by proving the authenticity of the SRA." The court, however, disallowed the fees attributed to attorney Franceschi (the attorney who had represented all of the defendants for a period of time), because WDI and WAM were awarded those fees. Therefore, the court awarded Mindey $14,897 in attorney fees for pre-June 2012 work done solely on her behalf. The total amount awarded to Mindey for attorney fees was $69,299.

The amended judgment subsequently was amended to reflect the award of costs and attorney fees. Michael timely filed a notice of appeal from the order awarding attorney fees and the amended judgment.

DISCUSSION

A. *Trial Court's Determination of Reasonable Fees*

Michael contends the trial court erred by using an improper legal standard in determining Mindey's attorney fees, relying upon evidence of the amounts Mindey paid to her attorneys rather than on the attorneys' billing records from which the court could determine the number of hours reasonably expended and the reasonable hourly rate and calculate the "lodestar." We find no error.

In making this argument, Michael relies upon the statement by our Supreme Court that "the fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an

appropriate attorneys' fee award.'" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

We have no doubt that in many cases it would be difficult, if not impossible, to determine what is a reasonable attorney fee without computing the lodestar in this way. But as the Supreme Court itself recognized, "the trial court is not precluded from using other methodologies" to determine a reasonable fee award. (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th 1097.) Indeed, the Supreme Court emphasized that the trial court "has broad authority to determine the amount of a reasonable fee," explaining that "'[t]he "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong."'" (*Id.* at p. 1095.)

In this case, the trial court had before it the total amount of money Mindey paid her attorneys ($69,299). It also had billing records from two of those attorneys showing those attorneys' billing rates ($275 per hour for one, $325 per hour for the other). In determining the reasonableness of the amount of fees Mindey paid, the court observed: "The matter has been hotly litigated from the beginning. Trial of the matter took place over five court days. Post-trial briefing was required. On remand after the decision of the court of appeal, several hearings and additional briefs were required before the court issued its judgment. The parties have now engaged in post-trial motion practice including the instant motion for fees." Based upon its own observation regarding the complexity of the litigation and of the attorneys'

performances, the court concluded that $69,299 was a reasonable amount of fees for Mindey's successful defense.

We are not convinced that the trial court's determination was """clearly wrong."""" (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th 1095.) Using an average hourly rate of $300,[5] we easily can compute the approximate number of hours represented by the fee award: just under 231 hours, 194 hours of which were spent before the case was remanded following the first appeal. Having reviewed the record in that appeal, we are aware of the complexities of the case, and have no reason to doubt that an amount equal to 231 hours at a $300 hourly rate is a reasonable value for the legal services rendered on behalf of Mindey. Accordingly, we conclude the trial court did not err in the method it used to determine the amount of the attorney fee award.[6]

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[5] We note that Michael did not challenge below, and does not challenge on appeal, the hourly rates of the attorneys for whom billing statements were submitted.

[6] Michael raises two additional issues in his opening brief with regard to the evidence used to determine the amount of the fee award. First, he argues, without citation to any authority, that a billing statement Mindey submitted was inadmissible because it was not accompanied by a declaration from the attorney authenticating it. He is mistaken. Mindey stated in her declaration that she received that billing statement and paid the attorney for the services performed. That is sufficient to authenticate the document. (*McAllister v. George* (1977) 73 Cal.App.3d 258, 263.) Second, Michael argues that certain entries in the bills submitted by another attorney did not pertain to the litigation between Michael and Mindey, and therefore those fees should be deducted from the fee award. We note that Michael made this same argument in the trial court in his opposition to Mindey's motion. In her reply, Mindey explained that in the declaration of her attorney that she submitted with her motion, and a supplemental declaration submitted with her reply, the attorney attested that all of the charges were for work relating

B. *Failure to Apportion Fees Between Contract and Tort Claims*

Michael contends the trial court abused its discretion by failing to apportion the attorney fees between those incurred in defending against Michael's contractual claims and those incurred in defending against his tort claims. We disagree.

As Michael correctly notes, the Supreme Court has held that when a cause of action based on a contract providing for attorney fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney fees only as they relate to the contract cause of action. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129 (*Reynolds*).) However, the Supreme Court also instructed that "[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Id.* at pp. 129-130.)

In this case, the trial court found that apportionment was not possible because the issues in all of the causes of action overlapped.

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only to this case. The "Case Summary" included in the appellant's appendix shows that, in fact, such declarations were filed. They are not, however, included in the appendix. Because he failed to provide an adequate record for us to review the trial court's implied rejection of this argument, we must presume the court's ruling was correct and resolve the issue against Michael. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) Finally, Michael raises two more issues in his appellant's reply brief related to Mindey's evidentiary submission, but we decline to address them because they were not raised in the opening brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 ["'Points raised for the first time in a reply brief will ordinarily not be considered'"].)

The court explained: "the court was required to address the validity of the SRA, the WAM operating agreement, the MIPA and the promissory note, along with purported agreements between Michael and Tradewind, to determine who owned WDI and WAM. As the court has previously observed these agreements were often incomprehensible, inconsistent internally and vis-à-vis one another and otherwise made no sense. The promissory note was one of these documents. And contrary to plaintiffs' argument it was not a free-standing document unrelated to the myriad other agreements involving the parties. Thus the court finds that all of the work done by Mindey's attorneys after June of 2012 was necessary in order to determine the enforceability of the promissory note."

In making his argument that Mindey could not recover fees under the promissory note's attorney fee provision[7] for work related to his tort claims, Michael ignores the trial court's reasoning. As the trial court's order makes clear, all of the fees from June 2012 forward were related to the breach of promissory note claim, because in order to resolve that claim, the trial court first had to resolve the issues related to Michael's tort claims. Therefore, the court did not improperly award Mindey her fees incurred solely in defending against Michael's tort claims.

Michael argues that regardless of the trial court's finding that it could not apportion fees incurred in Mindey's defense against Michael's

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[7] The attorney fee provision in the promissory note states in relevant part: "Borrower agrees that if any legal action is necessary to enforce or collect this Note, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled."

tort claims from those incurred in defense of the breach of promissory note claim, "the trial court never addressed the apportionment of Mindey's fees between her fees incurred in defense of Michael's Cross-Complaint [*sic*] and her fees incurred in defense of the nine causes of action in Steven's Cross-Complaint." However, as we noted in our brief discussion of the cross-complaint, the cross-complaint states that "[t]he factual allegations offered to support Plaintiffs' claims for damages as set forth in their operative complaints revolve around virtually the same parties and events, however albeit with differing versions, addressed in this pleading." Michael fails to provide any discussion in his opening brief regarding what issues, if any, Steven's cross-complaint raised that were unique to the cross-complaint. "One cannot simply say the court erred, and leave it up to the appellate court to figure out why. (See *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546 [35 Cal.Rptr.2d 574] [appellate court need not furnish argument or search the record to ascertain whether there is support for appellant's contentions].)" (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.) We are "not inclined to act as counsel for . . . appellant and furnish a[n] . . . argument as to how the trial court's ruling[] in this regard constituted an abuse of discretion." (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.)

C. *Fees Awarded Under the SRA*

In awarding Mindey her fees incurred prior to the introduction of the breach of promissory note claim, the court relied upon the attorney fee provision of the SRA, which provides: "In any legal action or other

proceeding brought by either party to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs." The parties to the SRA are Michael and WDI; Mindey signed it as President of WDI. Mindey relied upon the SRA in defense against many of Michael's claims, arguing that Michael did not have standing and/or was not damaged because he had sold his interest in WDI. Until the eve of trial, Michael denied the validity of the SRA.

On appeal, Michael argues the trial court abused its discretion in awarding fees under the SRA because Mindey was not a party to the agreement, and because one cannot recover fees under a contractual attorney fee provision based upon an affirmative defense against claims that do not seek to enforce or interpret the contract. We disagree that the fact that Mindey was not a party precludes her from recovering fees under the SRA. However, based upon a recent Supreme Court, we conclude that she is not entitled to recover fees based upon her assertion of the SRA as an affirmative defense.

1. *Nonparty Recovering Attorney Fees*

In arguing that Mindey could not recover attorney fees under the SRA because she was not a party to the agreement, Michael relies upon *Reynolds, supra,* which held that section 1717 "provide[s] a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (*Reynolds*, *supra*, 25 Cal.3d at p. 128.) He contends that,

since he could not recover his attorney fees from her under the SRA because he could not sue her to enforce the contract, she cannot recover fees against him. His reasoning is flawed.

Had Michael sued Mindey under an alter ego theory for breach of the SRA and prevailed, he certainly would have been entitled to his attorney fees. That is exactly what the Supreme Court observed in *Reynolds*, where the plaintiff sought to hold the defendants personally liable as alter egos for the contractual obligations of corporations for which they were shareholders and directors. (*Reynolds*, *supra*, 25 Cal.3d at p. 127.) The trial court rejected the alter ego theory, found in favor of defendants, and awarded defendants their attorney fees under the contract. (*Ibid.*) In affirming the award, the Supreme Court noted that "[h]ad plaintiff prevailed on its cause of action claiming defendants were in fact the alter egos of the corporation [citation], defendants would have been liable on the notes. Since they would have been liable for attorney's fees pursuant to the fees provision had plaintiff prevailed, they may recover attorney's fees pursuant to section 1717 now that they have prevailed." (*Id.* at p. 129.)

In any event, *Reynolds* is not particularly helpful here because in that case a party to the contract sued to enforce the contract against a nonparty, whereas in this case a purported nonparty asserted the contract as a defense against a party to the contract. Moreover, at least some of the claims for which the contract provided a defense -- such as breach of fiduciary duty -- were claims based upon Mindey's conduct as a director or officer of WDI, the party to the contract. Thus, for purposes of enforcing the SRA, Mindey in effect stood in the shoes of

WDI and would be entitled to recover her attorney fees under the SRA's attorney fee provision if fees were recoverable for enforcing the SRA as an affirmative defense.

2. *Recovery Based Upon Enforcement of Contract in Defense*

Relying upon *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698 (*Exxess Electronixx*), Michael argues that Mindey cannot recover her attorney fees for her defense based upon enforcement of the SRA because the assertion of an affirmative defense is not the equivalent of an action to enforce or interpret the SRA. A few days before oral argument in this case, the California Supreme Court heard argument in a case presenting this precise issue, i.e., whether the assertion of an agreement as an affirmative defense constitutes an action or proceeding that triggers the attorney fee provision in that agreement. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (July 31, 2017, S223536) ___ Cal.5th ___ <http://www.courts.ca.gov/opinions-slip.htm?Courts=S> (*Mountain Air*).) We delayed submission of this matter until the Supreme Court issued its decision and the parties had an opportunity to file supplemental briefing on the application of *Mountain Air* to this case. We have received supplemental briefing from Michael; Mindey did not file a brief.

In *Mountain Air*, the defendants asserted as an affirmative defense to plaintiff's claims an option agreement that included the following attorney fee provision: "'If any legal action or any other

proceeding, including arbitration or an action for declaratory relief[,] is brought for the enforcement of this Agreement or because of an alleged dispute, breach, default, or misrepresentation in connection with any provision of this Agreement, the prevailing party shall be entitled to recover reasonable attorney fees, expert fees and other costs incurred in that action or proceeding, in addition to any other relief to which the prevailing party may be entitled.'" (*Mountain Air*, *supra*, ___ Cal.5th at p. ___ [Slip Opn., p. 8], italics omitted.) Defendants prevailed on the claims and sought attorney fees under that provision. (*Id.* at p. ___ [Slip Opn., p. 4].) The trial court denied defendants' attorney fee motion on the ground that defendants had not "brought" an action for the enforcement of the agreement. (*Id.* at p. ___ [Slip Opn., p. 4].) The Court of Appeal reversed the trial court, finding that the affirmative defense constituted a "legal action," and the Supreme Court granted review. (*Id.* at p. ___ [Slip Opn., pp. 4-6].)

The Supreme Court held that "the assertion of an affirmative defense is *not* contemplated as an 'action' or a 'proceeding,'" and therefore attorney fees cannot be recovered by a defendant who asserts an agreement as an affirmative defense if the attorney fee provision is limited to an action or proceeding brought to enforce the agreement. (*Mountain Air*, *supra*, ___ Cal.5th at p. ___ [Slip Opn., p. 13].) We are bound by the Supreme Court's holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we conclude that Mindey is not entitled to recover her fees under the attorney fee provision of the SRA, and therefore reverse the trial court's award of

$14,897 in attorney fees incurred prior to the introduction of the breach of promissory note claim.

DISPOSITION

The portion of the order awarding Mindey Morrison $14,897 in attorney fees incurred prior to the introduction of the breach of promissory note claim is reversed; the remainder of the order is affirmed. Mindey Morrison shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.