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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

NEMAN REAL ESTATE INVESTMENTS, LLC,

Plaintiff and Appellant,

v.

FREDERICK OKEN et al., as Trustees, etc.,

Defendants and Respondents.

B263196, B265718

(Los Angeles County Super. Ct. No. BC 488472)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Kevin C. Brazile and Delila Corral Lyons, Judges. Affirmed.

Law Office of Philip A. Metson, Philip A. Metson, Law Office of Mohammad A. Fakhreddine and Mohammad A. Fakhreddine, for Plaintiff and Appellant.

Gray Duffy and David S. Fisher for Defendants and Respondents.

In a case arising from the failed purchase of a commercial building, the prospective buyer, Neman Real Estate Investments, LLC, appeals from a summary judgment in favor of respondents Frederick Oken,[1] Stanford Oken, and Ruth Dawson, as trustees of three trusts that own the property. We conclude that as a matter of law there is no enforceable purchase agreement that satisfies the statute of frauds, and no basis for finding part performance, estoppel, or fraud. We also find no error or abuse of discretion in the postjudgment order awarding attorney fees to respondents. The judgment and order are affirmed.

FACTUAL AND PROCEDURAL SUMMARY

Respondents are successor co-trustees of a survivor's trust, a marital deduction trust, and a residuary trust created under the will of their father, Harry Oken, for the benefit of their mother, Dorothy Oken, during her lifetime. The trusts own the subject commercial property located on South Hope Street in downtown Los Angeles. The will provides that the co-trustees must take action by majority vote. Although not designated as such by his co-trustees, Frederick has held himself out as "managing trustee."[2]

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[1] For the sake of brevity and clarity, we refer to Frederick Oken by his first name. No disrespect is intended.

[2] In deposition, Frederick testified that he has managed the property since the 1970's and that he became the manager of the Oken Trust in 2005, the year Dorothy Oken died. He testified that as property manager he maintains the property, negotiates leases, handles finances, and obtains insurance. He testified that he negotiated a refinancing loan but "signed the documents along with the trustees."

In August 2010, Ben Neman, appellant's managing member, offered to buy the property for $8 million, with $5.5 million financed by the seller. The offer was made in a letter of intent sent by real estate broker David Brandt of Lee & Associates to Frederick, as "Trustee of the Dorothy Oken Trust." The offer lapsed by its own terms without a response. In February 2011, Neman, again through Brandt, sent Frederick a second letter of intent, offering a purchase price of $9 million, all cash at close of escrow, with some additional terms. Frederick, as "Seller's Trustee," counteroffered with additional and different terms, which Neman did not accept.

On March 17, 2011, Brandt filled out a standard real estate contract form that included an offer, agreement and escrow instructions (hereafter, form agreement). The March 17 form agreement identified appellant as the buyer and Dorothy Oken, as trustee of the three trusts, as the seller. The three respondents also were named, but not identified as trustees. "Commerce Escrow Company c/o Robert Minsky" was designated the escrow holder. Lee & Associates was listed as a dual agent for both buyer and seller, even though in a separate provision the buyer acknowledged that the broker had been retained to represent the buyer. The broker's dual agency provision remained unchanged through all subsequent drafts of the form agreement.[3] In April 2011, Frederick wrote Brandt that since Neman had not responded, all offers and counteroffers were withdrawn.

[3] At his deposition, Brandt testified that was error because at some point Frederick had objected to the dual agency.

Afterwards, Neman and Frederick, through Brandt, resumed negotiations. In June 2011, Frederick sent Brandt an e-mail listing additional terms and a marked-up copy of the March 2011 form agreement with his comments and changes. Specifically, Frederick requested that escrow open only after the agreement had been signed by the buyer and all three trustees on the seller's side, and after the buyer had proven he had $4.5 million in liquid funds and had approved the preliminary title report in writing. Frederick corrected the name of the seller to read "Frederick Oken, Stanley Oken and Ruth Dawson, as trustees" of the three trusts created by Harry Oken's will. A revised draft of the form agreement, dated June 17, 2011, adopted that correction. In subsequent drafts, all three respondents, as trustees of the three trusts, were identified as the "seller." The June 17 form agreement stated that the down payment and first loan were "TBD [to be determined] by lender," which was unacceptable to respondents as it indicated that the purchase price would be financed.

Nevertheless, the form agreement dated July 7, 2011 continued to provide that the down payment and new loan amount were "TBD by lender," and included a financing contingency. The buyer's title contingency contained a typed-in addition, which read: "While approval of the condition of Title of the subject property remains a Buyer's contingency for 90 days from the opening of Escrow, Buyer shall have reviewed the Preliminary Title Report and shall notify Seller, in writing, of Buyer's preliminary characterization of the condition of Title. This characterization shall in no way be deemed as Buyer's approval or waiver of its condition of Title contingency herein." The addendum stated that escrow would open upon receipt of the agreement, supplemental escrow instructions signed by buyer and seller, and the buyer's $300,000 deposit. Neman signed the July 7 form agreement and e-mailed it to his own attorney, as well as to the broker and escrow company on the evening of July 6; in the same e-mail, Neman asked the escrow officer to "order the title now."

The signed agreement was forwarded to Frederick on July 7, 2011, and he was told it had been sent to escrow, along with a $500,000 deposit. The escrow company received the $500,000 deposit wired on behalf of appellant on July 11. In deposition, Neman testified the $500,000 was "a wire coming" to him from another deal, for which he had no other use and which he sent directly to escrow in this case, regardless of what he had to pay under the contract. At some point, Frederick called the escrow officer to confirm that the signed agreement and deposit had been received by escrow.

In an e-mail to Brandt on July 10, 2011, Frederick forwarded proposed escrow instructions to prevent unilateral attempts at modifying some of the contingency provisions, terminating the agreement, and releasing the deposit. He asked that the proposed language be included as item No. 39 in the addendum. In the e-mail, Frederick also wrote: "After the buyer signs off on this item he should then proceed to comply with those items required prior to opening. If you email me the signed corrected Agreement I will sign and hold until the Buyer completes the aforementioned requirements."

Frederick then received an unsigned form agreement dated July 12, 2011, which included the proposed item No. 39. On July 14, 2011, Frederick sent Brandt an e-mail, which read: "I was to understand that you were sending me a copy of the SIGNED

Purchase Agreement. Please confirm that he has signed and submitted to Escrow the signed copy and wired the deposit."[4]

On July 20, 2011, the escrow officer, through Brandt, forwarded Neman the preliminary title report, and Neman raised an issue about three parking covenants recorded against the property. After a failed attempt to resolve the issue administratively on August 4, 2011, Frederick wrote Brandt that Neman could "back out" if he wanted to, and that the property would be listed once the parking issue was cleared, or "[i]f he wants to wait, OK." Eventually, Frederick hired a law firm and filed a lawsuit to terminate the parking covenants.

In the meantime, Brandt sent Frederick a form agreement dated July 20, 2011, that included a number of new provisions.[5] He sent out another revised form agreement in September 2011,

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[4] During a discussion of the July 12, 2011 form agreement and his July 14, 2011 e-mail in deposition, Frederick testified that, before or after sending the e-mail, he asked the escrow officer whether Neman had submitted a signed copy of the agreement and deposit to escrow, and the officer confirmed that he had.

[5] One of the new provisions had to do with curing the parking issue. On July 19, 2011, Brandt e-mailed Neman and Neman's attorney, Philip Metson, that Frederick needed to "clear" provisions proposed by Metson "with his partners." Brandt appeared confused about who had proposed item No. 39 and treated the item as unsettled: "With regard to paragraph 39 (Break in Mutuality) I recommend that you conference [the escrow officer] . . . to discuss the merits and language of this paragraph. My question would be 'Would timely disapproval of our contingencies be a way to move past this paragraph and incorporating it in the agreement to satisfy the seller.'"

as well as a seller's due diligence list on behalf of appellant. In December 2011, Frederick received an unsolicited purchase offer from Jade Enterprises, and entered into negotiations with this new prospective buyer.

In February 2012, Brandt e-mailed Frederick a new letter of intent from Neman.[6] On March 1, 2011, Frederick sent a letter, notifying Neman, through Brandt, that the trustees had accepted another offer and were revoking any prior offers and promises to him. Frederick signed the letter as "Managing Trustee." In April 2011, Neman instructed the escrow company to disburse $1.5 million it held, of which $1 million had been deposited without Frederick's knowledge.[7]

In July 2012, appellant sued respondents for breach of an implied or oral agreement, seeking specific performance, and for fraud. Appellant alleged that the broker had conveyed the seller's acceptance of the agreement in a July 19, 2011 e-mail, that appellant had made three deposits into escrow and reviewed the preliminary title report at the seller's request, but the seller

[6] The parties dispute at whose request the letter of intent was prepared. Brandt's e-mail stated it was being sent at Frederick's request, but in deposition, Brandt testified the preparation of the letter of intent was "a mystery" since he could not remember who had requested it.

[7] At his deposition, Neman admitted, and in its opposition to the separate statement appellant did not dispute, that respondents had not asked Neman to deposit $1.5 million into escrow. Neman testified he thought depositing more money than necessary into escrow would give Frederick confidence that appellant could close the deal, which Neman knew was to be all cash.

subsequently had "shopped" the property to other buyers. After a substantially similar first amended complaint, appellant's second amended complaint asserted a single cause of action—for fraud—and included an allegation that Neman had obtained $1.5 million from an investor in exchange for a 25 percent share in appellant's interest in the property,[8] and that Frederick had orally promised to sign the July 7, 2011 form agreement. The operative third amended complaint—for breach of written and implied agreement, specific performance, and fraud—relied on Frederick's July 2011 e-mails as evidence of the formation of an agreement.

Respondents' motion for summary judgment was granted in December 2014. The court sustained respondents' objections to Metson's declaration, and most of their objections to a declaration by Brandt submitted by appellant. It sustained one of appellant's objections to Frederick's declaration. Both sides submitted some court documents and declarations, including a declaration by Neman, through requests for judicial notice. The court granted the requests, but not as to "hearsay or disputable facts asserted in any documents."

In its written decision, the court closely followed the separate statement of undisputed and disputed facts. It rejected appellant's argument that Frederick's July 10, 2011 e-mail contained an electronic signature, or that it constituted an acceptance of the July 7, 2011 agreement. The court relied on the conditional language in the e-mail, the lack of evidence that Neman accepted Frederick's proposed item No. 39, and the

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[8] At his deposition, Neman admitted he did not tell Frederick about the deal with the investor.

continued exchange of draft agreements. The court also noted that the form agreement itself requires the signatures of all three trustees. Alternatively, the court concluded specific performance was not appropriate in a case involving commercial property.

The court also rejected appellant's fraud theory—that Frederick knowingly concealed the parking issue and then used it to string appellant along while he shopped the property to other buyers. The court concluded there was no evidence Frederick had made knowing misrepresentations of material fact, since the parking issue truly existed and Frederick offered Neman an opportunity to withdraw from the negotiations. The court dismissed appellant's theory that Frederick used Neman's offer to get competing offers from other buyers as speculative, and concluded that appellant suffered no reliance damages since Neman was able to withdraw the deposit.

The appeal in case No. B263196 followed the entry of judgment[9] in favor of respondents and the denial of appellant's motion for new trial. The appeal in case No. B265718 followed the entry of a postjudgment order awarding respondents costs and fees. The appeals were consolidated.

DISCUSSION

I

We first consider appellant's challenge to the summary judgment.

Defendants moving for summary judgment must make a prima facie showing that one or more elements of a cause of action cannot be established, or that there is a complete defense

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[9] The case was heard by Judge Kevin Brazile, but the judgment was signed by Judge Delila Lyons.

to it. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*), citing Code Civ. Proc., § 437c, subd. (o)(2).) Then the plaintiff must make a prima facie showing that a triable issue of material fact exists. (*Id*. at p. 850.) Although "the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*." (*Id*. at p. 856.) If the plaintiff's evidence or inferences show or imply the existence of a cause of action more likely than not, the court must deny the defendants' motion for summary judgment, "even in the face of contradictory evidence or inference presented or drawn by the defendants, because a reasonable trier of fact could find for the plaintiff." (*Id*. at pp. 856-857.) But if the plaintiff's evidence and inferences show or imply the existence of a cause of action no more likely than its nonexistence, the defendants' motion for summary judgment must be granted, regardless of defendants' own evidence and inferences, because as a matter of law "a reasonable trier of fact could not find for the plaintiff." (*Id*. at p. 857.)

We review the trial court's decision on a motion for summary judgment de novo, "considering all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65–66.) We view the evidence and all reasonable inferences drawn from it in the light most favorable to the opposing party. (*Aguilar, supra,* 25 Cal.4th at p. 843.) To be reasonable, an inference must logically flow from the material facts in issue. (*Dimond v. Caterpillar Tractor Co.* (1976) 65 Cal.App.3d 173, 181.) A triable issue of material fact may not be created by speculation or a “stream of conjecture and surmise.” (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1421; *Dumin v. Owens-Corning Fiberglas Corp.* (1994) 28 Cal.App.4th 650, 656.)

Nor may a plaintiff create a triable issue on appeal by presenting a possible theory “‘*not fully developed or factually presented to the trial court* . . . .’ [Citation.]” (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 31.) Where “evidence is not referenced, is hidden in voluminous papers, and is not called to the attention of the court at all, a summary judgment should not be reversed on grounds the court should have considered such evidence.” (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316; see also *Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, 1916, fn. 3 [facts not included in separate statement need not be considered].)

Appellant complains that the trial court improperly weighed the evidence in favor of respondents and did not consider appellant’s evidence as to a number of disputed facts. We review the validity of the judgment rather than the court’s reasons for it. (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448-449.) Neither the trial court nor we are required to draw unreasonable, speculative, or legally unsound inferences in its favor. Moreover, on appeal, appellant heavily relies on evidence and factual theories not presented in its opposition to the separate statement or excluded from consideration by the court’s evidentiary rulings. A salient example is that, in its opposition to the separate statement, appellant did not cite Neman’s declaration in support of any disputed material fact regarding breach of contract or fraud. In contrast, appellant's briefs on appeal are replete with citations to that declaration.

Appellant also ignores the court's evidentiary rulings that sustained respondents' objections to portions of Brandt's and Metson's declarations, and declined to consider the truth of disputed facts contained in Neman's declaration, which was offered through a request for judicial notice. Any claim of error as to the correctness of those rulings is forfeited. (See *Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 41 [party that fails to challenge trial court's evidentiary rulings on appeal forfeits any claim of error as to them].)

It would be unfair to respondents and the trial court to entertain appellant's arguments on appeal completely unconstrained by appellant's own theories in the trial court and the court's evidentiary rulings. With that caveat, we proceed to examine appellant's arguments as to each cause of action.

A. *Breach of Contract*

Appellant's breach of contract cause of action presupposes the formation of a binding and enforceable agreement.

1. *Offer and Acceptance*

"""Contract formation requires mutual consent, which cannot exist unless the parties 'agree upon the same thing in the same sense.""" [Citation.] 'The manifestation of mutual consent is generally achieved through the process of offer and acceptance.' [Citation.]" (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 309.) "'Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.' [Citations.]" (*Bustamante v.*

Intuit, Inc. (2006) 141 Cal.App.4th 199, 208.)

In both pleading and argument, appellant has repeatedly changed its theory as to who accepted whose offer and when. Its argument on appeal that the July 7, 2011 form agreement was an offer for sale by Frederick, which Neman accepted, is unsupported. At most, the dual agency provision in the form agreement indicates that Brandt followed instructions from both buyer and seller. In a declaration, Brandt stated that in July 2011 he believed Neman and Frederick had agreed to an all-cash purchase of the property which needed to be memorialized, but he did not state he drafted the July 7 form agreement as an offer for sale on behalf of Frederick, and the form agreement itself indicated it was an offer to buy. The agreement included a financing contingency even though, in his deposition, Neman admitted that he knew the purchase was to be all cash. There is no basis for concluding the agreement was an offer by Frederick.

Alternatively, appellant relies on Frederick's July 10, 2011 e-mail as evidence of his acceptance of the July 7 form agreement. In the e-mail, Frederick proposed a new item No. 39 "to satisfy the escrow officer and the intent of the Agreement." The new item purported to prevent a "break in the mutuality of the instructions to the escrow holder as to the approval of contingencies, termination of this agreement or release of deposit contained" in several specified paragraphs. Frederick wrote: "After the buyer signs off on this item he should then proceed to comply with those items required prior to opening. If you email me the signed corrected Agreement I will sign and hold until the Buyer completes the aforementioned requirements."

"An acceptance must be absolute and unqualified . . . . A qualified acceptance is a new proposal." (Civ. Code, § 1585.)

However, an offeree's addition of conditions to its acceptance which are implied either in the offer's terms or by law does not constitute a rejection or counteroffer. (See *State v. Agostini* (1956) 139 Cal.App.2d 909, 915 [unconditional acceptance means acceptance "free of conditions which the other party is not bound to perform"].) Appellant argues the proposed new item No. 39 was a nonessential escrow instruction, which did not constitute a rejection or counteroffer. Appellant is correct that, to the extent it purported to provide instructions to escrow to ignore unilateral attempts to break "the mutuality of . . . provisions" in the agreement, item No. 39 was not necessary to the purchase agreement itself. (See *Patel v. Liebermensch* (2008) 45 Cal.4th 344, 351 [escrow instructions are not necessary terms to contract for sale]; see also *Keelan v. Belmont Co.* (1946) 73 Cal.App.2d 6, 12 ["Escrow instructions are a customary and necessary means of consummating real estate transactions, they do not take the place of the agreement for sale but merely carry it into effect"].) Similarly, to the extent item No. 39 sought to prevent unilateral modifications of specific provisions in the form agreement, it overlapped with the provision in paragraph 17.2 that amendments must be in writing and signed by the parties.

Yet, since Frederick expressly conditioned his acceptance on the buyer's signing off on item No. 39 and promised to sign "the signed corrected Agreement," he did not unconditionally accept the July 7 version. Neman's signature on a corrected agreement became a condition precedent to contract formation. (See *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 [where parties understood acceptance of terms would be signified by signing, failure to sign means no binding contract was created, even if one party later expresses willingness to sign].)

Appellant's argument that Neman agreed to or signed off on item No. 39 is not supported by evidence sufficient to raise a triable issue of material fact. In its opposition to the separate statement, appellant relied solely on Neman's signature on the July 7, 2011 form agreement. But there is no evidence that item No. 39 was added to the agreement signed by Neman, and in the trial court appellant did not claim that Neman signed the July 12, 2011 agreement or any other agreement in which this item was included. On appeal, appellant argues that Neman signed off on item No. 39 because in his deposition Frederick testified that, either before or after July 14, 2011, the escrow officer told him Neman had deposited a signed agreement into escrow. Frederick's testimony about an undated hearsay statement by the escrow officer cannot reasonably be used for the first time on appeal to infer the existence of a signed agreement containing item No. 39.

Also for the first time on appeal, appellant relies on Brandt's vaguely expressed belief in deposition that the form agreements did not include language proposed by one side unless it had been approved by the other side. That evidence was not cited in the opposition to the separate statement, and Brandt's contemporaneous e-mail to Neman and Metson, sent on July 19, 2011, indicates item No. 39 was subject to discussion past the date of its inclusion in the July 12, 2011 form agreement. Nor would Neman's tacit agreement to the inclusion of this item satisfy Frederick's express condition that he "sign[] off" on it.

Alternatively, appellant claims Neman must have approved item No. 39 because he proceeded to review the preliminary title report. Generally, in cases of doubt and to avoid unfair results, an offer may be interpreted as inviting acceptance by either promise or performance. (Rest.2d Contracts, § 32; see *Klein v. Farmer* (1948) 85 Cal.App.2d 545, 555.) However, Frederick's July 10, 2011 e-mail unambiguously conditioned Frederick's signature on Neman's signing off on the new item. It did not invite acceptance by performance.

Nor does appellant's own evidence show that Neman more likely than not performed in response to Frederick's July 10, 2011 e-mail. Although the escrow deposit receipt is dated July 11, in the trial court and on appeal, appellant has insisted that, even before the July 10 e-mail, Frederick had been told that Neman had deposited the agreement and $500,000 into escrow. Based on appellant's own theory, it is reasonable to infer that the deposit had been sent to escrow independently of Frederick's July 10 e-mail. In addition, the July 7, 2011 form agreement required that the buyer "shall have reviewed" the preliminary title report and given a "preliminary characterization" of title at some unspecified time. While Neman received the title report only on July 20, he had requested it as early as July 6, indicating an intent to review it even before Frederick's July 10 e-mail.

Appellant's reliance on *King v. Stanley* (1948) 32 Cal.2d 584, disapproved on another ground in *Patel v. Liebermensch, supra,* 45 Cal.4th 344, 349, is misplaced. In *King v. Stanley*, the defendant rejected the plaintiff's offer to buy one of two lots and made a counteroffer to sell both lots for $2,000 each. "The plaintiff accepted the counteroffer and indicated his intent to open escrow to consummate the transfer. In her letter of acknowledgment the defendant added the qualification that the price stated should be net to her . . . and authorized the plaintiff, if satisfied, to open the escrow and send the papers for her signature, and indicate his approval. The plaintiff without delay opened the escrow which was the designated act of acceptance, and thereby and through the letter of the escrow company indicated his approval of the specified terms. The contract was complete when the escrow was opened and the letter of the escrow company was placed in the course of transmission to the defendant . . . ." (*King v. Stanley*, at p. 588.)

King v. Stanley, *supra*, 32 Cal.2d 584 does not support appellant's position. The July 10, 2011 e-mail did not instruct Neman to open escrow; nor is it evidence that Neman had Frederick's permission to open escrow as early as July 7, 2011. Frederick expressly required that Neman first sign off on item No. 39 and then proceed with the prerequisites to opening escrow; moreover, Frederick conditioned his own signature on receiving a corrected signed agreement, which he never received. It would be unreasonable to conclude that Frederick's later condition was satisfied by Neman's earlier or unrelated performance.

"A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent." (Civ. Code, § 1626.) Appellant cites *Estate of Klauenberg* (1973) 32 Cal.App.3d 1067, 1071 for the proposition that "[w]here an agreement is retained by either party with the consent of the other, it must be considered as delivered, if both understand that it has been executed and is in operation." Here, there is no evidence that both sides understood Frederick held onto a fully executed operative agreement. To the contrary, the evidence shows Neman deposited the July 7, 2011 agreement into escrow with only his signature, ordered the title report, and deposited

$500,000 (more than what the agreement asked for) before there was a fully formed and executed agreement.

Additionally, as the trial court noted, in its opposition to the separate statement appellant did not sufficiently dispute the fact that it sent a new offer to Frederick on July 20, 2011, and conceded it was undisputed that it sent a new offer to Frederick on September 27, 2011. The attempt on appeal to recharacterize these offers as modifications of an already existing agreement, or documents prepared on behalf of respondents, fails to convince in light of appellant's concessions and failure of proof in the trial court. Moreover, it is unreasonable to conclude that the July 20, 2011 draft was prepared solely on behalf of respondents, as the document contained new provisions suggested by Metson, appellant's attorney, which Frederick reportedly needed to clear with his co-trustees.

The result does not change even if we assume that the July 11, 2011 escrow deposit slip and Neman's July 20 review of the preliminary title report are sufficient to raise triable issues of material fact that Neman more likely than not began complying with the prerequisites to opening escrow only after, and because of, Frederick's July 10, 2011 e-mail. Nor does it change if we assume further, contrary to appellant's own theory, that Frederick confirmed the deposit of the signed agreement and money into escrow only after July 10; and still further that Frederick waived Neman's signature on item No. 39 as a condition precedent to his own signature by accepting without objection Neman's performance of the prerequisites to opening escrow. (See *Noel v. Dumont Builders, Inc.* (1960) 178 Cal.App.2d 691, 697.) Even assuming these are triable issues of material fact, at most they give rise to an inference of an implied acceptance of Neman's performance by Frederick. They do not prove the existence of a fully executed written contract for the purchase of the property.

2. *Statute of Frauds*

The statute of frauds provides that "[a]n agreement . . . for the sale of real property" is "invalid" unless it is "in writing and subscribed by the party to be charged or by the party's agent." (Civ. Code, § 1624, subd. (a)(3).) Initially, the parties disagree whether Frederick's July 10, 2011 e-mail is sufficiently signed by him to satisfy the statute of frauds.

As respondents acknowledge, the Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.) applies only when the parties consent to conduct a transaction by electronic means. (*Id*., § 1633.5, subd. (b).) Here, there is no evidence of such an agreement. However, under the common law, typed, printed, or stamped names may be considered signatures for purposes of the statute of frauds if they are intended to authenticate the writing. (See *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 278 [merchant's printed name on advertising]; see also *Marks v. Walter G. McCarty Corp.* (1949) 33 Cal.2d 814, 820 [letterhead]; but see *McNear v. Petroleum Export Corp.* (1929) 208 Cal. 162, 167 [printed name in body of telegram intended as identification, not authentication].) A signature block on an e-mail, as in this case, even when automatically generated, is not much different than a preprinted letterhead. (See *Princeton Industrial, Products, Inc. v. Precision Metals Corp.* (N.D. Ill. 2015) 120 F.Supp.3d 812, 820.)

Respondent's reliance on *J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974 is misplaced to the extent the court in that case distinguished the common law signature requirement under the statute of frauds from what it considered to be a stricter signature requirement under the settlement enforcement provisions of Code of Civil Procedure section 664.6. (*J.B.B. Investment Partners, Ltd. v. Fair*, at p. 992.) Yet, in this as in that case, there is insufficient evidence of authentication by the parties to be charged. (See *id*. at pp. 992-993.)

It is undisputed that Frederick did not own the subject property in his own right, and the purchase agreement Neman signed clearly showed that the property was owned in trust by three co-trustees. There is no evidence that Frederick signed the July 10, 2011 e-mail in his capacity as trustee or in a representative capacity, let alone that all three trustees ever signed the purchase agreement. At oral argument, appellant's counsel represented that it would be reasonable to infer they did because respondents did not claim otherwise in the separate statement. However, the separate statement contains repeated assertions that respondents "never promised to sign [a]ny contract to sell the [p]roperty" to appellant and that they "did not ever agree to sign any contract with" appellant. These assertions cannot reasonably be read as concessions that a fully executed agreement exists. It would be speculative to infer its existence in the absence of any supporting evidence.

Nevertheless, appellant argues that either Frederick alone or all respondents should be held to his promise in the July 10, 2011 e-mail to sign the agreement.

a. Enforceability against Frederick

Appellant relies on the partial specific performance doctrine in *Milkes v. Smith* (1949) 91 Cal.App.2d 79, 83 to bind at least Frederick's "ownership interest" in the property. That doctrine applies "'[w]hen a person who owns only an undivided share of a tract of land enters into an agreement to sell the whole, as though he was the owner of the entirety, to a purchaser who is ignorant of any defect in the title. . . .'" (*Ibid*.) The doctrine has no application here because the purchase agreement placed appellant on notice that the subject property was held in trust by three trustees, not by Frederick alone.

Appellant also cites *Angell v. Rowlands* (1978) 85 Cal.App.3d 536 for the proposition that "a contract is invalid if not signed by all parties purportedly bound *only when it is shown*, either by parol or express condition, that the contract was not intended to be complete until all parties had signed. Conversely, in the absence of a showing that the contract is not intended to be complete until signed by all parties, the parties who did sign will be bound." (*Id*. at p. 542.) Appellant argues that, here, although the form agreement contains signature lines for the three trustees, it lacks an express condition precedent that all three must sign. But an express condition is not required, so long as the party challenging enforceability can show "he only intended to be bound by the contract if all parties signed the instrument . . . ." (*Ibid*.) There was no such evidence in *Angell*, where two husbands signed a sales agreement as buyer and seller of real property, but their wives did not. The agreement included signature spaces for the buyer's wife only, but not for the seller's. While signature spaces for both wives were included in a follow-up agreement, the broker who drafted both agreements testified that whether the wives were to be bound was not discussed during the negotiations. (*Id*. at pp. 538-539.) The court concluded the buyer husband could not challenge the validity of the agreement. (*Id*. at p. 542.)

In contrast, here, Frederick made sure that the name of the seller in the form agreement was corrected to read “Frederick Oken, Stanley Oken and Ruth Dawson, as trustees” of the three trusts that hold the property, and requested that escrow open only after the agreement had been signed by the buyer and all three trustees on the seller’s side. The agreement itself specifies that it would be “create[d]” upon delivery to the other party, or the broker, of “a duly executed writing unconditionally accepting the last outstanding offer or counteroffer,” and that “upon acceptance . . . by Seller,” the agreement would also constitute instructions to escrow.

Appellant’s argument that this is insufficient to show Frederick’s intent to be bound only along with his co-trustees, or that his June 10, 2011 e-mail waived any condition regarding co-signatures or delivery is unpersuasive. It begs the question why Frederick would insist on the signatures of all co-trustees as a condition for opening escrow, but not as a condition for creating an enforceable agreement in the first place. Frederick’s June 10, 2011 promise to “sign and hold” a “signed corrected” agreement was not an unconditional acceptance of Neman’s June 7, 2011 offer. Nor can Frederick’s e-mail be read as waiving the condition of co-signing with the other trustees since he did not signal an intent to submit the agreement to escrow with only his signature in order to bind only himself.

b. Enforceability Against All Trustees

Probate Code section 15620 states that “[u]nless otherwise provided in the trust instrument, a power vested in two or more trustees may only be exercised by their unanimous action.” (*Ibid.*) Harry Oken’s will required that the trustees act by majority vote. A trustee may not “delegate the entire administration of the trust to a cotrustee" (*id.*, § 16012), but may delegate management functions. (*Id.*, § 16052, subd. (a).) Although Frederick declared that his co-trustees had not designated him "Managing Trustee" and had not consented to or ratified his negotiations for the sale of the property, his self-designation and general ability to negotiate contracts and leases on behalf of the trusts may be sufficient to raise a triable issue of fact whether he was authorized to engage in negotiations on behalf of the other trustees.

Appellant assumes Frederick negotiated with the full knowledge and prior consent of his co-trustees because in his July 19, 2011 e-mail, Brandt reported that Frederick wanted to consult "with his partners" about some of appellant's proposed additions to the form agreement. From this e-mail, appellant infers that in all other instances where Frederick did not mention the other trustees, he must have acted with their full knowledge and consent. But while that may be a reasonable inference regarding Frederick's authority to negotiate on behalf of his co-trustees, his authority to bind them to a contract for the sale of real property is an entirely different matter.

Under the equal dignities rule, an agent's authority to enter into an agreement subject to the statute of frauds "can only be given by an instrument in writing." (Civ. Code, § 2309.) An agreement made by an agent without such authorization is invalid. (*Id.*, § 1624, subd. (a)(3).) There is no evidence Frederick had written authorization by at least two trustees to sign the purchase agreement on behalf of the trusts. Appellant's argument that the existence of such authorization may be inferred from his authority to negotiate is speculative and legally unsound. As a matter of law, an agent's authority to negotiate for the principal is not an authority to bind the principal. (See, e.g., *Angus v. London* (1949) 92 Cal.App.2d 282, 285 ["Agency to negotiate a sale or purchase of real property does not authorize the agent to bind his principal by contract"]; see also 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency & Employment, § 136, p. 181 [authority to sell real property does not authorize agent to enter into contract to convey]; Rest.3d Agency, § 1.01, com. c ["Agents who lack authority to bind their principals to contracts nevertheless often have authority to negotiate or to transmit or receive information on their behalf"].)

While it may be reasonable to infer that Frederick negotiated with the consent of his co-trustees, his authority to negotiate on their behalf should not be confused with his authority to bind the trusts, which could only have been given in writing. To infer the existence of written authorization to bind the trusts from his negotiations on their behalf would be a logical nonsequitur because the authority to bind the trusts is not encompassed in the authority to negotiate for the trusts.

Nothing in the record suggests that Frederick routinely signed contracts on behalf of all trustees. In deposition, he acknowledged negotiating leases, but he did not say he alone signed for the trusts, and he testified that he signed loan documents "along with the trustees." A copy of an amendment to respondents' agreement with the new buyer, which appellant has lodged under seal, is signed by all three trustees. In sum, there is no evidence, or basis to infer, that Frederick was authorized to, or could, bind the trusts on his own.

3. Exceptions to the Statute of Frauds

Appellant's argument that respondents should be estopped to rely on the statute of frauds under the doctrines of promissory and equitable estoppel, and part performance is not persuasive.

Promissory estoppel requires justifiable reliance on a promise that would result in an injustice if not performed. (*Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 418.) However, recovery would be denied if the plaintiff's reliance was unreasonable in light of his or her intelligence or the available information. (*Ibid*.) "A third party . . . 'who deals with an agent and knows of the agency is under a duty to ascertain its scope. Hence, if the agent acts beyond his actual authority, *and the conduct of the principal has not been such as to give him ostensible authority*, the principal cannot be held.' [Citation.] 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' [Citation.]." (*Seneca Ins. Co. v. County of Orange* (2004) 117 Cal.App.4th 611, 620.)

Similarly, an agent "by his conduct alone cannot [equitably] estop his principal and the estoppel can only arise out of reasonable reliance upon some conduct of the principal himself. [Citations.]" (*Monte Carlo Motors, Inc. v. Volkswagenwerk, G.M.B.H.* (1960) 177 Cal.App.2d 107, 110.) "A principal is estopped to raise the equal dignities rule against a contracting third party if the principal, by its own conduct, lulls the third party into believing that its agent has written authority to enter the contract or has no need of written authority. [Citations.]" (*Kerner v. Hughes Tool Company* (1976) 56 Cal.App.3d 924, 934.)

There is no evidence that any of the trustees did anything to “lull” appellant into believing that Frederick had written authority to bind the trusts, or did not need such authority. Although respondents’ briefs and separate statement are written in the plural, the record does not show that the other two trustees were involved in the negotiations and made any representations to appellant. The evidence is limited entirely to Frederick’s statements and conduct.

After Frederick corrected the form agreement to indicate he was one of three co-trustees and requested that escrow not open until all three had signed, Neman was on notice that he was negotiating with one of several trustees and had a duty to ascertain the scope of Frederick’s authority to bind the others. There is no legal basis for inferring that Frederick may on his own waive the requirement of the number of signatures required to bind the trust by law. Appellant’s reliance on the e-mail as a promise sufficient to create an enforceable agreement is unreasonable as a matter of law.

Alternatively, estoppel to rely on the equal dignities rule may be established when the principal, with complete knowledge of the circumstances, has received benefits resulting from its oral authorization of the agent to act. (*McGirr v. Gulf Oil Corp.* (1974) 41 Cal.App.3d 246, 257.) However, “[t]o estop a defendant from asserting the statute of frauds, a plaintiff must show unconscionable injury or unjust enrichment if the promise is not enforced. [Citation.]” (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 944.) By its nature, estoppel “is not properly invoked where its invocation is intended as an ‘instrument of gain or profit. . . .’ [Citation.]” (*Irving Tier Co. v. Griffin* (1966) 244 Cal.App.2d 852, 865.) Thus, appellant may not invoke the estoppel doctrine absent unjust enrichment or unconscionable injury as that would allow it to profit from an invalid contract.

In *Isaac v. A & B Loan Co.* (1988) 201 Cal.App.3d 307, 313 (*Isaac*), the court explained that "[t]he payment of money which was returned and the loss of appellants' bargain are not sufficient circumstances to invoke equitable estoppel to plead the statute of frauds. [Citations.] Appellants' cooperation regarding expungement of [a] lis pendens . . . neither injured them nor unjustly enriched respondent, especially since respondent obtained the expungement by other means." Appellant seeks to distinguish *Isaac* on the basis that the agreement in that case was oral whereas in this case there was a written promise by Frederick. The distinction is without a difference since the issue in *Isaac*, as here, was whether the parties' agreement was barred by the statute of frauds.

Appellant argues that *Grant v. Long* (1939) 33 Cal.App.2d 725 is dispositive. In *Grant*, the president of a hotel company and his wife had lived in an apartment at the hotel owned by the company and had had access to free services, food and refreshments. (*Id*. at pp. 728-729) The wife claimed she was entitled to continue to receive those benefits after the husband's death. (*Id*. at p. 729.) The court found there was an implied contract, upon which the husband and wife had relied when they sold a partial interest in the hotel company to the defendants. (*Id*. at pp. 738-739.) The defendants were estopped from relying on the statute of frauds because they still retained the benefits of the contract in the form of bonds they had received from the husband and wife. (*Id*. at p. 741.)

In contrast, here there is no evidence that respondents retained any benefit they received from appellant that would give rise to unjust enrichment. It is undisputed that appellant has received back its deposit with interest, and the loss of its bargain is not an unconscionable injury. Nor did the review of the preliminary title report unjustly enrich respondents, or unconscionably injure appellant. (See *Isaac*, *supra*, 201 Cal.App.3d at p. 313.)

Part performance also is inapplicable. That doctrine permits an otherwise invalid contract for the sale of real property to be enforced when the party seeking to enforce it takes possession of the property and either makes full or partial payment of the purchase price or substantially improves the property in reliance on the agreement. (*Sutton v. Warner* (1993) 12 Cal.App.4th 415, 422.) However, the payment of money by itself is not sufficient to take a contract out of the statute of frauds. (*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 555.) There is no evidence that appellant has taken possession of the property or made improvements in reliance on the agreement.

In sum, the evidence is insufficient to raise a triable issue of material fact as to the existence of a valid contract for the sale of the commercial property at issue in this case. Absent a valid contract, there is no basis to consider appellant's request for specific performance.

B. Fraud

On appeal, appellant proceeds on a theory of promissory fraud based on Frederick's e-mails to Brandt on July 10 and August 4, 2011. As we have discussed, in the first e-mail, Frederick conditionally promised to sign the agreement if Neman signed off on item No. 39, and represented that he would "hold" the agreement until Neman complied with the prerequisites for opening escrow. In the second, Frederick wrote Brandt to advise Neman of the delay in resolving the parking issue, adding that "if he wants to back out I will understand. I will then wait to clear the problem and then list the property. If he wants to wait, OK."

"'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.] [¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. [Citation.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) The elements of fraud are: "'(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.]" (*Ibid.*)

1. Promise

To establish a promissory fraud claim, the plaintiff must specifically plead and prove a promise that is "clear and unambiguous." (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1044.) While Frederick's conditional promise in the July 10, 2011 e-mail to "sign and hold" the agreement may be sufficiently clear as to his own performance, it says nothing about the performance of the other two trustees, and as we have explained, nothing in the record suggests Frederick could bind the trusts on his own.

It is even less clear that the August 4, 2011 e-mail contains a promise of any kind. Appellant reads into the e-mail language that is not there: that Frederick offered Neman the option of backing out "of the Agreement," and that he promised "the Parties will continue to move forward" if Neman was willing to wait. The August 4 e-mail does not acknowledge the existence of an agreement; nor does it promise or require any future performance.

2. Fraudulent Intent

Appellant argues that Frederick intended to induce reliance because he instructed Neman to comply with the prerequisites to opening escrow but did so without intending to sign the agreement because his deposition testimony showed he believed "there was no deal as long as . . . I did not sign any documents." Appellant argues further that Frederick did not sign the agreement because he intended to "shop" the property to other buyers. Appellant assumes the letter of intent that Brandt sent Frederick "at his request" in February 2012 was prepared at the latter's request. From this, appellant infers that Frederick wanted to create the appearance that the parties were still in negotiations and to increase his negotiating leverage with the new buyer.

We agree with the trial court that appellant's fraud theory is based on a chain of assumptions and inferences that do not flow from the evidence and thin out into conjecture and surmise. Appellant's theory requires the following conclusions: that Frederick, already in July 2011, had no intent to sign the agreement with appellant because he intended to use appellant's offer to get a better offer, even though the offer from the new buyer in December 2011 was undisputedly unsolicited; that because the February 2012 letter of intent was sent to Frederick at his request, it must have been prepared at his request, even though Brandt could not remember at whose request the letter was prepared; and that the letter of intent was actually shown to the unsolicited buyer in order to get a better offer, even though the evidence in the record is that the new offer was for $9 million, the same purchase price as appellant's offer and there is no evidence that the February 2012 letter of intent was used in the negotiations.

In its brief, appellant represents that respondents' agreement with the new buyer includes incremental purchase price increases based on the two pending lawsuits and the buyer's consent to share litigation costs in this and the parking covenant case. However, the second amendment to that agreement, on which appellant relies, indicates that those terms were added in 2013, after this lawsuit already had been filed. They are not evidence of the offer respondents obtained in 2012.

3. Justifiable Reliance

Even assuming that appellant's chain of inferences is sufficient to raise a triable issue of material fact that Frederick acted with fraudulent intent, there is no basis to infer Neman justifiably relied on Frederick's e-mails. While the July 10, 2011 e-mail directed Neman to sign off on item No. 39 and complete the prerequisites for opening escrow, the August 4 e-mail did not suggest that he do anything other than back out or wait. The evidence does not show that Neman more likely than not followed Frederick's directions in the two e-mails; rather, it shows that as likely as not he acted prematurely and for reasons independent of the e-mails.

As we have discussed, there is no evidence Neman signed the July 12, 2011 form agreement, which included item No. 39. Additionally, Neman already had started performing before July 10, 2011—by sending a signed copy of the agreement into escrow and instructing the escrow officer to order the preliminary title report on July 6, and by redirecting a $500,000 wire deposit from another deal sometime around July 7, when, according to appellant's theory in the trial court, Brandt told Frederick about the deposit. There is no evidence that the timing and amount of the initial deposit were related exclusively to Frederick's July 10 e-mail. As to the further $1 million deposit, in his deposition Neman acknowledged, and in the opposition to the separate statement appellant did not dispute, that it was made without Frederick's knowledge and not at his direction.[10] In September 2011, appellant prepared a seller's due diligence list even though in August, at most, Frederick had given Neman the option to wait.

As we have discussed, the form agreement Neman signed placed him on notice that the property was owned in trust and that three trustees, not one, needed to sign on the seller's side. Frederick had told Brandt that the agreement needed to be signed by all three trustees. While in the July 10, 2011 e-mail Frederick conditionally promised to "sign and hold," he did not represent that his signature would bind the trusts. Appellant's

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[10] At his deposition, Neman testified he thought that a larger deposit than called for in the agreement would allay Frederick's concerns about appellant's ability to close an all-cash deal; he did not say that Frederick had required that proof of funds be made through a $1.5 million deposit. On appeal, appellant relies on Neman's declaration to show that he thought a $1.5 million deposit was required for the type of loan he had arranged. As we have explained, the declaration was not cited in the opposition to the separate statement and was not considered for its truth by the trial court; we decline to consider it for the first time on appeal.

interpretation of the July 10 e-mail as Frederick's promise to singlehandedly bind the trusts is objectively unreasonable, and any reliance on it was unjustifiable.

4. Damages

Finally, appellant has failed to raise a triable issue of fact with regard to its damages. In opposition to the motion for summary judgment, appellant stated only that it sought fraud damages based on the loss of its bargain. However, "[i]n fraud cases involving the 'purchase, sale or exchange of property,' the Legislature has expressly provided that the 'out-of-pocket' rather than the 'benefit-of-the-bargain' measure of damages should apply. ([Civ. Code,] § 3343, subds. (a), (b)(1).)" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240-1241.) On appeal, appellant conclusorily claims that it was damaged because it was deprived of the use of its $1.5 million deposit for several months, and that it incurred damages in retaining an attorney to review the preliminary title report and draft the seller's due diligence list.

As we have explained, there is no evidence that the excessive deposit, review of the report, and drafting of the seller's list were made in justifiable reliance on Frederick's July 10 and August 4, 2011 e-mails. Even assuming there may be triable issues of material fact as to at least some of these items, appellant cites no evidence to support its claim that it retained counsel and incurred legal expenses specifically in reliance on Frederick's e-mails. Metson, appellant's attorney through the contract negotiations and trial court proceedings, suggested that he had reviewed the preliminary title report, but the trial court sustained respondents' evidentiary objection to this portion of his declaration. Appellant has not challenged the trial court's evidentiary rulings on appeal, and may not rely on evidence the court excluded from consideration.

Appellant does not dispute it received its deposit back with interest, and it cites no evidence that the money could have been used or invested more advantageously in the interim. The evidence is to the contrary. Neman testified he had no other use for the first $500,000 that was transferred to escrow in July 2011, and even that amount exceeded the required deposit. The escrow officer testified that $1 million of the deposit was disbursed to another escrow in April 2012 and the rest was disbursed to Neman, indicating that some of the money was immediately invested in another deal. In its opposition to the separate statement, appellant purported to dispute this evidence without citing to any contrary evidence.

Summary judgment was properly granted as appellant's evidence is insufficient to support its breach of contract and fraud claims as a matter of law.

II

Next, we consider appellant's challenge to the postjudgment order awarding respondents' attorney fees.

We review the trial court's legal basis for awarding attorney fees de novo (*In re Tobacco Cases I* (2011) 193 Cal.App.4th 1591, 1604) and the amount of fees for abuse of discretion. (*Cates v. Chiang* (2013) 213 Cal.App.4th 791, 820-821). "'[T]he amount awarded by the trial court will not be set aside absent an affirmative showing of abuse of discretion in that the award is "manifestly excessive in the circumstances."'" (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1274, citations omitted.)

Respondents' attorney David Fisher asked for, and the trial court awarded, $619,566.75 in attorney fees. The amount was based on a flat rate of $495 an hour, which Fisher declared was below the average rate of $550 to $650, or $500 to $750 an hour charged by similar real estate attorneys in Los Angeles. The rate was multiplied by a total of 1,251.65 hours (178.15 billed between August 2012 and February 2013, and 1,103.50 billed between March 2013 and March 2015).

Fisher, an attorney specializing in real estate cases since 1986, billed 87 percent of all hours at a variable rate. As a sole practitioner between August 2012 and February 2013, Fisher charged between $425 to $450 an hour. After joining Gray Duffy, where he was a partner, Fisher charged $450 to $495 an hour between March 2013 and December 2013; $495 in 2014, and $550 since January 2015. He explained that he did not raise his fee for existing clients, and that his fee agreement with respondents had been for $495 an hour, even though at times he had agreed to a lower rate by way of accommodation.

The rest of the billable hours were attributed to attorneys Rene Faucher (8 percent) and Nathan Lee (5 percent). Faucher had more than 30 years of experience and his hourly rate was the same as Fisher's. Lee had graduated from law school in 2011 and had been an associate at Gray Duffy since 2012. His hourly rate was $350 an hour.

A. Legal Issues

Appellant raises two legal arguments: that fees cannot be awarded at a rate higher than that actually charged, and that respondents did not incur all their fees because their new buyer was contractually obligated to pay for half. We disagree with both.

Civil Code section 1717, subdivision (a)[11] provides that when a contract authorizes an award of attorney fees and costs "which are incurred to enforce that contract," the prevailing party is entitled to "reasonable" fees. """The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. [Citations.] This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel. [Citations.]"' [Citation.]" (*Nemecek & Cole v. Horn* (2012) 208 Cal.App.4th 641, 651 (*Nemecek*).)

Appellant relies on *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 130 (*Reynolds*) to argue that the statutory right to fees under section 1717 "should be no greater than the contractual right." In an action to collect under two unpaid promissory notes that limited attorney fees "to 15 percent of the amount of the notes," the court concluded that "recovery of fees under section 1717 must be similarly limited." (*Reynolds*, at pp. 127, 130.) Appellant argues that the purchase agreement it unsuccessfully sought to enforce in this case limits the recovery of attorney fees. But the agreement imposes no monetary cap. Instead, it provides that the prevailing party "shall be entitled to reasonable attorneys' fees" and must be reimbursed for "all attorneys' fees reasonably incurred."

Arguments similar to appellant's, on contractual attorney fee provisions similar to the one here, have been rejected in other cases. The majority in *PLCM Group, Inc. v. Drexler* (2000) 22

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[11] All further statutory references in this section are to the Civil Code.

Cal.4th 1084 (*PLCM*) disagreed with the suggestion in the concurring and dissenting opinion that the parties' agreement, "merely by referring to costs 'incurred,'" required the court to apply a particular cost-based method to calculate reasonable attorney fees under section 1717. The court noted that "[t]he parties did not agree to any particular method for calculating fees or purport to establish a specific monetary cap on attorney fees as in [*Reynolds*, *supra*,] 25 Cal.3d 124." (*PLCM*, at p. 1097, fn. 5.) It noted that *Reynolds* did not require a particular method to determine the reasonableness of fees under section 1717. (*PLCM*, at p. 1097, fn. 5.)

Similarly, in *In re Tobacco Cases I*, *supra*, 193 Cal.App.4th 1591, the court was not persuaded by the tobacco company's argument that the state of California should be limited to the actual fees it incurred in enforcing a consent decree. (*Id*. at p. 1605.) The consent decree did not "place a monetary cap on fees. Rather, it provide[d] for an award of fees 'incurred' by the state, which simply brings the provision within the ambit of section 1717." The court described the tobacco company's argument as "contrary to the express language on section 1717, subdivision (a), which provides for 'reasonable' fees when a contractual provision authorizes an award of attorney fees 'incurred' by . . . the prevailing party." (*Tobacco*, at p. 1605.)

Appellant's argument that the attorney fee award should be limited to the actual fees the attorneys charged respondents fails for the same reasons. The purchase agreement in this case did not use the phrase "actually incurred." It used the phrase "reasonably incurred," which is consistent with the provision in section 1717 for "reasonable" fees "incurred" by the prevailing party.

Appellant's attempt to limit *PLCM*, *supra,* 22 Cal.4th 1084 to its facts—as an in-house counsel case—is unavailing. As explained in *Nemecek*, *supra*, 208 Cal.App.4th 641, the trend "'is toward the conclusion that a trial court may consider the terms of the parties' contract, along with other factors, but that the terms of the contract do not compel any particular award." (*Id*. at p. 652, citing *Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 520.) The court in *Nemecek* declined to "accept a rule that requires a trial court to limit its fee award to the amount incurred in all circumstances except under 'unique factual circumstances' such as pro bono cases, contingency fee cases and representation by in-house counsel." (*Nemecek*, at p. 652.) The reasonable market value of the attorney's services determines the reasonable hourly rate even when the attorney charges "'"below-market or discounted rates."'" (*Id.* at p. 651, citations omitted.)

Appellant's alternative argument—that respondents did not incur all their fees because a third party was contractually responsible for half of all fees—also is flawed. In order to be incurred, fees need not actually be the prevailing party's liability or be paid from the prevailing party's assets. (See *Lolley v. Campbell* (2002) 28 Cal.4th 367, 371; see also e.g. *Nemecek*, *supra*, 208 Cal.App.4th at p. 652, citing *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1410 ["'Plaintiffs were not entitled to avoid their contractual obligation to pay reasonable attorney fees based on the fortuitous circumstance that they sued a defendant who obtained insurance coverage providing a defense'"]; *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 283 [waived attorney fees are still incurred]; *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1192–1194 [former employees incurred fees even if new employer paid for their defense because they would have been responsible for the fees if it had not].)

Here, Fisher declared that respondents were contractually obligated to pay and did, in fact, pay all his law firm's attorney fees throughout the litigation; the law firm did not receive payments from anyone else. That respondents separately contracted for partial payment of fees with their new buyer does not mean they did not incur all fees they were required to pay under the attorney-client agreement. Fisher's declaration supports the conclusion that, regardless of the terms of the third-party agreement, respondents continued to be primarily responsible for all attorney fees, even though they may have been partially reimbursed by the new buyer. Appellant may not take advantage of that circumstance to avoid its obligation to pay attorney fees under the purchase agreement it sought to enforce.

B. Abuse of Discretion Issues

Appellant also challenges the court's exercise of its discretion in determining the amount of the fee award in this case. Appellant argues that the court's adoption of a flat rate of $495 across the board was unreasonable as applied to the three-year associate, who billed 5 percent of the hours in this case. However, not adopting a separate rate for each attorney who worked on a case, or adopting a "blended" rate for partners and associates does not result in reversible abuse of discretion. (See *569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 440, citing *Cates v. Chiang* (2013) 213 Cal.App.4th 791, 819–820; *Finkelstein v. Bergna* (N.D. Cal. 1992) 804 F.Supp. 1235, 1238.)

Fisher's declarations show that he did almost all of the work in the case. His rates fluctuated between $425 and $550 over the years, but the rate of $495 an hour was for the most part either the actual rate charged or a fair average of the discounted rate charged and Fisher's actual going rate. Faucher's rates and experience were comparable to Fisher's. Associate Lee, who had less experience and commanded a lower rate, accounted for only 5 percent of all the work on the case. Appellant did not dispute Fisher's claim that the rate of $495 an hour was below the rates charged in similar real estate cases by other law firms in Los Angeles. As the court suggested during oral argument, the range of reasonable market rates included rates higher than $495. We see no abuse of discretion in the court's adoption of a flat rate of $495 for all attorneys instead of selecting a market rate higher than $495 for the experienced attorneys and a lower market rate for the associate, as there would likely be no significant change in the result.

Appellant complains about the adequacy of Fisher's original declaration and attached documentation in support of the attorney fee request, but Fisher provided three additional declarations, with supporting documentation, in response to appellant's objections in the trial court. Appellant does not show any material defect or contradiction in the totality of the evidence Fisher offered in support of the attorney fee request, and in essence seeks a redetermination of the credibility of evidence the trial court accepted.

Specifically, appellant complains that the hours listed on a time report attached to Fisher's initial declaration exceed the hours that can be billed in a day. As respondents point out, the report reflects monthly, not daily, totals. Appellant does not dispute that, but points to the representation in respondents' brief on appeal that respondents' counsel "dedicated between 25 and 50 percent of his time to this case during any given month while the matter was pending." Appellant notes that the representation is contrary to the time report, which shows no hours in March 2013. But the generalization in the respondents' brief on appeal is not evidence; nor did the trial court award damages based on it instead of on the actual hours reported.

Appellant has shown no reversible error or abuse of discretion in the attorney fee award.

DISPOSITION

The judgment and order are affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.