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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

NETWORK WORLD MARKET CENTER, LLC, Plaintiff and Appellant, v. NAMA HOLDINGS, LLC, Defendant and Respondent.	B233397 (Los Angeles County Super. Ct. Nos. BS123207, BS123445 & BS123457)

APPEAL from an order of the Superior Court of Los Angeles County, Matthew C. St. George, Commissioner. Affirmed.

Greenberg Traurig, Jordan D. Grotzinger, Amy B. Alderfer, Karin L. Bohmholdt, and Leslie D. Corwin (Pro Hac Vice) for Plaintiff and Appellant.

Sidley Austin, Howard J. Rubinroit, Ronald C. Cohen, Frank J. Broccolo, Alexis Miller Buese, Ronald P. Slates, and J. Steven Bingman for Defendant and Respondent.

INTRODUCTION

Judgment creditor NAMA Holdings, LLC, instituted a summary proceeding seeking to enforce a money judgment by executing on a bank account in the name of Network World Market Center, LLC, a wholly-owned subsidiary of the judgment debtor, Alliance Network, LLC. Network World Market Center, LLC, resisted the enforcement efforts, contending that the judgment debtor had no interest in the funds at issue on deposit in its account. Because we conclude that the underlying judgment conclusively determined that the funds at issue were owned by Alliance Network, LLC, we find that the trial court properly ordered Network World Market Center, LLC, to relinquish the funds in its account that were derived from funds owned by Alliance Network, LLC. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Underlying Action

A. Inception of the Project

The World Market Center (the project) is a campus of home furnishings showroom buildings in Las Vegas, conceived by Shawn Samson and Jack Kashani. An operating agreement was executed in August 2001 to create Alliance Network, LLC (Alliance Network), which was comprised of three investor members: respondent NAMA Holdings, LLC (NAMA), Prime Associates Group, LLC (Prime) (an entity owned by Samson and Kashani), and Crescent Nevada Associates, LLC (Crescent). Seventy percent of the capital contributions for the project were to come from NAMA, 20 percent from Crescent, and 10 percent from Prime. Samson and Kashani served together as Alliance Network's "Managers."

As the project progressed, disputes arose among the members of Alliance Network, which were temporarily resolved pursuant to a settlement agreement executed in April 2004, entered into by the members of Alliance Network (NAMA, Crescent, and

Prime) and the Managers. The settlement agreement created Alliance Network Holdings, LLC (Alliance Holdings), a wholly-owned subsidiary of Alliance Network, and appellant, Network World Market Center, LLC (Network), a wholly-owned subsidiary of Alliance Holdings (collectively, the Alliance Companies). The settlement agreement reorganized and recapitalized the project by admitting a new entity, Related World Market Center, LLC (Related), into the project. Related agreed to become a 50 percent equity participant in the project and make capital contributions. Related's participation in the project was memorialized in the WMCV operating agreement, which formed and governed World Market Center Venture, LLC (WMCV). The two signatories of the WMCV operating agreement were an affiliate of Related and appellant Network (a wholly-owned subsidiary of Alliance Network). Related and Network were the sole members of WMCV.

Further disputes arose in October 2006, when WMCV tendered to Alliance Network's Managers a proposed funding notice for the third phase of the project. The Managers forwarded the notice to the members of Alliance Network (Prime, Crescent, and NAMA), and each member was required to approve or disapprove of the notice. NAMA and the other members of Alliance Network unconditionally elected to invest; however, when the time came for funding to be made, NAMA placed numerous conditions on its tender. Accordingly, the Managers refused the tender from NAMA.

B. The Demand to Arbitrate

The Alliance Companies (Alliance Network, Alliance Holdings, and appellant Network) and the Managers (Samson and Kashani) (sometimes collectively referred to as the claimants) filed a demand to arbitrate, claiming that NAMA's failure to contribute its share of capital caused it to suffer millions of dollars in damages. Also as a result of NAMA's failure to contribute, the claimants alleged that NAMA had no further right, title, or interest in Alliance Network or its affiliates, other than a distribution interest in the first phase of the project, as well as other minor interests. The claimants sought a

declaration that they did not breach any duties or contractual obligations and acted appropriately under the company's operating agreements.

NAMA filed a "Statement of Defense and Counter-demand and Demand for Arbitration," opposing the claimants' allegations and asserting claims for itself and derivatively on behalf of Alliance Network. Among others, it named Samson, Kashani, Prime, and Crescent as counterrespondents. NAMA alleged that the counterrespondents had withheld and diverted payments and distributions due to NAMA. NAMA specifically alleged "that the $19 million of funds generated by the re-financing and operation of Phase 1 *held by Alliance Network* (which the Managers improperly refused to distribute) should be distributed to the Members . . . ." (Italics added.) NAMA filed an amended statement of defense and counterdemand for arbitration in which it requested that "[t]he parties' respective accounts and interests in Alliance Network, it[s] subsidiaries and affiliates, the Project, and its Phases be appropriately adjusted, and, if necessary, contributions and distributions appropriately unwound . . . ."

C. The Arbitration

The arbitration panel concluded that "In general, the evidence established that, subsequent to the formation of WMCV, Samson and Kashani largely abdicated their contractual duties to act on behalf of Alliance Network, and instead shifted their allegiance to protecting Prime's interests and deferring to the wishes of Related." The panel found that the Managers breached their contractual obligations by approving the funding notice even though it contained terms that were inimical to the interests of Alliance Network and NAMA, including the provision that retained as reserves $18 million that would otherwise have been available for distribution. Specifically, the panel noted that the parties' dispute included "an $18,214,865.95 distribution *paid to Alliance Network* in June 2005 . . . . NAMA demanded that these funds be distributed pursuant to section 3.09 of the Operating Agreement." (Italics added.) The panel concluded that every explanation offered by Samson and Kashani of their decision to reserve the distribution violated NAMA's rights. The panel ordered as follows:

"Claimant Alliance Network shall pay to NAMA, within thirty days of the date of this Final Award, $12,750,405.00 (representing NAMA's 70% share of the $18,214,865.95 of proceeds *distributed to Alliance Network* in June, 2006) together with interest at the rate of 5% from the date *Alliance Network received these monies* until the date of payment." (Italics added.)

NAMA was also granted $414,211.68 against Alliance Network, Alliance Holdings, and appellant Network, jointly and severally, as sanctions for discovery misconduct.

The arbitration panel later clarified that "the Panel regarded the 'failure to distribute' the $18,214,865.95 of proceeds *paid to Alliance Network* in June, 2006 and the inappropriate use of such funds for other purposes . . . as the most significant, although not the only, basis for awarding monetary compensation to NAMA." (Italics added.) The panel explained that "the significant injustice [it] sought to remedy [was] the undeserved benefit Alliance experienced by means of its use, in connection with Phase 3 of the Project, of the full reserves—reserves in which NAMA had a 70% ownership interest, but from which it enjoyed none of the benefits."

D. The Claimants' Petitions to Correct/Vacate the Award and NAMA's Petition to Confirm the Award and the Judgment

The court denied the claimants' petitions to correct or vacate the arbitration award, and granted NAMA's petition to confirm the arbitration award and entered judgment in its favor. The claimants appealed from the judgment and orders. In a companion appeal to this one (B226167), we conclude that the judgment and other orders must be affirmed.

II. The Present Action to Enforce the Judgment

A. The Writ of Execution

After the trial court entered judgment in the underlying action in late June 2010, Alliance Network did not comply by paying the judgment. On September 13, 2010, NAMA obtained a writ of execution. A few days later, NAMA levied all of the funds in

Alliance Network's bank accounts, as well as the amount from Network's bank accounts necessary to satisfy the joint and several judgment of $414,211.68. The funds held by Alliance Network were insufficient to satisfy the $12 million judgment. Specifically, NAMA reached an account in the name of Alliance Network at City National Bank (CNB), which contained approximately $1.49 million, and another account at the same bank in the name of Network containing $2,303,987.50. The trial court ordered the $1.49 million in Alliance Network's account to be applied toward satisfaction of the $12.7 million judgment against Alliance Network, and ordered $414,211.68 of the funds in Network's CNB account to be applied toward satisfaction of the sanctions award against the three Alliance Companies, leaving for determination the proper disposition of the $1,885,803.67 remaining in Network's CNB account.

B. The Motion for an Order to Assign Network's CNB Account to NAMA in Satisfaction of the Judgment Against Alliance Network

Thus, because $1,885,803.67 remained in Network's CNB account after execution of the levy to pay the sanctions award for which Network was jointly and severally liable, NAMA served an order for appearance and examination on Alliance Network, Alliance Holdings, and Network pursuant to Code of Civil Procedure section 708.110 (as judgment debtors), and on Alliance Holdings and Network pursuant to section 708.120 (as third-parties who may have possession or control of funds belonging to the judgment debtor). It also served subpoenas duces tecum on the three Alliance Companies to produce documents for examination.

NAMA asserted that Alliance Network had an interest in Network's CNB bank account. It therefore moved for an order assigning Alliance Network's alleged interest in Network's bank account directly to NAMA in partial satisfaction of the judgment against Alliance Network.

The trial court denied the motion, noting that if Alliance Network had an ownership interest in the funds in Network's bank account, NAMA should obtain

evidence of that during the scheduled judgment debtor examinations of the three Alliance Companies.

C. Postjudgment Discovery

Samson, one of the Managers of Alliance Network and the representative of Alliance Holdings and Network, was designated as the "person most knowledgeable" on behalf of the three Alliance Companies for purposes of the judgment debtor examinations. NAMA also deposed Kashani, the other Manager. Samson testified regarding the origin and nature of the funds remaining in Network's bank account. Network produced all of its bank statements received since the arbitration.

Samson indicated that Alliance Network had no funds of its own since the formation of WMCV. Network was the entity that made payments on behalf of Alliance Network, and the latter was used solely for bookkeeping purposes as the operating account through which checks cleared (those paid on its behalf). As a matter of custom and practice, Network would forward Alliance Network funds for a specific purpose because it had no funds of its own, and Network would record this in its tax accounting system as a receivable from Alliance Network. Samson testified at deposition that "Network and Alliance Holdings are disregarded entities for tax purposes; therefore, all the transactions went through the conduit of Alliance Network." Samson said that the books of the Alliance Companies are maintained on a tax basis and that there is a single consolidated balance sheet because Network and Alliance Holdings are considered "disregarded entities" for tax accounting purposes under the Internal Revenue Code.

Network did not dispute that the $1,885,803.67 in Network's CNB account originated from the WMCV distribution to Network of $18 million in 2005. $2 million of the latter funds had been transferred to Alliance Network on June 26, 2009, purportedly as a loan to Alliance Network, to enable it to make a retention payment to the Managers' litigation counsel, Quinn Emanuel Urquhart & Sullivan LLP (Quinn Emanuel), in fulfillment of Alliance Network's indemnity obligations to the Managers. The $2 million was recorded on Network's books as a receivable from Alliance Network.

However, on August 11, 2009, shortly after the arbitration award was entered, the Managers (because they had retained other counsel) instructed Quinn Emanuel to transfer the funds to Network's account at East West Bank. On September 16, 2010, the Managers had the funds transferred out of East West Bank to a new account in Network's name at CNB.

D. NAMA's Second Motion for a "Turnover Order"

NAMA again moved for a "turnover order" in March 2011. In support of its motion, NAMA presented the declaration of forensic accounting specialist Amanda Massucci of accounting firm Ernst & Young. She stated that on June 26, 2009, $2 million was transferred from the Alliance Network bank account to Quinn Emanuel. On August 11, 2009, $2 million was transferred from Quinn Emanuel to Network's bank account. On September 8, 2009, Network transferred $2 million to another money market account in its name. On September 16, 2010, Network transferred $2 million to another savings account in its name, the same CNB account on which NAMA levied on September 17, 2010, in order to satisfy its $414,211.68 judgment against Network. Massucci declared that "[t]he CNB Funds were originally part of $18,214,865.95 in funds (including interest earned thereon) which were deposited into the Far East National Bank Business Money Market Account . . . of Network World Market Center, LLC . . . on June 27, 2005 . . . ." Massucci also examined the 2005 consolidated financial statements of the Alliance Companies. She concluded the financial statements claimed the funds as the property of Alliance Network.

Network requested a continuance of the hearing and an opportunity to file briefing. The trial court continued the hearing pursuant to Code of Civil Procedure section 708.180.

Network thereafter filed written opposition. Network argued that the arbitration award had denied NAMA's "identical" request for relief when it purportedly denied a distribution of $18,214,865.95 from Network to Alliance Network, and when it provided

for $12,750,405 in damages to be paid to NAMA by Alliance Network only, rather than jointly and severally by the three Alliance companies.

NAMA filed a reply, contending that the arbitration award and ensuing judgment conclusively established that the $18 million distribution was paid to Alliance Network, and thus was owned by Alliance Network regardless of the fact the initial deposit of that money was made into an account of Network, Alliance Network's wholly-owned, pass-through subsidiary. NAMA also contended that Alliance Network's balance sheet as of December 31, 2005, showed the $18 million in cash held by Network was an asset of Alliance Network.

E. The Trial Court's Turnover Order

On April 26, 2011, after hearing argument on the motion, the trial court granted the turnover order requested by NAMA. The court observed: "All three of these entities are controlled by Mr. Sam[]son and Mr. Ka[s]hani, and . . . basically the history of the funds has been that they're shunted back and forth between these three entities at the direction of Mr. Sam[]son and Mr. Ka[s]hani, and that there is . . . no way that these funds can be anything but the funds that were originally part of 18 million held by Alliance Network, LLC." Indeed, counsel for Network had confirmed that "[i]t came from the 18 million, Your Honor, and I think we traced it, and I think Mr. Sam[]son had described that."

The court concluded: "Mr. Sam[]son has always maintained that that money belonged to Network World Market Center, but when I looked at the arbitration award, it's clear that the arbitrators and Judge Brazile found that that money was, in fact, Alliance Network's."

Accordingly, the trial court entered an order as follows: "Having considered all the moving and responding papers filed by the parties, including but not limited to all of the parties' competing showings, the continuing examination of Shawn Samson . . . , the continuing examination of Jack Kashani, the June 25, 2010 Judgment of this Court, as well as the oral argument of counsel at the hearing; the matter having been argued and

submitted, it appears to the satisfaction of the Court that the $1,885,803.67 on deposit at City National Bank as of March[] 21, 2011 is the property of Judgment Debtor Alliance Network, LLC. It further appears to the satisfaction of the Court that these funds are under the control of the Network World Market Center, LLC, by and through its managers, Jack Kashani and Shawn Samson, and that the funds are not exempt from enforcement of the money judgment." The court ordered that the funds be delivered to NAMA, the judgment creditor, to be applied toward the satisfaction of its judgment against judgment debtor Alliance Network; however, the court also granted a stay as requested by Network.

DISCUSSION

I. The Statutory Enforcement Proceedings and the Standard of Review

A judgment debtor or a third person may be examined pursuant to Code of Civil Procedure sections 708.110 and 708.120, respectively.[1] Section 708.120 provides in relevant part: "(a) Upon ex parte application by a judgment creditor who has a money judgment and proof by the judgment creditor by affidavit or otherwise to the satisfaction of the proper court that a third person has possession or control of property in which the judgment debtor has an interest . . . , the court shall make an order directing the third person to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to answer concerning such property . . . ."

Pursuant to section 708.110, subdivision (d), a lien attaches to the judgment debtor's interest in property under a third person's possession and control. Thus, when NAMA served its application and order for appearance and examination on judgment debtor Alliance Network, a lien attached to any property of Alliance Network that was under the possession or control of a third party such as Network. Similarly, when NAMA served a third-party application and order for appearance and examination on

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[1] All further undesignated statutory references are to the Code of Civil Procedure.

Network respecting any money it was holding in its accounts for the judgment debtor Alliance Network, a lien was created under section 708.120, subdivision (c) against the judgment debtor's interest in property in the third person's (Network's) possession or control. "[T]he California legislature did not intend that the property subject to the § 708.110(d) lien need be solely within the judgment debtor's custody and control. Surely, the California legislature did not intend for an abusive judgment debtor to have a safe haven by giving his property to a third party, or for a judgment creditor to have to play 'pin the lien' on shifting property." (*Kipperman v. Proulx* (*In re Burns*) (2003) 291 B.R. 846, 853.) The statutory examination process allows the judgment creditor to identify assets that may be used to satisfy the judgment, whether they are actually held in the name or in the possession of the judgment debtor. (*Id.* at pp. 852-853.)

"[A]t the conclusion of a proceeding pursuant to this article, the court may order the judgment debtor's interest in the property in the possession or under the control of the judgment debtor or the third person . . . to be applied toward the satisfaction of the money judgment if the property is not exempt from enforcement of a money judgment. . . ." (§ 708.205, subd. (a).)

Taken together, these statutes authorized the trial court to determine, in a summary proceeding, the existence of Alliance Network's interest in Network's CNB account. If in such a proceeding a judgment creditor presents prima facie evidence of the existence of the judgment debtor's interest in a third person's property, and the trial court determines that the third person has not carried its burden of showing by a preponderance of the evidence that its denial of the judgment debtor's interest in its property is made in good faith, the court may determine the existence of the interest without requiring the judgment creditor to file a creditor's suit. (§ 708.180; see *Evans v. Paye* (1995) 32 Cal.App.4th 265, 270, 280-282.)

Implicit in the trial court's order here is the determination that Network's denial of any interest on the part of Alliance Network in the funds held in Network's CNB account was not made in good faith. On appeal from the trial court's order, we view the record in the light most favorable to the prevailing party and draw all reasonable inferences in

favor of the trial court's determination. (*Evans v. Paye, supra,* 32 Cal.App.4th at p. 283.) To the extent we also determine the effect of the underlying judgment on the ownership of the disputed funds as a matter of law, we review the matter de novo. (*Roos v. Red* (2005) 130 Cal.App.4th 870, 878.)

II. The Location and Ownership of the Disputed Funds

As detailed above, NAMA retained Ms. Massucci of Ernst & Young to examine the bank records of the Alliance Companies. She traced all of the $1,885,803.67 in Network's CNB account to the original $18,214,865.95 referenced in the judgment as having been paid and distributed to Alliance Network in 2005. She confirmed that $2,022,979 in funds deposited by Network into its CNB account on September 16, 2010, were funds previously deposited in the Far East National Bank account of judgment debtor Alliance Network. Those CNB funds were transferred by Alliance Network to Network via the following route: On June 26, 2009, the sum of $2,000,000 was transferred from a bank account of Alliance Network to Quinn Emanuel. On August 11, 2009, the same sum of $2,000,000 was transferred from Quinn Emanuel to a bank account of Network. On September 8, 2009, the sum of $2,001,017 was transferred to another bank account of Network's. On September 16, 2010, the sum of $2,022,979 was transferred to the new CNB account of Network's, the account at issue here. After levies by NAMA and remittance to the Sheriff, about $1,885,803.67 of those funds remained in the CNB account. That amount was what NAMA requested to be turned over, and the superior court so ordered.

Network conceded that Massucci's tracing was accurate, although it of course disputed that the $18 million was originally owned by Alliance Network.

III. The Judgment Conclusively Determined Ownership by Alliance Network of the $18 Million Reserve Fund

The crux of this matter comes down to whether the trial court had before it sufficient evidence to establish that the $18 million fund which the Managers were found

by the arbitration panel to have wrongfully withheld from distribution to its members, including NAMA, was owned by Alliance Network, rather than by Network. The parties both concede that the $1,885,803.67 that was the subject of the turnover order at issue here originated from that $18 million reserve fund. Therefore, if the trial court had before it sufficient evidence to establish that the $18 million reserve fund was owned by Alliance Network, then its turnover order was proper.

NAMA argues that Alliance Network has been judicially determined to be the owner of the $18 million fund, to wit, in the underlying judgment which the trial court entered upon confirming the award of the arbitration panel. NAMA asserts that Alliance Network's ownership of the $18 million was a necessary factual finding arrived at by the arbitration panel and confirmed by the trial court upon entry of the underlying judgment. It also argues that this factual finding was supported by the terms of the parties' written operating agreements, which required Network to immediately distribute net income to Alliance Network for immediate distribution to the members of Alliance Network.

Network argues, on the other hand, that the judgment did not determine ownership of the $18 million by Alliance Network. It argues that, in fact, the arbitration panel specifically refused NAMA's purported request that Network be ordered to turn the $18 million over to Alliance Network. Network contends that there was no evidence before the trial court that the $1,885,803.67 ever belonged to Alliance Network. Rather, it was at one time considered a receivable owed by Alliance Network to Network.

As we shall explain, we agree that Alliance Network's ownership of the $18 million was conclusively established by the arbitration panel and in fact was an intentional and necessary part of the judgment. As a result, Network is precluded from relitigating that issue. Accordingly, we affirm the turnover order entered by the trial court.

A. Collateral Estoppel Principles

The doctrine of res judicata or claim preclusion precludes parties to an action from relitigating a cause of action a second time. Collateral estoppel or issue preclusion is an

aspect of res judicata. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897.) "Under collateral estoppel, a prior judgment between the same parties operates as an estoppel or conclusive adjudication as to those issues that were *actually litigated and necessarily determined* in the prior action." (*Groves v. Peterson* (2002) 100 Cal.App.4th 659, 667; *Rohrbasser v. Lederer* (1986) 179 Cal.App.3d 290, 297.)

B. The Arbitration Award and Resulting Judgment

At the outset of its award (which was entered unchanged by the trial court as its judgment), the arbitration panel specifically defined how it would refer to the parties (Alliance Network, LLC as "Alliance Network" or the "Company," and Network World Market Center, LLC as "Network WMCV Member" or "Network"). The panel noted at the beginning of its recitation of facts that "[t]he following is a statement of those facts found by the Arbitrators to be true and necessary to this Final Award. To the extent that this recitation differs from any party's position, that is the result of this panel's determinations as to credibility, determinations of relevance, burden of proof considerations, and the weighing of the evidence, both oral and written."

The arbitration panel found that the Managers breached their contractual obligations by approving a funding notice for phase 3 of the project even though it contained terms that were inimical to the interests of Alliance Network and NAMA, including the provision that retained as reserves over $18 million that should have been distributed to Alliance Network's members. The panel noted that the parties' dispute included "an $18,214,865.95 distribution *paid to Alliance Network in June 2005* . . . . NAMA demanded that these funds be distributed pursuant to section 3.09 of the Operating Agreement." (Italics added.) The panel concluded that every explanation offered by Samson and Kashani of their decision to reserve the distribution violated NAMA's rights. The panel therefore ordered as follows: "Claimant Alliance Network shall pay to NAMA, within thirty days of the date of this Final Award, $12,750,405.00 (representing NAMA's 70% share of the $18,214,865.95 of proceeds *distributed to*

Alliance Network in June, 2006 [*sic*]) together with interest at the rate of 5% from the date *Alliance Network received these monies* until the date of payment." (Italics added.)

The arbitration panel later clarified that "the Panel regarded the 'failure to distribute' the $18,214,865.95 of proceeds *paid to Alliance Network* in June, 2006 [*sic*] and the inappropriate use of such funds for other purposes . . . as the most significant, although not the only, basis for awarding monetary compensation to NAMA." (Italics added.) The panel explained that "the significant injustice [it] sought to remedy [was] the undeserved benefit *Alliance* experienced by means of *its use*, in connection with Phase 3 of the Project, *of the full reserves*—reserves in which NAMA had a 70% ownership interest, but from which it enjoyed none of the benefits." (Italics added.)

The record before the arbitration panel included the bank statements of Alliance Network and Network from 2005 through 2008, and Alliance Network's financial balance sheet as of December 31, 2005. Based on those documents, the arbitration panel's award concluded that the $18 million was "paid to Alliance Network," "distributed to Alliance Network," and that the funds were wrongfully left "sitting in the Alliance Network accounts." The award and judgment also characterized Network as a mere "pass-through entit[y]" of Alliance Network.

The 2004 amendment to the operating agreement entered into by the parties (and others) was also well known to the arbitration panel. That agreement provided at section 3 that "[Network][2] and Alliance Holdings are intended and shall serve merely as conduits pursuant to which the rights, obligations, privileges and responsibilities of Alliance Network and the Members as to the Project and the various Phases thereof, including, without limitation, each Members' right to receive Net Income (herein defined) deriving therefrom, shall be effected and held, and neither such entity, shall serve to diminish, qualify, frustrate, limit, modify, delay, alter or otherwise change the respective rights, obligations, privileges and responsibilities of the Parties. All Net

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2 The operating agreement referred to Network World Market Center, LLC as the "Alliance Network WMCV Member," but for ease of reference and consistency, we refer to it here as "Network."

Income received by [Network] and/or Alliance Holdings shall, except as expressly provided for herein be promptly remitted to Alliance Network for further distribution to the Members as provided for in the Alliance Operating Agreement as amended by this Agreement." Section 5(a) defined "Net Income" as: "any funds actually paid, remitted, distributed or otherwise received by [Network]." It instructed that "The Manager [of Alliance Network] shall use commercially reasonable efforts to ensure that [Network's] . . . amounts constituting Net Income . . . [are] distributed as expeditiously as possible to Alliance Network . . . ." Finally, section 16 of the amendment provided that all such distributions "shall be deemed to flow to and to be conferred upon Alliance Network."

In fact, during the arbitration hearing, Samson conceded that if the $18 million were deemed to be cash available for distribution (as the arbitrators eventually found to be the case), it would have to pass through to Alliance Network, and then out to the members. "Q. Isn't it the case that monies, cash available for distribution — let me ask you that — cash available for distribution was to be distributed at the Alliance Network level?" "A. To the extent that an item constituted cash available for distribution, which was 18 million dollars did not, then you would be correct."

Thus, with all of this evidence before it, the arbitration panel intentionally and repeatedly concluded that Alliance Network, not Network, was the entity that owned the $18 million at issue, even though the funds were initially deposited into an account belonging to Network (the judgment debtor's wholly-owned, pass-through subsidiary) and remained there from 2005 to the close of evidence at the arbitration hearing. The panel rightfully treated the transfer of the $18 million fund to Alliance Network as a *fait accompli*, in accordance with the terms of the operating agreements and the tacit understanding of all of the parties.

Indeed, after the award was issued, Alliance Network and Network effectively conceded that the funds at issue were held by Alliance Network. In a letter to the panel dated September 2, 2009, a month after the award was issued, they stated: "In the Award, among other things, the Panel ordered certain distributions to [NAMA] with respect to NAMA's 'share of the $18,214,865.95 of proceeds distributed to Alliance

Network in June, 2006 (*sic*)[fn. 1].'" Footnote 1 reads: "The actual date of distribution *to Alliance Network* was June 27, 2005." (Italics added.) On appeal, Network contends that it was simply quoting from the arbitration award. However, we conclude that it is disingenuous for Network to contend that Alliance Network and Network would have made a point of correcting the date of the distribution, but not the entity to which the distribution was made. Additionally, we note that in the related appeal (B226167), Alliance Network and Network did not contend that the arbitration award and resulting judgment were erroneous on this basis; rather, they contended that NAMA did not make claims against them as counterrespondents and therefore no judgment could be entered against them.

C. Network's Res Judicata Argument

In a vain attempt to turn the tables on NAMA, Network argues on appeal that NAMA had sought from the arbitration panel an order requiring Network to distribute the $18 million reserve to Alliance Network, and the arbitration panel specifically rejected that request for relief. We conclude that there is no support for this contention and that Network mischaracterizes the relief sought by NAMA in the underlying action as well as the arbitration panel's award.

In support of its argument, Network points to NAMA's argument in postarbitration hearing briefing. However, nothing in the cited briefing supports Network's argument.[3] Network contends that NAMA's "request for Network to pay the

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[3] For example, NAMA stated therein: "The Alliance Operating Agreement explicitly provides in Section 3.09(f)(i) that, '*all Cash Available for Distribution* shall be distributed to the Members quarterly.' [Internal record citation omitted.] In June 2005, the Phase 1 construction loan was refinanced by a $225 million permanent take out loan which generated excess proceeds of approximately 30 million dollars. These excess proceeds were distributed to and between Network and Related, resulting in a $18,214,865.95 distribution to Network on June 27, 2005. [Internal record citation omitted.] [¶] NAMA was not immediately informed of such distribution. [Fn. omitted.] And when it learned that the monies were sitting in Alliance Network accounts, NAMA repeatedly demanded that the funds be distributed. But Samson and Kashani persistently

entire $18,214,865.95 amount to Alliance Network, and a portion of that to NAMA," was denied by the arbitration panel and is *res judicata*. While it is true that when the panel was called upon to interpret its award, it stated in essence that it was not ordering a distribution *qua* distribution (i.e., pursuant to the waterfall provision contained in the parties' operating agreement), but it did make a factual finding that the $18 million was being held by Alliance Network, and arrived at the $12 million damage award against Alliance Network based on NAMA's 70% ownership interest in the $18 million the Managers failed to distribute. Indeed, the panel awarded NAMA *more* than it would have received if the waterfall provision were used by the panel as the basis of the award. It is entirely misleading for Network to claim that the arbitration panel denied NAMA its requested relief.

Similarly, Network further claims the arbitration panel knew that Network had the $18 million in its accounts, and knowingly made Network jointly and severally liable for only $414,211.68 as a sanctions award. "Knowing that the bank statements showed that the funds were held by Network, the arbitrators not only denied NAMA's request for a distribution from Network to Alliance Network, but the arbitration panel also issued two very deliberate items of relief. The arbitrators ordered Alliance Network to pay NAMA the larger sum. [Internal record citation omitted.] They ordered the three Alliance Companies to pay the smaller sum, jointly and severally. [Internal record citation omitted.] This distinction must be given meaning. NAMA's request for Network to pay the entire $18,214,865.95 amount to Alliance Network, and a portion of that to NAMA, was denied by the arbitration panel and is *res judicata*. Knowing that Network had the $18,214,865.95 in its accounts, the arbitration panel made Network liable for only $414,211.68—which has long since been paid." Network argues that it is significant that NAMA did not move to correct or vacate the award on the ground the panel awarded

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refused. Indeed, they made the incredible claim that [the funds] need *never be distributed*, because the '*funds being held by Alliance Network* are Net Proceeds of a Capital Transaction under section 3.09 of the Operating Agreement, for which there is no requirement for distribution at any particular time.' [Internal record citation omitted.]" (First italics in original; second italics added.)

damages only against Alliance Network, rather than jointly and severally against Alliance Network, Alliance Holdings, and Network (the Alliance companies, collectively), and that it thereby forfeited its right to effectively impose joint and several liability against all three Alliance companies.[4] However, this contention ignores the arbitration panel's necessary finding that the $18 million belonged to Alliance Network, and mischaracterizes the relief granted by the arbitration panel. We conclude that the judgment specifically determined that the $18 million reserve fund was owned by Alliance Network, and Network could not in good faith contend otherwise in opposing the turnover order at issue in this appeal. As the judgment established that $18 million wrongfully remained in the possession of Alliance Network, the only additional fact necessary to establish was that the $1,885,803.67 on deposit in Network's CNB account was in fact part of the original $18 million. Network does not dispute that fact. We therefore conclude that the trial court's turnover order was appropriate, and affirm that order.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondent, NAMA Holdings, LLC.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J. MANELLA, J.

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[4] We note that NAMA attempted to impose joint and several liability against all three Alliance Companies for the $12 million damages award by inserting those words into its proposed judgment. The trial court rejected that attempt, and confirmed the award as written.