UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SILVERLAKE PARK, LLC,

Plaintiff,

v.

STEWART TITLE GUARANTY COMPANY,

Defendant.

Case No. 2:17-cv-03291-SK

MEMORANDUM OPINION AND ORDER

I.
INTRODUCTION

Plaintiff Silverlake Park, LLC ("Silverlake") is a company owned by the Dromy family, which has run a successful multimillion-dollar real estate business for 50 years. Defendant Stewart Title Guaranty Company ("Stewart") is among the top real estate escrow companies in the country. In 2015, the Dromys deposited more than $13 million in a Stewart escrow account, intending to invest in what the Dromys believed was a straightforward hotel property acquisition. Meanwhile, Stewart received no direct communication or instruction from the Dromys themselves, even as they wired millions to the escrow account. Instead, Stewart received instruction only from the escrow parties and Rone Oren—a family friend of the Dromys whom they entrusted to help close the hotel transaction. But unbeknownst to both Stewart and the Dromys, the escrow parties and Oren restructured the hotel deal behind the scenes so that they could divert the entire $13 million that the Dromys wired to escrow. That diversion ultimately succeeded because Stewart released all escrow funds, even amid warning signs with no closing in sight.

This case thus asks a difficult question: When escrow funds are fraudulently diverted, who bears the loss—the third-party depositor who provided no instructions to the escrow holder, or the escrow holder who disbursed the funds without the depositor's authorization? The question arises in an unfortunate context. Both the escrow holder and the depositor failed to exercise reasonable care that would have prevented the fraud. And the fraudsters themselves are effectively judgment-proof. So the dispute is between two victims—a family business that blindly funded the escrow at the bidding of the lead fraudster, and an escrow company that indiscriminately released those funds despite suspicions of fraud.

That dispute played out during a four-day bench trial. The court has reviewed all trial testimony ("RT"), the trial exhibits ("Ex."), and the stipulated facts in the amended final pretrial conference order (ECF 236). In doing so, it has assessed witness credibility, studied key documents, weighed conflicting evidence, and drawn reasonable inferences from proven or admitted facts. It has also considered each side's posttrial briefs and proposed factual findings. (ECF 244, 245, 258, 259). Based on those efforts, the court now provides its findings of fact and conclusions of law under Federal Rule of Civil Procedure 52(a)(1).

In brief, the court concludes that Stewart owed Silverlake no fiduciary duty but only a tort duty of care, which the escrow company breached when it released all escrow funds by uncritically following instructions of suspect parties amid mounting warning signs with no possibility of closing. But because Silverlake's principals—the Dromys—also failed to exercise due care with their own funds, they are equally responsible for the losses they incurred. Judgment will therefore be entered in Silverlake's favor on its negligence claim only, with damages reduced by half according to the comparative fault between the parties.

II.
FINDINGS OF FACT

A. THE FRAUDULENT REAL ESTATE TRANSACTION

1. Escrow Opens With Conventional Commercial Real Estate Deal

This decade-long dispute has its roots in what looked like a straightforward commercial real estate acquisition. On January 9, 2015, First Capital Real Estate Investments, LLC ("FCREI"), through its managing member Suneet Singal, agreed to sell 17 hotels to VC Visions, LLC ("VCV"), through its managing member Joseph Guglielmo, for $101 million. (Ex. 2). They executed a Purchase and Sale Agreement (the "PSA") that contemplated a sale to VCV with a leaseback to FCREI, which would retain operational control of the hotels. (PSA § 3.6). The PSA defined the "Seller" to include not only FCREI but "other Sellers to be identified." And the "Buyer" could be "VCV" or its "assignee" to the extent allowed by the PSA's assignment provision. Under that provision, VCV could assign its buyer's interests only to certain qualified parties or else only with FCREI's written consent. (PSA § 13). Consistent with those limits, the PSA provided that the agreement was intended only for the benefit of the seller and buyer as defined in the PSA—not for the benefit of unnamed third parties. (PSA § 15.15).

The PSA had standard commercial real estate terms. Among them, the buyer was to make two equal earnest deposits of $200,000, the total of which could be released to the seller (absent seller default) after the buyer's investigation period expired. (PSA §§ 2, 3.1). The closing date was set for April 15, 2015, subject to extension by the buyer for financing or by the seller to cure problems found in the buyer's investigation. (PSA § 7.1). The buyer's conditions to closing included delivery of grant deeds and title insurance for the hotels. (PSA § 6.1). The seller's conditions included delivery of the $101 million purchase price (less the $400,000 deposit) and leasehold title policies insuring the seller's interest as leaseback tenant. (PSA § 6.2).

"Closing" was defined in the PSA as the date that grant deeds were recorded. (PSA § 2(b)). The PSA required that the seller deposit those deeds into escrow beforehand, and that the buyer deposit the balance of purchase funds into escrow no later than one day before closing. (PSA §§ 7.2, 7.4). And because it was a condition to closing that the leaseback take effect upon recording of the grant deeds, the seller had to deposit into escrow a lease agreement identifying buyer as landlord before closing. (PSA § 3.6). For these anticipated escrow services, the PSA stipulated that the parties hire Defendant Stewart Title Guaranty Company, which they did. (PSA § 2(b)).

Stewart is a top-five national title insurance and escrow company. (6/27 RT 93). With its principal place of business in Texas, Stewart conducts business nationwide including California. (6/26 RT 136; 6/27 RT 8). Escrow opened at Stewart around January 20, 2015. (Ex. 11; 6/26 RT 138). Stewart assigned Sandy Hale as escrow officer—a veteran employee in the national commercial services unit with more than 50 years' experience in complex escrow transactions. (6/26 RT 131–33, 138, 182; 6/27 RT 94). Although Hale managed the escrow from Texas, the PSA was governed by California law. (Ex. 2; 6/26 RT 136).

2. The Dromy Family Invests in the Real Estate Deal

VCV and FCREI couldn't execute the deal without an outside investor. Enter Rone Oren, a businessman and real estate broker who agreed to help find an investor.[1] In January 2015, around the same time the PSA was executed, Oren approached the Dromy family to invest in

[1] FCREI and VCV retained commercial real estate brokers too, but there is no evidence the brokers did anything significant to bring the deal together or to help it close. (Ex. 2; 6/26 RT 176; 6/27 RT 64). They apparently received no commissions.

the hotel deal. (Ex. 1; 6/24 RT 79–83). Oren had known the Dromys for almost a half century, personally and professionally. (6/25 RT 13–16).

Ely Dromy ("Ely") is head of the family. Born in Yemen and raised in Israel, he moved to Southern California in 1971 and has lived there ever since. (6/25 RT 6). Ely is a self-made man. He worked as a janitor, a bus driver, and a teacher before building his family's multimillion-dollar real estate business. (6/24 RT 74; 6/25 RT 7, 9). A sophisticated investor, Ely has remained in that business ever since, making the family's strategic—and profitable—investment decisions. (6/24 RT 75, 82–83; 6/25 RT 10–12, 16, 18–19). Over the decades, Oren and Ely not only shared family meals and milestones but also discussed and closed real estate deals together. (6/24 RT 79–80; 6/25 RT 13–16). Ely thought of Oren "like a brother." (6/25 RT 13–14).

Together with his wife Judy, Ely has five sons, three of whom—including David Dromy ("David")—work in the family business. (6/25 RT 7, 11–12). In 2015, David handled mostly operational and administrative tasks: negotiating with brokers, working with escrow companies, that sort of thing. (6/24 RT 73–75, 82; 6/25 RT 11–12, 16). Ely decided that David—then 29 years old—was ready for more, so he put him in charge of the real estate deal pitched by Oren. (6/24 RT 74–75; 6/25 RT 17–19). Before then, David had never negotiated or closed a deal of this size. (6/24 RT 72–75).

Oren described the transaction as a "17 hotels package" deal. (Ex. 1). He asked David to invest up to $11 million for a 50% ownership in the hotels. (Exs. 1, 6; 6/25 RT 18–19). As David understood it, Oren's proposal involved a 50/50 partnership or "binding joint venture" with Oren, such that the Dromys and Oren would each own 50% of the hotels with their respective investments. (Exs. 1, 3; 6/24 RT 79–83, 183–85). It was important that Oren have such "skin in the game," because then David could rely not only on Oren's business acumen but also his due diligence. (6/24 RT 83; 6/25 RT 18–19). Oren projected annual returns from hotel operations for up to 20 years (starting at 9% a year, increasing 2.5% annually), significant tax benefits from depreciation, and a 15% profit if the hotels were later sold. (Ex. 1).

Enticed by these projections, David discussed the proposal with his father. Ely blessed the major deal points but left all "nuts and bolts" of the transaction for David. (6/24 RT 82–83). David gave Oren a letter of intent dated January 28, 2015, which committed $11 million for 50% ownership in the hotel acquisition priced at $102 million. (Ex. 5; 6/24 RT 83–84). The letter provided that Oren would receive a $250,000 broker's commission. (Ex. 5). It stated that the "Buyer/Lessor" of the hotels for the Dromys' half would be "DIICO" and/or its "Assignee." (Ex. 5; 6/24 RT 84–85). DIICO stood for Dromy International Investment Corporation, the private family holding company that Ely formed decades ago for his real estate deals. (6/25 RT 10). David expected that the hotels would be placed under contract first with DIICO according to the family's business practice. (6/24 RT 78, 85–86; 6/25 RT 20). Afterward, the Dromys would assign the property from DIICO to another entity, as was the family's practice for tax benefits, estate plans, or liability protections.[2] (6/24 RT 78; 6/25 RT 20).

Two days later, Oren replied to David's letter with "business plans" from the "seller of the hotel portfolio." (Ex. 6). In that January 31 email, Oren described what still appeared to be a conventional real estate purchase with some modified terms. Oren said that the deal was "in escrow" and priced at $102 million, but he was now "looking for [a] $13 million cash equity investment from [the Dromys] for a fifty percent (50%) ownership interest." (Ex. 6). He said that "[his] side" would be "putting up an equal amount of $13 million cash and equity." (*Id.*).

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[2] As a closely held family business, the Dromys didn't always document these assignments but they were tracked internally by the family's accountants. (6/24 RT 76–79; 6/25 RT 23–25).

Oren's businesses included Sherr LLC, Rasbe Inc., Saper LLC, and Emmett Inc.—names that will come up more later. (Exs. 78–79). For the remaining $76.5 million of the purchase price, Oren explained that it would be financed through debt with a plan to secure favorable refinancing afterward. (Ex. 6). Oren reiterated the projected returns on investment. (*Id.*).

Neither David's January 28 letter of intent nor Oren's deal terms in his January 31 email were memorialized in a written contract. That naturally led to disputes between them later in the aftermath of events, but everyone here agrees that David essentially agreed to Oren's modified terms with no written contract. (6/24 RT 96–97, 194). Later in March 2015, David told Oren that the Dromys wanted DIICO's expected ownership interest in the hotels assigned to the Plaintiff here—Silverlake Park, LLC.[3] (Ex.74; 6/24 RT 75, 92–93; 6/25 RT 25).

3. Hale Prepares to Close a Standard Two-Party Escrow

By early February 2015, the hotel deal described in the PSA seemed to be proceeding according to plan. When escrow opened at Stewart the month before, the PSA served not only as the escrow-creating contract but also included the presiding escrow instructions for Hale. (PSA § 2(f)). Hale carefully reviewed the PSA—as she would all documents in escrow—to identify provisions pertinent to her duties. (6/25 RT 124; 6/26 RT 146, 226–27; 6/27 RT 7). Based on that review, Hale identified the essential terms of the transaction—parties, sales price, closing date, due diligence deadlines, amounts of deposits or purchase monies, conditions to closing—needed to complete her job. (6/26 RT 141–42, 146, 226–27; 6/27 RT 7).

[3] Ely is the authorized representative of Silverlake. (6/25 RT 20–21). Before related state-court litigation began, Ely assigned to Silverlake (again informally) all rights to sue on behalf of the Dromys and their entities whose accounts directly incurred the losses in dispute. (Ex. 76; 6/24 RT 178; 6/25 RT 27–29).

Importantly, to close the escrowed transaction according to the PSA, Hale understood that the buyer had to deliver cash for the balance of the purchase price no later than one day before closing, and the seller had to deliver grant deeds conveying title in the hotels to the buyer before closing. Hale knew that under the PSA she could only release escrow funds (less the earnest deposits) once the seller's grant deeds had been deposited in escrow and then recorded. (6/26 RT 174, 226–27; 6/27 RT 7, 21, 23, 33, 55). She also understood that the only preclosing disbursements the PSA permitted were for the initial earnest deposits—totaling $400,000—which, even then, could only be released to the seller upon expiration of the buyer's investigation period.[4] (6/26 RT 227).

Noticing that the first $200,000 earnest deposit was past due under the PSA, Hale reached out to VCV and its broker. (Ex. 11; 6/26 RT 141–42). Unbeknownst to Hale, Oren had instructed David to wire the deposit to escrow, which David did on February 5, 2015. (Exs. 9, 74; 6/24 RT 86–87). The deposit was sent from the Wells Fargo bank account of "Judy and Ely Dromy." As escrow officer, Hale was notified of all deposits to the escrow account, which were also recorded in a computer system generating a detailed ledger for her to track credits and debits. (Exs. 10, 76; 6/26 RT 231–32). It was customary at Stewart for third parties other than the contract buyer or seller of real property to deposit funds into escrow. (6/27 RT 97). In most cases, those third-party depositors didn't need to provide—and so usually didn't provide—escrow instructions. (6/27 RT 97–98).

[4] Hale also deduced (though it wasn't spelled out in the PSA) that the transaction involved "an assumption of existing debt," whereby VCV would assume mortgages on the hotels and FCREI would provide seller financing through a "carryback" or "wrap" arrangement. (Ex. 23; 6/26 RT 241). This understanding was confirmed by title documents Hale obtained. (Ex. 23; 6/26 RT 174–75, 206–10, 215–19; 6/27 RT 33-34). She thus understood that she would need documents from lienholders on the hotels for note balances to close the deal. (6/27 RT 39, 68–69).

Besides possibly its source, nothing about that first deposit revealed anything about the Dromys' interest in the transaction—other than as third-party depositor. The wire was sent according to Stewart's deal-specific instruction, referencing the account number for the VCV-FCREI transaction, the "buyer" name as VCV, and the "seller" name as FCREI. (Exs. 9, 10, 76; 6/24 RT 126–27, 215–16). The funds were deposited according to wire instructions intended for the benefit of the escrowed transaction and the known parties under the PSA. From Hale's perspective, a third-party deposit was consistent with company custom, her experience, and then-available information for a standard two-party escrow.[5] (6/24 RT 126–27, 215–16; 6/26 RT 192).

Moreover, shortly after the deposit in February 2015, Guglielmo told Hale that the depositors were "investors" working alongside VCV. He then introduced Hale to Oren, whom Guglielmo vouched for as the investors' representative. (6/26 RT 155–58, 235–37). With that understanding of Oren's role, even though undocumented at the time, Hale didn't think to ask anything more about the Dromys. Nor did she think there was need to contact them to confirm receipt of the first deposit or ascertain if they had a role in escrow beyond investors making third-party deposits toward VCV's purchase funds. (6/26 RT 232).

For confidentiality reasons, Hale maintained that she could communicate only with the escrow parties who signed the PSA—FCREI and VCV—and their authorized agents. Additional instructions beyond those contained in the PSA had to be sent to Hale in writing and approved by VCV and FCREI. (Ex. 2; 6/26 RT 146). Nothing in the PSA, on the other hand, referenced DIICO, Silverlake, or any Dromy entity. No Dromy representative signed the PSA. Nor did Silverlake or DIICO ever become a buyer by assignment. (6/24 RT 259; 6/26 RT 169–71).

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[5] Besides, the day after the deposit arrived, VCV's broker told Hale that his client, Guglielmo, had wired the $200,000 deposit, further obfuscating from Hale's view—intentionally or not—the Dromys' interest in the transaction. (Ex. 11; 6/26 RT 145).

Thus, between January (when escrow opened) and February (after the first deposit arrived), Hale understood she was helping to close a conventional two-sided real estate acquisition. (6/26 RT 226; 6/27 RT 36). By all appearances and available information, the Dromys were investors helping to fund VCV's acquisition of hotels owned by FCREI. She assumed she had permission from VCV's principal to speak with Oren, whom she considered to be on the buyer-side of the transaction representing VCV's investors. As a result, no one at Stewart thought in January and February 2015 that the Dromys—just because they were the likely identifiable source of the first deposit—were beneficial escrow parties to whom Hale had to answer. (6/26 RT 232–33). That assumption would be tested later as millions of dollars flooded escrow—at Oren's direction—from financial accounts owned by the Dromys.

4. The Escrow Parties and Oren Restructure the Hotel Deal

Things dramatically changed in March 2015. Unbeknownst to Stewart and the Dromys, problems or disputes among the principals and Oren emerged soon after escrow opened. (Exs. 12, 14; 6/26 RT 235). Less than eight weeks later, the straightforward transaction described in the PSA would be transformed—behind the scenes by Oren, Guglielmo, and Singal—into a convoluted corporate membership transaction. Their undisclosed restructuring agreements would culminate in a March 31, 2015 "Agreement for Sale and Assignment of Membership Interests" that the three executed. (Ex. 71). The Dromys never signed that agreement, and it was never deposited into Stewart's escrow to replace the PSA.

The new agreement specified that VCV and FCREI "desire[d] to restructure the transactions described in the Original Purchase Agreement from a real estate acquisition to a sale and assignment of a portion of Seller's membership interest" in various "Hotel Entities." (Ex. 71). The Hotel Entities were third-party limited liability companies that owned the underlying 17 hotel properties. (Ex. 71; 6/24 RT 108–10). At first, the financing terms remained superficially similar to what Oren had described: a $102.5 million purchase price financed through a $26 million capital contribution with a $76.5 million carryback note held by FCREI, subject to refinancing by VCV on (hopefully) favorable terms. (Exs. 17, 18, 82). If split between the Dromys and Oren, that expected $26 million contribution would have required a $13 million down payment each, consistent with what Oren had represented to David.

And the restructuring terms provided that the Dromys—first via DIICO, then through Silverlake—would still nominally acquire a 50% ownership interest in the hotels, just indirectly through membership in the Hotel Entities rather than by direct acquisition. (Exs. 17–18). The March 31 agreement also seemed to carry forward FCREI's commitment of guaranteed annual payments from hotel operations, as Oren had promised to David in January. (Ex. 71). Indeed, on the same day that the agreement was executed, Oren emailed David a "reserve agreement" signed by FCREI that backed five years of guaranteed distributions from hotel profits. (Exs. 34–35).

But everything else about the deal changed. No longer was it a 50/50 partnership between Oren and the Dromys—it was now a four-way joint venture between VCV, FCREI, Silverlake, and one of Oren's companies (first Saper, then Sherr). (Ex. 71; 6/24 RT 109–10). And not only was Oren not acquiring a 50% ownership in the hotels along with Silverlake's 50% stake, the new agreement fractionalized the other 50% membership interest in the Hotel Entities—allocating 25% to FCREI, 12.5% to VCV, and 12.5% to Sherr. (Exs. 17–18). While early restructuring documents at first pegged the purchase price at $102 million with a $26 million down payment, in the final March 31 agreement, the interests in the Hotel Entities were to be acquired for $69.5 million to be paid with a $13 million contribution—from Silverlake alone now—and the rest through carryback seller financing. (Ex. 71).

The new agreement also accelerated closing to April 3, 2015—sooner than the April 15 date in the PSA. (Ex. 71). Of course, closing would no longer entail delivery of grant deeds to the buyer. Membership assignment documents would have to be conveyed instead. (*Id.*). What's more, before any membership assignments even had to be delivered, the agreement provided that $2.25 million in fees were to be paid to VCV (Guglielmo) and $2.25 million to Saper (Oren's company) out of escrow. (Ex. 71). Early restructuring documents referred to Oren as both the principal of Saper and a member of VCV. (Exs. 17–18, 71). Finally, rather than restricting preclosing disbursements and only allowing release of purchase funds (less initial deposits) upon recording of grant deeds as prescribed by the PSA, the agreement permitted Oren, Guglielmo, and Singal to have the $13 million released on a rolling basis—with no closing—as soon as funds were deposited. (Ex. 71).

As of March 31, 2015, the deal Oren pitched to the Dromys less than two months before was officially no longer a straightforward real estate purchase. What started out as a conventional "dirt deal" had become an elaborate corporate "share deal" barely resembling the original. (6/25 RT 204–05). It was a four-party joint venture with only three parties signed on, while the absent fourth party—Silverlake— was to contribute all $13 million toward the purchase price. Even then, any putative buyers—including Silverlake—weren't purchasing hotels or acquiring direct ownership interests from FCREI; they were buying membership interests along with FCREI in separate LLCs (the Hotel Entities) that owned the hotels. No deeds would transfer; no titles would change hands. And not least, Oren and his associate Guglielmo could extract a combined $5.5 million in up-front fees no matter if or when the deal closed. All these changes were made without the informed, signed agreement of the largest 50% stakeholder—Silverlake.

B. THE DROMYS' INVESTMENT AND WIRE TRANSFERS

1. David Wires Millions to Escrow With No Instructions

After agreeing to Oren's proposal, David entrusted Oren to "run the show." (6/24 RT 58, 202–12). The millions that the Dromys lost were wired to escrow—all at the direction of Oren—in less than three months between February and April 2015. (Ex. 76; 6/24 RT 90). Many wires, including one for $4 million, were haphazardly initiated just by exchange of text messages with Oren. (Ex. 74). Most of the funds—about $9.5 million including the first $200,000 deposit—were wired from the personal account of Judy and Ely Dromy.[6] Another sum of $1.51 million was then wired from "The Dromy 1995 Family Trust," of which $1.2 million was deposited on April 16 and the balance of $310,000 was deposited in two wires on April 17. (Ex. 76). Finally, just over $1.8 million in funds (as part of a so-called IRS 1031 exchange) were wired from "The Peak 1031 Exchange" for Silverlake's benefit on April 20. (Ex. 76). None of these wires was accompanied by instructions indicating only the Dromys could direct its disposition. The Dromys claim they lost most of the estimated $13 million sent to escrow.

David's reliance on Oren extended not only to the amounts of the wires but also to their timing. Besides the initial deposit, Oren directed David to start wiring considerable funds even before the March 31 membership-assignment agreement was executed. On March 3, he directed David to wire $800,000 into escrow, which when added to the initial deposit increased the escrow funds to $1 million. (Exs. 16–18, 76). The next day, he instructed Hale to immediately disburse $780,000 to FCREI and $200,000 to Oren's company Rasbe—leaving only $20,000 in escrow. (Exs. 17–20; 76). Two weeks later on March 24, Oren

[6] Those deposits—as reflected on Hale's escrow ledger—consisted of $200,000 on February 6; $800,000 on March 4; $1.5 million on March 25; $4 million on March 31; $1 million on April 3; and $2 million on April 16. (Ex. 76).

directed David to wire another $1.5 million. (Exs. 27–29). Once that wire arrived on March 25, Oren instructed Hale to release it all: $1 million to Rasbe and $500,000 to FCREI. (Ex. 29).

The majority of the Dromys' funds, however, were wired to escrow after the undisclosed membership-assignment agreement was executed on March 31. That same day, Oren texted David with a seemingly urgent message: "David escrow closing in half an hour please go to the bank and do a direct transfer thank you." (Ex. 74). Oren told David to wire $4 million—the largest single deposit yet.[7] (Exs. 39, 76; 6/24 RT 45). As soon as that deposit hit, Oren had Hale release all of it: $2 million to FCREI, $1 million to VCV, and $1 million to his company Sherr. (Exs. 42, 76; 6/27 RT 42–43).

The pattern continued in April. Around April 3, Oren directed David to wire another $1 million, which was released to FCREI that day. (Exs. 42, 47, 76). Then, on April 6, Oren recapped for David that he had deposited $7.5 million to date but still needed to deposit the remaining $5.5 million "for closing next Monday" on April 13. (Ex. 47; 6/24 RT 102). As David understood it, this was just another "partial" closing. Oren characterized David's remaining contribution as "[y]our share," implying that he had his own "share" of deposits in escrow. While David missed the April 13 deadline, he still dutifully did as Oren instructed by sending multiple waves of wires over three days between April 16 and 20. (Exs. 54, 76; 6/24 RT 103–04). David deposited about $5.7 million in less than a week. (Ex. 76). By April 22, all that was gone.

2. <u>David Relies Exclusively on Oren to Provide Escrow Instructions</u>

David never contacted Stewart while escrow was active. He didn't call Hale asking for closing statements until May 2015, by which time the

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[7] When asked about this exchange, David said he believed a "partial closing" was happening. (6/24 RT 250). David couldn't coherently explain what a partial closing was generally much less how it pertained to the hotel deal. (6/24 RT 267–68).

escrow funds had all been disbursed. (Ex. 72; 6/24 RT 165; 6/26 RT 194–95). For the first time in this lawsuit, David claimed he had talked to Hale right after wiring the initial deposit in February 2015, explaining his family's interest in the transaction and asking for the deposit's return if the deal faltered. (6/24 RT 87–89). Hale testified to the contrary, denying that she received a call from David before May 2015, much less when the first deposit came in. (6/26 RT 232). Her recollection is more credible. If nothing else, David's self-serving account is contradicted by his insistence that he relied on Oren "to run the show." (6/24 RT 58, 202–12).

Ironically, that delegation to Oren may not have been inevitable. In mid-February 2015, around when problems and disputes over the hotel deal supposedly arose, Oren told David (and his brother Daniel) that he intended to pull out of the deal given the seller's perceived unacceptable demands at the time. (Ex. 12). So Oren told the Dromy brothers to call Stewart themselves for the return of their initial deposit. (Ex. 12; 6/24 RT 216–27). It had even been Oren's suggestion that David add a note to the first wire, which he did, stating: "if escrow cancelled deposit to be refunded to sender." (Exs. 9–10; 6/24 RT 87). But for reasons never explained, it was Oren—not David (or Daniel)—who emailed Hale on February 17 to demand the return of the deposit. (Exs. 12, 14; 6/26 RT 155–57, 235–37). That is when Hale first met Oren.

Anyway, the immediate point is that if David had connected so early with Hale over a $200,000 deposit, as he claimed after the fact in litigation here, it's hard to believe that he wouldn't have called her again—at least once—in the midst of depositing tranche after tranche of millions of dollars into escrow. And even when he mistakenly believed there might have been a final closing at the end of April, David asked Oren first—not Hale—for closing statements. (Exs. 70, 73; 6/24 RT 104–08, 162–63). None of this is consistent with David's belated claim that he had contacted Hale before May 2015. So the credible evidence shows that, rather than contact Hale early to confirm that Stewart wouldn't release any of his family's deposits without obtaining his permission first, David merely assumed that would be the case. (6/24 RT 50, 86). And the evidence proves that, rather than send closing instructions (including disbursement restrictions) that Hale could have possibly agreed to undertake on behalf of his family if only she had known about them, David just took it for granted that Stewart wouldn't release any escrow funds without a closing—even though David had never talked to Hale.[8] (6/24 RT 90, 264–65).

Of course, the truth is David didn't think he needed to do escrow outreach because he trusted Oren would handle everything. (6/24 RT 115, 163, 209–12, 239, 245–51). It's not as if he didn't know how to make a call to escrow agents or submit escrow instructions—those were among his routine tasks for the family business before 2015. Yet David not only "relied on Rone Oren [to] communicat[e] with Stewart" unilaterally, he "assumed that [Oren] was signing [the] escrow instructions." (6/24 RT 168, 218, 235–36). In other words, David wasn't genuinely thinking that Stewart would look after his family's best interests. David was assuming Oren would. After all, in David's heart, Oren was like family. (6/24 RT 80–81, 96–97, 183, 186–87, 195, 202–04, 237, 240, 245). In David's mind, Oren was a co-investor with an equal financial stake, ensuring his loyalty. (6/24 RT 196–97, 253). And if that weren't enough, Oren was getting a broker's commission.[9] (Ex. 3).

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[8] It's not evident anyway how the assumption that Stewart wouldn't release funds without a closing could have done anything to prevent losses in time. The fraud could have just as easily ended with the pretense of a closing—and all escrow funds diverted anyway—with David none the wiser. Even when David learned of "partial closings," he never asked to be part of them or requested partial closing statements verifying how interim escrow funds had settled. (6/24 RT 250, 267–68).

[9] The Dromys claimed in later state court litigation—and rightly so—that Oren owed them a fiduciary duty as their broker. (Ex. 84).

But assumptions like these can't protect against fraud—only due diligence can.

3. <u>David Undertakes No Serious Independent Due Diligence</u>

As David (ruefully) admitted, he performed "virtually no due diligence" on a transaction that would cost his family more than $13 million. (6/24 RT 48, 96–97, 202–12, 240, 245). He never received or reviewed a copy of the PSA. He executed no written contract with Oren, even though that was his father's business practice—friends were no exception. (6/24 RT 257; 6/25 RT 41). And he never verified whether Oren had in fact put his $13 million "skin in the game." Any of these basic verification tasks could have exposed the fraud—or perhaps salvaged the transaction in a way that might have preserved the Dromys' investment.

If nothing else, at the height of escrow activities (in late March and early April) when David was sending millions upon millions in wire after wire listing the "buyer" as VCV, he could have ensured—or least asked about—the necessary assignment from VCV so that DIICO or Silverlake would be assuredly in the buyer's position. Just because it may have been his family's practice to make assignments between companies informally was no valid reason for David to assume that some unknown third party would do the same. But as David admitted at trial, the Dromys never received—let alone asked for—a written assignment from VCV to DIICO or Silverlake according to the PSA's terms. (6/24 RT 259–60). That alone might have brought the Dromys into restructuring discussions—which would have either revealed Oren's mischief or led to a new deal with the Dromys' direct and informed involvement.

Even minimal due diligence near the end of escrow could have prevented considerable losses. In mid-April, David was talking directly with Singal, evidently to help FCREI secure carryback financing for the purchase of the hotels.[10] (Exs. 51, 52). David was also disclosing confidential financial statements of his family business. (*Id.*). Earlier, in fact, David had disclosed financials for the sake of the hotel deal to a prospective lender, who evidently wanted a personal guarantee that the Dromys weren't willing to provide. (Ex. 33; 6/24 RT 175–77). Yet David asked not a single question of Singal about the transaction during these disclosures that might have exposed warning signs or revealed anything material to the Dromys' investment. This begs the question whether the Dromys at some point learned enough about the restructured deal and were trying to salvage it—even by disclosing their sensitive financials—to preserve the promised returns on investment.

The limited trial evidence couldn't really answer that question. (6/24 RT 158–59; 6/27 RT 120–24). But little hinges on whether the Dromy family was from start to finish, inside and out, defrauded by Oren (and his associates)—or just fooled long enough by the combination of the family's blind trust and Oren's unscrupulousness. Either way, the Dromys performed nowhere near the minimum due diligence expected of sophisticated investors. So while the fraud losses couldn't have happened unless Stewart released the escrow funds, earlier contact with Stewart and even the smallest dose of due diligence by the Dromys could have unraveled the fraud as well—before it was too late.

C. STEWART'S DISBURSEMENTS DURING ESCROW

1. Hale Learns of Material Changes to Escrowed Transaction

As discussed, the transaction in escrow underwent radical restructuring in March 2015, culminating in the March 31 membership-assignment agreement. That agreement was never disclosed in full to Stewart, much less deposited in escrow to supersede the PSA. Hale

[10] Or the dialogue between the two was possibly about refinancing an existing carryback loan; the documents and limited trial evidence weren't crystal clear. (Ex. 33; 6/24 RT 176–77).

credibly testified that she never received or reviewed this agreement during escrow. (6/26 RT 195). What Hale did receive, however, were other restructuring documents that should have been enough for an experienced agent like her to deduce that the deal in the PSA was being materially altered—and that PSA instructions might no longer be in effect.

As early as March 3, Hale received early restructuring documents from Oren drawn up between Guglielmo and Singal, but also involving Oren and his company Saper. (Exs. 17–20). And not only did those documents inject Saper into the mix besides VCV and FCREI, they revealed that "Title" to the hotels would now "be vested" among four parties: 50% in DIICO "and/or assign"; 25% in FCREI; 12.5% in VCV; and 12.5% in Saper. (Ex. 18). Shortly after, Hale received an email from VCV's broker on March 12, asking if she could "send [him] a copy" of the "new signed documents regarding the sale" because, he told her, the "deal keeps changing." (Ex. 22). Then, around March 24, Hale received another piecemeal set of documents from Oren—signed by Oren, Guglielmo, and Singal—which reaffirmed the percentage assignments from before but with two entities substituted: Silverlake in place of DIICO, and Sherr in place of Saper. (Ex. 32). Hale gave no thought to this raft of new apparent parties—DIICO and Silverlake included—and whether that could affect who had authority to provide escrow instructions.

Finally, on March 31, Hale received an addendum and authorization that outlined a "schedule of incoming wires" through April 10, totaling $10.5 million. (Ex. 42). The instructions set forth a "final schedule" for the "distribution and release" of those funds, which the signing parties had "irrevocably and unconditionally" agreed on, such that it could "not be changed or altered by any of the parties to this escrow." (Exs. 42–43). The signatories were not only Singal and

Guglielmo. They now included Oren who—for the first time—signed on behalf of VCV with Guglielmo. (*Id.*).

To explain that shift, Oren forwarded to Hale a memo dated March 27—from Guglielmo to Oren, not to Hale or Stewart—regarding the "17-Hotel Portfolio Transaction." (Ex. 43). The memo purported to make Oren a co-representative of VCV and authorized him "to make joint decisions" with Guglielmo "on behalf of the closing." (*Id.*). The memo, which appeared to be signed by Guglielmo, directed Oren himself—not some third-party investors he supposedly represented—to "forward the balance of funds to Escrow so that the transaction can timely close." (*Id.*). The memo implied that time was of the essence. Recall this is the same day that Oren texted David to quickly send $4 million to Stewart because escrow was supposedly "closing in half an hour." (Ex. 74).

Read together, these March restructuring documents should have signaled to Hale that the PSA was no longer a reliable source of escrow instructions. The documents specified an accelerated closing timeline with a "first initial closing," implying multiple closings might follow with no explanation what would happen at either the first or subsequent closings. (Ex. 18). And nothing in those documents amended the PSA's requirement that final disbursement could occur only after recording of grant deeds. If nothing else, the documents should have cast into serious doubt who Oren represented, since before then she had no other documentation of Oren's authority to represent the depositors of the escrow funds.

Even if they might have been reasonably viewed as a disinterested third-party depositor in January or February, or represented by Oren, the Dromys could no longer be viewed that way by March. While Hale may have thought that third-party depositors were irrelevant to her job if they weren't escrow principals, that is different than the claim that she was ignorant of the Dromys' existence as the primary funding source during escrow. (Ex. 49; 6/26 RT 193, 231–33). That disavowal is not credible, given Hale's experience as a detail-oriented escrow officer and the available email or ledger records showing the considerable sums of money wired over months from accounts denominated with the hard-to-miss Dromy name. Hale knew—or should have known—by March that nearly every escrow deposit was being made by the Dromys or an affiliated entity.

Several material changes from the PSA should have also been apparent to Hale based on the documents she received in March, even if she never saw the complete March 31 agreement. Instead of VCV acquiring 100% ownership of the hotels as laid out in the PSA, she discovered it would now acquire at best a 12.5% minority interest. Instead of FCREI selling 100% of the hotels according to the PSA, she learned it would now still retain a 25% interest of some sort. And instead of only the two parties which signed the PSA, she now knew there would be at least four involved—with Silverlake and Sherr entering the picture—throwing into doubt whether the only escrow parties authorized to give Hale instructions were still just VCV and FCREI. If there were other escrow parties, Hale needed to identify them.

True, the documents Hale received in March were jumbled and sloppily-drafted. And they didn't include the fully executed March 31 agreement. Still, for an experienced escrow officer like Hale, the documents she did receive, even if incomplete or unclear (or precisely because of those characteristics), should have raised critical questions. Who were the proper escrow parties? When and how would closing happen? What would the disbursement protocols be? Should the third-party depositors be involved now? Asking such questions wouldn't have been second-guessing the wisdom or viability of any business terms in the new agreement. It would only have been in search of the clarity she needed to do the most essential parts of her job—identifying who could give instructions, nailing down how those new instructions replaced the original ones, and confirming the conditions under which she could release escrow funds deposited by third parties. (6/25 RT 206).

2. Hale Maintains She Had No Choice But to Follows Orders

By the middle of March and no later than the first week of April, then, Hale was facing a slew of irregularities—transactional chaos, conflicting instructions, and escrow-party confusion. And there was still time to act: Stewart was expecting another estimated $5.5 million to be deposited after April 3 according to the schedule Oren had emailed her on March 31. Those wires even arrived later than scheduled—between April 16 and 20—bringing the total escrow funds to just over $5.7 million. (Exs. 54, 76; 6/24 RT 103–04). Yet within days afterward, Hale exhausted those funds—no questions asked—strictly complying with the release instructions. She released the combined $3.2 million deposited on April 16: $1.05 million to Sherr, $950,000 for VCV's benefit, and $1.2 million to Emmet—a fourth Oren company that emerged from nowhere. In the last two days of escrow, she wired $300,000 to Oren's company Sherr on April 21, and about $2.2 million to FCREI on April 22. (Ex. 76).

Through it all, Hale described her experience with this escrow account as just "business as usual." (6/26 RT 163). But the evidence at trial, especially her own testimony, didn't support that sentiment. To the contrary, her testimony was rife with internal inconsistencies that only exemplified the dilemma Hale no doubt faced when caught between, on the one hand, suspicions not amounting to clear evidence of fraud by the escrow parties controlling third-party funds, but on the other hand, suspect instructions still signed by the only parties she could definitively prove were authorized to give instructions according to the PSA.

Foremost among those contradictions was Hale's claim that, for her, the transaction under escrow never changed from the real estate purchase described in the PSA. (6/27 RT 21–23). But by that understanding, as Hale couldn't deny, there should have been a closing at which (a) the seller would convey title to the buyer via grant deed, and (b) the buyer would provide the remaining purchase funds to be released upon the recording of that deed. Since neither condition was present, only one of two facts makes sense. Either Hale breached the closing instructions in the PSA by releasing all funds with no grant deeds recorded. Or she didn't tell the complete truth at trial about her genuine belief at the time she released the last of the funds. Perhaps for trial, she thought, a better—if flawed—post hoc explanation for her decisions than admitting breach of contract (or breach of fiduciary duty) was following orders of the signatories to the PSA in escrow, no matter how questionable their orders might have been in hindsight.

At the same time, Hale couldn't credibly deny realizing from the March documents she received that the PSA transaction in escrow had changed—from a "dirt deal" to a "share deal"—no longer involving just VCV and FCREI. She conceded being aware no later than April 2015, if not sooner, that the deal had changed from a real property acquisition "to a partnership or an entity acquisition." (6/26 RT 183–84). But while this understanding could then have possibly (if only partially) explained her decision to release funds with no grant deeds in escrow, it would have only raised a host of other problems for Stewart. Not the least among them would have been that Silverlake (and DIICO at an earlier point) was a putatively named party to the restructured transaction, whose approval for the disbursements should have been required.

To be sure, the March 31 membership-assignment agreement was never in escrow. But the lack of that agreement should have been more—not less—reason to pause and inquire before releasing funds. For if the original escrow parties had intended to supersede the PSA (and its embedded closing instructions), then Hale needed to have them deliver that superseding agreement into escrow so that she could identify the new instructions—and the new parties—for the newly structured transaction. (6/25 RT 124). Otherwise, she would have found herself caught (as perhaps she did anyway) either risking breach of contract by not releasing funds according to a new contract she should have ensured was in escrow, or continuing to release funds according to instructions no longer reconcilable with the only contract in escrow.

The other major incongruity in Hale's testimony was her acquiescence to Oren as a de facto escrow party empowered to transmit all three major sets of disbursement instructions in March. For someone who couldn't have been an escrow principal at first by Hale's own definition, Oren—not Singal or Guglielmo—still directed all of Hale's disbursement activities in the open. And Oren was, of course, included on all—presumably confidential—escrow communications between the escrow principals and Hale, yet there was no documentation in Hale's file verifying that Oren could be privy to all that transactional information. (6/26 RT 188–89, 222–23). To be fair, Hale was correct of course that Singal and Guglielmo—in the end—ostensibly signed every disbursement instruction she followed to the letter, no matter Oren's extra third-party presence. (6/26 RT 191–92; 6/27 RT 42–43). And Guglielmo's memo that she received on March 31 seemingly delegated express authority to Oren to act on behalf of VCV—an original escrow party.

But these facts should have raised more questions. If the first time Oren were authorized in writing to officially be a VCV representative was on March 27, then on whose behalf was he acting before—when exchanging confidential escrow details with Hale and purporting to represent "investors" separate from VCV? And if Oren, as Guglielmo initially vouched for him, were the investors' ostensible agent before March 27—there to help facilitate funding for VCV's purchase of the hotels—why would VCV have authorized Oren's company Rasbe to receive more than $1 million of those investor funds before March 24?

(Exs. 17–20, 27–29).[11] And not least, the memo stated that Oren was the one who needed to fund the rest of escrow—going forward from March 31—so that the deal could close on time. If so, then why would Oren cause buyer-side funds over $5 million to be wired into escrow only to redirect much of them right back to the buyer VCV, rather than transmit them all to the seller FCREI as one would expect if closing were imminent? Worse, why would Oren be boomeranging his own funds—through escrow—right back to companies he controlled?

In the face of those glaring questions, the undeniable background property interests of the third-party depositors—even if not technically escrow parties—couldn't just be ignored anymore. (6/25 RT 214–15; 6/26 RT 21, 28, 74–75). That is not to suggest that Hale had an obligation to hastily or categorically reject the escrow instructions out of hand, risking confrontation with the escrow principals. Nor do the questions necessarily mean Hale should have detected "clear evidence of fraud" requiring termination of escrow services. Hale credibly testified that she saw no clear evidence of fraud, even if she should have harbored suspicions. (6/26 RT 181–82, 187). The point instead is that these are questions that should have occurred (and most likely did) to a veteran escrow officer like Hale.[12] (6/26 RT 77–87). And until those questions

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[11] Indeed, Hale witnessed firsthand the problems caused by Oren's ill-defined role in escrow. When Oren directed Hale to release $1.5 million on March 24 to Rasbe and FCREI, Hale received right after a countermanding email from Guglielmo urgently telling her to disregard Oren's instruction as "null and void"—despite Guglielmo's own signature appearing on the release instruction. (Ex. 30). Still, he directed Hale not to release the funds pending "additional documentation from Rone Oren of RASBE" that he needed. (*Id.*). Oddly, Singal seemingly wasn't involved in any of these conflicting email exchanges. Still, Hale immediately held the funds as soon as she saw Guglielmo's email without even asking about Singal's position apparently. The next day, Guglielmo lifted the stop-order as quickly as he had issued it, explaining vaguely only that the "parties"—necessarily referring to VCV, FCREI, and Rasbe—had "reviewed the documentation and [were] all ready to proceed." (Ex. 32).

[12] Hale knew how to push back when she needed to. When Oren emailed Hale in February insisting that she return the $200,000 wire to the sender, she refused to reflexively do as Oren instructed, informing him—and the escrow parties—that

were answered—and, even better, documented one way or the other—a skilled officer like Hale had not only options, but obligations to inquire and proceed with caution. (6/26 RT 74–75, 82). Not to police the business transaction—only to understand it enough to properly find and then execute her controlling escrow instructions, especially for disbursements of third-party deposited funds in the absence of a closing.

To that end: Because the release instructions conflicted with those in the PSA, Hale could have paused disbursements until any conflicts or ambiguities were resolved to Stewart's satisfaction, especially about the role of the third-party depositors. (6/25 RT 123, 127, 131; 6/26 RT 77–87). Because the new instructions introduced parties not mentioned in the original instructions (including new ones affiliated with the third-party depositors), she could have asked for clarification and documentation about the parties' identities, their authority to direct escrow, and if they were approved assignees of the original escrow parties. (6/25 RT 124–25, 196–97, 199, 214; 6/26 RT 29). And because she had plenty of reason to believe that the original deal in the PSA had been changed in material ways, she could have asked for any superseding contract to be deposited into escrow so that she could derive the instructions needed to close in accordance with the operative transaction. (6/25 RT 123–24, 144–45, 199). Yet Hale made none of these inquiries, or anything resembling them, to anyone. (6/25 RT 221–22).

3. <u>Hale Has Private Misgivings Because No Closing Is In Sight</u>

Finally, even if Hale had no obligation to suspend disbursements subject to reasonable inquiries, her decision to instead deplete all escrow funds by April 2015 was still largely inexplicable on its own terms. If her working assumption all along was that property and money must change hands at closing as part of a conventional two-party real estate escrow,

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refunding the deposit would immediately terminate escrow. (Ex. 15; 6/26 RT 160). No one pressed the issue further.

she had no convincing answer for why she exhausted the escrow account—with no closing in sight.[13] (6/27 RT 21–22). Hale's only plausible explanation was that it can be common for escrow officers to disburse funds before closing during investigation and other due diligence periods. (6/26 RT 190).

But most examples that Stewart or Hale could give were for incidental transactional costs—like property abatements and taxes—or for other inapposite situations like litigation funding. (6/26 RT 190–91; 6/27 RT 49–52, 63). None of those examples involved disbursements at the speed, frequency, and size of those here. Similarly, Stewart's expert confirmed that preclosing disbursements—for "termite inspectors or appraisers for the bank"—were "common." (6/25 RT 142). But even with these examples, the preclosing disbursements presuppose a closing eventually. (6/25 RT 142). They are discrete disbursements before a final disbursement at closing, not preclosing disbursements that would exhaust every dollar in the escrow account with no closing—ever. (6/25 RT 142, 210). Yet at least on the public record, that is what Hale unconvincingly maintained happened here.[14] (6/27 RT 72–74).

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[13] Indeed, without a closing, Hale also had no way of fulfilling the commission demands she was receiving near the end from VCV's and FCREI's brokers. (Exs. 36–37). To be honored, those commitments would have meant that Hale needed to conserve at least $2 million in escrow just for broker commissions. For reasons never explained, no commissions were paid out of escrow.

[14] Even through trial, a decade later, Hale oddly maintained that an escrow she had opened in January 2015—with all of its $13.3 million of funds disbursed as soon as three months later—was still indefinitely open today. Never mind that Hale zeroed out the account balance by debiting the costs and fees for Stewart's services on the same day as the last disbursement on April 22. (Ex. 76). As soon as she could, Hale sent Stewart's final invoices—to Oren's attention, no less—for approval to pay the invoices with the $30,000 remaining in escrow. (Exs. 66–67). Even so, Hale claimed that escrow was still "open" after that because there was no closing. That's also why, she said, she never prepared final closing statements. (6/27 RT 72–74). Perhaps all that is technically true, but hardly convincing evidence that she hadn't finished all she intended to do with the escrow account—in every practical way that mattered—once the last disbursement was made and Stewart's final $30,000 bill was paid.

Hale's internal company emails revealed a more nuanced—and likely more accurate—picture of Hale's private concerns about the lack of a closing. As early as March 16, Hale told a colleague: "I'm not sure how [closing] is going to happen, given that we do not have all the title work and then they have to get documents drafted." (Ex. 23). Recall that she had heard from VCV's broker around this time that the "deal keeps changing" and there were "new signed documents." (Ex. 22). Yet Hale still released $980,000 from escrow to FCREI and Oren for a deal still evidently in flux, with no confirmed closing date, and no required closing documents in escrow.

Later in early April, Hale complained to a colleague on April 6 that the escrow parties were "very bossy," calling "several times a day" and demanding that she monitor "several wires" that they claimed were "investors buy in funds." (Ex. 49). Yet when she asked for a "firm" closing date, they deflected and said nothing other than to expect one after another $5.5 million had been deposited. (Exs. 49, 50). So the next day, on April 7, Hale emailed her colleague again, indicating that Stewart needed to charge more for her services because the principals were demanding far more frequent and unusual tasks than Hale ordinarily performed. (Ex. 49; 6/26 RT 238). Not business as usual, it seemed.

And as more days passed with no closing in sight, on April 13, Hale commented to her colleague that even after $8.5 million had been disbursed by then, "they [were] sending [her] more to disburse" with still no definite closing date. (Ex. 50; 6/26 RT 211–13). When the colleague responded (cluelessly) that it "[s]ounds like a real deal," Hale tersely—but tellingly—replied: "I don't know, pretty strange if you ask me." (Ex. 50). Yet in just three days' time on April 16, against her intuitions, Hale released another $3.2 million as instructed—no questions asked—in a self-described "strange" escrow with no approval from those who deposited those millions to begin with.

Then, around April 18, she learned from VCV's broker that the "Seller" (FCREI) was now "getting refinancing" for a loan and the parties could only "close once he gets his loan completed"—still estimated to take "about 90 days" from then. (Ex. 59). Recall that this around the time that Singal was in touch with David about financing (or refinancing) a seller loan. (Exs. 51, 52). He also told her (in an effort to keep her updated on most current events) "that the buyers bought in and took partnership interests in the various LLC's." (*Id.*). If she even needed more confirmation of the restructured deal, it was corroborated by Oren in the intervening days too when he told her on April 20 that the escrow parties would likely be asking Stewart for "title polices" for each of the hotels as soon as they had the "membership entities lined up." (Ex. 60). In other words, anywhere between April 17 and 20, if not weeks earlier, Hale not only understood that a closing was still another 90 days away at least, she knew (or should have known) that the "dirt deal" described in the PSA had transformed into a corporate "membership" or "partnership" transaction. But there was no superseding contract in escrow, or any other writing of some kind, providing her instructions to replace or modify the ones from the PSA in escrow. Nor were there any membership assignment documents to transfer out of escrow.

So, despite the practical impossibility of a closing on any terms in the near future, not to mention her own private misgivings about the ephemeral closing dates and the escrow parties' rushed disbursement demands, Hale indiscriminately released the last $2.2 million on April 22. And for reasons never explained, she did so under apparent time pressure, again. (Ex. 66). But as she was compelled to admit at trial, she knew by then that "no closing was possible" for a number of reasons.[15]

[15] Among them, the title commitments Hale obtained revealed that FCREI was never the record owner for 16 of the 17 hotels. (Exs. 62, 80; 6/27 RT 32). Though Hale claimed this situation was "not uncommon," she still "did not follow up" for closing. (6/26 RT 174–75; 6/27 RT 33–34). And while the PSA referenced "other sellers to

(6/26 RT 227–28; 6/27 RT 34). No legitimate reasons explained the urgency. Nothing prevented Hale from inquiring to ensure that the last of the third-party deposits in escrow were authorized for disbursement, especially if there was to be no closing.

D. THE AFTERMATH OF THE FRAUD

The Dromys maintain that it wasn't until early summer 2015 when they finally began to suspect that something was wrong. (6/24 RT 109–110, 157–67). On May 26, 2015, David received an email from Oren attaching the March 31 membership-assignment agreement, which David said was the first time he saw this document. (6/24 RT 108–10). Meanwhile, in May and June 2015, the Dromys received two payments totaling $190,535, which seemed consistent with the guaranteed returns Oren had projected. (Ex. 86; 6/24 RT 104–05, 179–80). But once those payments stopped after June, any pretense of a legitimate transaction couldn't be held together. Even then, the Dromys apparently didn't suspect Oren's role in the scheme. (6/24 RT 114).

But by fall 2015, the Dromys finally began to piece together what had happened. The Dromys immediately referred the matter to the FBI, but it declined to pursue federal criminal charges. (Ex. 75). They then sued civilly in state court, naming FCREI, Singal, VCV, Guglielmo—and later Oren and Oren's companies—as defendants. (Exs. 81–84). Soon after, Oren declared bankruptcy. His liabilities from the fraud here were deemed nondischargeable, though, and Oren admitted to some of his deceptions in the bankruptcy proceedings: failing to disclose to the Dromys his fee-agreements with FCREI and facilitating disbursement of their funds knowing there would be no closing. (Ex. 79).

be identified," this persistent discrepancy between the only identified seller and the record owners of the hotels was never resolved before Hale released all escrow funds.

Otherwise, besides the two payments they received in summer 2015 and a recovery of about $263,000 from Oren through a fraudulent conveyance action (ECF 258-1 at 23), the Dromys have only obtained uncollectible judgments from Oren and his associates after years of state-court litigation. (Exs. 77-79). That leaves Stewart as the only solvent party from which Silverlake can recoup any of its claimed damages.[16]

III.
CONCLUSIONS OF LAW

Silverlake claims that Stewart should be responsible for its lost $13 million investment because, as escrow holder of the Dromys' funds, Stewart owed a fiduciary duty or at least a duty of care to the Dromys. It thus asserts two claims against Stewart: breach of fiduciary duty and negligence. For its part, Stewart asserts counterclaims against Silverlake, but those are contingent on finding that Silverlake was a party to the escrow contract. Stewart also preserved some professed affirmative defenses from its answer to Silverlake's complaint.[17] (ECF 236).

The court concludes that Silverlake was not a party to the escrow. As a result, Silverlake lacked a contractual or fiduciary relationship with Stewart. On the other hand, even as a nonparty to the escrow, Silverlake was still owed a duty of reasonable care. Stewart breached that duty and

[16] Stewart filed a third-party complaint against Oren and his companies, as well as against VCV, FCREI, and their respective principals, seeking (among other things) indemnification or contribution. (ECF 43). Stewart obtained default judgments against those third-party defendants but the amounts of the judgments remain unspecified until after judgment is entered here on Silverlake's claims.

[17] None of these claimed defenses requires extended or separate discussion, as they are really more merits arguments addressed in this order. Some like setoff rest on the premise that Silverlake was an escrow party, which is rejected here. Others like standing rest on the mistaken assumption that Silverlake couldn't be assigned the right to sue for the damages incurred by other Dromy entities. Yet others like failure to mitigate damages are inapplicable or addressed through comparative fault. The rest—estoppel, waiver, and consent—are variations of Stewart's argument, also addressed below, that Hale reasonably relied on Oren's authority to order disbursements just as if the Dromys had ordered them.

caused the claimed losses by releasing escrow funds in circumstances that would have led a prudent escrow officer to suspend disbursements pending inquiries about the depositors' interests and to interplead the funds if those inquiries revealed competing claims over rights to their disposition. But at the same time, the inexcusable carelessness of the Dromys and their misplaced trust in Oren contributed equally to their own damages. Thus, Silverlake's damages must be reduced by a 50% allocation of comparative fault.

A. ESCROW AGENTS' DUTIES TO PARTIES AND NONPARTIES

The legal duties of escrow holders—and to whom those duties are owed—exist in an admixture of laws in contract, tort, agency, and property.[18] Understanding where and how these discrete areas of common law intersect—and diverge—for escrow duties is thus essential to resolve Silverlake's claims against Stewart. Contrary to Stewart's defense, the answer is not as simplistic as an escrow officer's only duty is to "follow orders" absent clear evidence of fraud. But neither is the answer as reductionist as Silverlake's: that a depositor's background property ownership of funds in escrow overrides all other valid competing rights to control the disposition of those funds—even when the depositor provides no instructions to the escrow holder.

1. <u>Duties Owed to Escrow Parties</u>

At its base, escrow is a contract. *See* Cal. Civ. Code § 1057; Cal. Fin. Code § 17003(a); *Amen v. Merced Cnty. Title Co.*, 375 P.2d 33, 35 (Cal. 1962). "An escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition." *Summit Fin. Holdings, Ltd. v. Cont'l Law. Title Co.*, 41 P.3d 548, 551

[18] California law governs Silverlake's claims. (ECF 24, 38). The PSA's choice-of-law provision also stipulated that California law would apply to disputes arising from that contract. *See Nedlloyd Lines B.V. v. Superior Ct.*, 834 P.2d 1148, 1154–55 (Cal. 1992).

(Cal. 2002). "The agreement" between those depositors "to all terms of instructions, and the acceptance by a third party of the position of depository, create the escrow." *Security-First Nat. Bank of L.A. v. Clark*, 48 P.2d 167, 168–69 (Cal. Ct. App. 1935). The escrow contract is created upon delivery of escrow instructions to the escrow holder. *See Amen*, 375 P.2d at 35. Thus, "[e]scrow instructions may be analyzed under contract principles." *Rideau v. Stewart Title of Cal., Inc.*, 185 Cal. Rptr. 3d 887, 891 (Cal. Ct. App. 2015).

Escrow instructions are usually in writing, but as with any contract, may be provided orally or implied from express instructions. *See Kelly v. Steinberg*, 306 P.2d 955, 959 (Cal. Ct. App. 1957); *Zang v. Northwestern Title Co.*, 185 Cal. Rptr. 176, 181 (Cal. Ct. App. 1982); *Gordon v. D & G Escrow Corp.*, 122 Cal. Rptr. 150, 154 (Cal. Ct. App. 1975). However conveyed, the escrow instructions form a contract with the escrow parties that the escrow holder is bound to follow according to contract rules. *See Claussen v. First Am. Title Guaranty Co.*, 230 Cal. Rptr. 749, 753–74 (Cal. Ct. App. 1986). Under those rules, the "escrow holder must comply strictly with the instructions of the parties." *Amen*, 375 P.2d at 35. If the escrow holder fails to comply or does something prohibited by the instructions, the escrow holder may be sued for breach of contract. *See Summit,* 41 P.3d at 551–52.

But escrow holders are not just parties to a contract, they are also agents of the other parties to that contract. *See Rianda v. San Benito Title Guar. Co.*, 217 P.2d 25, 27 (Cal. 1950). Like all agents, escrow holders owe a fiduciary duty to their principals—the escrow parties. *See Summit*, 41 P.3d at 551–52. Fiduciary duties are elevated ones that require agents to act in the best interests of their principals. *See Mendoza v. Cont'l Sales Co.*, 45 Cal. Rptr. 3d 525, 533–34 (Cal. Ct. App. 2006). Those duties demand, among other things, loyalty, prudence, and good faith. *See Leko v. Cornerstone Bldg. Inspection Service*, 103 Cal.

Rptr. 2d 858, 862 (Cal. Ct. App. 2001); *Brown v. Wells Fargo Bank, N.A.*, 85 Cal. Rptr. 3d 817, 834–35 (Cal. Ct. App. 2008).

For escrow holders, though, the scope of their agency cannot be general—as it often is for agents in different professional relationships—because the escrow holder simultaneously serves as agent to two (or more) principals with presumptively conflicting interests at the same time. *See Kirby v. Palos Verdes Escrow Co.*, 227 Cal. Rptr. 785, 789 (Cal. Ct. App. 1986). It's precisely because those conflicting interests require a neutral third party to help the principals achieve a common objective that the escrow exists in the first place. *See Lee v. Title Ins. & Tr. Co.*, 70 Cal. Rptr. 378, 379–80 (Cal. Ct. App. 1968). But because of that unique dual-agency position, the agency created by the escrow is limited—limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. *See Blackburn v. McCoy*, 37 P.2d 153, 155 (Cal. Ct. App. 1934).

Thus, contract and agency law overlap for escrow holders. They owe contractual duties derived from escrow instructions given by the contracting escrow parties. But they also owe fiduciary duties to those escrow parties that both originate in—and are circumscribed by—the contractual escrow instructions. *See Schaefer v. Mfr. Bank*, 163 Cal. Rptr. 402, 407 (Cal. Ct. App. 1980); *Claussen*, 230 Cal. Rptr. at 753. Escrow agents who fail to perform as instructed by the escrow parties (or do that which their instructions prohibit) can be sued not only for breach of contract but also for breach of fiduciary duty as a tort. *See Tribeca Cos., LLC. v. First Am. Title Ins. Co.*, 192 Cal. Rptr. 3d 354, 371, 375 (Cal. Ct. App. 2015).

An escrow agent can also breach its fiduciary duty in tort without necessarily breaching the escrow contract. Such a breach can be based on either negligence or fraud, depending on the circumstances. *See Knutson v. Foster*, 236 Cal. Rptr. 3d 473, 486 (Cal. Ct. App. 2018);

Salahutdin v. Valley of Cal., Inc. 24 Cal. App. 4th 555, 563 (Cal. Ct. App. 1994). For one thing, an escrow holder's fiduciary duty to its principals may require the escrow holder *not* to follow an instruction if it would result in fraud. *See Summit*, 41 P.3d at 552. Adherence to the escrow instructions would be no defense. Relatedly, an escrow holder's fiduciary duty can require disclosure of material information learned during escrow if a principal relies on the escrow holder for protection on that material matter. *See Vournas v. Fidelity Nat. Title. Ins. Co.*, 86 Cal. Rptr. 2d 489, 495 (Cal. Ct. App. 1999); *Kirby*, 227 Cal. Rptr. at 789. So if following escrow instructions would facilitate fraud by one escrow party on the other unwitting one, the escrow holder could breach its fiduciary duty by complying with those instructions without disclosing the material information. *See Zang*, 185 Cal. Rptr. at 181; *Romo v. Stewart Title of Cal.*, 42 Cal. Rptr. 2d 414, 421 fn.9 (Cal. Ct. App. 1995).

For another thing, especially pertinent here, an escrow holder has a duty to exercise ordinary skill and diligence in carrying out escrow instructions. *See Axley v. Transamerica Title Ins. Co.*, 151 Cal. Rptr. 570, 574 (Cal. Ct. App. 1978); *Wade v. Lake County Title Co.*, 86 Cal. Rptr. 182, 184 (Cal. Ct. App. 1970). It is one thing to follow an instruction, but it is another thing to carry it out well or badly. Thus, an escrow holder can be liable not only for ordinary negligence, but also for breach of fiduciary duty if it negligently executes escrow instructions. *See Amen*, 375 P.2d at 35.

An escrow holder can also breach its fiduciary duties or commit negligence if it fails to take actions that a prudent escrow officer would before obeying questionable, conflicting, ambiguous, or erroneous instructions. *See Kirk Corp. v. First Am. Title Co.*, 270 Cal. Rptr. 24, 37 (Cal. Ct. App. 1990); *Diaz v. United Cal. Bank*, 139 Cal. Rptr. 314, 321 (Cal. Ct. App. 1977). If such conflicting or uncertain demands cannot be resolved by clarification on inquiry or agreement by the escrow parties, the escrow holder should not disburse any disputed funds or deliver any contested documents, but should interplead them instead. *See Security Trust etc. Bank v. Carlsen*, 271 P. 100, 103–04 (Cal. 1928); *St. Paul Title Co. v. Meier*, 226 Cal. Rptr. 538, 540 (Cal. Ct. App. 1986). That is how the escrow holder avoids the horns of the dilemma created by dual agency—either risking breach of contract for not following instructions or breaching duties of care in tort by following the instructions.[19]

This is not to imply that an escrow holder has a "general duty to police the affairs of its depositors." *Summit,* 41 P.3d at 552. An escrow holder is not obligated to monitor business risks, assess the prudence of business decisions, or to understand all the financial consequences of a business deal that is the subject of escrow. *See id.* But even without doing those things, "if the escrow holder acts negligently" in carrying out escrow instructions, "it would ordinarily be liable for any loss occasioned by its breach of duty." *Amen*, 375 P.2d at 35 (cleaned up).

Property law is the last part in this matrix of escrow duties. *See, e.g., Huong Que, Inc. v. Luu*, 58 Cal. Rptr. 3d 527, 537 (Cal. Ct. App. 2007). All property in escrow is held in trust for the property owner, so the escrow holder never acquires beneficial interest in escrow funds just because it inevitably has custody of the funds. *See Hildebrand v. Beck*, 236 P. 301, 302–03 (Cal. 1925). "[T]he deposit of moneys in the escrow

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[19] Two nuanced but important points to clarify: First, both negligence claims and breach-of-fiduciary duty claims arise in tort, but they are each still distinct claims in their own right. Sometimes, "[b]reach of fiduciary duty and negligence" may in effect just be "different terms for the same cause of action under the facts" of a given case. *Zang*, 135 Cal. App. 3d at 180. But while a "fiduciary duty may be breached by negligence in some instances," negligence can also be asserted based on the breach of duties other than a fiduciary one. *Id.* Second, California recognizes the economic loss rule, which prevents recovery in negligence for economic losses that are otherwise recoverable in a breach of contract action. *See Sheen v. Wells Fargo Bank, N.A.*, 505 P.3d 625, 632 (Cal. 2022); *Robinson Helicopter Co., Inc. v. Dana Corp.*, 102 P.3d 268, 274 (Cal. 2004). So parties injured in escrow cannot transform contract actions into tort actions unless there is a violation of an independent duty arising from established principles of tort law. *See Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 679–80 (1995); *Brown v. California Pension Adm'rs & Consultants, Inc.*, 52 Cal. Rptr. 2d 788, 795–96 (Cal. Ct. App. 1996).

does not alter or change the ownership thereof." *Tribeca*, 192 Cal. Rptr. 3d at 370. So, under property law, an escrow agent may not "disregard the rights of a third party whose property is lodged" in the agent's escrow account. *Id*. But those rights are not self-executing; no enforceable duty in property law alone arises if the third party never makes itself known and provides no instructions on the disposition of the escrow funds. *See Summit*, 41 P.3d at 551–52; *Jafari v. F.D.I.C*, 2 F. Supp. 3d 1125, 1132 (S.D. Cal. 2014); *Markowitz v. Fidelity Nat. Title Co.*, 48 Cal. Rptr. 3d 217, 230–31 (Cal. Ct. App. 2006).

At the same time, in typical two-party escrows, a third-party depositor's property rights do not exist in isolation—they operate within a framework where the escrow parties have competing contractual rights to direct fund disposition if closing conditions are met. Of course, if escrow doesn't close for any reason, "the funds deposited with the escrow holder are returnable to the respective depositors." *Crooks v. State Bar*, 475 P.2d 872, 880 (Cal. 1970). But so long as closing remains possible under the escrowed contract, those contractual rights of the escrow parties take precedence over the background property rights of the nonparty depositors. *Cf. Tribeca*, 192 Cal. Rptr. at 370. These conclusions follow from the intersection of property, contract, and agency law.

2. Escrow Duties Owed to Nonparties

An escrow holder's duties—whether in contract, property, or tort—generally extend only to those persons in privity with the escrow holder: the "parties" or "principals" to the escrow contract. *See Summit*, 41 P.3d at 554. For simple transactions, of course, the parties to an escrow are usually the same as the parties to the underlying transaction subject to the escrow. But modern transactions—involving lenders, investors, assignees, and so on—can make identifying the parties to an escrow more complicated. But again, first principles help.

In California, the duties of escrow holders are strictly construed for policy reasons. The state has decided that escrows are "a valuable business procedure," and so it takes great care in not "subjecting an escrow holder to conflicting obligations," unless there are countervailing policy reasons. *Summit*, 41 P.3d at 555. Thus, as a rule, strangers or outsiders to an escrow must ordinarily establish privity between themselves and either the escrow parties or the escrow holder to impose a duty, especially a fiduciary duty, on the escrow holder. *See, e.g.*, *Builders' Control Serv. of No. Cal., Inc. v. North Am. Title Guar. Co.*, 22 Cal. Rptr. 712, 716–17 (Cal. Ct. App. 1962); *Money Store Inv. Corp. v. S. Cal. Bank*, 120 Cal. Rptr. 58, 63–64 (Cal. Ct. App. 2002); *Plaza Home Mortg., Inc. v. North Am. Title Co., Inc.*, 109 Cal. Rptr. 3d 9, 15–16 (Cal. Ct. App. 2010). Just having an interest (even a remotely assigned one) or other important stake in the outcome of the escrow is not enough. Nonparties to an escrow in that posture remain incidental beneficiaries to whom no legal duty is owned. *See Jafari*, 2 F.Supp.3d at 1133; *Markowitz*, 48 Cal. Rptr. 3d at 230–31.

But there is no absolute rule barring all duties to third parties, either. For starters, even if not principals to the escrow, third parties can create a contractual duty with the escrow holder if they submit instructions that the escrow holder agrees to execute. This follows from ordinary contract rules. *See Money Store*, Cal. Rptr. at 62–63. So, for example, an escrow holder may owe duties to a lender who provides specific "closing instructions" that are accepted by the escrow holder. *Id.* But just because the lender is owed compliance with the closing instructions (and thus may sue for breach of contract if the instructions aren't followed or for negligence if the instructions are carried out negligently) doesn't for that reason alone make the lender an escrow principal owed fiduciary duties. *Id.* at 64.

Another category of protected parties are intended third-party beneficiaries of the escrow instructions given by the principals to the escrow. *See Builders' Control*, 22 Cal. Rptr. at 716–17. But the intent to benefit such third parties must be clear, certain, and undisputed in the escrow instructions provided by the principals to the escrow. *Id.* at 715–16. Otherwise, such third parties remain mere incidental beneficiaries with no contractual rights that can be enforced against the escrow holder. *See Markowitz*, 48 Cal. Rptr. 3d at 230–31. It makes no difference if the escrow holder happens to be aware of the nonparty's interest in the transaction. *See Summit*, 41 P.3d at 552. They remain incidental beneficiaries at most.

So too, as relevant here, for nonparties who may be the source of deposited escrow funds. *See Alereza v. Chicago Tile Co.*, 211 Cal. Rptr. 3d 469, 475 (Cal. Ct. App. 2016). If those nonparty depositors provide instructions that the escrow holder agrees to follow, there can be privity of contract created between the depositors and the escrow holder. *See Delgado v. Trax Bar and Grill*, 113 P.3d 1159, 1175 (Cal. 2005). Similarly, if the escrow holder voluntarily or gratuitously performs services for the nonparty, it assumes "a duty to exercise due care in performance." 6 Witkin, Summary of Cal. Law, Torts § 1205 (11th ed. 2025). But in no circumstance does that nonparty become a principal to whom fiduciary duties are owed when the escrow holder has not agreed to be his agent. Merely having custody of funds that the nonparty deposited for the benefit of the escrowed transaction can't alone create a principal-agency relationship. *See Markowitz*, 48 Cal. Rptr. 3d at 231–32.

Tribeca is not to the contrary. While the money in *Tribeca* was deposited by a nonparty and then returned to that nonparty, the court there was not suggesting—contrary to *Summit*—that the escrow holder was obligated to do that because of a contractual or fiduciary duty owed to the nonparty. *Tribeca,* 192 Cal. Rptr. 3d at 367. If anything, *Tribeca* followed the premise of *Summit* by holding the escrow party—which opened a unique single-party escrow—to the terms of that party's instructions. *Id.* at 371–74. Those instructions gave the lone party in that one-of-a-kind escrow no right to control funds it didn't deposit. *Id.* So when the owner of the deposited funds gave notice to the escrow holder and demanded the return of funds that happened to be in that account, there was no competing legal claim to those funds. The funds had to be returned based on the background property rights the depositor had over the funds in a single-party escrow with no valid competing claims to the control of those funds. *Id.* at 367, 370–71.

Tribeca provides two important takeaways for this case. On the one hand, property ownership of funds in escrow does not alone create a fiduciary relationship with the escrow holder. The depositor's property rights remain only in the background, subject to the escrow parties' competing rights to direct fund disposition once closing conditions are met. On the other hand, those background property rights become salient again—not as an independent source of duty, but as a critical factor in defining the scope of any duty of care—when closing becomes impossible and the escrow parties' competing claims lose their legal foundation. In other words, property law principles only inform but do not create tort duties of reasonable care in the escrow context.

Still, all this doesn't leave a third-party depositor of escrow funds with no recourse under the law. As much as it limits an escrow holder's duties to nonparties in the absence of recognized privity, California preserves the possibility of such duty in some cases. *See J'Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979); *Connor v. Great W. Sav. & Loan Ass'n*, 447 P.2d 609, 617 (Cal. 1968). That rule, adopted in 1958, recognizes that "privity of contract is no longer necessary to recognition of a duty in the business context" if "public policy" requires existence of a duty to nonparties for their economic losses. *Quelimane Co. v. Stewart Title Guar. Co.*, 77 Cal. Rptr. 2d 709, 728 (Cal. 1998); *J'Aire Corp.*, 598 P.2d at 63.

To determine when such a duty to third parties exists, California uses the six-factor test from *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958), which considers (1) "the extent to which the transaction was intended to affect the plaintiff," (2) "the foreseeability of harm" to the plaintiff, (3) "the degree of certainty that the plaintiff suffered injury," (4) "the closeness of the connection between the defendant's conduct and the injury suffered," (5) "the moral blame attached to the defendant's conduct," and (6) "the policy of preventing future harm." *Id.* at 18–19. And if an escrow holder is found to owe a duty of care to a third party by these factors, the ordinary rules and elements for proving negligence apply. *See Leslie G. v. Perry & Assoc.*, 50 Cal. Rptr. 2d 785, 789–90 (Cal. Ct. App. 1996).

B. STEWART OWED SILVERLAKE A DUTY OF CARE ONLY

1. Silverlake Was Not an Escrow Party Owed a Fiduciary Duty

Consistent with the legal framework above, the court previously sketched the possible ways in which Stewart could owe a fiduciary duty to Silverlake. (ECF 213). The first two are contract-based: (1) if "Silverlake submitted instructions to Stewart regarding the disbursement of its funds," or (2) if it "was the assignee of the buyer's [VCV's] rights under the [PSA]." (ECF 213 at 4). But Silverlake doesn't rely on the former because it is undisputed that the Dromys never submitted instructions to Stewart about the disposition of their funds. And it can't rely on the latter because Silverlake has conceded there is no evidence of an assignment of VCV's rights under the PSA to DIICO or Silverlake. (6/24 RT 259; 6/27 RT 176–77, 181).

The third way to establish fiduciary duty is by consent: if "Silverlake or its affiliates deposited the funds, Stewart consented to accept the deposits, no closing occurred, and the depositors retained title to their funds." (ECF 213 at 4).[20] But whether viewed through contract, agency, or property law principles, the required consent by Stewart is missing here. For starters, Silverlake concedes it provided no escrow instructions to Stewart. And it also concedes that it was not a direct assignee of VCV under the PSA. Without such instructions or direct assignment, there was no offer and acceptance—no meeting of the minds between Stewart and Silverlake—that could create contractual consent.

Nor was there consent by agency. Agency requires manifestation of assent by both principal and agent. *See* Restatement (Third) of Agency § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."); Miller & Carr, 2 Cal. Real Est. § 3:5 (4th ed. 2025) ("Agency is a bilateral matter created through mutual consent. . . . It can be created only where there is evidence that the principal intended to appoint a person as his or her agent, and the agent has accepted the appointment and agreed to act as an agent."). Stewart never manifested assent to serve as the Dromys'

[20] Stewart can't contest the third or fourth elements. It partially disputes the premise of the first, arguing that Silverlake never deposited its own funds to escrow. But Silverlake has standing to pursue the losses incurred directly by other Dromy entities because it was assigned (even if informally) the right to sue for those losses in tort. *See* Cal. Civ. Code 954; *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009); *AMCO Ins. Co. v. All Sol. Ins. Agency, LLC,* 198 Cal. Rptr. 3d 687, 693–94 (Cal. Ct. App. 2016); *Fink v. Shemtov*, 148 Cal. Rptr. 3d 570, 578 (Cal. Ct. App. 2012); *McCown v. Spencer*, 87 Cal. Rptr. 213, 219 (Cal. Ct. App. 1970). There is no reason to doubt the Dromys' testimony about that intended assignment. (6/25 RT at 23–25).

agent.[21] If mere receipt of wired funds in modern banking could unilaterally create an agency relationship, every escrow holder would become an involuntary agent to countless unknown depositors—a result that is as unworkable as it would be contrary to California policy.[22]

Property law can't create the requisite consent here, either. Custody of someone else's property alone doesn't equal consent to be a fiduciary to the property owner. That wouldn't even be enough to create a bailor-bailee relationship.[23] *See Windeler v. Scheers Jewelers*, 88 Cal. Rptr. 39, 43–44 (Cal. Ct. App. 1970). As foreshadowed, *Tribeca* doesn't support Silverlake's argument to the contrary.[24] In *Tribeca*, 192 Cal. Rptr. 3d at 370, the depositor's property rights were immediately enforceable because no other party had a legally cognizable claim to

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[21] Silverlake cannot cherry-pick among favored agency principles depending on the issue. If, as Silverlake argues, an agency relationship between the Dromys and Oren cannot be established unless Stewart checked with the principal first to determine the purported agent's authority, Stewart couldn't have mutually consented to handle the Dromys' funds as a fiduciary when there was no contact between Stewart and any Dromy family member.

[22] By the same analysis, Stewart cannot distort agency principles to claim that the Dromys authorized Oren to order all the disputed disbursements as their actual or ostensible agent. As Stewart's expert confirmed (6/26 RT 30), escrow officers generally cannot rely on "agent conduct alone" without confirming that the principal intended to confer agency. *Lombardo v. Gramercy Ct.*, 328 Cal. Rptr. 3d 449, 453–54 (Cal. Ct. App. 2024). Besides, by late March and early April, Hale no longer had cause to assume that Oren was the agent for "investors" anyway. As will be discussed, it's precisely because that presumed authority was thrown into such doubt that Hale had a duty to ask whether the disposition of the escrowed funds could still be controlled by Oren and the escrow parties.

[23] And if property law alone were the dispositive consideration, Stewart's arguments about which Dromy entity owned the deposited funds would have more purchase. *See, e.g.*, *Burlesci v. Petersen*, 80 Cal. Rptr. 2d 704, 706 (Cal. Ct. App. 1998) (discussing property conversion claim).

[24] The other case Silverlake relies on—*Home Loan Corp. v. Texas Am. Title Co.*, 191 S.W.3d 728 (Tex. App. 2006)—is inapplicable too, as that case applies non-controlling Texas law. (ECF 24, 38). It's also distinguishable: *Home Loan* involved only the scope of disclosure obligations arising from an undisputed existing fiduciary relationship. *See* 191 S.W.3d at 730–31. It didn't address whether or when nonparties to an escrow agreement may assert fiduciary duty claims. *See id.*

direct the disposition of funds in the single-party escrow. Here, VCV and FCREI initially had such claims under the PSA—claims that gave them authority to instruct Stewart on fund disbursements provided the PSA's closing conditions could be satisfied. The Dromys' background property rights did not disappear during this period, but they remained subordinate to the escrow parties' contractual rights unless those closing conditions became impossible to satisfy.

2. Silverlake Was Still Owed a Duty of Care as a Third Party

While fiduciary duties flow from consensual relationships, negligence duties flow from conduct and circumstances. So even if Silverlake were neither an escrow nor protected party owed fiduciary duties, Stewart still "owed Silverlake a duty of care" under ordinary tort principles by application of the *Biakanja* factors. (ECF 213 at 7). *Biakanja* recognizes that tort duties to third parties for economic losses, while rare, can arise when public policy and fairness dictate, even absent a fiduciary relationship or contractual privity. On this score, the court found before that the six *Biakanja* factors warrant imposing on Stewart a duty of care over Silverlake's funds.[25] (ECF 213 at 7–8). The Court adheres to that finding:

- The transaction in escrow was intended to benefit Silverlake. Whether under the PSA or the restructured agreement, Silverlake was to receive a 50% property interest of some kind in the Hotel Entities in exchange for a $13 million investment.

- It is foreseeable that releasing escrow funds in a transaction that couldn't close would cause harm to the depositor/owner of those funds.

- The certainty of injury was absolute. If escrow funds are released under circumstances that should have caused suspension of

[25] The court's prior finding is law of the case, but even if it weren't, the court's evaluation of the trial evidence only reinforces, rather than undercuts, that finding.

further releases, the depositor of the funds would naturally be injured by a definite and quantifiable loss once the funds are released.

- There is necessarily a close causal connection between an escrow holder's conduct (disbursing funds) and the certain injury (loss of the funds).

- As for moral culpability, Stewart's blameworthiness comes from Hale's decision to choose blind compliance over careful inquiry in a suspect situation warranting conservation of escrow funds.

- The policy considerations are more nuanced but still favor finding duty. On the one hand, imposing a duty risks subjecting escrow agents to conflicting obligations—the concern that animated *Summit*. On the other hand, allowing escrow agents to disburse millions in third-party funds without any inquiry or clarification creates moral hazard and undermines the protective function that escrow is supposed to serve. This tension is resolved not by eschewing all duty, but by properly defining the scope of that duty.

C. STEWART BREACHED ITS DUTY OF CARE AND CAUSED SILVERLAKE'S CLAIMED DAMAGES

1. Standard of Care

Since Stewart had a duty of care over the disposition of the escrow funds, the next question is the standard of care. *See Diaz,* 139 Cal. Rptr. at 317–19. Each side's expert on this issue gave the most extreme opinion—most favorable to his paid client. Silverlake's expert, relying mostly on Texas law, said that escrow officers must obtain written authorization from nonparty depositors of funds not only before releasing them, but even in accepting them. (6/25 RT 65, 104). Stewart's expert, by contrast, said that escrow officers are just "order followers" who can ignore nonparties to the escrow. (6/26 RT 52–53). If the escrow principals say jump, the officer can't even ask how high. Neither view, in its purest form, is credible or sound.

Woven together, though, the experts' opinions yield a sensible middle ground between the extremes of imposing a tort duty nearly as broad as a fiduciary duty (as Silverlake wants) and of reducing an escrow officer's job to little more than that of a robot (as Stewart contends). Three governing principles emerge:

First, there is a duty to suspend actions when an escrow officer detects potential fraud, even if there is no clear evidence of fraud. Potential fraud exists when the escrow officer develops "a well-founded suspicion or perception of a significant likelihood that fraud is occurring through the escrow." (6/26 RT 76–77, 82–83). When it comes to disbursement of escrow funds, the escrow officer should pause operations and obtain legal guidance if it appears that fraud may be afoot. (6/26 RT 71, 80). As Stewart's expert recognized, escrow holders face risk of liability from both releasing funds when they arguably shouldn't have and refusing to release funds when they arguably should have. (6/26 RT 77, 87). The path through that Scylla and Charybdis is one of conserving escrow funds when in doubt rather than disbursing them irreversibly. (6/26 RT 82, 84). Sure, it may take a day, a week, or longer to resolve doubts, but it may also take minutes or hours at most. In the end, when there are only two bad options on offer, as Stewart's expert said, the escrow officer has to pause for diagnosis: "First, do no harm." (6/26 RT 86–87).

The duty to preserve the status quo when suspicious facts emerge is not a duty to investigate fraud. Escrow officers are not amateur detectives. But to resort to the default of "follow instructions" in the face of accumulating warning signs cannot meet an escrow agent's standard of care, either. Think of it as a spectrum. On one end: routine transactions where escrow holders follow instructions without question will meet the standard of care. On the other end: clear evidence of fraud will require escrow holders to refuse instructions even if it risks breach of the escrow contract. In the middle: questionable, confusing, or suspicious circumstances where prudence requires suspension of activities pending reasonable inquiries. This case falls in that middle ground.

Second, both existing law and the experts agree that there is a duty to ask reasonable questions when an escrow officer encounters conflicting, confusing, incomplete, or ambiguous instructions. (6/25 RT 66; 6/26 RT 76, 82). *Diaz,* 139 Cal. Rptr. at 317–19; *Kirk*, 270 Cal. Rptr. at 37. That duty of inquiry becomes doubly important when, as here, the underlying contract for the escrowed transaction hasn't been deposited in escrow, when new instructions appear to conflict with earlier ones in a way that would materially alter closing conditions, and when objective concerns arise over the identity and authority of the purported escrow parties to give binding instructions. (6/25 RT 216–17; 6/26 RT 30, 58–59). Escrow officers should "never assume anything in this business." (6/25 RT 63).

A duty of inquiry doesn't mean that the escrow agent is policing the underlying business transaction. It just means they cannot turn a blind eye to suspicious facts, especially when irreversibly releasing escrow funds with no closing in sight, without the permission of the depositors of those funds who still retain residual property rights absent closing. Nor can she take cover in following the most current instruction if it contradicts the instructions in the only transactional document in escrow. The point of obtaining the controlling transactional document is not to study it for business viability—it is simply to identify the correct conditions for closing, the correct parties authorized to give instructions, and the correct instructions to consummate the parties' intended transaction. (6/25 RT 125, 216–17, 219–20; 6/26 RT 16, 20, 22, 25–28, 30, 58–59, 62–63, 65–66, 85, 87).

Third, once escrow activities have been suspended pending inquiry, there is a duty to initiate interpleader proceedings if the inquiries reveal competing claims of right to own, possess, or control escrow funds—including by third parties. (6/25 RT 138–39; 6/26 RT 22, 35, 78, 80, 83, 100–01). Even if the inquiries reveal no such competing claims, the documentation of the effort dispelling the need to interplead would protect the escrow holder. (6/25 RT 108). To be sure, interpleading is strong medicine. But that is precisely why antecedent inquiries are not only prudent, but indispensable questions that any reasonable escrow officer would have to ask before contemplating interpleader. Interpleading would just be the last step in a set of tiered, ascending duties starting with preserving the status quo, making reasonable verifying inquiries, and ending—only if necessary—with interpleading disputed funds. And that remedy exists anyway not to create or exacerbate conflicting demands on escrow officers, but to help resolve competing claims through a neutral judicial process instead. *See Campbell v. Scripps Bank*, 93 Cal. Rptr. 2d 635, 643 (Cal. Ct. App. 2000). Otherwise, an escrow holder who faces conflicting demands and proceeds anyway "act[s] at its peril." *Carlsen*, 271 P. 100 at 103.

So, in effect, the duty of care expected of Hale under the unique circumstances she faced here would just have meant suspending disbursements—temporarily at least—while she inquired about and verified (a) whether the persons giving disbursement instructions had authority to do so in light of the restructured transaction without the permission of the third-party depositors; (b) whether those instructions were clear, unambiguous, and non-conflicting with her original instructions; and (c) whether the instructions were consistent with the intended objective of the escrowed transaction or if another contract needed to be delivered into escrow because the transaction had changed. If the answers to those questions then revealed potentially competing claims to the control and disposition of the escrow funds, Hale could have pursued the remedy of interpleader that was designed for this situation.[26]

2. Breach of Duty

Because Hale did none of those things, her decisions to release escrow funds fell below the standard of care that applied to the facts here. While no single fact alone might have prompted a reasonable escrow officer to suspend disbursements pending inquiry with the possibility of interpleading, the growing accumulation of warning signs here made doing nothing unreasonable. *See Diaz,* 139 Cal. Rptr. at 317–18. Among the warning signs:

Questionable Authority to Instruct. By end of March or early April 2015, Hale had plenty of reasons to doubt the authority of the purported escrow principals—including Oren—to provide exclusive instructions over the disbursement of escrow funds deposited solely by a third party. Of course, escrow principals can ordinarily instruct about the escrow's conditions and order release of the escrow funds at closing once conditions for closing are met. But depositors don't lose their proprietary rights over their own money until those closing conditions are met, either. So when, as here, doubts and questions emerged about who has authority to control the disposition of escrow funds, Hale breached the duty of care by proceeding in the face of that uncertainty and exhausting all escrow funds without ascertaining the role of the third-party depositors who owned the funds. (6/25 RT 216–17; 6/26 RT 30).

Changed Transaction Structure. By April 2015 at the latest, Hale knew from the documents she had received that the transaction had "changed to a partnership or an entity acquisition"—even if she maintained at trial an inconsistent position that the transaction never

[26] Or if turned out that Hale was thoroughly deceived by Oren and his associates, at least Stewart would have had the documentation to prove that they acted reasonably under the circumstances with the best available information.

changed from the PSA. (6/26 RT 183-84; 6/27 RT 21-23). This was no minor modification. It was a fundamental shift from one category of transaction to another. Real property acquisitions require deeds; entity acquisitions require membership documents. Hale never received modified escrow instructions reflecting the new structure—which included Silverlake as a party to the new deal. The only escrowed contract was the PSA. The duty to clarify conflicting or questionable instructions applies with full force when the fundamental nature of the transaction changes, and the new agreement is never placed into escrow. *Diaz*, 139 Cal. Rptr. at 319–20; *Spaziani v. Millar*, 30 Cal. Rptr. 658, 683 (Cal. Ct. App. 1963). Hale nonetheless proceeded as if the transformation were inconsequential with no change of closing escrow instruction. That was a breach. (6/25 RT 125; 6/26 RT 22, 65–66).

Impossibility of Closing. By Hale's own admission she knew "no closing was possible" when she made the final disbursement on April 22, 2015. Hale also admitted knowing that FCREI was not the title owner to any hotel property, save possibly one. Sure, there can be innocent explanations—pending transfers, subsidiary structures, contractual rights to convey. But those explanations required verification, not assumption. (6/26 RT 28, 58–59, 62–63, 66, 71). Worse, by April 2015, Hale knew that any closing was more than 90 days out so that FCREI could obtain financing for the deal and required more title work once "membership entities" were "lined up." So when Hale exhausted the escrow funds, she had no deeds, no membership documents, no organizational papers—nothing that would allow a closing to happen.

And once closing became impossible, the escrow parties' claims to control the deposited funds lost their legal justification under the PSA, while the Dromys' property rights—which had remained in the background until then—reasserted themselves. This shift did not give the Dromys superior rights to control the funds as a matter of property law alone, but it materially heightened Stewart's duty of care before releasing those funds irreversibly. At a minimum, Stewart needed to find out whether the depositors—whose property was now at risk with no prospect of the contemplated closing—would authorize the releases that the escrow parties were demanding.

None of this is to suggest that these warning signs required indefinitely refusing instructions or investigating fraud like the FBI might have. Nor did they give the nonparty depositors some overriding rights to the exclusion of the escrow parties, as Silverlake contends, no matter what Hale discovered. Third-party deposits happen routinely. Pre-closing disbursements are sometimes authorized. Title discrepancies can have innocent explanations. Transaction structures sometimes change. But with all the warning signs that accumulated here, "following orders" didn't meet the standard of care.

3. Causation and Damages

But for Stewart releasing the funds, Silverlake would still have them. To establish causation, though, a defendant's breach need not be the sole "but for" cause of the injury. *See Rutherford v. Owens-Illnois, Inc.*, 941 P.2d 1203, 1214 (Cal 1997). In California, as long as the breach is a substantial factor in causing injury, causation is established. *See Mitchell v. Gonzales*, 819 P.2d 872, 873 (Cal. 1991). Stewart's only counterargument is that even if Hale had suspended disbursements, the fraudsters would have just told her they had authority to order disbursements on behalf of the depositors, leading to the same outcome. (ECF 259 at 19–20). Perhaps or perhaps not.

It isn't Silverlake's burden to rule out every counterfactual in which Hale might have released the funds anyway even if she met the standard of care. *See Cooper v. Takeda Pharm. Am., Inc.*, 191 Cal. Rptr. 3d 67, 85 (Cal. Ct. App. 2015). By that logic, even the Dromys couldn't have contributed to their own damages because, one could argue, they trusted Oren so blindly that they would have wired all the funds anyway even with the best due diligence. The very point of the substantial factor test is to relieve tort plaintiffs of such burden to disprove speculation just to establish cause-in-fact. *See S. Coast Framing, Inc. v. Workers' Comp. Appeals. Bd.*, 349 P.3d 141, 145 (Cal. 2015); *Tribeca*, 192 Cal. Rptr. 3d at 366–67. Thus, Silverlake has adequately established causation by a preponderance of the evidence.

Proximate cause is also established here for essentially the same reason that imposing a duty of care in the first place was not unreasonable under *Biakanja*. *See Modisette v. Apple Inc.*, 241 Cal. Rptr. 3d 209, 225 n.15 (Cal. Ct. App. 2018); *Kumaraperu v. Feldsted*, 187 Cal. Rptr. 3d 583, 590 (Cal. Ct. App. 2015). Stewart counters that Oren's fraud was an unforeseeable intervening cause breaking the legal causal chain. (ECF 259 at 19–20). But foreseeability cuts in favor of proximate cause here, not against it. It was foreseeable that releasing escrow funds without unambiguous authorization from their depositors to parties of questionable authority in a transaction that couldn't close would create a substantial risk of misappropriated funds. The duty of care here exists precisely to avoid and reduce such risks. An escrow holder cannot escape liability for negligently releasing funds by pointing to the very fraud that the duty was designed to guard against. Stewart's breach was thus both cause-in-fact and proximate cause of Silverlake's claimed losses—even if the fraud of Oren and associates also undeniably caused the losses, too.

D. SILVERLAKE'S COMPARATIVE FAULT CAUSED NO LESS THAN 50 PERCENT OF ITS OWN DAMAGES

Now the hardest question: How should fault be allocated between Stewart's breach and the Dromys' negligence? California follows a system of comparative fault rather than contributory negligence. *See* Cal. Civ. Code § 1714; *B.B. v. Cnty. of L.A.*, 471 P.3d 329, 338 (Cal. 2020); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1233 (Cal. 1975). Under comparative fault principles, a plaintiff's own negligence does not bar recovery but proportionally reduces the damages recoverable against other tortfeasors. *See S. Pac. Transp. Co. v. State of Cal.*, 171 Cal. Rptr. 187, 190 (Cal. Ct. App 1981) (citing *Li*, 532 P.2d at 1233).

Start with what the Dromys didn't do. They didn't review the PSA—the contractual foundation for their $13.3 million investment. They didn't execute a written agreement with Oren. They didn't verify Oren's promised co-investment. They didn't ensure their rights would be assigned from VCV. And—most critically—they never contacted the escrow holder to provide instructions or impose conditions on fund releases. For a $13.3 million investment by a family that had been in the real estate business for 50 years, that wasn't mere negligence—it was gross negligence. The Dromys misplaced trust in Oren explains their conduct but doesn't excuse it. Sophisticated investors don't abandon all due diligence just because they're dealing with friends. Ely never did that, in fact.

Still, Silverlake argues that comparative fault should be limited to conduct directly relevant to Stewart's breach. Because Stewart's breach was failing to seek their authorization before disbursing, Silverlake says, only the Dromys' failure to provide authorization should count. Under this view, everything else—not reading the PSA, not verifying Oren's investment, not ensuring they were assigned the buyer's rights—is just background negligence that didn't contribute to the specific harm. On the other hand, Stewart argues that the Dromys' negligence is much greater because the $13.3 million would never have been deposited if the Dromys had performed even minimal due diligence. Oren's fraud, Stewart argues, would have been exposed before their funds were put at risk. The majority of the fault lies in the funding decision of the Dromys, Stewart concludes, not in the disbursement decision of Hale.

Both arguments have force. But California's comparative fault regime is a "flexible, commonsense concept" for evaluating "relative responsibility." *Pfeifer v. John Crane, Inc.*, 164 Cal. Rptr. 3d 112, 123 (Cal. Ct. App. 2013). The inquiry isn't limited to conduct that mirrors the defendant's breach. It encompasses all conduct that contributed to the harm. Perhaps the Dromys' failures fall into two categories. Some failures (not reading PSA, not verifying assignment, not documenting Oren's deal) contributed to getting into the transaction. Other failures (not contacting Stewart, not providing instructions, not verifying Oren's authority) contributed to the funds being released without authorization. The first category is perhaps more remote, while the second is directly related to Stewart's breach. But both matter for comparative fault, even if they matter differently.

In the end, the Court concludes that fault should be allocated equally for four reasons that make a 50/50 allocation equitable:

- *Symmetry of Silverlake's Expected Benefit*. The Dromys expected a 50% ownership interest for their 50% cash contribution. That expected benefit provides a natural benchmark. If they would have received 50% of the gain from success, it's equitable that they bear 50% of the loss from failure when their own negligence contributed so substantially to that failure.

- *Equivalent Lack of Due Diligence*. Compare what each party failed to do. The Dromys performed near-zero due diligence. Stewart turned a blind eye to emerging red flags. Both failures in due care are serious. And both have a rough equivalence: an abandonment of investor responsibility by a 50-year-old real estate business and a neglect of modest and prudent measures by an escrow agent with 50 years of escrow experience.

- *Proportionate Causation*. Both parties' conduct was necessary for the loss to occur. But for the Dromys depositing funds without any contact with—or oversight of—Stewart, the funds wouldn't have been at risk. But for Stewart releasing funds despite warning signs, the Dromys would still have their money (or a lot of it). Each party's failure was approximately equal in causal importance. Neither was more responsible than the other.
- *Comparable Culpability*. The Dromys were sophisticated investors with 50 years of experience, investing their own money in their area of expertise. They had every incentive and every capability to protect themselves. They chose not to. Stewart was a professional escrow company handling other people's money, with professional duties to exercise care. It faced mounting red flags that should have prompted protection, even if they fell short of clear evidence of fraud. It chose to proceed anyway under suspicious circumstances. Both had the knowledge, capability, and incentives to detect or avoid the fraud. Both failed, so the culpability between the two is comparable. Both are equally at fault.

IV.
CONCLUSION

Based on the factual findings and legal conclusions above, the court orders that judgment be entered in favor of Plaintiff Silverlake Park, LLC and against Defendant Stewart Title Guaranty Company on Silverlake's negligence claim only. Based on its share of comparative fault, Silverlake may recover from Stewart no more than 50% of its provable net damages, exclusive of prejudgment interest.[27] Meanwhile, Stewart's counterclaims

[27] After deducting its post-trial recovery from a fraudulent conveyance action and two payments it received in the summer of 2015, Silverlake's net claimed damages (excluding prejudgment interest) appear to be $12,864,890. Stewart argues, though, that another $500,000 should be deducted because that came from Oren's company

will be dismissed as part of judgment since those rest on the now-rejected premise that Silverlake was a party to the escrow contract. Judgment will also be entered without prejudice to Stewart's rights under its third-party complaint.[28]

Within 21 days, the parties should submit a stipulation and proposed order addressing (1) the form, amount, and timing of Silverlake's judgment to be entered consistent with this order; and (2) the scheduling for any other necessary post-judgment proceedings, including finalizing the default judgments on Stewart's third-party complaint and briefing on Silverlake's anticipated application for prejudgment interest.

IT IS SO ORDERED.

DATED: November 26, 2025

STEVE KIM
United States Magistrate Judge

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and Silverlake hasn't proven that it repaid Oren outside escrow. It's unclear, too, if the estimated $30,000 paid to Stewart for its services should be included in damages.

[28] This order doesn't address any allocation of fault—and thus any contribution or indemnity issues—between Stewart and the third-party defendants. It does necessarily recognize, though, that where damages from a tort stem from an indivisible economic loss, all tortfeasors are jointly and several liable for those damages. *See Gen. Motors Corp. v. Doupnik*, 1 F.3d 862, 865 (9th Cir. 1993); *Am. Motorcycle Ass'n v. Superior Ct.*, 578 P.2d 899, 905–07 (Cal. 1978); *Nevis v. Rideout Mem'l Hospital*, 2022 WL 17852045, at *5 (E.D. Cal. Dec. 22, 2022).