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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE OAKLAND RAIDERS, Plaintiff, Cross-defendant and Appellant, v. NATIONAL FOOTBALL LEAGUE, Defendant, Cross-complainant and Appellant; PAUL TAGLIABUE et al., Defendants and Respondents.	B163115 (Los Angeles County Super. Ct. No. BC206388)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County. Richard C. Hubbell, Judge. Affirmed in part and reversed in part.

Kaye Scholer, Larry R. Feldman, Robert M. Turner; Arnold & Porter, John J. Quinn, Laurence J. Hutt; and Jeffrey E. Birren for Plaintiff, Cross-defendant and Appellant The Oakland Raiders.

Covington & Burling, Gregg H. Levy; Ruby & Schofield, Allen J. Ruby; Skadden, Arps, Slate, Meagher & Flom and Douglas B. Adler for Defendant, Cross-complainant

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts A.3 through B.2 of the Discussion.

and Appellant National Football League and for Defendants and Respondents Paul Tagliabue and Neil Austrian.

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Defendant, cross-complainant and appellant the National Football League (NFL) appeals from an order granting a new trial following a six-week jury trial. The jury returned a verdict in favor of the NFL on the Raiders' claims involving their move to Oakland, and the trial court granted a new trial on the ground of juror misconduct. Plaintiff, cross-defendant and appellant the Oakland Raiders (Raiders) cross-appeal from a pretrial order granting summary adjudication in favor of individual defendants and respondents Paul Tagliabue (the NFL commissioner) and Neil Austrian (the NFL president) on the Raiders' cause of action for breach of fiduciary duty. The Raiders also appeal from a statement of decision following a bench trial on the Raiders' declaratory relief cause of action.

We reverse the order granting a new trial and affirm the judgment in all other respects. Because the order granting a new trial failed to comply with Code of Civil Procedure section 657 by omitting a statement of reasons, we have independently reviewed the grounds asserted in the motion. We conclude that neither the conflicting evidence of juror misconduct nor any asserted instructional error justifies a new trial. As to the cross-appeal, we conclude that the trial court correctly determined that, as a matter of law, there is no fiduciary relationship between NFL officials and the Raiders, and that substantial evidence supports the trial court's conclusion that the NFL was not estopped to rely on the NFL constitution's revenue sharing requirements.

FACTUAL AND PROCEDURAL BACKGROUND

A. Facts Leading to the Raiders' Move From Los Angeles.

The Raiders are a member club of the NFL, an unincorporated association governed by the NFL constitution and bylaws. After the Raiders relocated to Los

Angeles from Oakland in 1982, they played their home games at the Los Angeles Memorial Coliseum until 1995. Unlike newer stadiums, the Coliseum did not permit any revenue to be derived from items such as luxury suites, club seats, naming rights or other sponsorships.

Throughout the end of 1994 and the first half of 1995, the Raiders negotiated with individuals representing Hollywood Park for the construction of a new, state-of-the-art stadium in Inglewood, reaching an agreement in principle in March 1995. That agreement required the Raiders to secure from the NFL a contribution in the amount of $20 million and a commitment that at least two Super Bowls would be played in the stadium between 2000 and 2004. The NFL offered to support construction of the Hollywood Park stadium, though not to the extent sought by the Raiders. It agreed to schedule one Super Bowl during the requested time period, to provide the Raiders with a certain number of Super Bowl tickets and to invest some money into the project. It further agreed to provide additional assistance on the condition that a second NFL team be permitted to play at the stadium for several years.

Ultimately, the NFL memorialized its commitment at a meeting in May 1995, where it adopted 1995 Resolution FC-7 which, among other things, awarded two Super Bowls to the Hollywood Park stadium conditioned on two NFL teams playing there, and created a committee to negotiate with both the Raiders and Hollywood Park concerning a second NFL team.[1] The Raiders voted in favor of Resolution FC-7, though they remained opposed to the notion of a second team playing at the Hollywood Park stadium.

The committee created by Resolution FC-7 developed terms for the provision of a second NFL team that were inconsistent with the Raiders' goals and that the Raiders perceived as favoring the second team. As a result, the Raiders—who had simultaneously been negotiating with Oakland officials to relocate the team there—entered into an agreement with Oakland in June 1995 to move to the renovated Oakland Coliseum. The agreement included an up-front $64 million payment to the Raiders,

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[1] The NFL makes its decisions by way of resolutions voted on by the membership.

immediately enhanced revenue streams and assurances from Oakland officials that personal seat licenses and game tickets were already sold out.

In July 1995, the NFL adopted 1995 Resolution G-7, approving the Raiders' relocation to Oakland and reaffirming that "the League's member clubs collectively own and will control any League franchise opportunity in the greater Los Angeles area . . . ."

B. Pleadings and Trial

In March 1999, the Raiders filed a complaint for damages against the NFL and myriad other defendants, alleging eleven causes of action: Breach of contract (first, seventh and eighth causes of action); breach of the implied covenant of good faith and fair dealing (second, sixth and tenth causes of action); unjust enrichment (third cause of action); tortious interference with prospective business advantage (fourth cause of action); breach of fiduciary duty (fifth cause of action); declaratory relief (ninth cause of action); and civil conspiracy (eleventh cause of action).[2] The NFL, in turn, answered and filed a cross-complaint for declaratory relief against the Raiders.

In August 2000, the trial court granted the NFL's motions for summary adjudication on the fourth, seventh, eighth and tenth causes of action, and denied its summary adjudication motions on the third, fifth and sixth causes of action. The court also granted summary adjudication motions brought by individual defendants Mr. Tagliabue and Mr. Austrian on the fourth through seventh, tenth and eleventh causes of action.

The trial began on March 13, 2001 and lasted approximately six weeks. The jury heard testimony and received documentary evidence on five causes of action. The first through third causes of action involved the Raiders' claim that, by moving to Oakland, they left the NFL with an "opportunity" to put another team in Los Angeles and that the NFL's constitution and bylaws implicitly required that the Raiders be compensated for

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[2] The parties subsequently stipulated to dismiss all NFL teams and their holding companies named as defendants. They also stipulated to dismiss the eleventh cause of action for civil conspiracy.

providing the NFL with that opportunity (sometimes referred to as the "Los Angeles opportunity"). The fifth and sixth causes of action addressed the NFL's failure to offer the Raiders more support with the development of the Hollywood Park stadium.

The jury deliberated for 15 days, though it began deliberations anew on the fifth day after one juror was excused due to a scheduling conflict. During the deliberations, the jurors asked several specific questions about the evidence and instructions. On May 21, 2001, the jury returned a 9 to 3 verdict in favor of the NFL.

Following a subsequent bench trial, the trial court entered its statement of decision on the ninth cause of action on June 3, 2002. It denied the Raiders' request for a declaration that they were not required to share certain stadium revenues, because the NFL constitution and bylaws obligated the Raiders to share and the NFL had not modified or waived the sharing requirement.

On July 26, 2002, the trial court entered judgment on all matters tried before the jury and the court.

C. Posttrial Motions

Also on July 26, 2002, the Raiders filed their motion for judgment notwithstanding the verdict and motion for new trial. The Raiders premised their new trial motion on grounds of juror misconduct, erroneous jury instructions, erroneous admission of evidence and insufficiency of evidence.

With respect to juror misconduct, the Raiders asserted that one juror, Mr. Abiog, harbored a bias against the Raiders and concealed that bias during voir dire. They further asserted that another juror, attorney Ms. Hillman, had an unconcealed, preexisting bias against the Raiders, infected the deliberations with her own view of the law, and engaged in private deliberations with another juror. They also suggested that a third juror, Ms. Paulino, had difficulty understanding English.

To demonstrate this misconduct, the Raiders submitted five juror declarations, as well as declarations of counsel averring that counsel were unaware of any jury misconduct occurring during the trial or deliberations. According to the juror

declarations, Mr. Abiog stated several times during deliberations that he hated the Raiders and their owner, Al Davis, and that he would never award any money to the Raiders or find for them in this case. One juror confronted Mr. Abiog, telling him that it was improper for him to make such a statement and that he had a duty to disclose in his juror questionnaire his hostility toward the Raiders. Mr. Abiog responded that the questionnaire had only asked what his favorite team was and did not ask whether he disliked the Raiders. Two other jurors, including the jury foreman, told Mr. Abiog that concealing his bias against the Raiders could cause a mistrial.

With respect to Ms. Hillman, the declarations stated that she "exercised an unofficial leadership position," dominated the deliberations and instructed the jurors on the law. One example of Ms. Hillman's dominance repeated throughout the declarations was that she "told the jury that if they voted one way on one of the claims, they had to vote the same way on another claim, because 'that was the law.'" Another example cited in three declarations was that Ms. Hillman told the jury that there could be no fiduciary relationship between the NFL and the Raiders as a matter of law. Ms. Hillman also wrote out statements of the law and taped them to the jury room walls; her statements were not quotations from the jury instructions "but were her own words of what she claimed the law was." Some jurors also observed Ms. Hillman having private conversations with another juror during deliberations.

Finally, the declarations stated that Ms. Paulino, an alternate juror who replaced an excused juror during deliberations, appeared to have trouble understanding English. According to the jurors: "She would say to us, 'I don't understand,' and, several times, that she wanted to re-read material."

Independent of any juror misconduct, the Raiders asserted that a new trial was warranted because the jury received several erroneous and prejudicial jury instructions.

The NFL opposed the motion for new trial and submitted eight juror declarations in support of its opposition, including one declaration from an alternate juror who did not participate in the deliberations, one declaration from a juror who was excused before the jury reached a verdict, and a supplemental declaration from one of the five jurors who

submitted declarations in support of the motion. It also filed evidentiary objections to the Raiders' juror declarations. According to Mr. Abiog's declaration, at some point well into the deliberations, Mr. Abiog joked that he "hated the Raiders" because he had lost a small bet on them in Las Vegas. Mr. Abiog declared that he harbored no bias against the Raiders or Mr. Davis. In four other declarations, the jurors stated they could not recall Mr. Abiog stating that he hated the Raiders or Al Davis; nor could they recall any other jurors responding to such a statement. The declarations further stated that Mr. Abiog did not give the jurors any reason to believe that he harbored a preexisting bias against the Raiders. The juror who submitted the supplemental declaration stated that he could not tell whether Mr. Abiog had formed an unfavorable impression of the Raiders before or during trial.

Ms. Hillman submitted a declaration in which she denied dominating the deliberations; stated that she told her fellow jurors to follow the instructions given by the court and did not tell the jury what the law was; and explained that she wrote out the jury instructions verbatim, with the exception of an inadvertent error where she wrote "fiduciary duty" instead of "fiduciary relationship." She denied expressing legal opinions as to the validity of any claim or the effect of any evidence. The other juror declarations stated that Ms. Hillman did not dominate the deliberations. To the contrary, the jurors declared that Ms. Hillman repeatedly stated that the jury's decision must be based on the instructions given and that any questions about the instructions should be directed to the judge. The declarations further stated that Ms. Hillman helped write out the jury instructions verbatim on butcher paper, and that many jurors also wrote on the paper by summarizing the evidence helpful to particular instructions.

The NFL's declarations also stated that Ms. Paulino fully participated in the deliberations; on the occasions when she asked for help, she did so because she was unfamiliar with points that had been addressed in the deliberations prior to her arrival.

The NFL also responded to the claim that a new trial was warranted because of erroneous jury instructions, arguing that the evidence supported giving the challenged

instructions, that the supporting evidence obviated the need to plead defenses relating to the instructions, and that the instructions correctly stated the law.

The Raiders filed their reply, together with six reply declarations, on September 5, 2002. According to those declarations—including one from Ms. Paulino in well-written English—Mr. Abiog's demeanor indicated that his comment about the Raiders was not a joke and Ms. Hillman repeatedly instructed the jury on her knowledge of the law. The NFL moved to strike the declarations on the ground they were untimely filed and, alternatively, objected to the declarations' contents.

On September 11, 2002, the trial court heard argument on the motions for new trial and judgment notwithstanding the verdict, and took the matters under submission. On September 23, 2002, the court issued a minute order granting the motion for new trial and denying the motion for judgment notwithstanding the verdict. In ruling on the motion for new trial, the trial court stated only: "The motion for new trial is granted. The Court finds that the objectively ascertainable acts of Juror misconduct were prejudicial to the Oakland Raiders' right to a fair trial." With respect to the other grounds raised by the motion, the court further stated: "While some of the objections in the motion for new trial premised on erroneous and/or prejudicial jury instructions raise serious questions concerning their use, and having given the Court some pause, having granted the motion for new trial on other grounds, we have not reached these issues." The minute order did not rule on any of the evidentiary objections.

The NFL appealed from the order granting a new trial and the Raiders appealed from the judgment.

DISCUSSION

A. The NFL's Appeal.

The NFL's appeal challenges solely the trial court's grant of a new trial. Generally, we review an order granting a new trial for abuse of discretion. (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412; *Bell v. State of California* (1998) 63 Cal. App.4th 919, 930-931.) Here, however, the NFL not only challenges the result of

the trial court's order, but also contends that the order itself is deficient for failing to specify the reasons for granting a new trial. (See Code Civ. Proc., § 657.)[3] According to the NFL, this deficiency requires us to apply a less deferential standard of review in evaluating the trial court's decision.

We conclude that the order failed to comply with section 657 because it did not adequately specify "the court's reason or reasons for granting the new trial upon each ground stated." (§ 657.) We further find that this deficiency renders the order defective and requires us to independently review whether a new trial was warranted on the ground of juror misconduct or any other ground raised by the motion.[4] (*Thompson v. Friendly Hills Regional Medical Center* (1999) 71 Cal.App.4th 544, 550.) On the basis of that review, we must reverse the order granting a new trial, as neither juror misconduct nor instructional error materially affected the substantial rights of the Raiders.

1. The New Trial Order is Defective Because it Does Not Specify the Court's Reasons for Granting a New Trial.

A trial court may grant a new trial only by following the applicable statutory procedures. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 899.) Section 657 governs the manner of making and entering an order granting a new trial and provides in relevant part: "When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated." The court's specification of reasons need not be contained within the order granting the new trial. Section 657 further provides: "If an order granting such motion does not contain such specification of

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[3] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

[4] Though the Raiders asserted that a new trial was required on the ground of insufficiency of the evidence, we cannot review that ground because it was not stated in the order granting the new trial and, therefore, we cannot affirm the order on that basis. (See § 657 ["the order ['granting a new trial'] shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, . . . unless such ground is stated in the order granting the motion"].)

reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk."

Here, the order granting a new trial specified "Juror misconduct" as the ground upon which it was based. This specification was adequate, as it reasonably approximated the language of section 657, permitting a new trial on the ground of "[m]isconduct of the jury." (See *Treber v. Superior Court* (1968) 68 Cal.2d 128, 131 [new trial order using statutory language adequately stated ground]; *Mercer v. Perez* (1968) 68 Cal.2d 104, 111 [new trial order's specification of the ground on which it is based should use statutory language or a reasonable approximation thereof].)

In the same sentence in which the trial court set forth the ground upon which its grant of the new trial was based, the court also set forth its "reason" for the grant: "The Court finds that the objectively ascertainable acts of Juror misconduct were prejudicial to the Oakland Raiders' right to a fair trial." We conclude that this statement fails adequately to specify the trial court's reason for granting the new trial motion.

"[S]ection 657 places on the trial courts a clear and unmistakable duty to furnish a timely specification of both their grounds and their reasons for granting a new trial . . . ." (*Treber v. Superior Court, supra,* 68 Cal.2d at p. 136.) Requiring a specification of reasons serves the dual purpose of "encouraging careful deliberation by the trial court before ruling on a motion for new trial, and of making a record sufficiently precise to permit meaningful appellate review." (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 363, citing *Mercer v. Perez, supra,* 68 Cal.2d at p. 113.) A specification of reasons satisfies these purposes "if the judge who grants a new trial furnishes a concise but clear statement of the reasons why he finds one or more of the grounds of the motion to be applicable to the case before him." (*Mercer v. Perez, supra,* at p. 115; see also *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 136 [trial court granting a new trial should consider "'whether his proposed specification of reasons will fairly serve the legislative purposes elucidated in *Mercer*'"].)

As *Mercer* further explained, "[n]o hard and fast rule can be laid down as to the content of such a specification, and it will necessarily vary according to the facts and

circumstances of each case." (*Mercer v. Perez, supra,* 68 Cal.2d at p. 115.) But despite the absence of any rule governing the specification of reasons' content, courts have articulated one clear guideline, explaining that a reason must do more than simply restate the ground on which the order granting the new trial is based. (*Scala v. Jerry Witt & Sons, Inc., supra,* 3 Cal.3d at pp. 366-367; *Mercer v. Perez, supra,* at p. 112; *Van Zee v. Bayview Hardware Store* (1968) 268 Cal.App.2d 351, 359.) While this guideline had been applied principally in cases involving the grant of a new trial on the ground of insufficiency of evidence (see, e.g., *Scala v. Jerry Witt & Sons, Inc., supra,* at pp. 363-364), it applies with equal force to new trial orders based on any statutorily authorized ground. For example, in *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, the court reversed an order granting a new trial on the ground of excessive damages. The order contained a specification of reasons stating "that the 'verdict is excessive, that it is not sustained by the evidence'"; the court found that these reasons did "not go beyond a statement of the ground for the court's decision." (*Id*. at pp. 61-62; accord, *Treber v. Superior Court, supra,* 68 Cal.2d at p. 131 [holding that where new trial is granted on the ground of "errors in law," § 657 requires the trial court "to briefly specify the errors that are the basis for his ruling"]; *Thompson v. Friendly Hills Regional Medical Center, supra,* 71 Cal.App.4th at pp. 549-550 [holding that adequate specification of reasons is required where new trial is granted on the ground of juror misconduct]; see also *Mercer v. Perez, supra,* at p. 115 [noting by way of example that "if the ground is 'misconduct of the jury' through their resorting to chance, the judge should specify this improper method of deliberation as the basis of his action"].)

Evaluated under these principles, the trial court's specification of reasons for granting the motion is inadequate. Deeming the "objectively ascertainable acts" of juror misconduct prejudicial does nothing more than restate the elements necessary to grant a new trial on the ground of juror misconduct. Under Evidence Code section 1150, a verdict may be impeached by "proof of overt acts . . . objectively ascertainable," i.e., those that are "'open to sight, hearing, and the other senses and thus subject to corroboration.'" (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 413; *Jones v. Sieve*

(1988) 203 Cal.App.3d 359, 366.) By the same token, the trial court may grant a motion for a new trial on the ground of juror misconduct only where that misconduct prejudiced the losing party's right to a fair trial. (§ 657; *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 507.) Thus, specifying that the reasons for granting the new trial motion were prejudicial, objectively ascertainable acts of misconduct "borders on the tautological" and "simply reiterates the ground of the ruling itself." (*Scala v. Jerry Witt & Sons, Inc.*, *supra*, 3 Cal.3d at p. 367.)

The specification of reasons likewise fails to satisfy either of the two purposes of the requirement. On its face, the order does not indicate that it is the "product of a mature and careful reflection on the part of the judge." (*Mercer v. Perez, supra,* 68 Cal.2d at p. 113.) The mere fact that the order was issued 12 days after the hearing on the new trial motion is not indicative of the type of judicial deliberation sought to be promoted by the specification of reasons requirement. (See *ibid*.) To the contrary, the issuance of a one-sentence order after that period of time makes it appear as if the decision to grant a new trial was "hasty or ill-considered." (*Ibid*.)

Nor is the specification of reasons sufficiently precise for the purpose of meaningful appellate review. (*Scala v. Jerry Witt & Sons, Inc.*, *supra*, 3 Cal.3d at p. 363; see also *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983, 987.) As the *Scala* court explained, "the need 'to make the right to appeal from the order more meaningful' [citation] is perhaps the more useful yardstick to an appellate court for measuring the adequacy of the specification." (*Scala v. Jerry Witt & Sons, Inc.*, *supra,* at p. 366.) The specification of reasons does not satisfy this purpose. The order's references to "objectively ascertainable acts" could refer to any two or more of the several acts of misconduct raised by the new trial motion, including Mr. Abiog's remark about the Raiders and their owner as demonstrating a concealed bias; Ms. Hillman's telling the jury they had to vote the same way on related claims; Ms. Hillman's telling the jury that a fiduciary relationship between the parties could not exist as a matter of law; Ms. Hillman's writing her own version of the jury instructions on butcher paper taped to the wall; or Ms. Hillman's having private deliberations with another juror. We cannot

agree with the Raiders that the reference to "acts" necessarily means that the court found that the conduct of both Mr. Abiog and Ms. Hillman prejudiced them. In particular, the declarations asserted that Ms. Hillman committed multiple acts of misconduct. Without a more precise specification of reasons, we are left to speculate about the trial court's bases for granting a new trial.

These circumstances are no different than those in *McLaughlin v. City Etc. of San Francisco* (1968) 264 Cal.App.2d 310. There, the specification of reasons provided that the new trial granted on the ground of insufficient evidence to support an $8,000 verdict was "'based upon the failure of the Plaintiff to prove by a preponderance of the evidence reasonable total damages, both general and special . . . [in excess of $5,117.50] . . .'" (*Id.* at p. 315, italics omitted.) Though the appellate court could have speculated as to how the trial court reached its conclusion that there was insufficient proof of approximately $3,000 in damages, it declined to do so, explaining that the specification of reasons requirement "was designed to put an end to speculation of this nature, and we are not permitted to infer the trial court's reasons where we have not been told what they are." (*Id.* at p. 317, citing *Mercer v. Perez, supra,* 68 Cal.2d at p. 117.)

In sum, the specification of reasons merely restates the ground on which the new trial order was based. Moreover, it neither indicates it was the product of careful deliberation nor provides a basis for meaningful appellate review. "The failure to supply an adequate specification of reasons renders the new trial order defective, but not void." (*Thompson v. Friendly Hills Regional Medical Center, supra,* 71 Cal.App.4th at p. 550.) Where a new trial order is defective, "[t]he reviewing court remains under an express statutory duty to affirm such an order if the record will support any ground listed in the motion." (*Treber v. Superior Court, supra*, 68 Cal.2d at p. 134.) But before we address the grounds raised by the motion, we turn first to the appropriate standard of review.

2. Because the New Trial Order Fails to Provide an Adequate Specification of Reasons, We Must Independently Review the Grounds Advanced in the New Trial Motion.

As we acknowledged earlier, when a new trial order complies with the requirements of section 657, we review that order for an abuse of discretion. (*Lane v. Hughes Aircraft Co., supra*, 22 Cal.4th at p. 412.) At the other end of the spectrum, a defective new trial order—i.e., one that contains an inadequate specification of reasons—premised only on the ground of insufficient evidence or excessive or inadequate damages must be reversed as a matter of law. (§ 657; *Mercer v. Perez, supra*, 68 Cal.2d at p. 119.) The situation here, involving a defective new trial order premised on jury misconduct, lies somewhere in the middle. We conclude that independent review is an appropriate middle ground by which to determine whether there is any basis to affirm the new trial order in this case.

Our conclusion is based in large part on *Thompson v. Friendly Hills Regional Medical Center, supra*, 71 Cal.App.4th 544, which also involved an appeal from a new trial order granted on the ground of jury misconduct that lacked an adequate specification of reasons. There, the court stated: "We independently review all the grounds advanced for the new trial motion and will sustain the order 'if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons . . . .' (Code Civ. Proc., § 657.) That review includes searching the record, with the assistance of the party for whom the new trial was granted, 'to find support for any *other* ground stated in the motion . . . .' (*Mercer v. Perez, supra*, 68 Cal.2d at p. 119.) While we give 'considerable weight to the expressed opinion of the trial court' (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 749 [40 Cal.Rptr. 78, 394 P.2d 822]), we nonetheless exercise our own judgment, following our review of the record, to determine whether a new trial is legally required." (*Thompson v. Friendly Hills Regional Medical Center, supra*, at p. 550, fn. omitted.) In a footnote, the *Thompson* court distinguished the situation "where there is a specification of reasons for a new trial order based on jury

misconduct," explaining that such an order would be reviewed only for an abuse of discretion. (*Id*. at p. 550, fn. 6.)

Though earlier decisions did not articulate the appropriate standard of review as clearly as the *Thompson* court did, it is apparent that courts repeatedly have exercised their independent judgment to review defective new trial orders. (E.g., *Sanchez-Corea v. Bank of America, supra,* 38 Cal.3d at p. 905 ["If an order granting a new trial does not effectively state the ground or the reasons, . . . an order granting the motion will be affirmed if any such other ground legally requires a new trial"]; *Treber v. Superior Court, supra,* 68 Cal.2d at p. 136 ["the scope of review in such circumstances [where there is an inadequate specification of reasons] will encompass the entire record"].) As *Thompson* held and earlier decisions implied, independent review is essential to comply with the requirement of section 657 that a new trial order should be affirmed on any ground raised by the motion, "whether or not specified in the order or specification of reasons . . . ." (§ 657.) In addition to allowing the appellate court to address each ground raised by the new trial motion, independent review permits the appellate court to conduct a meaningful assessment of each ground in the absence of any guidance from the trial court as to its reasoning.

We do not agree with the NFL that a standard of review even less deferential than independent review is warranted under these circumstances. The NFL suggests that the trial court's failure to provide an adequate specification of reasons compels the Raiders, as the party moving for a new trial, to demonstrate on appeal that a new trial is required as a matter of law. To formulate this standard, the NFL relies on authority providing "'[w]here no grounds or reasons are specified in the order the burden is on the movant to advance any grounds upon which the order should be affirmed, and a record and argument to support it.'" (*Sanchez-Corea v. Bank of America, supra,* 38 Cal.3d at pp. 900, 906.) But this authority must be taken literally—that is, courts decline to review a ground not reached by the trial court where the moving party fails to offer any type of record on appeal that would permit the appellate court to affirm the order on that ground.

To illustrate, in *Gaskill v. Pacific Hosp. of Long Beach* (1969) 272 Cal.App.2d 128, the trial court granted a new trial motion on several grounds, but provided no specification of reasons. The appellant challenged the order for its failure to meet the requirements of section 657, providing only a clerk's transcript and no other record of the proceedings. (*Gaskill, supra,* at p. 129.) Reversing the order, the court explained the respondent's burden when a defective new trial order is challenged: "We hold that when the court states a ground or grounds for ordering a new trial but states no reason or a wholly insufficient reason for adopting the ground, the order must fail of validity unless the record on appeal shows the existence of some valid ground for a new trial which is stated in the motion. We also hold that in the present case a proper application of amended section 657 places the burden upon the respondents to furnish a reporter's transcript and that without a transcript we are forced to the conclusion that no valid ground for the order existed." (*Gaskill, supra,* at p. 133; see also *Tagney v. Hoy* (1968) 260 Cal.App.2d 372, 376-377 [same].) We decline to transmute a respondent's evidentiary burden into a burden of proof on appeal. The Raiders have provided an ample record and argument that will enable us to address the new trial grounds raised by the motion.

On the other hand, we do not agree with the Raiders that a standard more deferential than independent review should be applied to evaluate a defective new trial order. Applying an abuse of discretion standard of review to both new trial orders containing and lacking an adequate specification of reasons suggests that there should be no consequence for a trial court's failure to provide a specification of reasons and would effectively render that requirement meaningless. Though we acknowledge that comments in both *Treber v. Superior Court, supra*, 68 Cal.2d 128 and *Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862 suggest that an

abuse of discretion standard of review applies even when the order fails to provide a specification of reasons, we are not persuaded by this authority.[5]

In *Treber v. Superior Court, supra*, the court had no occasion to apply the abuse of discretion standard, as it denied a petition for writ of mandate to compel the trial court to vacate its new trial order and issued an alternative writ to construe the specification of reasons requirement in section 657. (68 Cal.2d at pp. 130-131.) Declaring that a specification of reasons need not include an explanation of why the trial court found an error prejudicial, the court observed that the factual question of prejudice must be reviewed for an abuse of discretion and that, therefore, "whether the particular explanation offered by the trial court supports the finding of prejudice" would not be determinative of the prejudice issue. (*Id*. at pp. 131-132.) The court thus discussed the abuse of discretion standard of review in the context of a hypothetical order containing a statement of reasons. We are not bound by dicta in a higher court opinion. (E.g., *County of San Bernardino v. Superior Court* (1994) 30 Cal.App.4th 378, 388.)

The court in *Hand Electronics, Inc. v. Snowline Joint Unified School Dist., supra*, affirmed a defective new trial order—one that failed to specify grounds—on the ground of erroneous jury instructions. (21 Cal.App.4th at pp. 867-868.) In doing so, the court recited the abuse of discretion standard of review. (*Id*. at p. 871.) However, the cases cited as authority for applying that standard all involved new trial orders containing adequate specifications of reasons.[6] (*Ibid*.; compare *Thompson v. Friendly Hills Regional Medical Center, supra*, 71 Cal.App.4th at p. 550, fn. 6 [applying independent standard of

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[5] The NFL also relies on *Malkasian v. Irwin, supra*, 61 Cal.2d 738, 747-749, where the court affirmed a new trial order that failed to specify grounds so as not to disturb the trial court's exercise of discretion. But the *Malkasian* decision construed the prior version of section 657, which did not contain the specification of reasons requirement. (See *Malkasian* at p. 744; see also Cal. Stats. 1939, ch. 713, p. 2234.) Therefore, *Malkasian* is of little assistance.

[6] See *Seimon v. Southern Pac. Transportation Co.* (1977) 67 Cal.App.3d 600, 604; *Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 345; *Christian v. Bolls* (1970) 7 Cal.App.3d 408, 415.

review to defective new trial order and expressly differentiating a case involving a new trial order containing an adequate specification of reasons].) Indeed, *Hand Electronics* illustrates the difficulty of applying an abuse of discretion standard to an order lacking a specification of reasons. There, following a detailed examination of the jury instruction at issue, the court stated: "Here, we find that the challenged instruction was ambiguous and likely misled the jury into awarding improper damages based on the replacement cost of the equipment. We find no abuse of discretion in the trial court's order granting a new trial on the basis of error in law." (21 Cal.App.4th at p. 871.) In essence, the *Hand Electronics* court appears to have conducted an independent review of the challenged instruction and thereafter found that there was no abuse of discretion because the trial court's conclusion mirrored its own.

Consistent with the reasoning of *Thompson v. Friendly Hills Regional Medical Center, supra,* 71 Cal.App.4th 544, we conclude that independent review is the appropriate standard of review for a new trial order containing an inadequate specification of reasons.[7]

3. The New Trial Order Cannot be Affirmed on the Ground of Juror Misconduct.

After examining the record, we conclude that a new trial was not required on the ground of juror misconduct.[8] On the basis of the conflicting juror declarations before us,

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[7] We are mindful of the Supreme Court's recent decision in *People v. Ault* (2004) 33 Cal.4th 1250, 1271-1272, which held that an order granting a new trial on the ground of prejudicial juror misconduct must be reviewed for an abuse of discretion, disapproving several cases that had held the question of prejudice should be independently reviewed. In *Ault*, however, there was no question about the sufficiency of the trial court's order granting the new trial, and thus the Supreme Court had no occasion to address the appropriate standard of review where an order lacks an adequate specification of reasons. (See *id*. at p. 1270 [trial court "rendered detailed factual findings leading to its determination that misconduct had occurred, and carefully analyzed the issue of prejudice"].)

[8] We note at the outset that we have confined our review of the juror declarations to those submitted with the moving and opposition papers. We consider those declarations

we cannot find that the conduct of Mr. Abiog, Ms. Hillman or Ms. Paulino—considered either in isolation or combination—constituted misconduct warranting a new trial.

a. Misconduct in the form of concealed bias.

According to the Raiders, Mr. Abiog's comment during deliberations that he "hated the Raiders," coupled with his response to a jury questionnaire during voir dire that he had no opinion about the Raiders, constituted evidence of a concealed bias against the Raiders. To warrant granting a new trial on the ground of a concealed bias, the court must "find that at the outset of the trial the juror as a 'demonstrable reality' [citation] was, because of a general bias against the plaintiff [citation] irrevocably committed to vote against the plaintiff regardless of the facts that might emerge in the trial [citation]." (*Johns v. City of Los Angeles, supra,* 78 Cal.App.3d at p. 996.) To enable the court to make this finding, the party moving for a new trial has the burden of establishing "that the controverted statements were made and that the juror[] who made them had in fact committed perjury on voir dire." (*Id*. at p. 991.)

The Raiders met their burden to show that Mr. Abiog made the statement purporting to reflect his concealed bias. Mr. Abiog admitted that during deliberations that he said he "hated the Raiders." Beyond that, however, the evidence was in sharp conflict. On the basis of this conflicting evidence, we conclude that the Raiders did not

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to the extent permissible under Evidence Code section 1150, which precludes the admission of evidence of jurors' subjective reasoning processes. (See *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 18 [even where evidence is admitted without objection, its legal effect is a matter for the appellate court]; see also *Tramell v. McDonnell Douglas Corp.* (1984) 163 Cal.App.3d 157, 171-172 ["Proof relating to the subjective reasoning process of any individual juror is not admissible and cannot be so considered"].) The failure of both the NFL and the Raiders to secure rulings on their respective evidentiary objections has waived any other evidentiary challenge to those declarations on appeal. (E.g., *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, fn. 1; *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1421.) Further, we have not considered the declarations submitted by the Raiders on reply, as they were untimely filed beyond the mandatory statutory time limit of 30 days following the filing of the notice of intent to move for a new trial. (§ 659a; *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1672 ["trial court has no discretion to admit affidavits submitted . . . [¶] [after] [t]he express limitation of section 659a"].)

meet their burden to show that Mr. Abiog was irrevocably committed to vote against the Raiders—in other words, that he committed perjury when he promised to be fair. (See *Johns v. City of Los Angeles*, *supra*, 78 Cal.App.3d at pp. 991, 995.)

The declarations submitted by the Raiders stated that, in the presence of the entire jury, Mr. Abiog said that he hated both the Raiders and their owner, Al Davis, and that he would never award the Raiders any money. One declarant qualified his statement, explaining: "[D]uring deliberations Mr. Abiog expressed strong opinions that were unfavorable to the Raiders. I could not tell whether he had formed these opinions before his jury service began, or whether he formed them from listening to the evidence and arguments during the trial." Also according to the Raiders' declarations, Mr. Abiog's statement resulted in another juror verbally confronting Mr. Abiog about the impropriety of his statement; this confrontation, too, occurred in the presence of the entire jury. In contrast, an approximately equal number of declarations submitted by the NFL stated that the jurors remembered neither Mr. Abiog's statement nor the confrontation. Those declarations stated that Mr. Abiog participated in the deliberations, supported his positions with reference to the evidence, and on occasion made jokes to relieve tension during the deliberations.

According to Mr. Abiog's declaration, he made "jokes or silly comments" during the deliberations when he "saw people yelling at each other or getting angry." Mr. Abiog declared that during one of these moments, "I said jokingly that I hated the Raiders 'because I lost my bet.' I mentioned that years earlier, I had gone to Las Vegas and placed a small, legal bet on the Raiders in a playoff game, which they lost." Mr. Abiog further declared that no one confronted him about this statement. He added that he did not make any negative comment—joking or otherwise—about the Raiders' owner.

When faced with such conflicting evidence, courts generally deny motions for a new trial. For example, in *Hasson v. Ford Motor Co.*, *supra*, 32 Cal.3d 388, defendant Ford moved for new trial, supported in part by two juror declarations stating that during deliberations jurors read and discussed newspaper articles concerning the case. The plaintiff submitted other juror declarations denying the presence of the articles and any

related discussions. (*Id*. at pp. 409-410.) Finding the denial of Ford's new trial motion proper under these circumstances, the court stated: "It does not appear that Ford met its burden of establishing misconduct due to the improper reception of evidence. Although the two affidavits it presented constitute a prima facie showing of misconduct, they are directly rebutted in all important respects by a number of counterdeclarations. The trial court correctly declined to settle this 'battle of the juror declarations' in Ford's favor by granting a new trial." (*Id*. at p. 410; see also *Thompson v. Friendly Hills Regional Medical Center, supra,* 71 Cal.App.4th at pp. 550-551 [motion for new trial should have been denied where contradictory juror declarations, taken as a whole, failed to show that jurors expressly or impliedly agreed to inflate the verdict to include attorney fees]; *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1237-1238 [motion for new trial properly denied where the jury foreman and fellow jurors discussed the damage award being reduced by the judge, but the affidavits conflicted as to what role the foreman played in the discussion and what was said]; *Tillery v. Richland* (1984) 158 Cal.App.3d 957, 972-977 [motion for new trial properly denied where affidavits describing statements amounting to juror misconduct and concealed bias were rebutted by affidavits submitted by the accused jurors and where trial court would have been required to speculate as to whether the alleged statements were indicative of any preexisting bias].)

Guided by this authority, we decline to settle the conflicts in the admissible evidence in favor of granting a new trial. We are not persuaded by the authority cited by the Raiders, as each of those cases involved uncontradicted evidence establishing juror misconduct. (See *Enyart v. City of Los Angeles, supra,* 76 Cal.App.4th at pp. 510-511 [declarations established that negative attitudes expressed by majority jurors were based on bias where those jurors responded with "imperfect denials"]; *Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679-1680 [new trial required where there was "no doubt juror misconduct occurred" on the basis of multiple, unrefuted juror declarations stating that one juror discussed a newspaper article about the case with other jurors], overruled on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41; *Smith v. Covell* (1980) 100 Cal.App.3d 947, 952-954 [jury

misconduct established on the basis of "uncontradicted" juror declarations]; *Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 365 [juror declaration submitted in response to multiple declarations charging bias not a "complete and categorical denial of all of the charges"]; *People ex rel. Dept. of Pub. Wks. v. Curtis* (1967) 255 Cal.App.2d 378, 391-392 ["evidence before the trial court was uncontradicted" that juror concealed on voir dire that he had an opinion which could tend to prejudice his judgment of the case and that during deliberations he provided the jury with outside information concerning an expert witness's qualifications]; *Deward v. Clough* (1966) 245 Cal.App.2d 439, 443 [no counteraffidavit filed in response to affidavits outlining misconduct].)

Here, in contrast, several juror declarations categorically refuted any charge of misconduct. Construing the juror declarations as a whole, we cannot conclude that Mr. Abiog perjured himself during voir dire and was irrevocably committed to vote against the Raiders regardless of the evidence presented at trial. (See *Johns v. City of Los Angeles, supra,* 78 Cal.App.3d at p. 995.) According to Mr. Abiog's declaration, the comment against the Raiders was made as part of a joke. Other jurors confirmed that Mr. Abiog would occasionally make jokes to ease the tension during deliberations. Though some declarations stated that Mr. Abiog's comment resulted in a dramatic confrontation witnessed by the entire jury, several jurors declared that they neither heard Mr. Abiog's comment nor witnessed any type of confrontation.[9] The failure of some jurors either to hear or to recall the comment or any reaction to it is consistent with it being made in an offhand manner, as part of a joke. Moreover, even one of the Raiders' declarants who stated that "Mr. Abiog did not hide the fact that he was biased against the Raiders" later tempered his statement by adding that he "could not tell whether he [Mr. Abiog] had

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[9] Similar to the court in *Hasson v. Ford Motor Co., supra,* which expressed surprise at the fact that no one involved in the trial reported or noticed the purported juror misconduct, we find it curious that no juror reported the confrontation where a juror contended that Mr. Abiog's concealing his bias against the Raiders could result in a mistrial. (32 Cal.3d at p. 411, fn. 6.)

formed these opinions before his jury service began, or whether he formed them from listening to the evidence and arguments during the trial."

On the basis of this record, we find that the Raiders failed to establish that a new trial was required because Mr. Abiog concealed a preexisting bias against the Raiders.

b. Misconduct in the form of outside information.

The Raiders' juror declarations charged Ms. Hillman, an attorney, with several related acts of misconduct. Specifically, they claimed that she wrote out statements of the law that differed from the jury instructions and taped them to the wall. They further claimed she told the jurors what could and could not be considered as evidence in the case, that there could be no fiduciary relationship between the NFL and the Raiders as a matter of law, that Resolution FC-7 could not be a contract as a matter of law, and that if the jurors voted one way on a claim they had to vote the same way on a different claim. Juror declarations submitted by the NFL refuted each of these charges.

A juror should not "'discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct.' (*In re Malone* (1996) 12 Cal.4th 935, 963 [50 Cal.Rptr. 281, 911 P.2d 468].)" (*McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 263.) By the same token, extraneous law entering the jury room—"i.e., a statement of law not given to the jury in the instruction by the court"—constitutes misconduct. (*Young v. Brunicardi* (1986) 187 Cal.App.3d 1344, 1350.) Thus, a new trial would be required if the Raiders established that Ms. Hillman used her professional expertise to instruct the jury in a manner contrary to the court's instructions to the jury.

Again, however, the evidence sharply conflicts with respect to Ms. Hillman's conduct. In response to three jurors' charge that Ms. Hillman wrote and taped to the wall statements of the law that were not quotations from the jury instructions, three other jurors (including Ms. Hillman) declared that she and other jurors wrote out verbatim

pertinent phrases and sentences from the instructions.[10] Though the Raiders contend that there could be no possible reason for Ms. Hillman simply recopying the jury instructions, another juror explained the process in detail: "After the instructions were copied onto the butcher paper, the jury, as a group, went through the documents and the testimony and tried to write beneath each instruction information from those materials that seemed to be helpful in deciding a particular instruction."

Similarly, in response to two jurors' assertion that Ms. Hillman stated what evidence could and could not be considered admissible, Ms. Hillman declared that she neither used her "position as an attorney to make pronouncements about the evidence" nor "opine[d] whether certain facts were or were not in evidence 'as a matter of law.'" Likewise, while three jurors asserted that Ms. Hillman told the jury that Resolution FC-7 could not be a contract as a matter of law and that there could be no fiduciary relationship between the NFL and the Raiders as a matter of law, Ms Hillman responded: "At no time during deliberations did I say that Resolution FC-7 could not be a contract 'as a matter of law,' nor did I express an opinion as to whether a fiduciary duty could have been created 'as a matter of law.'" Consistent with this response, three other jurors declared that Ms. Hillman repeatedly stated that the verdict must be based on the instructions given and the evidence in the case, while a fourth declared that Ms. Hillman did not try to tell the jury what the law was. With respect to the fiduciary duty claim, one juror specifically recalled that Ms. Hillman stated that the jury should get written clarification from the court and, as a result, sent a written question to the court. Finally, Ms. Hillman denied the charge by four jurors that she said the jury had to vote the same way on all the Raiders' claims, stating that she and other jurors wrote out verbatim language from the jury instructions identifying the elements of each claim so that all claims could be considered.

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[10] The Raiders contend that even if Ms. Hillman only excerpted pertinent portions of the jury instructions, she committed misconduct by using her professional expertise to highlight what she considered significant. But at least one declaration indicated that the jurors collectively decided what was pertinent and that several jurors in addition to Ms. Hillman helped to copy the instructions.

That the evidence of misconduct is controverted distinguishes this case from each of those relied on by the Raiders, which, again, all involved uncontroverted evidence of misconduct. For example, *McDonald v. Southern Pacific Transportation Co., supra,* 71 Cal.App.4th 256, involved a personal injury action against a railroad company. In support of the plaintiff's new trial motion, a juror declared that another juror who was a transportation expert opined during deliberations that it would have been impractical to install security gates at the location of the accident because they would trigger sensors. No evidence of sensors, however, had been introduced. (*Id.* at p. 262.) Specifically noting that each of the other declarations submitted both in support of and opposition to the motion confirmed the juror's statement to some extent and none contradicted it, the court held that the juror committed misconduct by interjecting an expert opinion about a matter that was not based on the evidence presented at trial. (*Id.* at pp. 262-263; see also *People v. Honeycutt* (1977) 20 Cal.3d 150, 154-155 & fn. 1 [misconduct warranting new trial based on uncontradicted evidence that foreman discussed case with attorney during deliberations]; *Jones v. Sieve, supra,* 203 Cal.App.3d at pp. 366-367 [misconduct warranting new trial based on an uncontradicted declaration establishing that one juror communicated to the other jurors her own experience concerning a pivotal issue and that another juror defined a relevant term by reference to an outside source rather than the evidence produced at trial]; *Young v. Brunicardi, supra,* 187 Cal.App.3d at p. 1349 [misconduct warranting new trial based on juror declarations stating that juror who was a retired police officer said that jurors needed to see the police report in order to determine negligence; declarations deemed unrefuted by officer's counterdeclaration conceding that "'[s]ome jury members, including myself, also felt that important evidence had not been produced, including a police report'"]; *Smith v. Covell, supra,* 100 Cal.App.3d at p. 952 [misconduct warranting new trial based on uncontradicted juror declarations detailing several acts of misconduct, including an account of one juror's experience with a medical condition similar to the plaintiff's].)

Unlike the declarations submitted in *In re Stankewitz* (1985) 40 Cal.3d 391, the conflicting declarations here cannot be reconciled. There, two jurors declared that

another juror advised that he had been a police officer for over 20 years; that as a police officer he knew the law; that the law provides a robbery takes place as soon as a person forcibly takes personal property from another person, whether or not he intends to keep it; and that therefore the petitioner committed a robbery when he took property at gunpoint, regardless of whether he intended to keep it. (*Id*. at p. 396.) The court found that subsequent declarations submitted by the same two jurors failed to undermine the determination that serious misconduct had occurred, as they addressed only what the juror might have meant by his comments and attempted to put his comments in a factual context. (*Id*. at pp. 400-401.) Significantly, the court commented that the declarations established that the juror "made the statements, and neither evidence nor argument is offered to show that he did not." (*Id*. at p. 401.)

Here, in contrast, the evidence conflicts as to whether Ms. Hillman actually made the statements amounting to misconduct. In view of this conflicting evidence, we do not believe that the Raiders met their burden to establish misconduct. (See, e.g., *Hasson v. Ford Motor Co., supra,* 32 Cal.3d at p. 410; *Thompson v. Friendly Hills Regional Medical Center, supra,* 71 Cal.App.4th at pp. 550-551.) While we need not resolve these evidentiary conflicts in order to conclude that a new trial is unwarranted, we note that we find the Raiders' juror declarations less persuasive in view of their remarkable similarity. (See *Estate of Vetter* (1930) 110 Cal.App. 597, 601 [trial court could skeptically view testimony that related facts in almost identical words and with the same level of detail].) We further note that statements in the NFL's juror declarations regarding Ms. Hillman's directing the jury to send questions to the court to obtain clarification are corroborated by the multiple, detailed written questions that the jury submitted during deliberations. Consistent with two of the NFL's juror declarations, two of those questions directly addressed the issue of whether a fiduciary obligation can run between more than two parties. Accordingly, we conclude that the Raiders' submission of contradicted, uncorroborated evidence of misconduct on the part of Ms. Hillman does not justify a new trial.

c. Misconduct in the form of language difficulty and private conversations.

Several of the Raiders' juror declarations indicated that Ms. Paulino, a juror who was brought in to replace an excused juror, had difficulty understanding English and engaged in private conversations with other jurors during deliberations. In contrast, juror declarations submitted by the NFL stated that Ms. Paulino actively participated in the jury deliberations and that, on occasion, she would ask jurors for help to understand items that had been discussed before she joined the jury. Those conversations, however, were open to all jurors.

We need not consider whether this evidence established misconduct, as the Raiders have not asserted in their brief that any action on Ms. Paulino's part amounted to misconduct.[11] They have therefore waived this claim on appeal. (See, e.g., *Bonshire v. Thompson* (1997) 52 Cal.App.4th 803, 808, fn. 1.) But even if we were to consider the Raiders' claim on the merits, we would conclude that they failed to meet their burden to establish misconduct. Though the evidence seemingly conflicted as to whether Ms. Paulino spoke fluent English, the weight of the evidence—including the NFL's declarations and Ms. Paulino's juror questionnaire and voir dire examination—established her English fluency. Moreover, the evidence concerning private conversations between Ms. Paulino and other jurors fell short of establishing misconduct. As the court in *People v. Majors* (1998) 18 Cal.4th 385, 425, explained: "Absent concrete evidence as to the content of the jurors' discussions or the nature of their opinions, the record fails to establish misconduct. . . . '[W]hen jurors are observed to be talking among themselves it will not be presumed that the act involves impropriety, but in order to predicate misconduct of the fact it must be made to appear that the conversation had improper reference to the evidence, or the merits of the case.'"

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[11] We attribute the Raiders' failure to challenge Ms. Paulino's language competency to their desire to rely on her untimely declaration submitted in reply to the motion for new trial.

Because the Raiders did not meet their burden to establish juror misconduct, the new trial order cannot be affirmed on that ground.

4. The New Trial Order Cannot be Affirmed on the Ground of Erroneous Jury Instructions.

In their motion for a new trial, the Raiders also asserted that several erroneous jury instructions prejudiced their right to a fair trial. First, the Raiders challenged Instruction 73-A, which permitted the jury to find that a March 1989 settlement agreement and release covered the Raiders' claims to rights in Los Angeles. They contended that the release did not extend to matters occurring after its execution, that interpretation of the release was a question of law that should not have been submitted to the jury, that the release should not have been put in issue because the NFL did not raise it as an affirmative defense, and that, even if applicable, the release expressly exempted the Raiders' claims raised by this action. Second, the Raiders asserted that the court misstated the law when it instructed the jury (Instruction 86) that lost profits could be awarded to the Raiders only if they proved that they were "ready, willing and able" to complete the proposed transaction but for the NFL's breach. Third, the Raiders asserted that Instruction 45-A, which permitted the jury to determine whether 1995 Resolution FC-7 constituted a binding contract, was prejudicially erroneous because the resolution was a contract as a matter of law and the NFL was estopped to claim otherwise. Finally, the Raiders contended that the trial court should not have given an unclean hands instruction (Instruction 73) because the NFL did not raise unclean hands as an affirmative defense and because the instruction was an incomplete statement of the law.

According to section 657, an order granting a new trial "shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons . . . ." Thus, we are required to determine whether the new trial order may be affirmed on the ground of instructional error. (See *Sanchez-Corea v. Bank of America, supra,* 38 Cal.3d at p. 905.)

"'The grant of a new trial is a proper remedy for the giving of an erroneous jury instruction when the improper instruction materially affected the substantial rights of the

aggrieved party. [Citation.]'" (*Maher v. Saad* (2000) 82 Cal.App.4th 1317, 1325.) Whether an instruction is erroneous presents a question of law that we independently review. (*Conner v. Southern Pacific Co.* (1952) 38 Cal.2d 633, 637.) An instruction that correctly states the law affords no basis for a new trial. (*Ibid.*; accord, *Brandelius v. City & County of S.F.* (1957) 47 Cal.2d 729, 747; *Dabis v. San Francisco Redevelopment Agency* (1975) 50 Cal.App.3d 704, 710.) We conclude that each of the challenged instructions correctly stated the law, and therefore presents no basis for reversal. In view of our conclusion, we need not reach the issue of whether any of the instructions was prejudicial.[12]

a. Instruction 73-A concerning the effect of a prior release and settlement agreement correctly stated the law.

In Instruction 73-A, the trial court instructed the jury as follows: "A release is the abandonment, relinquishment, or surrender of a known right or claim. A release extinguishes any claim that is within its scope. Releases are binding contracts and may be enforced in the same way as other contracts. [¶] In this case, there is a release contained within Trial Exhibit 1051, that is the March 4, 1989 Settlement Agreement and Special Release. If you find that the release covered the Raiders' claims to rights in Los Angeles, you may find that the Raiders released their claims against the NFL, in which case the Raiders would not be entitled to recover damages on their Los Angeles Opportunity claims, [sic] of breach of contract and violation of implied covenant." In essence, the instruction permitted the jury to find that the Raiders had previously released the NFL from liability for the Los Angeles opportunity claims.

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[12] Where an instruction is erroneous, a new trial may be ordered only if the erroneous instruction prejudicially affected the verdict. To ascertain prejudice, courts consider several factors, including "'(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's argument, and (4) any indications by the jury itself that it was misled.'" (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983.) Because the trial court did not exercise its discretion to grant the new trial motion on the ground of prejudicial instructional error, we would be required to examine the question of prejudice independently. (See *Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 907.)

The release referenced in Instruction 73-A was part of a March 1989 settlement agreement between the Raiders and the NFL that resolved all disputes and controversies raised by a prior action entitled *Los Angeles Memorial Coliseum Commission v. National Football League, et al.*, No. CV 78-3523-TJH (GHKx) (C. D. Cal.). In pertinent part, the release provided: "The Raiders hereby forever release and discharge the National Football League, . . . from any and all causes of action, actions, money judgments (but not the injunction entered in the Action on June 14, 1982), liens, indebtedness, damages, losses, claims, liabilities and demands of whatever kind and character, including, but not limited to, any claims in any manner whatsoever arising from or attributable to, the Action, the Raiders' move from Oakland to Los Angeles, or to any other matter or event occurring prior to the date hereof . . . ." The release also contained a waiver of Civil Code section 1542.[13]

The Raiders contend that the giving of Instruction 73-A was erroneous for four separate reasons; they further assert that each of the errors prejudicially affected the verdict.

First, the Raiders argue that, as a matter of law, the release could not have barred the claims raised in this action because they arose subsequent to the execution of the release. To the contrary, nothing bars parties from releasing each other from liability for future conduct. (See, e.g., *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 162-163.) For example, in *Winet v. Price* (1992) 4 Cal.App.4th 1159, the parties "release[d] each other from *all* claims, known or unknown, suspected or unsuspected, arising from" the facts of a settled case. The court held that this release barred an action brought 15 years later that involved claims arising from the partnership agreement at issue in the settled case. (*Id*. at pp. 1166-1169.) The only judicially imposed limitation on such releases precludes exculpatory provisions in contracts that

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[13] Civil Code section 1542 provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

affect the public interest. (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 96.) There is no suggestion here that the release in any way affected the public interest. (See *id*. at pp. 98-101.) Accordingly, the Raiders and the NFL were free to enter into a release that involved "any claims," including future claims, "in any manner whatsoever arising from or attributable to" the prior action or the earlier Raiders' move to Los Angeles.

Second, the Raiders argue that the release is void as against public policy under Civil Code section 1668, which states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility from his own fraud, or willful injury to the person or property of another, . . . are against the policy of the law." Courts have construed Civil Code section 1668 to preclude a party from entering into a release of liability for fraudulent or intentional acts, or violations of statutory law. (*Baker Pacific Corp. v. Shuttles* (1990) 220 Cal.App.3d 1148, 1153; *Blankenheim v. E. F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1471; compare, *YMCA of Metropolitan Los Angeles v. Superior Court* (1997) 55 Cal.App.4th 22, 27 ["'[N]o public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party . . . .'"].) Though the Raiders try to characterize their Los Angeles opportunity claims as those that cannot be released according to Civil Code section 1668 by arguing that the NFL's conduct was 'intentional," the record belies their efforts. The Raiders alleged claims for breach of contract and breach of the implied covenant related to the Los Angeles opportunity. Moreover, the trial court instructed the jury on claims for breach of contract and breach of the implied covenant in connection with the Los Angeles opportunity dispute. The Raiders did not bring a claim for fraud or any other type of intentional conduct related to the Los Angeles opportunity. Because Instruction 73-A permitted the jury to apply the release only to the Los Angeles opportunity claims, Civil Code section 1668 has no application to the challenged instruction. (See *Baker Pacific Corp. v. Shuttles, supra,* at p. 1156.)

Third, the Raiders assert that Instruction 73-A was erroneous because the scope of the release was a question of law that the trial court—not the jury—should have resolved. We acknowledge that "[c]ontract principles apply when interpreting a release, and 'normally the meaning of contract language, including a release, is a legal question.'" (*Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1356.) But contract principles also dictate that where a release is ambiguous, extrinsic evidence is admissible to aid in its interpretation. (*Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554.) "An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing." (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360; accord, *Benedek v. PLC Santa Monica*, *supra*, at p. 1357.) In the event that extrinsic evidence does not eliminate the ambiguity or if the evidence is contested, an issue of fact arises. (*Solis v. Kirkwood Resort Co.*, *supra*, at p. 361; cf. *Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 590 [denial of summary judgment correct where release was ambiguous]; *Hohe v. San Diego Unified Sch. Dist.* (1990) 224 Cal.App.3d 1559, 1568 ["Where the intention of the parties on the face of the releases is ambiguous, a triable factual issue is presented"].)

Here, the release was ambiguous on its face to the extent it did not explicitly include or exclude all future claims concerning the Los Angeles opportunity. It is semantically reasonable to construe language releasing the NFL from liability for "any claims in any manner whatsoever arising from or attributable to" the prior action involving the Raider's move to Los Angeles to encompass future claims involving the Los Angeles opportunity. On the other hand, it is also reasonable to construe that language together with the phrase immediately following—"or to any other matter or event occurring prior to the date hereof"—as reflecting an intent to limit the release to preexisting claims. Though the Raiders' Civil Code section 1542 waiver weighs in favor of the former construction, the parties' failure expressly to release future claims renders the release ambiguous on the point. (Compare *Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1163.)

Moreover, the extrinsic evidence failed to resolve the ambiguity. According to the Raiders, the release could not be construed to extend to claims concerning the Los Angeles opportunity because, by way of the settlement agreement containing the release, the Raiders paid the NFL for the Los Angeles opportunity. In other words, the same document that created the Raiders' right to the Los Angeles opportunity could not be construed to simultaneously release all claims stemming from that opportunity. Mr. Davis, the Raiders' owner, testified that the payment was consistent with the NFL's custom and practice either to provide or receive compensation when teams move to smaller or larger markets, respectively. On the other hand, Mr. Tagliabue, the NFL commissioner, testified that the parties intentionally drafted the release broadly to extinguish any claims related to the Raiders' move to Los Angeles. He disputed that the settlement involved a payment for the Los Angeles opportunity, asserting that the difference between the settlement payment and tentative award to the Raiders was the result of multiple factors that went into the settlement negotiations and the settlement of multiple claims. Consistent with this testimony, the Raiders' financial statements for the years 1988 and 1989 did not reflect any payment for a franchise opportunity. As this evidence did not resolve the scope of the release, Instruction 73-A properly asked the jury to determine the release's effect. (See *Solis v. Kirkwood Resort Co.*, *supra*, 94 Cal.App.4th at pp. 360-361.)

Finally, the Raiders maintain that the trial court erroneously gave Instruction 73-A because the NFL failed to plead the release as an affirmative defense. But the Raiders' complaint expressly relied on the release as the predicate to their right to the Los Angeles opportunity. The release was therefore not "new matter" required to be alleged as an affirmative defense. (Code Civ. Proc., § 431.30, subd. (b)(2); *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 424.) In any event, the Raiders maintained at trial that their claim to the benefit of the Los Angeles opportunity stemmed from the settlement agreement and release. Mr. Davis specifically testified that he believed that the $46 million difference between the judgment and the NFL's settlement payment equaled the Raiders' payment for the Los Angeles opportunity. Thus, even if

the NFL were required to plead the release as an affirmative defense, the trial court effectively permitted the NFL to amend its answer to conform to proof by allowing the jury to determine the effect of the release. (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 989; see also *Buxbom v. Smith* (1944) 23 Cal.2d 535, 543.)

We conclude that the trial court did not err in giving Instruction 73-A concerning the release.

b. Instruction 86 concerning damages for future lost profits correctly stated the law.

In their fifth and sixth causes of action for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing, respectively, the Raiders sought to recover damages in the form of lost profits resulting from their inability to play at a new Hollywood Park stadium. Following other instructions concerning the lost profits sought in connection with those claims, the trial court also instructed the jury (Instruction 86): "If future loss of profits are sought with respect to a proposed contract or business venture, a plaintiff must prove that it was ready, willing and able to complete the proposed transaction but for the alleged breach of contract or breach of fiduciary duty by Defendant."

The Raiders complain that this instruction erroneously imposed the additional element that they be "ready, willing and able" to perform on their breach of fiduciary duty and implied covenant claims. But this instruction addressed damages, not liability. The trial court did not instruct the jury that the Raiders' being ready, willing and able to perform was required to establish liability for either breach of fiduciary duty or breach of the implied covenant of good faith and fair dealing.[14] Rather, the "ready, willing and

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[14] With respect to the elements of the Raiders' breach of fiduciary duty claim, the trial court instructed that the Raiders had the burden to establish: "The existence of a fiduciary relationship; a breach of that [fiduciary] relationship; and damage to plaintiff legally caused by that breach." The trial court further instructed the jury that, in order to prove their claims for breach of the implied covenant of good faith and fair dealing, the Raiders had the burden of showing: "The existence and terms of the contract; that the Oakland Raiders performed all material obligations under the contract; that the NFL

able" requirement was limited to the Raiders' ability to recover damages flowing from a prospective contract or business venture.

Instruction 86 correctly stated the law. The Supreme Court in *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-693, explained that the recovery of prospective lost profits is contingent on the plaintiff's ability to establish such loss with reasonable certainty: "[A]nticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." Thus, "'lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. [Citation.] It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. [Citations.]'" (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 884.)

In applying this standard, courts conclude that plaintiffs seeking recovery of prospective lost profits must demonstrate, to a level of reasonable certainty, that they would have been able to earn such profits. For example, in *Kerner v. Hughes Tool Co.* (1976) 56 Cal.App.3d 924, the court affirmed an award of lost profits resulting from breach of a contract to produce a musical where the "[p]laintiff an experienced entertainer, agent, and producer established his ability to complete his obligations under the contract." (*Id*. at p. 937; see also *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 494.) On the other hand, courts find that plaintiffs are not entitled to lost profits awards where they fail to show they could have performed. (See, e.g., *S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 537; *Engle v. City of Oroville* (1965) 238 Cal.App.2d 266, 274.) According to this authority, the jury should find that a plaintiff is ready, willing and able to perform in order to award damages in the form of prospective lost profits.

Moreover, in determining whether a jury instruction is erroneous, we must consider the instructions as a whole. (*Smith v. Brown-Forman Distillers Corp.* (1987)

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violated a covenant of good faith and fair dealing implied in the contract; that the NFL's failure to perform was the actual and substantial cause of the Oakland Raiders' asserted injury; and the nature and extent of the Oakland Raiders' damages."

196 Cal.App.3d 503, 514.) Instruction 86 plainly did not address the NFL's liability for either breach of fiduciary duty or breach of the implied covenant of good faith and fair dealing. Rather, it appeared toward the end of the damage instructions—which the jury was instructed to consider only if it found for the Raiders on one or more of the causes of action—and followed several other instructions concerning the Raiders' ability to recover damages in the form of lost profits. Thus, both on its face and particularly when placed in the context of the instructions as a whole, Instruction 86 accurately stated the law concerning the recovery of prospective lost profits.

c. Instruction 45-A concerning the effect of 1995 Resolution FC-7 correctly stated the law and was supported by the evidence.

In the midst of several jury instructions addressing contract formulation and interpretation, the trial court instructed the jury with Instruction 45-A, which provided: "If parties agree that the terms of a proposed contract are to be reduced to writing and signed by them before it is to be effective, there is no binding agreement until that written contract is signed. [¶] In this case, there is a dispute as to whether 1995 Resolution FC-7 (Trial Exhibit 219) required the parties to reduce the terms of their agreement to a written contract before it would become binding. If you find that the parties intended that 1995 Resolution FC-7 would not be binding until they reached a written agreement on the contractual terms, then you may not find that the NFL owed any obligations under this resolution. [¶] Whether it is the intention of the parties that the agreement should be binding at once, or when later reduced to writing, or to a more formal writing, is an issue of fact, and is to be determined by reference to the words the parties used, as well as upon all of the surrounding facts and circumstances."

The Raiders contend that this instruction was erroneous because it misstated the law and was unsupported by the facts. We reject both contentions. The instruction correctly stated the law and the evidence—including the text of Resolution FC-7 and Mr. Davis's testimony—supported the giving of the instruction.

Because the Raiders' contentions are necessarily intertwined, we address them together. The Raiders first assert that Instruction 45-A misstated the law as it related to

Resolution FC-7 because that resolution constituted a contract as a matter of law. They rely on the proposition that "'"[t]he constitution, rules, and by-laws of a voluntary unincorporated association constitute a contract between the association and its members."'" (*American Society of Composers, Authors & Publishers v. Superior Court* (1962) 207 Cal.App.2d 676, 689; accord, *DeMille v. American Fed. of Radio Artists* (1947) 31 Cal.2d 139, 147.) While that is a correct statement of the law, Instruction 45-A did not address the binding nature of the NFL's constitution or bylaws. Rather, the question before the jury involved the parties' intent with respect to Resolution FC-7, which the NFL enacted in accordance with the manner in which it makes decisions pursuant to its bylaws.

In this regard, the concluding language of Resolution FC-7 is particularly instructive: "FURTHER RESOLVED, that . . . (4) [If] the foregoing arrangements are not reduced to fully binding agreements by July 1, 1995 or such later date as the Commissioner shall determine, all of the foregoing resolutions shall be null and void and of no force or effect without any further action by the League." Given this qualification, Instruction 45-A properly asked the jury to determine whether the parties intended for Resolution FC-7 to constitute a binding contract. As explained in *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, whether a writing constitutes a final agreement or instead merely an agreement to enter into an agreement depends primarily on the intent of the parties. "Where the writing at issue shows 'no more than an intent to further reduce the informal writing to a more formal one' the failure to follow it with a more formal writing does not negate the existence of the prior contract. [Citation.] However, where the writing shows it was not intended to be binding until a formal written contract is executed, there is no contract. [Citation.]" (*Id.* at p. 307; see also *Frankenheimer v. Frankenheimer* (1964) 231 Cal.App.2d 101, 108 [question of fact whether parties intended that contract exist between them or that contract would not exist until a writing evidencing its terms was executed].)

The Raiders also complain that Instruction 45-A misstated the law by modifying BAJI No. 10.58, from which the instruction originated. The omitted second sentence of

BAJI No. 10.58 provides: "This rule does not mean that a contract already reduced to writing, and signed, is of no binding force merely because it contemplates a subsequent and more formal instrument." (BAJI No. 10.58.) Below, however, the Raiders did not object to the giving of Instruction 45-A on this ground and therefore failed to preserve this contention for appeal. (E.g., *Rivera v. Parma* (1960) 54 Cal.2d 313, 316; *Chapman v. Enos* (2004) 116 Cal.App.4th 920, 927-928.) In any event, other portions of Instruction 45-A instruction properly informed the jury that it had the option of determining that FC-7 was a binding agreement even though it contemplated an additional writing. Omitting the sentence appearing in BAJI No. 10.58 did not render the instruction either erroneous or misleading.

Finally, the Raiders assert that the evidence did not support giving Instruction 45-A because the NFL had treated Resolution FC-7 as a binding agreement. We see nothing in the record, however, that conclusively demonstrates that either the NFL or the Raiders viewed Resolution FC-7 as a binding contract. Rather, by its own terms, Resolution FC-7 "prescribed the conditions for the award of one or two Super Bowls to be played at the proposed Hollywood Park stadium." Moreover, Mr. Tagliabue's testimony indicated that the NFL viewed the resolution as prescribing certain conditions necessary for a Super Bowl award, including that the NFL negotiate with the Raiders and Hollywood Park concerning the option of a second team playing at the proposed stadium. Mr. Davis concurred, stating that: "I viewed the resolution as not deciding anything with finality but, rather, as conditional in every respect and as to every detail." In response to the question, "You viewed the resolution as not deciding anything with finality; isn't that right?" Mr. Davis further responded: "Yes. And I was hoping that things would change so that we could go ahead with the Hollywood Park situation." He believed that by voting to approve Resolution FC-7 the Raiders were agreeing "to act in good faith and

hope that everyone else would act in good faith and that you would negotiate with the Raider[s] just as you said you would." [15]

In view of the language of Resolution FC-7 and the parties' testimony concerning its effect, Instruction 45-A correctly stated the law by permitting the jury to determine whether the parties intended for FC-7 to be a binding agreement.

d. Instruction 73 concerning the defense of unclean hands correctly stated the law.

Instruction 73 informed the jury of the NFL's unclean hands defense, providing: The "defendant claims that the Oakland Raiders engaged in misconduct with respect to their move to Oakland and that, as a result, they are not entitled to be compensated for moving to Oakland. To establish this defense, the NFL must prove by a preponderance of the evidence that the Oakland Raiders' failure to seek compensation at the time they sought and obtained approval for a move to Oakland was unconscionable and resulted in prejudice to the NFL." Though the Raiders wage multiple attacks on this instruction, we conclude that the instruction correctly stated the law and the trial court did not err in giving it.

Initially, the Raiders contend that the trial court should not have given Instruction 73 because the NFL did not plead unclean hands as an affirmative defense. But, as explained in *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, the defense of unclean hands "must be pleaded *or* called to the attention of the trial court in order that it may pass on the defense and also to permit the person against whom it is sought to be applied the opportunity to present such evidence as might bear on that issue." (*Id.* at p. 726, italics added.) Here, the NFL called the

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[15] This evidence likewise undermines the Raiders' claim that the NFL is estopped to claim that Resolution FC-7 is not a binding contract. *Lemat Corp. v. American Basketball Assn.* (1975) 51 Cal.App.3d 267, on which the Raiders rely, is inapposite. There, the court held that the defendant was estopped to deny that a resolution was a binding agreement because the vote was invalid. The evidence showed that all parties had treated the agreement as binding for a number of years and the defendant had obtained significant benefits from the agreement. (*Id*. at pp. 275-277.) Here, in contrast, all parties viewed Resolution FC-7 as conditional in nature and acted accordingly.

matter to the trial court's attention by submitting a jury instruction on the issue approximately two months before trial began. Thus, the NFL's failure to plead unclean hands is not a bar to Instruction 73.[16]

Next, the Raiders contend that Instruction 73 misstated the law by omitting the requirement that the Raiders' unclean hands must be "directly related" to the Raiders' claims in order to constitute a bar to recovery. (E.g., *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1742-1743.) We discern no error. Instruction 73 plainly explained to the jury that the NFL contended the Raiders "engaged in misconduct with respect to their move to Oakland"; that the asserted misconduct was "the Oakland Raiders' failure to seek compensation at the time they sought and obtained approval for a move to Oakland"; and that, if proven, this conduct would bar the Raiders from being "compensated for moving to Oakland." The instruction properly and sufficiently informed the jury that the unclean hands defense required the NFL to establish misconduct involving the Raider's move to Oakland that was related to the Raiders' claims for compensation for that same move.[17]

Finally, the Raiders claim that Instruction 73 was erroneous because it was not supported by the evidence. To the contrary, the NFL offered ample evidence demonstrating that the Raiders did not disclose their intention to seek millions in compensation for their relocation to Oakland before the NFL voted on the move. According to the NFL's evidence, the Raiders did not make their claim to be

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[16] We acknowledge that cases such as *Verbeck v. Clymer* (1927) 202 Cal. 557, 561, and *Dorn v. Baker* (1892) 96 Cal. 206, 209, require the pleading of equitable defenses. Following those cases, however, the law has developed to extend the defense of unclean hands to legal actions. (E.g., *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 620; *Pond v. Insurance Co. of North America* (1984) 151 Cal.App.3d 280, 290.) Because the NFL sought to apply the unclean hands defense to an action at law, we need not rely on authority requiring the pleading of equitable affirmative defenses.

[17] If there were any error in the instruction, it would be that it imposed too high a burden on the NFL by requiring it to establish that the Raiders' conduct was unconscionable. The defense of unclean hands applies to conduct that is also wrongful or inequitable. (See *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 846-847.)

compensated for the Los Angeles opportunity until after the NFL had voted to approve their move to Oakland; Mr. Davis, however, testified that he informally told the NFL of his claim before the vote. Given the state of the evidence, it would have been error for the trial court to refuse an unclean hands instruction. (E.g., *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 ["A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence"].)

In sum, because the trial court did not err in giving any of the challenged jury instructions, we cannot affirm the new trial order on the ground of instructional error. Considering this, together with our earlier conclusion that the new trial cannot be affirmed on the ground of juror misconduct, we must reverse the new trial order.

B. The Raiders' Appeal.

The Raiders cross-appeal from two rulings made separately from the jury trial. First, the Raiders challenge the trial court's grant of summary adjudication on the Raider's fifth cause of action for breach of fiduciary duty in favor of the individual defendants—the NFL commissioner Mr. Tagliabue and president Mr. Austrian. Second, the Raiders contend that substantial evidence does not support the trial court's ruling on the ninth cause of action for declaratory relief, involving the Raiders' claim that they should not be required to share certain types of revenue with the NFL. We reject both contentions. The trial court correctly concluded, as a matter of law, that neither the NFL commissioner nor its president owes a fiduciary duty to the NFL member clubs. Moreover, substantial evidence supported the trial court's determination that the Raiders were not excused from sharing certain revenues that fall within the definition of "gross receipts" as that term is used in the NFL constitution and bylaws.

1. The Commissioner and President of the NFL and the NFL Member Clubs Do Not Have a Fiduciary Relationship.

a. Summary adjudication motion.

In their fifth cause of action for breach of fiduciary duty, the Raiders alleged that the NFL and its commissioner and president breached their fiduciary duty to the Raiders

by undermining the development of the Hollywood Park stadium for the Raiders.[18] With respect to the existence of a fiduciary duty, the Raiders alleged that both "the structure of the League and the relationships between and among the NFL, the Commissioner and President of the NFL, and the individual member clubs of the NFL," and the course of dealing among the parties that had evolved over time, established the existence of a fiduciary relationship between NFL officials and the Raiders.

The NFL moved for summary adjudication of the fourth through sixth causes of action. In that motion, it argued that, as a matter of law, the nature and structure of the NFL precluded any finding that the NFL and its commissioner and president owed a fiduciary duty to any of the member clubs. In support of that aspect of the motion, the NFL submitted evidence comprised of the NFL constitution and bylaws to demonstrate that the NFL commissioner's and president's positions were, at times, necessarily antagonistic to the Raiders' interests. The Raiders did not dispute the evidence offered in support of the motion, but rather, argued that the NFL constitution and bylaws should be interpreted differently; "To the contrary, the NFL Constitution and structure require that the Raiders repose trust and confidence in the NFL Commissioner and provide secret and proprietary information and economic data to him."

Following a hearing, the trial court took the matter under submission and thereafter granted the motion, ruling: "The individual Defendants do not owe any fiduciary [duty] to Plaintiff individually as a matter of law. Any duty is owed to the collective whole which makes up the NFL. If there was any fiduciary relationship

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[18] Specifically, the Raiders alleged: "By making statements to Hollywood Park officials that were designed to disrupt the project, by making similar statements to third parties, by making unreasonable demands on the Raiders and Hollywood Park, by constantly changing the terms of the proposed agreement, by repeatedly making and reneging on promised support for the project, by seeking to sacrifice the interests of the Raiders in favor of another competitor, by delaying action on the project, by seeking to take advantage of the efforts of the Raiders for their own benefit, and by using confidential information for personal gain, defendants, and each of them, breached their fiduciary duties to the Raiders and hindered, impeded, delayed, disrupted, and ultimately thwarted altogether, the realization of the Hollywood Park project for the Raiders."

between Plaintiff and the individual Defendants, the other member clubs would necessarily suffer detrimental effects at the hands of Plaintiff given Plaintiff's unique relationship with Defendants. This is simply not the nature nor structure of the League as a matter of law." The trial court further found that there were no triable issues of material fact demonstrating any agency relationship or acknowledgements of a fiduciary duty between the Raiders and the individuals defendants, and that the fact the Raiders shared confidential information with the individual defendants was the result of their contractual—not fiduciary—relationship. The trial court concluded that "[a]s no legal duty exists, there is no disputes [*sic*] for the Jury to decide."

b. Summary adjudication law and the standard of review.

"The trial court properly grants summary judgment or adjudication if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. [Citations.]" (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 786.) To secure summary judgment or adjudication, the moving defendant "bears the initial burden of proving the 'cause of action has no merit' by showing that one or more elements of plaintiff's cause of action cannot be established or there is a complete defense. [Citations.] Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1385.)

We review the trial court's grant of summary adjudication "de novo, considering all of the evidence the parties offered in connection with the motion . . . and the uncontradicted inferences the evidence reasonably supports. [Citation.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) "As to conducting de novo review, the Supreme Court described our duty as follows, 'In ruling on the motion the court must "consider all of the evidence" and "all" of the "inferences" reasonably drawn therefrom ([Code Civ. Proc.,] § 437c, subd. (c)), and must view such evidence [citations] and such inferences [citations] in the light most favorable to the opposing party.' (*Aguilar v. Atlantic Richfield Co.* [(2001)] 25 Cal.4th [826,] 843.)" (*Kids' Universe v. In2Labs, supra,* 95 Cal.App.4th at p. 878.)

c. The relationship between the NFL commissioner and president and the Raiders is not akin to other legally recognized fiduciary relationships.

The trial court granted summary adjudication on the basis that the Raiders could not establish an element of their breach of fiduciary duty claim—that is, the existence of a fiduciary relationship. The Raiders contend that, at a minimum, a triable issue of fact existed as to whether the relationship between the NFL commissioner and president and the Raiders is sufficiently similar to other types of fiduciary relationships. Specifically, the Raiders contend that their relationship with those individuals is akin to the relationship between joint venturers, a principal and agent, and a controlling and minority shareholder. We disagree.

It is undisputed that the NFL is a private, unincorporated association. The parties have not cited any authority—nor have we located any—standing for the proposition that an automatic, status-based fiduciary duty exists among members of an unincorporated association. Rather, "[t]he rights and duties of members of a private voluntary association, between themselves and in their relation to the association, are measured by the terms of the association's constitution and bylaws. [Citation.]" (*Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 581; accord, *California Dental Assn. v. American Dental Assn.* (1979) 23 Cal.3d 346, 353; *Berke v. Tri Realtors* (1989) 208 Cal.App.3d 463, 466.) It is therefore appropriate to turn to the terms of the NFL constitution and bylaws to determine whether fiduciary duties exist between the NFL commissioner and president and the member clubs. (See *Southern Pacific Thrift & Loan Assn. v. Savings Assn. Mortgage Co.* (1999) 70 Cal.App.4th 634, 638; see also *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30-31.)

Generally, "'[a] mere contract or a debt does not constitute a trust or create a fiduciary relationship.' [Citation.]" (*Wolf v. Superior Court*, *supra*, 107 Cal.App.4th at pp. 33-34.) Consistent with this general principle, the NFL constitution and bylaws fail, as a matter of law, to establish the existence of a fiduciary relationship between the NFL commissioner and president and the member clubs. Nothing in the NFL constitution

imposes a duty on the commissioner or the president "'"to act with the utmost good faith for the benefit of the other party"'" or to require them to "'"take no advantage from his [or her] acts relating to the interest of the other party without the latter's knowledge or consent. . . ."'" (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 270.) To the contrary, the NFL constitution contains several provisions that are fundamentally inconsistent with the imposition of a fiduciary duty. For example, the commissioner has full and complete power to arbitrate disputes among two or more member clubs; the commissioner has authority to monetarily fine or more severely discipline any interest holder in a member club; and member clubs are required to be bound by all commissioner decisions and to "release and indemnify the Commissioner, the League . . . [and] every member club . . . from and against any and all claims . . . which they . . . may at any time have or assert in connection with or by reason of any action taken or not taken by the released/indemnified parties . . . ."

The relationship between NFL officials and members dictated by the NFL constitution and bylaws is incompatible with the elements that make up a fiduciary relationship. As explained in *Jones v. Stubbs* (1955) 136 Cal.App.2d 490, 500, a "fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of [the beneficiary]." That the NFL commissioner is empowered to arbitrate disputes among NFL members gives rise to the potential for conflicting duties and demonstrates that the commissioner cannot always act in the best interest of the Raiders. Similarly, the commissioner's disciplinary power over the member clubs demonstrates that the commissioner must consider myriad other interests beyond the best interests of the Raiders.

The Raiders contend that, despite the rights and duties created by the NFL constitution and bylaws, the commissioner and president must be held to owe a fiduciary duty to the member clubs because the structure of the NFL is comparable to other types of traditionally recognized fiduciary relationships. More specifically, the Raiders point to several cases seeming to acknowledge that the NFL is a joint venture. (E.g., *City of*

Oakland v. Oakland Raiders (1985) 174 Cal.App.3d 414, 420 ["although the clubs compete to an important degree, the League is also a joint venture of its members organized for the purpose of providing entertainment nationwide"]; *Los Angeles Memorial Coliseum Com'n v. N.F.L.* (9th Cir. 1984) 726 F.2d 1381, 1389 [noting that the NFL is similar to an organization described as a joint venture]; *St. Louis Convention & Visitors Com'n v. N.F.L.* (8th Cir. 1998) 154 F.3d 851, 853 ["The league was formed in 1966 by a union of the American Football League and the National Football League, and it functions as the governing body of a joint venture of thirty professional football teams producing 'NFL football'"]; *North American Soccer v. National Football League* (2d Cir. 1982) 670 F.2d 1249, 1252 ["The NFL teams are separate economic entities engaged in a joint venture"].) But each of these cases described the NFL in connection with legal issues not raised here, such as whether the NFL is sufficiently involved in interstate commerce so as to invalidate a city's effort to acquire a league franchise through eminent domain (*City of Oakland, supra,* at pp. 420-422) or whether the NFL is a "single entity" for the purpose of federal antitrust law (*Los Angeles Memorial Coliseum Com'n, supra,* at pp. 1387-1391). None of these cases specifically considered whether NFL officials and member clubs should be subject to heightened duties to one another imposed by a traditional joint venture. The Raiders' cited cases are therefore not authority for the proposition that the NFL is a joint venture. (E.g., *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278 [an opinion is not authority for a proposition which was not considered].)

Even more importantly, however, the undisputed evidence established that the NFL does not possess the requisite features of a joint venture, which "requires an agreement under which the parties have (1) a joint interest in a common business, (2) an understanding that profits and losses will be shared, and (3) a right to joint control. [Citations.]" (*Ramirez v. Long Beach Unified School Dist.* (2002) 105 Cal.App.4th 182, 193.) According to the NFL constitution, "[t]he League is not organized nor to be operated for profit." Moreover, the NFL member clubs do not share profits and losses. As explained in *Los Angeles Memorial Coliseum Com'n v. N.F.L., supra,* 726 F.2d at

page 1390: "Although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other 'single entities.' In fact, profits vary widely despite the sharing of revenue." (See also *North American Soccer v. National Football League, supra,* 670 F.2d at p. 1252.) Accordingly, we cannot find that the NFL is analogous to a joint venture for the purpose of imposing fiduciary duties.

Nor can we find that there was a triable issue of fact as to whether the NFL commissioner and president owe a fiduciary duty to the Raiders as an agent. "An agency is proved by evidence that the person for whom the work was performed had the right to control the activities of the alleged agent." (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 983.) "'Control may not be inferred merely from the fact that one person's act benefits another. [Citation.]'" (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 572.) Though the Raiders presented evidence that the commissioner acts on behalf of the member clubs, they offered no evidence to show that they had the right to control either the NFL commissioner or president. Indeed, the NFL constitution demonstrates that, to the contrary, the commissioner has virtually plenary power to act on behalf of the NFL and its member clubs. Absent evidence of the Raiders' right to control the NFL commissioner or president, the Raiders' agency theory failed to establish the existence of a triable issue of fact. (See, e.g., *Violette v. Shoup* (1993) 16 Cal.App.4th 611, 620.)

Finally, the Raiders contend that their position should be analogized to that of a minority shareholder in a closely held corporation and that the NFL commissioner and president, in the role of majority shareholders or directors and officers, should be held to owe a fiduciary duty to them. (See *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108-109.) But the Raiders are not in the position of a minority shareholder, given that they have the same rights and obligations as any other NFL member club. In any event, according to the undisputed evidence, the NFL is a private, unincorporated association. We see no reason to disregard evidence of the NFL's organization in order to impose the burdens, but not the benefits, of incorporation. (Cf. *Occidental Life Ins. Co. v. State Bd.*

of Equalization (1982) 135 Cal.App.3d 845, 851 [entity choosing corporate form for its particular benefits may be fairly and reasonably required to accept the burdens attendant to that form].)

In sum, the trial court properly determined, as a matter of law, that the relationship between the NFL commissioner and president and the member clubs created by the NFL constitution and bylaws does not give rise to fiduciary obligations.[19]

d. Evidence concerning the relationship and course of dealing between the NFL commissioner and president and the Raiders failed to create a triable issue of fact as to the existence of a fiduciary duty.

Alternatively, the Raiders contend that evidence regarding the NFL commissioner's and president's role within the NFL, access to confidential financial information and power over the member clubs, including the Raiders, raised a triable issue as to the existence of a fiduciary duty. At a minimum, they contend that the specific facts surrounding the negotiations for the proposed Hollywood Park stadium demonstrated that the commissioner and president acted in a fiduciary capacity with respect to that transaction. Again, we disagree.

The Raiders offered evidence in the form of the NFL constitution and bylaws, which showed that the commissioner has broad authority over the NFL and its member clubs to resolve disputes, formulate policy, impose discipline and appoint and establish committees for decisionmaking purposes. To demonstrate the practical import of this broad authority, the Raiders offered testimony from other club owners indicating that the owners invariably follow the commissioner's recommendations. They also offered evidence regarding NFL practice to obtain confidential financial and other information

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[19] We are not the first court to have reached this conclusion. Pursuant to Evidence Code sections 452, subdivision (d) and 459, we grant the NFL's request for judicial notice of the Santa Clara County Superior Court decision in *Oakland Raiders v. National Football League*, case No. CV756194, in which the court ruled on a motion for summary adjudication that "the [NFL] Commissioner does not have a fiduciary obligation to the individual member clubs."

from member clubs for various purposes, some of which is not disclosed to other member clubs.

Relying solely on *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, the Raiders assert that the jury should have been able to determine whether this evidence gave rise to the same type of fiduciary obligations that are imposed on the officers and directors of a homeowners' association. In *Cohen*, the court explained that because membership in a homeowners' association is generally mandatory and the powers of the association are extensive, "the Association must be held to a high standard of responsibility: 'The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors. . . . This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing.'" (*Id.* at p. 651.)

Two salient features distinguish the NFL from a homeowners' association. First, the homeowners' association in *Cohen* was a corporation, and therefore the Corporations Code expressly imposed fiduciary duties on the association's officers and directors. (*Cohen v. Kite Hill Community Assn., supra,* 142 Cal.App.3d. at p. 645; see *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513 ["Directors of nonprofit corporations such as the Association are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code. [Citation.]"].) Second, courts have characterized homeowners' associations as "quasi-governmental" and compared the associations' directors to the governing body of a municipality. (E.g., *Chantiles v. Lake Forest II Master Homeowners Assn.* (1995) 37 Cal.App.4th 914, 922; *Cohen, supra,* 142 Cal.App.3d at p. 651.) The NFL does not act in a quasi-governmental capacity. Thus, there is no basis for applying the considerations that warrant the imposition of a fiduciary duty on homeowners' association directors to NFL officials.

Finally, the Raiders assert that a triable issue of fact existed as to whether the NFL commissioner and president acted in a fiduciary capacity specifically with respect to the proposed Hollywood Park stadium. They assert that they necessarily reposed trust and

confidence in the commissioner in connection with those negotiations, thereby giving rise to a fiduciary obligation. The evidence and the law are to the contrary. Resolution FC-7 expressly directed NFL officials to "negotiate directly with [Hollywood Park] and the Raiders" regarding the feasibility of the stadium. The declarations and deposition excerpts offered by the Raiders, which outlined the history of the Hollywood Park negotiations, did not contradict evidence establishing that the NFL negotiated with—not on behalf of—the Raiders in connection with the proposed Hollywood Park stadium.[20] Generally, a fiduciary relationship does not arise from arms-length negotiations. (See *Recorded Picture Company [Productions] Ltd. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 370; *Worldvision Enterprises, Inc. v. American Broadcasting Companies, Inc.* (1983) 142 Cal.App.3d 589, 594.) Yet even if the evidence had shown that Raiders had reposed trust and confidence in the commissioner in the context of the Hollywood Park negotiations, that evidence would be insufficient to create a triable issue of fact. *Wolf v. Superior Court, supra,* rejected a similar claim, reasoning: "Every contract requires one party to repose an element of trust and confidence in the other to perform. For this reason, every contract contains an implied covenant of good faith and fair dealing, ... "'Being of universal prevalence, [the implied covenant] cannot create a fiduciary relationship; it affords basis for redress for breach of contract and that is all.'" (107 Cal.App.4th at p. 31.)

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[20] Because the evidence did not show that the Raiders retained or relied on NFL officials as trusted advisors in connection with the Hollywood Park negotiations, the cases cited by the Raiders for the proposition that the existence of a fiduciary relationship is a question of fact have no application here. (See *In re Daisy Systems Corp.* (9th Cir. 1996) 97 F.3d 1171, 1178 [existence of fiduciary relationship between investment banker and client was a question of fact where the client retained the investment banker to advise it about a type of transaction in which it had no experience]; *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1151 [question of fact as to whether limited partner and former attorney owed fiduciary duty in connection with partnership's real estate transaction].)

Because there is no triable issue of fact regarding the existence of a fiduciary duty on the part of the NFL commissioner and president, the trial court properly granted their motion for summary adjudication on the fifth cause of action.

2. Substantial Evidence Supported the Trial Court's Finding that the NFL is Not Estopped to Enforce the Sharing of Gross Receipts.

Following the jury trial, the trial court conducted a bench trial on the Raiders' ninth cause of action for declaratory relief, in which the Raiders sought a judicial declaration "that the Raiders are not obligated to share with the League any loan proceeds or any tax surcharges, personal seat license revenues, club seat premiums, and maintenance fees, beyond those the Raiders previously committed to share as set forth in their relocation submission to the League." During a four-day bench trial, the court received testimonial and documentary evidence, and thereafter issued a statement of decision denying the Raiders' request for declaratory relief.

The Raiders do not challenge the trial court's finding that the revenues at issue in their declaratory relief claim are included within the definition of "gross receipts" that are subject to revenue sharing pursuant to the NFL constitution and bylaws. The NFL constitution defines "gross receipts" as "all receipts derived from the sale of tickets, including taxes and special charges but excluding ticket handling charges." By way of resolution, the NFL clarified that the term includes "'monies received, directly or indirectly, by any party, including any member [club] (a) in excess of the stated ticket price for any "club" or "premium" seat . . . or (b) from any party's sale or issuance of any 'permanent seat licenses' or other similar instruments that give purchasers the right to acquire tickets to NFL games.'" According to the trial court, "all of the disputed revenue streams here—including, but not limited to, PSL [personal seat license] revenues, club seat premiums, ticket surcharges, and maintenance fees—are 'gross receipts.'" Article XIX, section 19.1 of the NFL constitution obligates each member club to share "gross receipts" with the other member clubs. For a member club to avoid sharing, the NFL must grant a waiver of the sharing requirement.

In support of their declaratory relief claim, the Raiders sought to establish that the NFL was estopped to rely on the revenue sharing requirement. A plaintiff asserting equitable estoppel must prove four elements: (1) The defendant must know the facts; (2) the defendant must engage in conduct intended to be acted upon by the plaintiff; (3) the plaintiff must be ignorant of the true state of facts; and (4) the plaintiff must detrimentally rely upon the defendant's conduct. (E.g., *Migliore v. Mid-Century Ins. Co.* (2002) 97 Cal.App.4th 592, 606.) The Raiders challenge the trial court's finding that they failed to establish the two latter elements—ignorance and reliance. The court concluded that the Raiders could not contend that they were ignorant of the NFL's position that no waiver of the revenue sharing requirement had been granted; it further concluded that the Raiders did not reasonably rely to their detriment on any assumption that the NFL had granted a waiver, given the undisputed evidence concerning the timing of when the Raiders learned that the NFL did not intend to grant a waiver.

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) The statement of decision, which provides the trial court's reasoning, "is our touchstone to determine whether or not the trial court's decision is supported by the facts and the law." (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718.) In reviewing the trial court's statement of decision, we must uphold the court's findings of fact if they are supported by substantial evidence. (*Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, 1558.) "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) "All the evidence most favorable to respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to

be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, we must affirm the judgment." (*In re Cheryl E*. (1984) 161 Cal.App.3d 587, 598.)

Both of the trial court's challenged findings are supported by substantial evidence. According to the evidence on which the trial court relied, the Raiders committed to relocate to Oakland, knowing that they had not received an exemption from the NFL revenue sharing requirements.

With respect to the Raiders' contention that they were unaware of the NFL's intention to deny a waiver, the evidence showed that on June 23, 1995, the Raiders entered into an agreement with the City of Oakland to return to the Oakland Coliseum for the 1995 season and 15 seasons thereafter. On the same day, they issued a press release to that effect. Approximately two weeks later, on July 10, 1995, the Raiders submitted a written relocation proposal to the NFL, the terms of which necessitated that the NFL grant an exemption from the NFL revenue sharing requirements. On July 19, 1995, the NFL sent a memorandum to the Raiders indicating that the NFL Finance Committee would shortly be discussing the Raiders' proposed relocation and noting that the proposed agreement raised several issues concerning the sharing of gross receipts that needed to be resolved.

On July 21, 1995, the NFL Executive Committee met to vote on the Raiders' proposed relocation. At that meeting, the NFL voted to approve 1995 Resolution G-7, which permitted the Raiders to relocate permanently to Oakland.[21] Resolution G-7 was silent on the issue of revenue sharing. The following day, a hand-delivered letter from

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[21] In pertinent part, Resolution G-7 states: "WHEREAS, the Los Angeles Raiders desire to relocate their home territory from Los Angeles to Oakland, and have made a submission in support of the proposed relocation, as contemplated by the League's Procedures for Proposed Franchise Relocations (the 'Procedures'); [¶] WHEREAS, the Executive Committee has determined that in light of all circumstances and factors relevant to the permanent relocation of the Raiders' home territory to Oakland, it is in the best interests of the League, as a collective whole, for such relocation to proceed; [¶] THEREFORE, BE IT RESOLVED, that the permanent relocation of the Raiders' home territory from Los Angeles to Oakland be approved."

the NFL commissioner informed the Raiders that their relocation had been approved and that the NFL expected the Raiders to comply with all revenue sharing obligations. Another letter to the Raiders from the NFL president followed on July 24, 1995, explicitly set forth the NFL's position: "The Raiders' sharing obligation exists with respect to all gross receipts as defined in the League Constitution and By-laws, regardless of who may own 'legal title' to those receipts. As we mentioned during our meetings last week, those 'gross receipts' include all receipts from sales of tickets, including surcharges as well as club seat premiums and PSLs." The letter further indicated that the Raiders could make a written submission requesting nonsharing of club seat premiums and PSL revenues in accordance with the procedures followed previously by other member clubs.[22]

The trial court concluded that the Raiders could not contend they were ignorant of the NFL's refusal to grant a waiver on the basis of Resolution G-7's silence on the matter: "The plain meaning of the resolution indicates that the NFL clubs voted to allow the Raiders to move to Oakland; a waiver of their contractual obligation to share gross receipts, to which no reference is made in the resolution, is a separate issue entirely." The court acknowledged that the evidence conflicted as to whether the Raiders knew that the NFL intended to consider waiver of the revenue sharing provisions separately from the relocation issue addressed in Resolution G-7. But it expressly weighed that evidence and concluded: "[T]he overwhelming weight of the evidence supports the conclusion that the NFL did not intend to and did not waive the Raiders' revenue sharing obligations and instead intended to and did consider as entirely separate issues (a) the Raiders' relocation, which was addressed by Resolution G-7, and (b) the Raiders' contractual obligation to share gross receipts, which was not."

On appeal, the thrust of the Raiders' argument is that the trial court improperly weighed the evidence. They assert that the evidence showed they were ignorant of the

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[22] Shortly thereafter, the Raiders and Oakland officials entered into an agreement to share responsibility for amounts that the Raiders might be required to pay as part of their gross receipts obligation.

fact that the NFL did not intend to adopt their position on revenue sharing for several reasons, including that Resolution G-7 can be reasonably read as incorporating all the relocation terms the Raiders proposed, prior relocation resolutions for other teams included a decision on revenue sharing, and Mr. Davis informed NFL officials that they should vote to pass Resolution G-7 only if they agreed with the Raiders' revenue sharing proposal. They also emphasize that their lack of knowledge stemmed from the fact that the NFL Executive Committee conducted a privileged session before the vote on Resolution G-7, which the Raiders were not permitted to attend, where the committee discussed revenue sharing.

We reject the Raiders' argument. The scope of our review is clear. Where an argument that substantial evidence is lacking rests upon a claim that there was conflicting evidence, we are guided by the well-settled principle that we resolve all evidentiary conflicts in favor of the NFL as the prevailing party and affirm so long as the evidence favoring the NFL is sufficient to support the judgment. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Rubin v. Los Angeles Fed. Sav. & Loan Assn.* (1984) 159 Cal.App.3d 292, 298.) "The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence." (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.) Moreover, when two or more inferences can be reasonably deduced from the facts, we are without power to substitute our deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; see also *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

Here, the trial court weighed the evidence relied on by the Raiders against evidence that, before the meeting to vote on Resolution G-7, the NFL repeatedly informed the Raiders that they would be required to comply with the NFL constitution and bylaws, as well as NFL policy, concerning revenue sharing. It also reasonably inferred that Resolution G-7's silence on the revenue sharing matter—particularly in light of the explicit revenue sharing provisions contained in resolutions for other member clubs—should not have led the Raiders to assume that the matter had been decided in their favor. Indeed, though the Raiders quote selective excerpts from Resolution G-7 in

support of their assertion that they believed the NFL Executive Committee had adopted their entire relocation submission, the complete text of the resolution is equally (if not more reasonably) capable of the interpretation given by the trial court. We find that substantial evidence supports the trial court's conclusion that the Raiders were not ignorant of the fact that the NFL did not grant a waiver of the revenue sharing provisions by voting to approve Resolution G-7.

The Raiders' second contention—that substantial evidence did not support the trial court's finding that the Raiders failed to establish reasonable, detrimental reliance—needs little discussion. The Raiders contend that the trial court ignored the evidence that NFL officials and the Raiders attended a press conference immediately after the vote on Resolution G-7 to announce the approval of the Raiders' move to Oakland. According to the Raiders, the evidence showed that they had no choice but to leave Los Angeles after this public announcement. But the Raiders ignore the evidence on which the trial court relied, which included that the Raiders had issued a press release one month earlier, on June 23, 1995, stating that "[t]he Raider organization has chosen to relocate to Oakland"; that the Raiders undisputedly learned of the NFL's position on revenue sharing with 24 hours of their later public announcement; and that the Raiders entered into a binding commitment with Oakland on August 7, 1995, well after it learned that the NFL had not granted a revenue sharing waiver.

By contending that the trial court failed to consider the July 21, 1995 press conference as dispositive evidence showing detrimental reliance, the Raiders, again, ask us simply to reweigh the evidence. We cannot do so. (E.g., *Eidsmore v. RBB, Inc.* (1994) 25 Cal.App.4th 189, 195.) Substantial evidence supports the trial court's conclusion that the Raiders failed to meet their burden to show reasonable and detrimental reliance, an essential element of their estoppel claim. Accordingly, we find no reason to disturb the trial court's decision to reject the Raiders' ninth cause of action for declaratory relief.

DISPOSITION

The order granting a new trial is reversed. The trial court is directed to enter judgment in accordance with the jury verdict. In all other respects, the judgment is affirmed. The NFL is awarded its costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

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